UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARIA ROSARIA ZHICAY,	:	
Petitioner	:	
	:	Case No.: 3:05-CV-315 (CFD)
v.	:	
	:	
SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, DIRECTOR OF U.S. IMMIGRATION CUSTOM ENFORCEMENT, and JOHN ASHCROFT, ATTORNEY GENERAL,	:	
Respondents	:	

MEMORANDUM OF DECISION

Petitioner Maria Rosario Zhicay has filed with this Court a petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. She seeks review of her 1995 *in abstentia* deportation order. She also seeks protection for her right to apply for immigration benefits by affording her fair immigration proceedings in her application for adjustment of status and her accompanying application for permission to reapply for admission after deportation. When she initially filed her petition, she claimed that her detention by the United States Customs and Immigration Service ("USCIS") pending removal violated the United States Constitution. The Court subsequently granted Zhicay's motion to stay her removal.[1]

For the following reasons, the portion of Petitioner Zhicay's writ of habeas corpus

[1]At the time Zhicay filed her motion for stay, she also filed a motion for bond. Although the government opposed Zhicay's motion for bond, the Court received notice on July 15, 2005, that Zhicay was released from USCIS detention on bond. Consequently, the motion for bond **[Doc. #5]** is **DENIED** as moot. Her release, however, has not mooted the instant petition, as the government continues to represent to the Court that it intends to deport Zhicay pursuant to the final order of deportation entered against her in 1995.

seeking judicial review of her removal order is **TRANSFERRED** to the docket of the United States Court of Appeals for the Second Circuit. To the extent that petitioner is seeking an order by this Court for the adjudication of her pending applications for permission to reapply for admission and for adjustment of status, her petition is **GRANTED.**

I Background[2]

In 1993, Zhicay, a native and citizen of Ecuador, entered the United States unlawfully. In 1995, because of her inadmissible status, Zhicay was placed into deportation proceedings and eventually ordered deported *in absentia* to Ecuador.[3] Zhicay never departed the country in accordance with that final order of deportation, and she has resided here since 1993.

On January 7, 1998, Zhicay had a child with Fausto Llivicura in Danbury, Connecticut. Their son, by virtue of his birth here, is a United States citizen. On January 15, 2002, Zhicay and Llivicura were married in Danbury, where the couple owns a home.

On January 31, 2005, Zhicay visited the USCIS office in Hartford with Llivicura, where Mr. Llivicura was interviewed about his application for adjustment of status to lawful permanent resident. At that time, USCIS determined that Zhicay was subject to a final order of deportation, and as a consequence, she was taken into custody. On February 1, 2005, Llivicura was granted

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[2]The facts described here are based on the undisputed facts presented in the parties' briefs.

[3]The government attached copies of the notices allegedly sent to Zhicay of her immigration hearings, as well as the Immigration Judge's decision, to its memorandum in opposition to Zhicay's petition. Those copies were illegible, however.

lawful permanent resident status based on his employment visa.[4]

On February 22, 2005, Zhicay filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, as well as a motion to stay her removal. Her habeas petition challenged in part the final order of deportation entered against her in 1995 on the ground of insufficient notice. The habeas petition also sought an order to "afford the Petitioner a fair immigration proceedings [*sic*] and application for adjustment of status." Petitioner's Writ of Habeas Corpus at 4. On February 28, 2005, this Court granted the motion to stay Zhicay's removal.

After filing her habeas petition with the Court, Zhicay filed a new application for adjustment of status, accompanied by an application for permission to reapply for admission into the United States after deportation or removal, with the USCIS regional service center in Vermont on May 9, 2005.[5] Those applications remain pending.

II Discussion

A) Judicial Review of Petitioner's Order of Removal

On May 11, 2005, Congress amended the Immigration and Nationality Act by the Real ID

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[4]See 8 C.F.R. § 1.1(p) ("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. Such status terminates upon entry of a final administrative order of exclusion or deportation."); see also Kim v. Ziglar, 276 F.3d 523, 528 (9th Cir. 2002) ("Lawful permanent resident aliens are the most favored category of aliens admitted to the United States"). The complaint and related memoranda filed by the parties do not provide any additional information on Llivicura's immigration history.

[5]Apparently, Zhicay filed both of those application previously without the assistance of counsel, and they were denied. The applications filed on May 9, 2005 were completed with the assistance of her current counsel, and they remain pending at this time.

Act of 2005. Among those statutory amendments are new procedures for judicial review of orders of removal. Petitioners seeking review of final orders of removal, whether through standard petitions for review of final orders of removal issued by the Board of Immigration Appeals or through writs of habeas corpus (28 U.S.C. § 2241), now file such petitions directly with the Circuit Courts of Appeals. 8 U.S.C. §§ 1252(b)(2) and (b)(9), Pub. L. 109-13, 119 Stat. 311. The Real ID Act's transitional rules provide that if such a case "is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit ..." See Transfer of Habeas Corpus Cases Pending in the District Courts on May 11, 2005. Pub. L. 109-113, 119 Stat. 311. Accordingly, this Court must transfer the portion of Zhicay's case that challenges her removal order to the Second Circuit Court of Appeals. Because the statute pertains only to habeas corpus petitions seeking review of orders of removal, this Court retains jurisdiction over Zhicay's other claims.[6] See, e.g., King v. Gonzalez, 2005 U.S. Dist. LEXIS 20342, *13 (holding that the Court retains jurisdiction after the Real ID Act over habeas corpus petitions challenging physical custody).

[6] The Court notes that district courts have jurisdiction to review statutory challenges raised through writs of habeas corpus pursuant to 28 U.S.C. § 2241. See Henderson v. I.N.S.,157 F.3d 106, 122 (2d Cir. 1998) ("we hold that the federal courts have jurisdiction under § 2241 to grant writs of habeas corpus to aliens when those aliens are "in custody in violation of the Constitution or laws or treaties of the United States.") citing 28 U.S.C. § 2241; Sol v. I.N.S., 274 F.3d 648 (2d Cir. 2001) (discussing the statutory as well as constitutional arguments raised in the § 2241 habeas petition); and Bowrin v. United States I.N.S., 194 F.3d 483, 490 (4th Cir. 1999) ("statutory claims affecting the substantial rights of aliens that have traditionally been judicially enforced are cognizable on § 2241 habeas.").

B. Adjustment of Status

The Court retains jurisdiction over Zhicay's habeas corpus petition seeking protection for her right to apply for immigration benefits by affording her fair immigration proceedings. Zhicay currently has two applications pending with the USCIS Vermont Service Center. She applied for permission to reapply for admission after deportation through a Form I-212 ("I-212"), as required by 8 C.F.R. § 212.2, and for adjustment of status through a Form I-485 ("I-485"), as required by 8 C.F.R. § 245.1.

As an initial matter, the parties dispute whether Zhicay properly filed for permission to reapply for admission while she was present this country.[7] Zhicay argues that the filing of her applications was appropriate, while the government maintains that an I-212 application "is available after the deportation order has been effectuated." (emphasis in original). The government contends that an application for permission to reapply for admission "must be made to the consular officer where the applicant resides" after deportation. The government's argument, in addition to being contrary to the plain language of the immigration laws, has been rejected by at least two Circuit Courts of Appeals.

First, the language of the relevant immigration regulations provides ample authority for Zhicay to seek permission to reapply for admission from within the United States. According to 8 C.F.R. § 212.2(e):

> 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

[7] The government does not dispute Zhicay's contention that, as a general matter, the approval of her I-212 would retroactively cancel the disqualifying effect of the final order of deportation entered against her in 1995. Instead, the government confines its argument to the specific ground that Zhicay must file her Form I-212 after she has been deported.

> her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. . . .

8 C.F.R. § 212.2(e). Additionally, § 212.2(g)(2) provides that, "If the applicant is physically present in the United States but is ineligible to apply for adjustment of status, he or she must file the application with the district director having jurisdiction over his or her place of residence. 8 C.F.R. § 212(g)(2). Petitioner Zhicay's applications for permission to reapply for admission and for adjustment of status comport with the requirements of the regulations. Even if she is ultimately ineligible for adjustment of status, which the Court does not take a position on, § 212.2(g) clearly indicates that because Zhicay resides in the United States, she must still file her I-212 with the district director for the jurisdiction in which she resides. Id.

Second, in Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), the government argued that an I-212 is only available "to aliens outside the United States, applying at a port-of-entry, or aliens paroled into the United States." Id. at 788. The Ninth Circuit rejected this argument, finding it "clearly contrary to the plain and sensible meaning of the [immigration] regulation[s]." Id. at 789 (quoting Ruangswang v. INS, 591 F.2d 39, 43 (9th Cir. 1978)). As the Ninth Circuit explained:

> The INS's claim that the waiver is only available to aliens outside the country is directly counter to the text of its own regulations, which explicitly states that consent to reapply for readmission after deportation or removal is available to aliens within the United States who are seeking adjustment of status under INA § 245. See 8 C.F.R. § 212.2(e) (stating that the application for permission to reapply must be filed with "the district director having jurisdiction over the place where the alien resides") (emphasis added). The regulations further state that, "If the applicant is physically present in the United States but is ineligible to apply for adjustment of status, he or she must file the application with the district director having jurisdiction over his or her place of residence." 8 C.F.R. § 212.2(g)(2). In addition, "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." 8 C.F.R. § 212.2(i)(2) (emphasis added). *These provisions of the regulations clearly contemplate applications for the waiver from aliens who are currently living within this country illegally.*

Id. at 789 (emphasis added). The Court also concluded that such relief was available to aliens who had previously been removed, and subsequently returned to this country illegally. Consequently, the Court concluded that the USCIS had committed legal error when it determined that the petitioner could not file an I-212 from within this country. Id.

The Tenth Circuit was presented with a similar question in Berum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004). Although the Tenth Circuit ultimately disagreed with the Ninth Circuit's specific conclusions in Perez-Gonzalez v. Ashcroft concerning aliens who were deported and who subsequently returned to this country unlawfully, the Tenth Circuit did agree with the Ninth Circuit's general conclusion that *some* aliens who are unlawfully present in this country may file an I-212 application without leaving the country. Id. at 1167. As the Tenth Circuit explained: "Aliens seeking adjustment of status under § 1255(i) must be physically present in the United States. Since their illegal presence renders the applicants 'inadmissible' under § 1182(a)(9)(B) or (C), INS regulations require aliens applying for adjustment of status to remedy their inadmissibility by filing a Form I-212 at the same time. 8 C.F.R. § 212.2(e)." Id. at 1166.[8] Further, the Tenth Circuit noted that:

> The INS regulations governing the simultaneous applications for waiver of inadmissibility and for adjustment of status direct aliens to submit their I-212 forms to the agency's "district director having jurisdiction over the place where the alien resides," thus implying what § 1255(i) already requires-- that aliens applying

[8]Here, the government does not contend that Zhicay was unable to file a Form I-485 while in this country, and only claims that she was precluded from filing a Form I-212 while here.

> for this combined relief do so while present in the United States. 8 C.F.R. § 212.2(e). The same regulations also state that I-212 waivers meant to accompany applications for adjustment of status "shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States." Id. § 212.2(i)(2).

Id. (emphasis omitted). Although there is disagreement between the Ninth and Tenth Circuits concerning the particular categories of aliens who may file a I-212 applications while in this country, both Circuits agree that those aliens who have made at least one unlawful entry are eligible to make such applications. See also Lopez-Flores, 387 F.3d at 777 n.4 (concluding that the petitioner was not precluded from applying for a waiver while in this country).[9] This Court finds those decisions persuasive, and, therefore, rejects the government's argument that Zhicay, who has made one unlawful entry into this country, must return to Ecuador before filing her I-212 request for permission to reapply for admissibility.

The Court's authority to address Zhicay's pending applications before the USCIS is limited. This Court lacks the authority to adjudicate Zhicay's applications, or to compel their particular outcomes. See, e.g., Succar v. Ashcroft, 394 F.3d 8, 25 n.22 (1st Cir. 2005) (noting that, pursuant to § 1255(i), the Attorney General has discretion "over the decision whether to adjust"); Perez-Gonzalez v. Ashcroft, 379 F.3d at 788 ("Ordinarily, we lack jurisdiction to review the INS's discretionary determination of whether to grant a Form I-212 waiver to an applicant for adjustment of status under INA § 245"); Dashto v. I.N.S., 59 F.3d 697, 703 (7th Cir. 1995)("Both the waiver [pursuant to § 212] and the adjustment of status are matters committed to the Board's discretion"); Kim v. Ashcroft, 340 F. Supp.2d 384, 389 (S.D.N.Y. 2004) ("the decision of whether to grant or deny an adjustment application is wholly discretionary"). This Court may,

[9]The Second Circuit has not addressed this issue.

however, review the government's denial of an I-212 or I-485 if such denial is based on a purely legal, nondiscretionary reason. See Mariuta v. Gonzales, 411 F.3d 361, 367 (2d Cir. 2005) (reviewing situations where a decision in an immigration case may not be "discretionary," and, therefore, subject to judicial review); Sepulveda v. Gonzales, 407 F.3d 59, 63 (2d Cir. 2005) (holding that 8 U.S.C. § 1252(a)(2)(B) does not strip courts of jurisdiction to review nondiscretionary, or purely legal, decisions regarding an alien's eligibility for relief pursuant to, *inter alia*, § 1255); Succar v. Ashcroft, 394 F.3d at 19-20 (holding that a determination that "preclude[s] an alien from even applying for relief under section 1255" is a "purely legal question" that is reviewable); Perez-Gonzalez v. Ashcroft, 379 F.3d at 787-89 (denial of an I-212 on a purely legal basis was subject to judicial review).

Because the government has yet to adjudicate Zhicay's applications for permission to reapply for admission and for adjustment of status, there are no decisions for this Court to review for legal errors. Thus, Zhicay's petition, to the extent that it seeks such review, is not ripe for review.[10] "The ripeness doctrine prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." United States v. Balon, 384 F.3d 38, 46 (2d Cir. 2004) (quotations and alterations omitted). "[I]n addressing any and all ripeness challenges, courts are required to make a fact-specific determination as to whether a particular challenge is ripe by deciding whether (1) the issues are fit for judicial consideration, and (2) withholding of consideration will cause

[10]Although the government has not raised this issue, the Court may, and should, raise it on its own. See Nutritional Health Alliance v. Shalala, 144 F.3d 220, 225 (2d Cir. 1998) ("Ripeness is a constitutional prerequisite to exercise of jurisdiction by federal courts. . . . The court, therefore, can raise the issue *sua sponte*") (citations omitted).

substantial hardship to the parties." United States v. Quinones, 313 F.3d 49, 58 (2d Cir. 2002) As the Second Circuit recently explained:

> This two-prong inquiry in some ways tracks both the doctrine's Article III and prudential underpinnings. The "fitness of the issues for judicial decision" prong recognizes the restraints Article III places on federal courts. It requires a weighing of the sensitivity of the issues presented and whether there exists a need for further factual development. See, e.g., Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581. Meanwhile, the "hardship to the parties" prong clearly injects prudential considerations into the mix, requiring us to gauge the risk and severity of injury to a party that will result if the exercise of jurisdiction is declined. See Abbott Labs., 387 U.S. at 149.

Murphy v. New Milford Zoning Commission, 402 F.3d 342, 347 (2d Cir. 2005).

As to "fitness for consideration," the Second Circuit has held that "fitness" is "concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." American Savings Bank v. UBS Financial Services, Inc., 347 F.3d 436, 440 (2d Cir. 2003) (quoting Simmonds v. INS, 326 F.3d 351, 356-57 (2d Cir. 2003)). In other words, issues "have been deemed ripe when they would not benefit from any further factual development and when the court would be in no better position to adjudicate the issues in the future than it is now." Id; compare National Health Alliance v. Shalala, 144 F.3d 220, 225 (2d Cir. 1998) (noting that purely legal questions are appropriate for judicial resolution). Here, there is no decision from the government for the Court to review, much less to determine whether or not it has subject matter jurisdiction to conduct such a review. Zhicay's applications are pending, and at such time the government renders a decision, jurisdiction in this Court may be proper. Until such time, however, this Court is without subject matter jurisdiction.[11] Most importantly, if Zhicay

[11]In addition, the Court notes that, after the government issues its decision on her I-212 and I-485, Zhicay must exhaust her administrative remedies prior to seeking relief in this Court. See American Savings Bank, 347 F.3d at 440 ("The fact that [a plaintiff] has not yet exhausted

succeeds in her applications for permission to reapply for admissibility and adjustment of status, review by this Court becomes unnecessary. See U.S. v. Balon, 384 F.3d 38, 47 (2d Cir. 2004) ("[T]he issue here is distinctly a matter of fact beyond the prescience of this court and is thus currently subject to abstract disagreements over matters that are premature for review" [quotations omitted]).

As to "hardship," the Second Circuit has stated that "hardship" involves "an evaluation of whether the challenged action creates a direct and immediate dilemma for the parties." American Savings Bank, 347 F.3d at 440. Clearly, Zhicay will suffer a "hardship" if she is ultimately removed – the likely result if her I-212 and I-485 are denied – as her removal would create a direct and immediate hardship for her and her family. Because there is no matter that is fit for judicial review at this time, however, there is nothing this hardship could be balanced against. In other words, there is no action available for this Court to take in an effort to alleviate the hardship.

To the extent that Zhicay brings this habeas petition seeking the fair administration of the immigration laws, this Court **GRANTS** her petition by ordering USCIS to adjudicate Zhicay's applications in a timely fashion. Consistent with this opinion, Zhicay may, if necessary, refile this petition with this Court to review those adjudications for any legal errors that may arise.

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its administrative remedies counsels in favor of invoking the prudential ripeness doctrine"); Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 192-93 (1985) (noting that the doctrines of ripeness and exhaustion, although similar, are "conceptually distinct").

III Conclusion

The petition for writ of habeas corpus for review of the order of deportation is **TRANSFERRED** to the Second Circuit Court of Appeals, and the Attorney General is **ORDERED** to adjudicate petitioner's applications for permission to reapply for admission and for adjustment of status in a timely manner. The clerk is directed to transfer this file to the Second Circuit Court of Appeals and close this case.

SO ORDERED this 23rd day of November, 2005, at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE