No. 10-1542

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2. Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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The Solicitor General, on behalf of Attorney General Eric H. Holder, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App. 5a-6a, 12a-16a) and the immigration judge (App. 7a-9a, 17a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2011. On April 18, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 24, 2011. On May

17, 2011, Justice Kennedy further extended the time to and including June 23, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App. 28a-30a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The statute sets forth the eligibility criteria for cancellation of removal of a lawful permanent resident alien as follows:

> **(a) Cancellation of removal for certain permanent residents**
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a).

The INA defines the phrase "lawfully admitted for permanent residence," as used in Subsection (a)(1), as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The INA defines "residence," as used in Subsection (a)(2) ("resided"), as the alien's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). And the INA defines "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). An alien may be "admitted" to the United States either at a port of entry or by adjusting to a lawful status while already in the country. See, *e.g.*, *In re Alyazji*, 25 I. & N. Dec. 397, 399-400 (B.I.A. 2011).

The cancellation-of-removal statute further provides that an alien's period of continuous residence is deemed to end

> when the alien is served a notice to appear under section 1229(a) of this title, or * * * when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1)(A)-(B).

To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998).

The alien bears the burden of proof on those issues. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d). The ultimate discretion of the Attorney General to grant such relief is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted).

2. a. In 1988 or 1989, at the age of five, respondent, a native and citizen of Mexico, illegally entered the United States and thereafter resided in the United States with his parents. App. 12a, 18a. In 1991, when respondent was seven years old, his father was granted lawful permanent resident (LPR) status. *Ibid.* In October 2003, at the age of 19, respondent obtained LPR status. App. 12a-13a.

b. In December 2005, immigration officials apprehended respondent at the border for alien smuggling and subsequently served and filed a Notice to Appear charging him with being inadmissible on that basis under 8 U.S.C. 1182(a)(6)(E)(i). App. 18a. Respondent admitted to the facts establishing his removability but sought cancellation of removal pursuant to 8 U.S.C. 1229b(a). App. 13a, 19a.

In March 2006, after a merits hearing, an immigration judge (IJ) found respondent statutorily eligible for cancellation of removal, even though he had neither been lawfully admitted for permanent residence for five years (8 U.S.C. 1229b(a)(1)) nor resided in the United States for seven years after lawful admission (8 U.S.C. 1229b(a)(2)). App. 19a-22a. Applying *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1021-1029 (2005), in which the Ninth Circuit held that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the

purpose of satisfying Section 1229b(a)(2)'s seven-year residency requirement, the IJ permitted respondent to rely on his father's years of lawful residence after his father's 1991 admission to satisfy that requirement. App. 21a-22a.

The IJ further invoked the reasoning of *Cuevas-Gaspar* to permit imputation to respondent of his father's 1991 adjustment to LPR status as well. App. 21a-22a. By virtue of that additional imputation, the IJ found that respondent satisfied Section 1229b(a)(1)'s separate requirement of having been an LPR for five years. App. 22a.[1]

Finally, after weighing the equities of respondent's situation, the IJ granted respondent cancellation of removal in the exercise of discretion.

c. The Board of Immigration Appeals (Board) reversed and remanded for entry of an order of removal. App. 12a-16a.

The Board declined to extend *Cuevas-Gaspar* to permit the use of imputation to satisfy Section 1229b(a)(1)'s requirement that the alien have been lawfully admitted as a permanent resident for five years. App. 13a-14a. The Board distinguished Section 1229b(a) from the statute at issue in *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (9th Cir. 1994), the case that formed the basis for the Ninth Circuit's holding in *Cuevas-Gaspar*. App. 14a-15a. In *Lepe-Guitron*, the Ninth Circuit had considered the term "domicile" as an eligibility requirement under former 8 U.S.C. 1182(c),[2] and had held that a minor child's

[1] It was undisputed that respondent had not been convicted of any aggravated felony, so the IJ also found that he satisfied 8 U.S.C. 1229b(a)(3). App. 20a.

[2] Section 1182(c), which was repealed in 1996 and replaced by Section 1229b (see Illegal Immigration Reform and Immigrant Responsibility

"domicile" is that of his parents because domicile requires an intent to remain indefinitely and children are not legally capable of forming the necessary intent. App. 14a-15a. The Board explained that the Ninth Circuit's reasoning did not apply to Section 1229b(a)(1)'s five-year LPR status requirement because the period of five years is measured from when the alien was "admitted" as an LPR, and that "admitted" is a term of art under the INA that "does not depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer." App. 14a. Accordingly, the Board reasoned that, unlike in *Lepe-Guitron*, "it was unnecessary to look to the respondent's parent to determine intent." App. 15a. "Instead, the critical question was how long had the respondent been lawfully accorded the privilege of residing permanently in the United States as an immigrant." *Ibid.*

Even as to Section 1229b(a)(2), the requirement directly at issue in *Cuevas-Gaspar*, the Board noted that the provision also "contains no domicile requirement,"

Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597), provided that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1182(c) (1988). Courts interpreted that provision to allow for a discretionary waiver of deportation to deportable aliens who were permanent residents and had accrued seven years of "lawful unrelinquished domicile" in the United States. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1023; see also *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) (explaining that Section 1182(c) was extended to deportable aliens).

but rather "requires residence, which contains no element of subjective intent." App. 15a. The Board further concluded that to allow imputation of a parent's status and residence to meet both the first and second prongs of Section 1229b(a) "would essentially destroy the distinct tests mandated by Congress." *Ibid.*

d. On remand, the IJ entered a removal order. App. 7a-9a. Respondent appealed, and the Board reaffirmed its prior disposition. App. 5a-6a. The Board cited its then-recent precedential decision in *In re Escobar*, 24 I. & N. Dec. 231 (2007), in which the Board noted its disagreement with *Cuevas-Gaspar* and elaborated on its reasoning for not extending *Cuevas- Gaspar*'s imputation rationale to Section 1229b(a)(1)'s five-year LPR status requirement. App. 6a.

e. Subsequently, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the Board rejected an alien's invocation of imputation in attempting to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decisions in *Ramirez-Vargas* and *Escobar* pursuant to *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See 24 I. & N. Dec. at 600-601.

3. The Ninth Circuit granted respondent's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (2009). App. 2a. In *Mercado-Zazueta*, the Ninth Circuit rejected the Board's decisions in *Ramirez-Vargas* and *Escobar* and treated *Cuevas-Gaspar*'s holding as binding with res-

pect to Section 1229b(a)(2). See 580 F.3d at 1115. The Ninth Circuit also extended *Cuevas-Gaspar* to Section 1229b(a)(1), holding that "for purposes of satisfying the five years of lawful permanent residence required under [Section 1229b(a)(1)], a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." *Id.* at 1113.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit is the only court of appeals that permits imputation to an alien of a parent's lawful admission date, years of residence after that admission, and period of having been lawfully admitted for permanent residence, for purposes of enabling the alien to satisfy the statutory criteria for cancellation of removal. Invoking *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (9th Cir. 2009), which in turn relied on *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), the Ninth Circuit granted the petition for review in this case challenging the Board of Immigration Appeals' determination that respondent was ineligible for cancellation of removal. The Ninth Circuit did so notwithstanding that respondent had neither "been an alien lawfully admitted for permanent residence for not less than 5 years" (8 U.S.C. 1229b(a)(1)) nor "resided in the United States continuously for 7 years after having been admitted in any status" (8 U.S.C. 1229b(a)(2)). That decision, and the Ninth Circuit precedents on which it is based, are ripe for this Court's review.

First, the Ninth Circuit's imputation rule is erroneous. Nothing in Section 1229b(a)'s text or legislative history suggests that an alien may rely on a parent's admission, residence, or LPR status to satisfy the statutory requirements that the alien have a certain period of

LPR status and residence after admission in order to qualify for cancellation of removal. To the contrary, the statute's plain language makes clear that only the alien's *own* period of LPR status and residence after admission are relevant for purposes of Section 1229b(a)(1) and (2). Even if the lack of any statutory basis for imputation somehow rendered Section 1229b(a) ambiguous, the Board's precedential interpretations of the statute as not permitting imputation are reasonable and thus entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Second, the Ninth Circuit's imputation rule conflicts with the holdings of two other courts of appeals and the considered view of a third court of appeals—all of which have expressly rejected the Ninth Circuit's position. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Augustin* v. *Attorney Gen. of the U.S.*, 520 F.3d 264, 269 (3d Cir. 2008); see also *Cervantes* v. *Holder*, 597 F.3d 229, 236 (4th Cir. 2010) (in dicta).

Third, because almost half of all cancellation-of-removal applications are filed within the Ninth Circuit, the practical consequences of the Ninth Circuit's aberrant imputation rule are significant. Not only does the rule preclude uniform administration of the immigration laws, but it also impedes the government's high-priority efforts to remove criminal aliens.

A. The Ninth Circuit's Imputation Rule Is Incorrect

1. The plain language and purpose of Section 1229b(a) dictate that the decisionmaker must look only to the status, residency, and admission of the alien, not anyone else, for purposes of establishing the alien's eligibility for cancellation of removal. The Ninth Circuit decisions allowing an alien to rely on a parent's status,

residency, and admission date to satisfy the requirements of Section 1229b(a)(1) and (2) cannot be reconciled with the statutory text or purpose.

a. Section 1229b(a)(2), the provision at issue in *Cuevas-Gaspar*, requires as an element of eligibility for cancellation of an alien's removal that "the alien * * * has resided in the United States continuously for 7 years after having been admitted in any status." That text forecloses the Ninth Circuit's imputation rule. First, by specifying that "*the* alien" whose removal is at issue must have resided in the United States for seven years after having been admitted, the statute leaves no room to impute to the alien the admission date or residency period of anyone else (including the alien's parent). The Ninth Circuit has failed to grapple with that basic textual point.

Second, and relatedly, the phrase "after having been admitted" reinforces the conclusion that Section 1229b(a)(2) refers to the alien's own admission rather than the admission of any other individual. That reading is supported by the INA's definition of the term "admitted," which is, "with respect to an alien, the lawful entry of *the* alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (emphasis added). In other words, an alien's status as "admitted" is to be determined solely by reference to the alien's *own* lawful entry, after official inspection and authorization. The admission of anyone else, including the alien's parent, is irrelevant.

Third, the INA provides that the "term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). The definition's use of the possessive pro-

noun "his" evinces that the term "residence"—and hence the term "resided" in Section 1229b(a)(2)—denotes the alien's own residence, and not the residence of anyone else. Moreover, the definition's reference to the "principal, actual dwelling place in fact, without regard to intent," expressly precludes any reliance on intent—which, by contrast, is relevant to determining an alien's domicile (see pp. 15-16, *infra*). For that reason, regardless of whether a minor alien is capable of forming a legally sufficient intent to establish *domicile*, there is no basis to consider a parent's intent with respect to the minor's actual *residence*. Accordingly, the use of the term "resided" in Section 1229b(a)(2) buttresses the conclusion that only the actions and physical location of the alien himself have relevance in establishing statutory eligibility for cancellation of removal.

b. Section 1229b(a)(1), the other eligibility requirement at issue in this case, requires that "the alien * * * has been an alien lawfully admitted for permanent residence for not less than 5 years." By referring to the lawful permanent residence of "*the* alien" subject to removal, Section 1229b(a)(1), like Section 1229b(a)(2), makes clear that the alien seeking cancellation must *personally* satisfy the specified requirement. Moreover, the phrase "lawfully admitted for permanent residence" is defined by the INA to mean "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." 8 U.S.C. 1101(a)(20). Because "status" is an attribute personal to the alien, the statutory focus on that term reinforces the conclusion that eligibility for cancellation turns on whether and when the government has affirmatively accorded the alien himself the privilege of residing

permanently in the United States. The actions and status of others, including the alien's parents, are irrelevant for those purposes.

By contrast, there is no reading of Section 1229b(a)(1)'s text that supports the Ninth Circuit's conclusion that *the alien's* admission for lawful permanent residence for five years can be equated with the alien's *parent's* admission for lawful permanent residence for five years. Indeed, under the Ninth Circuit's view, even an alien who was never granted LPR status might be eligible for cancellation of removal under Section 1229b(a) based on a parent's LPR status—contradicting the very title of that provision ("Cancellation of removal for certain permanent residents"). Cf. *Mercado-Zazueta,* 580 F.3d at 1110 n.9 (reserving question).

c. Nor is there any indication in the legislative history that Congress intended that an alien be allowed to impute another person's status or residency to satisfy either requirement of Section 1229b(a). Lacking any such evidence, the Ninth Circuit relied on what it perceived to be a generalized congressional preference for keeping LPR parents and their minor children together. See *Cuevas-Gaspar*, 430 F.3d at 1024; see also M*ercado-Zazueta*, 580 F.3d at 1105-1106. But there is no reason to believe that Congress intended that general principle to trump Section 1229b(a)'s express requirement that the alien himself meet certain minimum criteria to qualify for cancellation of removal, even if the alien's parent should meet those criteria.

Indeed, respondent, after all, was not granted LPR status in his own right until 2003, when he was no longer a minor, and he then was apprehended and placed in removal proceedings for alien smuggling in December 2005. Respondent thus sought cancellation of removal

as an adult, not as a minor child seeking to remain in the United States with a parent.

To the extent that a legislative purpose can be discerned from the structure of the statute, that purpose is at odds with an interpretation permitting imputation. That Congress specified separate subsections with distinct requirements reflects Congress's insistence that the alien seeking cancellation of removal must meet precise standards, and not be allowed to qualify through a form of substantial compliance or by resort to equitable theories. Moreover, the Ninth Circuit's interpretation conflicts with other relevant sections of the INA—a result that Congress would not have intended. For example, 8 U.S.C. 1229b(d)(1) provides that an alien's period of continuous residence after admission stops accruing for purposes of cancellation relief when that alien has committed a crime that renders him inadmissible. Allowing an alien subject to that limitation to circumvent it by imputing a parent's admission and residence would render Section 1229b(d)(1) meaningless as applied to such aliens. Additionally, 8 U.S.C. 1227(a)(2)(A)(i)(I) provides that an alien convicted of a crime involving moral turpitude committed within five years of admission is deportable. Under the Ninth Circuit's imputation analysis, however, such an alien might be able to impute a parent's prior admission date to become eligible for cancellation of removal under Section 1229b(a). Illogically, the same alien would thus be considered to have two different admission dates in the same removal proceeding—one admission date that determines his removability and another imputed admission date that determines his eligibility to obtain cancellation relief.

2. Given that the plain text and purpose of Section 1229b(a) foreclose imputation of another alien's status

period of residency or date of lawful admission, the questions presented can be resolved at step one of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843 (calling for further inquiry only if "the statute is silent or ambiguous with respect to the specific issue"). Contrary to the Ninth Circuit's conclusion, Section 1229b(a) is not rendered "silent" or "ambiguous" simply because it does not expressly forbid imputation. Cf. *Cuevas-Gaspar*, 430 F.3d at 1022; see also *id.* at 1032 (Fernandez, J., dissenting) (finding that Section 1229b(a) clearly forecloses imputation). If a statute were required to refute every possible alternative not expressly foreclosed, nearly every statute would be silent or ambiguous as to far-fetched alternatives. *Chevron* does not countenance such a result.

But even if the statute were deemed ambiguous, the Board's interpretation that imputation is impermissible—see *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007) (Section 1229b(a)(1)); *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (B.I.A. 2008) (Section 1229b(a)(2))—is reasonable and thus entitled to controlling deference at step two of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843-844; see also *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163-1164 (2009) (according *Chevron* deference to Board's interpretation of INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same). The standard for what constitutes an expert agency's reasonable interpretation for *Chevron* purposes is broad, 476 U.S. at 843, and courts ordinarily defer to the Board's interpretation of immigration laws unless the interpretation is "clearly contrary to the plain and sensible reading of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted). As other courts of appeals have concluded with respect to Section 1229b(a)(2), the

Board's "straightforward" refusal "to read into the statute an [imputation] exception seemingly at odds with the statute's requirements" is at the very least reasonable. *Augustin*, 520 F.3d at 270-271 (holding that the Board's "refusal to create an exception simply heeds the statute's plain requirements"); see also *Deus*, 591 F.3d at 811 (deeming "the [Board]'s interpretation * * * not inconsistent with the statute and therefore permissible under *Chevron*'s deferential review"); *Cuevas-Gaspar*, 430 F.3d at 1032 (Fernandez, J., dissenting). That is the end of the inquiry under *Chevron*.

For the reasons explained above (pp. 10-14, *supra*), the Ninth Circuit's determination that the Board's interpretation is unreasonable, see *Mercado-Zazueta*, 580 F.3d at 1112-1115; *Cuevas-Gaspar*, 430 F.3d at 1024-1029, is unsupported by Section 1229b(a)'s text or purpose. In any event, the Ninth Circuit's reasoning—based on its precedents and policy determinations—fails on its own terms. The chain of the Ninth Circuit's mistaken reasoning began with *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (1994), in which it held that a parent's domicile could be imputed to an unemancipated minor child for purposes of the "domicile" requirement in now-repealed 8 U.S.C. 1182(c). The Ninth Circuit relied on the fact that the statutory term "domicile" incorporates notions of intent, *i.e.*, not only physical presence but an intent to remain indefinitely in the United States. *Lepe-Guitron*, 16 F.3d at 1025 (citations omitted). The Ninth Circuit reasoned that because "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place," "a child's domicile follows that of his or her parents." *Ibid.*; see 1 Restatement (Second) of Conflict of Laws § 22(1), at 88

(1971) (providing that generally "[a] minor has the same domicil as the parent with whom he lives").

In *Cuevas-Gaspar*, the Ninth Circuit extended the reasoning of *Lepe-Guitron* to Section 1229b(a)(2) by effectively equating "domicile" with "residence"—the specified metric for Section 1229b(a)(2)'s seven-year requirement. 430 F.3d at 1026. Over a dissent, the panel majority rejected the distinction between residence and domicile, stating summarily that the distinction "is not * * * so great as to be dispositive." *Ibid*. The *Cuevas-Gaspar* majority then took a further leap by reasoning that because *Lepe-Guitron* held "that a parent's 'lawful unrelinquished domicile' is imputed to the parent's minor children," it must have "necessarily held that the parent's *admission* for permanent residence was also imputed to the parent's minor children." *Ibid*. On that basis, it proceeded broadly to permit imputation to the alien child of a parent's "admission" for purposes of satisfying the requirement of Section 1229b(a)(2). *Ibid*.

The Ninth Circuit's extension of *Lepe-Guitron* in *Cuevas-Gaspar* was erroneous in multiple respects. It ignored the well established distinction between "domicile" and "residence." The INA expressly provides that "residence" is to be evaluated "without regard to intent," 8 U.S.C. 1101(a)(33)—a key consideration in determining domicile. Courts are virtually unanimous that the element of intent distinguishes the two concepts in the immigration context (and elsewhere). See, *e.g.*, *Cervantes*, 597 F.3d at 237 ("[T]here is a crucial distinction between a 'domicile' and a 'residence.'"); *Augustin*, 520 F.3d at 271-272 (discussing differences between "domicile" and "residence"); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (noting that, although "[a] minor's domi-

cile is the same as that of its parents," residence is "determined from the physical fact of * * * living in a particular place"); *Chan Wing Cheung* v. *Hamilton*, 298 F.2d 459, 461 (1st Cir. 1962) ("'Residence' within the [INA] is not the equivalent of domicile."); see also, *e.g.*, *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989) ("'Domicile' is not necessarily synonymous with 'residence,' and one can reside in one place but be domiciled in another.") (citation omitted); *Gaudin* v. *Remis*, 379 F.3d 631, 637 (9th Cir. 2004) ("The traditional concept of domicile, as contrasted with mere residence, captures well the notion of permanence.").

Crucially, once "intent" is removed from the analysis, "there is no legal reason for [the Court] to turn to [a child's] parents." *Cuevas-Gaspar*, 430 F.3d at 1031-1032 (Fernandez, J., dissenting); see *Cervantes*, 597 F.3d at 237 (stating that children "can have their own residences, separate and apart from that of their parents"); *Deus*, 591 F.3d at 811 (holding that "the relevant inquiry under Section 1229b(a), residence, presents no question regarding a minor's intention").

Moreover, the court in *Lepe-Guitron* discussed the imputation of "domicile" alone and confined its holding to the limited principle "that a child's domicile follows that of his or her parents." 16 F.3d at 1025. *Lepe-Guitron* never purported to hold that a parent's lawful *admission* was imputed to the child; indeed, the court emphasized that the alien child himself had entered the United States legally with his parents. *Id.* at 1024; see also *id.* at 1026 n.12 (noting that only adults had to be lawful permanent residents to accrue domicile status). The Ninth Circuit's reliance in *Cuevas-Gaspar* on *Lepe-Guitron* as supporting imputation of admission (in addition to residency) thus has no basis in that decision. And

Mercado-Zazueta's extension of *Cuevas-Gaspar* as requiring imputation of LPR status is doubly mistaken.

The Ninth Circuit's policy-based arguments likewise do not render the Board's interpretation incorrect, let alone unreasonable under *Chevron*. The Ninth Circuit defended its imputation rule based on what it perceived to be the "high priority" accorded by the immigration statutes "to the relation between permanent resident parents and their children." *Cuevas-Gaspar*, 430 F.3d at 1024 (quoting *Lepe-Guitron*, 16 F.3d at 1025); see *Mercado-Zazueta*, 580 F.3d at 1105-1106. In addition, the Ninth Circuit concluded that the Board had "consistent[ly]" interpreted the immigration laws to "allow[] for imputation of a parent's status to unemancipated minor children" and that any departure in the cancellation-of-removal context would therefore be unreasonable. *Cuevas-Gaspar*, 430 F.3d at 1026; see *Mercado-Zazueta*, 580 F.3d at 1111-1112. Neither argument overcomes the plain language of the statute, but, in any event, the Ninth Circuit is wrong on both accounts.

First, while the INA does provide for an immigration preference (as well as certain other benefits) for children of lawful permanent residents, that preference is not absolute. By way of example, such children (including minors) are still subject to immigration quotas (see 8 U.S.C. 1151-1153 (2006 & Supp. III 2009)) and therefore may be subject to lengthy waiting periods before they can legally immigrate to the United States. In other words, Congress has not categorically put the preference for admitting children of LPR parents above all other requirements of the immigration laws. Imputation, however, essentially allows an alien child an end-run around other statutory limitations, such as those on cancellation-of-removal relief in Section

1229b(a), and thereby upsets Congress's carefully crafted balance among competing policy concerns.

Second, the other situations identified by the Ninth Circuit in which the Board has allowed imputation of a parent's attributes implicate state of mind. For example, the Board has imputed a parent's abandonment of lawful permanent residence to minor children; abandonment clearly incorporates consideration of the alien's intent. See *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988) (stating that "the immigration judge was incorrect in concluding that the applicant's intent was irrelevant in determining whether she [as well as her children] had abandoned that status"); see also *Augustin*, 520 F.3d at 271 (finding that such cases "are not in direct conflict with the BIA's interpretation of the cancellation statute because the determination in these cases turned in part on the minor alien's intention"). The other situations are similarly distinguishable. See, *e.g.*, *Vang* v. *INS*, 146 F.3d 1114, 1117 (9th Cir. 1998) (likening firm resettlement to domicile); *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (attributing parents' knowledge of misrepresentation in entering the United States to the children). By contrast, the criteria at issue here—"residence," "admission," and "status"—depend solely on an individual's objective conduct or status, coupled with some official action by the government, without regard to mental state—a fact with which the Ninth Circuit has failed to grapple.

B. The Ninth Circuit's Imputation Rule Conflicts With Decisions Of Other Courts Of Appeals

The Ninth Circuit is the only court of appeals that has permitted imputation of another alien's status or period of residency to satisfy the eligibility criteria for

cancellation of removal. The Third Circuit and the Fifth Circuit have upheld the Board's interpretation of the statute not to permit time imputed from a parent to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement. See *Deus*, 591 F.3d at 811 (finding an "absence of support in the statutory language or legislative history" for the proposition that a parent's residence "was intended to be counted towards the requirements of Section 1229b(a)"); *Augustin*, 520 F.3d at 270 (describing the Board's refusal to impute as "a straightforward application of the statute's requirements"). The Fourth Circuit, albeit in dicta, also has expressed its disagreement with the Ninth Circuit's imputation rule. See *Cervantes*, 597 F.3d at 236 (agreeing "with two of our sister circuits * * * that have specifically rejected the reasoning of *Cuevas-Gaspar*").[3] That conflict extends *a fortiori* to Section 1229b(a)(1)'s five-year LPR status requirement as well.

Notwithstanding the conflicting authority and several opportunities to correct its course, the Ninth Circuit has chosen not to do so. In September 2009, the Ninth Circuit declined to accord *Brand X* deference to the Board's considered views in *In re Escobar* and *In re Ramirez-Vargas*, *supra*, which were published after the Ninth Circuit's decision in *Cuevas-Gaspar*; the Ninth Circuit instead extended its imputation rule to Section

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[3] Two judges of the Ninth Circuit have also criticized their court's case law. See *Mercado-Zazueta*, 580 F.3d at 1116 (Graber, J., concurring) ("I think that, as a matter of statutory interpretation and *Chevron* deference, *Cuevas-Gaspar* was wrongly decided."); *Cuevas-Gaspar*, 430 F.3d at 1031-1032 (Fernandez, J., dissenting) ("[S]tatute [] could not be more clear" that it "requires seven years of residence subsequent to admission."); see also *Saucedo-Arevalo* v. *Holder*, 636 F.3d 532, 533 n.1 (9th Cir. 2011) ("The issue of imputation is not without controversy.").

1229b(a)(1), and then denied the government's petition for panel rehearing. See *Mercado-Zazueta*, 580 F.3d at 1113-1115. More recently, the Ninth Circuit denied a petition for rehearing en banc in *Sawyers* v. *Holder*, 399 Fed. Appx. 313 (2010) (mem.), reh'g denied (Feb. 1, 2011), in which the court applied its imputation rule to vacate the Board's decision denying cancellation of removal based on the alien's inability to satisfy Section 1229b(a)(2)'s seven-year continuous residency requirement without relying on the parent's period of residency after admission. Based on the Ninth Circuit's steady expansion of the imputation rule, and its unwillingness to revisit that rule despite a circuit conflict, the questions presented here are ripe for this Court's review.[4]

C. The Ninth Circuit's Rule Has A Substantial Effect On The Administration Of The Immigration Laws

The Ninth Circuit's imputation rule creates significant adverse consequences that underscore the need for

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[4] Although this case implicates both the seven-year continuous residence requirement of Section 1229b(a)(2) (see *Cuevas-Gaspar*) and the five-year LPR status requirement of Section 1229b(a)(1) (see *Mercado-Zazueta*), as respondent cannot satisfy either requirement without imputation, the Board ultimately appeared to deny eligibility for cancellation of removal based on the latter requirement only (presumably due to binding Ninth Circuit precedent in *Cuevas-Gaspar* with respect to the former). App. 5a-6a; but cf. App. 14a-15a (criticizing *Cuevas-Gaspar*). As a result, the Ninth Circuit vacated the Board's decision in light of *Mercado-Zazueta*, citing specifically its holding permitting imputation for purposes of Section 1229b(a)(1). App. 2a. To ensure that both requirements are properly presented to this Court, the government is concurrently filing a petition for a writ of certiorari in *Sawyers*, *supra*, which expressly raises the issue of the use of imputation for purposes of Section 1229b(a)(2)'s seven-year residence requirement. The government requests that certiorari be granted in both cases and that the cases be consolidated for argument.

this Court's review. First, according to information conveyed by the Executive Office of Immigration Review, over 40% of all cancellation-of-removal applications resolved in fiscal year 2010 originated within the Ninth Circuit. For that reason alone, the Ninth Circuit's interpretation of Section 1229b(a) impedes the uniform administration of the immigration laws and affects many cases in which eligibility for cancellation of removal turns on imputation of a parent's status or residency. See *Chen* v. *Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (quoting *Kaganovich* v. *Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006) (national uniformity is "paramount" in the immigration context); *In re Cerna*, 20 I. & N. Dec. 399, 408 (B.I.A. 1991) ("We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide, particularly where the most significant aspects of the law are in issue.").

Second, although no statistics are kept on how many cancellation-of-removal applications would not have been granted but for reliance on imputation, the Ninth Circuit's rules clearly expand the class of removable aliens eligible for such relief. Because criminal aliens are part of that group, see 8 U.S.C. 1227(a)(2) (2006 & Supp. III 2009) (listing criminal grounds on which lawfully present aliens become removable); 8 U.S.C. 1182(a)(2) (2006 & Supp. III 2009) (listing criminal grounds on which an alien is inadmissible), the Ninth Circuit's rules impede the execution of the INA's goal—which the Department of Homeland Security (DHS) has prioritized—of removing criminal aliens. Cf. *Demore* v. *Kim*, 538 U.S. 510, 518-522 (2003) (describing Congress's interest in removal of criminal aliens).

Third, the Ninth Circuit's interpretation imposes an additional burden on the government insofar as it increases litigation before immigration courts and requires DHS to devote resources to litigating facts that would otherwise not be relevant to an alien's cancellation-of-removal case, including facts about events that have occurred many years in the past or about people other than the alien himself.

Fourth, aliens have sought (albeit unsuccessfully thus far) to extend the Ninth Circuit's imputation approach to other immigration contexts beyond Section 1229b(a). See *Saucedo-Arevalo* v. *Holder*, 636 F.3d 532 (9th Cir. 2011) (non-LPR cancellation of removal under 8 U.S.C. 1229b(b)); *De Leon-Ochoa* v. *Att'y Gen. of the U.S.*, 622 F.3d 341 (3d Cir. 2010) (temporary protected status under 8 U.S.C. 1254a); *Cervantes*, *supra* (same); *Barrios* v. *Holder*, 581 F.3d 849 (9th Cir. 2009) ("physical presence" requirement for cancellation of removal under Section 203 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2196); *United States* v. *Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (citizenship), aff'd by an equally divided court, No. 09-5801 (June 13, 2011). This Court's resolution of the questions presented should curtail such subsidiary litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
DONALD E. KEENER
CAROL FEDERIGHI
Attorneys

JUNE 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-70436
Agency No. A078-463-557

CARLOS MARTINEZ GUTIERREZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, RESPONDENT

[Filed: Jan. 24, 2011]

MEMORANDUM[*]

Submitted January 10, 2011[**]

On Petition for Review of an Order of the Board of Immigration Appeals

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[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BEEZER, TALLMAN, and CALLAHAN, Circuit Judges.

Carlos Martinez Gutierrez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order sustaining the government's appeal from an immigration judge's decision granting his application for cancellation of removal. We have jurisdiction under 8 U.S.C. § 1252, and we grant the petition for review and remand for further proceedings.

Because the BIA decided this case without the benefit of our decision in *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1113 (9th Cir. 2009) ("[F]or purposes of satisfying the five years of lawful permanent residence required under INA section 240A(a)(1), 8 U.S.C. § 1229b(a)(1), a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent."), we remand to the BIA to allow it to reconsider Martinez Gutierrez's cancellation of removal application. *See generally INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

PETITION FOR REVIEW GRANTED; REMANDED.

APPENDIX B

[Seal Omitted]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Aguirre, Dario, Esquire
1010 Second Avenue, Suite 1700
San Diego, CA 92101-4997

Office of the District Counsel/SND
880 Front St., Room 1234
San Diego, CA 92101-8834

Name: MARTINEZ GUTIERREZ, CARLOS

A78-463-557

Date of this notice: 1/24/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
DONNA CARR
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78 463 557 - San Diego, CA

Date: [JAN 24, 2008]

In re: CARLOS MARTINEZ GUTIERREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dario Aguirre, Esquire

ON BEHALF OF DHS: Kerri A. Harlin
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent appeals from an Immigration Judge's December 1, 2006, decision in which the respondent, a native and citizen of Mexico, was ordered removed. The respondent argues that he is eligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1229b(a).

We find no error in the Immigration Judge's decision. As we previously held in our decision dated September 29, 2006, a parent's lawful permanent resident status cannot be imputed to a child for purposes of cal-

culating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under section 240A(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a)(1) (2000). *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007) (limiting application of *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005)). The respondent here is not statutorily eligible for the relief he has requested because he adjusted his status to that of a lawful permanent resident short of the required 5-year statutory period provided by section 240A(a)(1) of the Act, and cannot impute his father's lawful permanent resident status to satisfy his requirement.

Accordingly, the appeal is dismissed.

/s/ JOHN GUENDELSBERGER
FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
446 ALTA ROAD, STE 5400, COURTROOM 1
SAN DIEGO, CA 92158

In the Matter of

Case A78-463-557

MARTINEZ GUTIERREZ, CARLOS
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Dec 1, 2006. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[xx] The respondent was ordered removed from the United States to MEXICO.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal was ( )granted under section 240A(b)(1) ( )granted under section 240A(b)(2) ( )denied ( )withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ____ of the INA was ( )granted ( )denied ( )withdrawn or ( )other.

[ ] Respondent's application for adjustment of status under section ____ of the INA was ( )granted ( )denied ( )withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until ____.

[ ] As a condition of admission, respondent is to post a $____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[xx] Other: Respondent waives I-589 Relief, Asylum, Withholding, and Convention against Torture

Date: Dec. 1, 2006

Appeal: WAIVED Appeal Due By: Jan 2, 2007

/s/ ZSA ZSA DEPAOLO
ZSA ZSA DEPAOLO
Immigration Judge

APPENDIX D

[Seal Omitted]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Orendain, Edward
1010 Second Avenue, Suite 1700
San Diego, CA 92101-4997

Office of the District Counsel/SND
880 Front St., Room 1234
San Diego, CA 92101-8834

Name: MARTINEZ GUTIERREZ, CARLOS

A78-463-557

Date of this notice: 09/29/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
DONNA CARR
Acting Chief Clerk

Enclosure

Panel Members:
FILPPU, LAURI S.
O'Leary, Brian M.
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78 463 557 - San Diego Date: [SEP 29, 2006]

In re: CARLOS MARTINEZ-GUTIERREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Edward Orendain, Esquire

ON BEHALF OF DHS: Kerri A. Harlin
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(E)(i), I&N Act [8 U.S.C. § 1182(a)(6)(E)(i)] - Alien smuggler

APPLICATION: Cancellation of removal

The Department of Homeland Security (the "DHS') appeals from an Immigration Judge's March 1, 2006, decision which granted the respondent, a native and citizen of Mexico, cancellation of removal under section 240A(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1229b(a).

The respondent was born in 1983, and came to the United States illegally in 1989. The respondent's father became a lawful permanent resident in 1991, while the respondent was admitted for lawful permanent residence in October of 2003. The respondent was arrested on December 2, 2005, for attempting to smuggle three

undocumented aliens into the United States. The respondent admitted the factual allegations against him, conceded removability, and applied for the relief of cancellation of removal. Section 240A(a) of the Act provides in relevant part that the Attorney General may cancel removal if the alien: (1) has been an alien *lawfully admitted for permanent residence*[1] for not less than 5 years (emphasis added); (2) has resided in the United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. *See* section 240A(a) of the Act; 8 U.S.C. § 1229(b)(a).

In *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit held that lawful admission and legal permanent residence can be imputed to an unemancipated minor to satisfy the *second prong* requirement of residing in the United States continuously for 7 years after having been admitted. It should be noted that only section 240A(a)(2) of the Act was at issue in *Cuevas-Gaspar* as there was no question that the alien had been a lawful permanent resident for not less than 5 years as required by section 240A(a)(1) of the Act. *See Cuevas-Gaspar v. Gonzales, supra,* at n.5. The Immigration Judge held that the reasoning of the Ninth Circuit's *Cuevas-Gaspar* decision should be applied to the respondent's case. The Immigration Judge goes beyond the scope of that case, however, by expanding and extending the holding in

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[1] 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." *See* 8 U.S.C. § 1101(a)(20).

Cuevas-Gaspar to the *first prong* of the cancellation statute. The Immigration Judge held that the respondent's father's legal permanent residence, acquired in 1991, while the respondent was a minor, could be imputed to the respondent to satisfy the *first prong* requirement that an alien be lawfully admitted for permanent residence for not less than 5 years. This is not the holding in *Cuevas-Gaspar,* and this Board declines to extend the precise holding of *Cuevas-Gaspar* beyond the *second prong* of the cancellation statute.

In finding that lawful admission and legal permanent residence can be imputed to the *second prong* of the cancellation statute, the *Cuevas-Gaspar* court relied heavily on the reasoning in *Lepe-Guitron v. INS,* 16 F.3d 1021 (9th Cir. 2004). In *Lepe-Guitron*, the court concluded that an unemancipated minor residing with his parents shares the same domicile as that of his parents, and that the period of lawful domicile begins when his parents attained permanent resident status while he was a child. The term "admitted" is a term of art defined by the Act as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* 8 U.S.C. § 1101(a)(13). Unlike domicile, which depends on intent or capacity, admission does not depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer. Moreover, in *Lepe-Guitron,* the Ninth Circuit interpreted domicile under former section 212(c) of the Act and looked to the minor's parents' intent (as minors are incapable of forming the intent necessary to establish domicile), whereas the present cancellation of removal statute contains no domicile requirement. Instead, it requires residence, which contains no element

of subjective intent. As such, unlike the alien in *Lepe-Guitron,* it was unnecessary to look to the respondent's parent to determine intent under the current cancellation statute. Instead, the critical question was how long had the respondent been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws—or in other words, how long had the respondent been lawfully admitted for permanent residence? *See* 8 U.S.C. § 1101(a)(20); *see* also section 240A(a) of the Act. Moreover, the *Lepe-Guitron* court noted that the alien had legally entered the United States with his parents and had always legally resided within the United States, which is in contrast to the respondent, who had been living illegally in the United States until he was admitted as an adult (and no longer in his parent's custody) in October 2003.

Allowing the imputation of a parent' s status and residence to both the *first* and *second prongs* of the cancellation statue, would essentially destroy the distinct tests mandated by Congress. For example, if imputation is all that is needed, why would an alien ever need to be a lawful permanent resident in his own right? Moreover, why would an alien ever need an admission or period of United States residence or presence? Extending the limited holding of *Cuevas-Gaspar* to the *first prong* of the cancellation statute runs contrary to the clear language of the statute, which requires an alien to be lawfully admitted for permanent residence, in his own right, for no less than 5 years. More importantly, an imputation as to the *first prong* would also run counter to the legislative history that is actually discussed by the Ninth Circuit in

Cuevas-Gaspar.[2] Accordingly, this Board respectfully declines to extend the Ninth Circuit's limited holding in *Cuevas-Gaspar v. Gonzales, supra*, to the *first prong* of the cancellation statute.

To answer the critical question in this case, the respondent adjusted his status to that of a lawful permanent resident a mere 3-years ago in 2003, a full 2 years short of the required 5 year statutory period provided by section 240A(a)(1) of the Act. Therefore, the respondent is not statutorily eligible for the relief he has requested. As such, we reverse the Immigration Judge's determination that the respondent demonstrated that he is eligible for cancellation of removal. Accordingly, the DHS' appeal will be sustained.

ORDER: The DHS' appeal is sustained.

FURTHER ORDER: The proceedings are remanded to the Immigration Court for the entry of an order of removal.

/s/ [ROGER PAULEY]
FOR THE BOARD

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[2] "In enacting the new cancellation of removal provision, Congress resolved the conflicting interpretations of 'unrelinquished lawful domicile' by requiring five years of status as a permanent resident. . . . [T]he language of the new two-part requirement apparently was designed to clear up the prior confusion and to strike a balance between the conflicting interpretations . . . while still requiring at least five years of permanent residence." *See Cuevas-Gaspar,* at 1028.

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Diego, California

File No.: A 78 463 557 March 1, 2006

In the Matter of

CARLOS MARTINEZ GUTIERREZ Respondent

IN REMOVAL PROCEEDINGS

CHARGE:	Section 212(a)(6)(E)(i) of the Immigration and Nationality Act - alien smuggling.
APPLICATIONS:	Section 240A(a) of the Immigration and Nationality Act - cancellation of removal for certain permanent residents.
	Section 240B(b) of the Immigration and Nationality Act - voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Edward Orendain	Kerri Harlin Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

PROCEDURAL FACTS

The respondent, Carlos Martinez Gutierrez, is a 22-year-old native and citizen of Mexico. Respondent came into the United States unlawfully, entering with his parents sometime in 1988 or 1989 when he was five years old. Respondent's father and mother are both legal permanent residents. Respondent's father has been a legal resident since February 7, 1991. Respondent's mother is a lawful permanent resident, but apparently did not receive that status prior to the legal permanent resident status obtained by respondent on October 28, 2003. Respondent has resided in the United States since his initial unlawful entry, and has maintained his residence with his parents.

Respondent came into the United States from Mexico, making his application for admission at the San Ysidro, California port of entry on December 2, 2005. At that time, respondent was detained following inspection when he was found to have three undocumented minors in the vehicle he was driving. Immigration officers made a determination that respondent was inadmissible, serving him with a Notice to Appear charging a violation of Section 212(a)(6)(E)(i) of the Immigration and Nationality Act. The Notice to Appear was served on respondent on December 3, 2005. The Notice to Appear was filed with the United States Immigration Court in San Diego, California on December 6, 2005. This Court has jurisdiction over these removal proceedings pursuant to 8 C.F.R. 1003.14(a) (2005).

Respondent appeared before this Court for an initial Master Calendar hearing on December 29, 2005. Re-

spondent was represented by counsel, and entered a plea admitting allegations of fact relevant to his citizenship and nationality in Mexico. Respondent also admitted his lawful permanent resident status. A determination was made that respondent had been given lawful permanent resident status on October 28, 2003. Respondent denied allegations of fact relevant to alien smuggling. A contested merits hearing was, therefore, scheduled for March 1, 2006. Exhibit No. 2.

Respondent appeared before this Court on February 3, 2006, following the submission and review of documentary evidence within the custody of the Department of Homeland Security relating to alien smuggling. Respondent informed the Court that following a review of the evidence that is in this record as Exhibit No. 3, he would be changing his plea, admitting allegations of fact relevant to alien smuggling. Exhibits 3 and 4. The Court entered a formal finding that respondent is inadmissible, the Government having established a violation of Section 212(a)(6)(E)(i) of the Act by clear, cogent, and convincing evidence. *Woodby v. INS*, 385 U.S. 276 (1966).

STATUTORY ELIGIBILITY FOR RELIEF

Certain facts relevant to statutory eligibility for relief are undisputed. There is no dispute regarding the length of respondent's residence in the United States. Respondent has testified that with the exception of his departure to Mexico in December of 2005, he has maintained a residence in the United States since his original unlawful entry. It is also undisputed that respondent has been a legal permanent resident in the United States since October 28, 2003. Issues relevant to eli-

gibility for relief involve whether or not respondent meets the eligibility requirements pursuant to Section 240A(a)(1) and (2). It is undisputed that respondent has not been convicted for an aggravated felony offense. He meets the eligibility requirements pursuant to Section 240A(a)(3) .

The Court has discussed with the parties that respondent meets the statutory requirements for seven years residence in the United States after having been admitted in any status, a requirement of Section 240A(a)(2). In this regard, the Court and counsel for respondent and the Department acknowledge the 9th Circuit decision in *Cuevas-Gaspar*, 430 F.3d 1013 (9th Cir. 2005). While respondent entered the United States as an unemancipated minor in 1988 or 1989, his father, having become a lawful permanent resident on February 7, 1991, establishes the legal requirement that respondent have the period of lawful residence imputed to him from his father's lawful permanent resident admission. The Court imputes the February 7, 1991 lawful admission of respondent's father to respondent, therefore meeting the eligibility requirements pursuant to Section 240A(a)(2).

The Department of Homeland Security has argued before the Court that the 9th Circuit's decision in *Cuevas-Gaspar*, *supra*, does not reach the issue regarding respondent's eligibility for relief required of Section 240A(a)(1) of the Act. Section 240A(a)(1) requires that respondent meet the eligibility requirement in that he "has been an alien lawfully admitted for permanent residence for not less than five years." The Department of Homeland Security argues that although the lawful permanent resident admission of respondent's father, dated

February 7, 1991, can be imputed to establish respondent's period of residence in the United States, it cannot be computed in making a determination that respondent has been admitted for permanent residence for a period of five years. The Court recognizes that respondent received his lawful permanent resident status on October 28, 2003. Clearly, respondent's date for lawful permanent resident status does not meet the facial requirements of the status relevant to that five year period.

In a careful review of *Cuevas-Gaspar*, *supra*, this Court understands that the 9th Circuit in that decision, consistent with its analysis of Congressional intent and policies regarding families in Immigration, necessarily included the imputation of lawful permanent resident status as well as the period of residence. In this regard, the Court has explained to both parties that the intention of the cancellation applications do not appear to be intended to narrow the scope for eligibility, but instead are interpreted to meet the underlying goals to provide children the necessary lawful admission based on the lawful admission of a parent, thus providing a consistency for eligibility for relief pursuant to both Sections 240A(a)(1) and (2). The 9th Circuit, in *Cuevas*, explains as follows: "In holding that a parent's "lawful unrelinquished domicile" is imputed to the parent's minor child, we necessarily held that the parent's admission for permanent residence was also imputed to the parent's minor children." In explaining its holding in *Cuevas*, the 9th Circuit simply expressed the need for consistency given the Congressional intention regarding family unification. "*Lepe-Guitron* necessarily held that a parent's admission to permanent resident status is imputed to

the child - and to the BIA's own longstanding policy of imputation. . . . "

The Court is convinced, following a careful reading of *Cuevas-Gaspar*, that it would be completely inconsistent with the 9th Circuit's decision for this Court to make a finding that respondent can be afforded the imputation of his father's lawful residence and not find that respondent was entitled to also have imputed to him his father's lawful admission as a legal resident. It would make no sense for this Court to find seven years of residence without allowing respondent the appropriate admission date of February 7, 1991. This Court will find that based on the 9th Circuit's decision in *Cuevas-Gaspar*, respondent has met each of the statutory eligibility requirements, and is eligible for consideration of his application to cancel removal pursuant to Section 240A(a) .

THE EXERCISE OF DISCRETION

Respondent has filed the application to cancel deportation and removal from the United States, and has provided supporting documents which establish the positive equities the Court will consider in support of his application. The Department of Homeland Security has also provided the Court with all of the evidence relevant to the violation relevant to alien smuggling. The Court obviously considers the alien smuggling violation as one of the negative factors in the exercise of discretion. *In re C-V-T-*, Int. Dec. 3342, Pages 7 through 15 (BIA 1998). The Court is well aware of its obligation to balance adverse factors which would influence respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf to

determine whether the granting of the application for relief is in the best interests of the United States. *Id*. Page 11.

In considering negative factors, the Court considers the alien smuggling event of December 2, 2005. Respondent also has a prior conviction. The Court does not have a record of the conviction document. Respondent has testified to a misdemeanor conviction for possession of stolen property while he was a student at New Valley High School.

Respondent has provided testimony today relating to the events of December 2, 2005. The Department has provided the reports from the Immigration inspectors at the port of entry. This Court finds that by engaging in an agreement to smuggle three children into the United States that respondent's behavior was deliberate, was planned, and was intended for respondent's financial gain. Although respondent and his parents are lawful permanent residents, respondent has at least six siblings, four of whom reside in the United States unlawfully. Respondent has a sister who is a legal permanent resident, and a younger brother who is a U.S. citizen. Respondent has grown up with a family that was in the United States unlawfully, at least until respondent's father became a legal permanent resident on February 7, 1991. The legal status for respondent's mother and respondent himself are more recent, that status being granted in 2003.

The Court makes this observation in light of facts presented in this case. Respondent, in agreeing to be involved in alien smuggling, used the U.S. birth certificates of several of his nieces and nephews. In so doing,

respondent also engaged the parents of those children, who are undocumented Mexican nationals, to create notarized letters providing respondent with birth certificates and permission to transport the undocumented children into the United States. This clearly exhibits to the Court a very planned and deliberate effort to deceive Immigration officers regarding the citizenship and nationality of the undocumented children. Moreover, respondent rented a truck or SUV for use in the transportation of the three undocumented children into the United States from Mexico. This Court very rarely sees the involvement of rented automobiles in smuggling cases, unless there is an understanding on the part of the smuggler that the use of private vehicles would certainly include the seizure of those vehicles for a violation of alien smuggling pursuant to the provisions of Section 274 of the Immigration and Nationality Act.

This Court has advised respondent that the factors involved in this particular incident did show a sophisticated level of planning. In this respect, respondent's case is characterized by a level of thought and planning that is inconsistent with an impulsive decision to do someone a favor. The Court is not persuaded by respondent's testimony that he considered that what he was doing was a favor to the mother of the three undocumented children. The Court finds that respondent certainly anticipated financial gain. Although respondent has attempted to minimize the fact that he expected financial return, the Court finds that respondent engaged in this alien smuggling with a full understanding of the legal consequences. Respondent was simply of the misunderstanding that the consequences of alien smuggling would not include the loss of his lawful permanent resi-

dent status. The Court has advised respondent that in the exercise of discretion, had respondent a criminal history of a more serious nature or an Immigration history which included any other violations of the Immigration and Nationality Act, that discretion could not be exercised favorably given the seriousness of this particular event.

The Court is required to consider positive equities, taking into consideration respondent's own relationship with the United States. Respondent was brought into the United States while he was still a young child. His relationship with the United States has been through his experience in a first generation family. Respondent's family includes members who are in the United States legally, as well as family members who reside here unlawfully. Respondent, in his daily life, encounters individuals, like the mother of these three children, who are in the United States living and working here illegally. Living very close to the border and having family in both countries oftentimes creates a culture that minimizes the severity of law enforcement and the Federal requirements for Immigration.

It is respondent's relationship with the United States over an extended period of time, including the fact that he has been educated in the United States, has both of his parents here legally, and has never lived in Mexico, that tips the discretionary scale in his favor.

At the time the respondent was arrested and detained for alien smuggling, neither of his parents were employed. Respondent testified that his father has been on disability and his mother had not been working. Respondent told Immigration officers that he agreed to be

involved in alien smuggling because he expected to be paid at least $1,500. The record establishes, based on respondent's testimony, that he was actually paid that money. The Court recognizes from the entire record that respondent's assertions to Immigration officers regarding financial need are credible.

This Court is persuaded that following three months of incarceration and the time to consider the value of legal permanent residence, this Court is assured that respondent is not likely to re-offend. Respondent could have suffered a criminal conviction in Federal court for alien smuggling, and appreciates the fact that he has not been convicted for an aggravated felony crime. Although this Court may have assumed that respondent was involved in an alien smuggling operation, there appears no evidence to establish any other violation of the Immigration laws outside of the December 5, 2005 alien smuggling attempt. Although the Court recognizes the seriousness of alien smuggling, as stated in this decision, respondent has the necessary equities and is entitled to have the Court consider allowing respondent to maintain his lawful permanent resident status given his new appreciation for the very serious consequences of human trafficking.

The Court will grant the application to cancel deportation and removal. The respondent has established sufficient equities in the United States which outweigh the single but serious alien smuggling event which has brought him before the Court.

Accordingly, the following orders are hereby entered:

ORDER

IT IS HEREBY ORDERED that respondent meets the eligibility requirements pursuant to Section 240A(a)(1) through (3) of the Act.

IT IS FURTHER ORDERED that respondent has met the Court's need to have sufficient positive equities which are exercised favorably in the granting of the application.

ZSA ZSA C. DEPAOLO
Immigration Judge

APPENDIX F

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the

alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

* * * * *

(20) 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.

* * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

* * * * *

2. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *