No. 11-831

In the Supreme Court of the United States

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

v.

KARINA PIMENTEL-ORNELAS

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 has 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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In the Supreme Court of the United States

No. 11-831

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v.

KARINA PIMENTEL-ORNELAS

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

PETITION FOR A WRIT OF CERTIORARI

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., *infra*, 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 4a-8a) and the immigration judge (App., *infra*, 9a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2011. A petition for rehearing was denied on October 5, 2011 (App., *infra*, 3a). 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., *infra*, 18a-20a.

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. IV 2010). The statute sets forth the eligibility criteria for cancellation of removal of a lawful permanent resident 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," the noun form of the term "resided" used in Subsection (a)(2), 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," also used in Subsection (a)(2), 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 his status to that of a lawful permanent resident (LPR) 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 she is statutorily eligible for such relief and that she 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 1990, at the age of three, respondent, a native and citizen of Mexico, entered the United States and thereafter resided in the United States with her father. Administrative Record (A.R.) 54, 123. Respondent's father had been granted LPR status in 1990. A.R. 54. In December, 2003, at the age of 16, respondent obtained LPR status. A.R. 123; App., *infra*, 10a.

b. In August 2006, immigration officials apprehended respondent at the border and subsequently served and filed a Notice to Appear charging her with being inadmissible under 8 U.S.C. 1182(a)(6)(E)(i) for having knowingly assisted or aided other aliens to enter or try to enter the United States in violation of law. App., *infra*, 10a; A.R. 206-207. Respondent initially conceded her removability, but later sought to withdraw the concession. She also sought cancellation of removal pursuant to 8 U.S.C. 1229b(a). App., *infra*, 10a-16a.

In August 2007, after a merits hearing, an immigration judge (IJ) found respondent removable as charged and further found her ineligible for cancellation of removal because she had not been lawfully admitted for permanent residence for five years (8 U.S.C. 1229b(a)(1)). App., *infra*, 10a-11a, 16a. The IJ noted that there was no dispute that respondent satisfied the seven-year residency requirement in 8 U.S.C. 1229b(a)(2) under the rule of *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. App.,

infra, 10a.[*] In this case, the rule of *Cuevas-Gaspar* would permit respondent to use her father's years of lawful residence after they began residing together to satisfy Section 1229b(a)(2)'s seven-year residency requirement. Following the recent precedential decision of the Board of Immigration Appeals (Board) in *In re Escobar*, 24 I. & N. Dec. 231 (2007), however, the IJ declined to permit imputation to respondent of her father's 1990 adjustment to LPR status to satisfy Section 1229b(a)(1)'s five-year LPR status requirement. App., *infra*, 10a-11a.

c. The Board agreed that respondent was ineligible for cancellation of removal and dismissed her appeal. App., *infra*, 4a-8a.

The Board acknowledged *Cuevas-Gaspar*'s holding that imputation was permitted for the purpose of satisfying the seven-year residency requirement in Section 1229b(a)(2). App., *infra*, 6a-7a. For Section 1229b(a)(1), however, the Board considered itself bound by its more recent precedential decision in *In re Escobar*. *Ibid.* Moreover, the Board observed that, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), it had recently rejected an alien's invocation of imputation in attempting to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement and indicated that the Ninth Circuit would be required to defer to that decision pursuant to *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). App., *infra*, 7a n.2; see *Ramirez-Vargas*, 24 I. & N. Dec. at 600-601.

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[*] It was undisputed that respondent had not been convicted of any aggravated felony, so she also satisfied Section 1229b(a)(3).

3. The Ninth Circuit granted respondent's petition for review and remanded to the Board for reconsideration of respondent's cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (2009). App., *infra*, 1a-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 respect to Section 1229b(a)(2). 580 F.3d at 1115. The Ninth Circuit in *Mercado-Zazueta* 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.

4. The government petitioned for panel rehearing and asked the court of appeals to stay the petition pending the Solicitor General's decision on whether to seek certiorari in *Martinez Gutierrez* v. *Holder*, 411 Fed. Appx. 121 (9th Cir. 2010), cert. granted, No. 10-1542 (Sept. 27, 2011), as well as any further review granted in that case. The court of appeals denied the petition. App., *infra*, 3a.

REASONS FOR GRANTING THE PETITION

The question whether 8 U.S.C. 1229b(a) permits imputation of a parent's lawful admission date, years of residence after that admission, and period of lawful permanent resident status to an alien for purposes of satisfying the statutory eligibility criteria for cancellation of removal is presented in two cases currently pending before the Court. See *Holder* v. *Martinez Gutierrez*, No. 10-1542 (to be argued Jan. 18, 2011); *Holder* v. *Saw-*

yers, No. 10-1543 (to be argued Jan. 18, 2011). If the Court concludes that imputation is not permitted to satisfy the eligibility criteria of Section 1229b(a)(1) and (2), then respondent in this case would not be eligible for cancellation of removal. Accordingly, the Court should hold this petition pending the final disposition of *Martinez Gutierrez* and *Sawyers* and then dispose of the petition as appropriate in light of those decisions.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's final disposition of *Martinez Gutierrez* and *Sawyers*, and disposed of as appropriate in light of those decisions.

Respectfully submitted.

DONALD B. VERRILLI, JR.
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TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
DONALD E. KEENER
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JANUARY 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-70437
Agency No. A073-949-310

KARINA PIMENTEL-ORNELAS, PETITIONER

v.

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

MEMORANDUM[*]

[Filed: May 10, 2011]
Submitted: Apr. 20, 2011[**]

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

Before: RYMER, THOMAS, and PAEZ, Circuit Judges.

Karina Pimentel-Ornelas, a native and citizen of Mexico, petitions for review of the Board of Immigration

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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).

Appeals' ("BIA") order dismissing her appeal from an immigration judge's decision denying her application for cancellation of removal. We have jurisdiction under 8 U.S.C. § 1252. We review de novo questions of law, *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1104 (9th Cir. 2009), and we grant the petition for review.

The BIA decided this case without the benefit of our decision in *Mercado-Zazueta v. Holder*, in which we held that for purposes of satisfying the five years of lawful permanent residence required under 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. 580 F.3d at 1113-16. Accordingly, we grant the petition for review and remand to the BIA for further proceedings. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam).

PETITION FOR REVIEW GRANTED; REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-70437
Agency No. A073-949-310

KARINA PIMENTEL-ORNELAS, PETITIONER

v.

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

[Filed: Oct. 5, 2011]

ORDER

Before: THOMAS, and PAEZ, Circuit Judges.

The government's petition for panel rehearing is denied.

APPENDIX C

[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

Dario Aguirre, Esquire
1225 17th St., Suite 1530
Denver, CO 80202

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

Name: PIMENTEL-ORNELAS, KARINA

A073-949-310

Date of this notice: 1/27/2009

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

Sincerely,

DONNA CARR
DONNA CARR
Chief Clker

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: A073 949 310 - San Diego, CA Date: [Jan. 2, 2009]

In re: KARINA PIMENTEL-ORNELAS a.k.a. Karina Pimentel-Orenlas

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT: Dario Aguirre, Esquire

ON BEHALF OF DHS: Megan Berry Oshiro
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 under section 240A(a)

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's August 3, 2007, decision. In that decision, the Immigration Judge denied the respondent's application for cancellation of removal under section 240A(a) of the Immigration and National-

ity Act (the "Act"), 8 U.S.C. § 1229b(a). The respondent's appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see also* Matter of S-H-, 23 I&N Dec. 462, 464-65 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R § 1003.1(d)(3)(ii).

We note that the respondent indicated on his Notice of Appeal (Form EOIR-26) that he intended to file a brief in support of his appeal. In addition, the record indicates that we granted the respondent an extension until January 24, 2008, to file his brief. Nevertheless, and despite extending the briefing deadline, the record does not contain any brief from the respondent. *See* 8 C.F.R. § 1003.3(c)(1). However, we understand from the statements contained in the Notice of Appeal (Form EOIR-26) that the respondent argues that her parents' admission to lawful permanent residence should be imputed to her for purposes of meeting the requirement under section 240A(a)(1) of the Act that she have been lawfully admitted for permanent residence for not less than five years.[1] However, the respondent's reliance on

[1] The record indicates that at the hearing the respondent sought to withdraw his concession to the sole charge of removability and, alternatively, sought to suppress the evidence supporting the charge. However, after multiple continuances and succession of different attorneys appearing on the respondent's behalf, none of whom adequately address these issues, the Immigration Judge properly accepted the respondent's concession to the charge and accepted the evidence supporting the charge (I.J. at 6-7). *See Matter of Gawaran*, 20 I&N Dec.

the Ninth Circuit's limited holding in *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005) (holding that residence of parent could be imputed to minor, dependent child to satisfy "continuous residence following admission" requirement for cancellation of removal under section 240A(a)(2) of the Act), among other similar cases, is misplaced.[2] For the reasons that the Immigration Judge stated, the holding in *Cuevas-Gaspar* does not extend to the requirement that the applicant have been lawfully admitted for permanent residence for not less than five years under section 240A(a)(1) of the Act (I.J. at 2). *See Matter of Escobar*, 24 I&N Dec. 231, 235 (BIA 2007) (declining to extend the holding in *Cuevas-Gaspar v. Gonzales*, *supra*, to the lawful permanent residence requirement of section 240A(a)(1) of the Act).

In sum, the respondent has failed to raise any argument on appeal warranting disturbing the Immigration Judge's decision. Accordingly, the following order will be entered.

938, 942 (BIA 1995) (stating that "absen[t] . . . egregious circumstances, an alien is bound by the 'reasonable tactical actions' of [his] counsel"). In any event, insofar as the respondent does not contest this issue on appeal, we see no reason to disturb the Immigration Judge's decision, in this regard. *See Matter of Edwards*, 20 I&N Dec. 191, 196-197 n.4 (BIA 1990) (noting that issues not addressed on appeal are deemed waived on appeal).

[2] Moreover, we have recently determined that we interpret the statute in a manner contrary to the holding in *Cuevas-Gaspar v. Gonzales*, *supra*, with regard to imputing a parent's residence to a child for purposes of section 240A(a)(2) of the Act. *See Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008), citing *Gonzales v. Department of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007), and *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

ORDER: The respondent's appeal is dismissed.

ILLEGIBLE
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File A 73 949 310

IN THE MATTER OF
KARINA PIMENTEL-ORNELAS, RESPONDENT

Filed: Aug. 3, 2007

IN REMOVAL PROCEEDINGS

CHARGE: Section of 212(a)(6)(A)(i) of the Immigration and Nationality Act—an alien who anytime knowingly has encouraged, assisted or aided any other alien to enter or try to enter the United States in violation of law.

APPLICATION: None.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Guy Grande, Esquire Dario Aguirre, Esquire	Megan Oshiro, Esquire

ORAL OPINION AND ORDER OF
THE IMMIGRATION JUDGE

The respondent is charged as a native and citizen of Mexico who applied for admission to the United States from Mexico on or about August 12, 2006 at the Tecate, California land point of entry by presenting her valid permanent resident alien card, Form 1-551.

It is also alleged [at] allegation number four that the respondent on that same date when she applied for admission she knowingly assisted or aided two aliens to enter or try to enter the United States in violation of law.

The issue in this case is whether the respondent is removable as charged. The parties agree that because the respondent became a legal permanent resident on December the 5th of 2003 she would not be eligible for the cancellation of removal for permanent resident under Section 240(A)(a) of the Act because she has still not accumulated the five years after being admitted in lawful permanent resident status. In this regards the Court of Immigration Appeals recently decided the case of *Matter of Kattia-Escobar*, I&N Dec. 231 (BIA 2007) where they held that the cancellation applicant cannot impute the parents period of time as a legal permanent resident while the applicant was a minor to add to the five year period.

[With respect to] the seven year period[, t]here appears to be no dispute that the respondent would have acquired that period of residence under the ruling of *Cuevas-Gaspar v. Gonzales*, 430 F.3rd 1013 (9th Cir. 2005). However, regardless of the fact that she may have the seven years, based on that ruling she, according to

the Board decision in *Matter of Escobar*, does not have the five years and will not have the five years until December of 2008.

The issue of removability in this case was originally conceded when the respondent first appeared before Immigration Judge De Paolo[, while] she was [still] detained [and] she admitted all the factual allegations, including allegation 4, and conceded the charge and indicated that she would be applying for the relief of cancellation. It was noted that the respondent was going to argue that she was eligible based on the *Cuevas-Gaspar* ruling since her father had been a legal resident since 1988 and she had only become a legal resident in 2003.

When the respondent was released she appeared before me at pre-trial hearings. At that point which was November of 2006 the Government submitted many documents related to her arrest at the Tecate point of entry. Those documents show that the respondent admitted to the officers that although she was a passenger [riding] in the 2004 black Nissan Armada SUV she admitted that she helped her cousin to place one of the illegal aliens underneath the seat of the Armada SUV where the young alien was hiding and that she knew that the young alien did not have any legal documents to enter the United States. The respondent admitted that she went to Mexico to assist her other family who were riding with her [in] trying to bring these children into the United States illegally.

At that master calendar when the Government counsel pointed out that respondent may not be eligible for relief because she did not have the five years after admission [as a] lawful permanent resident[, t]he respon-

dent's counsel who at that time was Mr. Tom Haine wanted to withdraw the prior concession for Mr. Grande and indicated that they would contest the charge and deny the allegation. The Government opposed the withdrawal of the concession. I should note that Mr. Haine at that time was working in the same law firm that Mr. Grande worked which is called the Aguirre Law Group which is headed by Mr. Dario Aguirre and other co-counsel in this case.

After that[,] the Court indicated to the parties that they should file a brief on the issue of whether the Court should allow a [withdrawal] of the plea and/or and also objections to the Government's evidence, if any.

Mr. Haine filed a motion to withdraw as counsel since he apparently had also made originally concessions to the charge and later had changed them [when it was revealed] that the respondent did not have the five years and would not have the five years until 2008. The Court allowed Mr. Haine to withdraw as counsel and [at] a subsequent master calendar hearing the Department of Homeland Security also submitted a response and objection to allowing respondent's counsel permission to withdraw their concession of removability.

Respondent's original counsel, Mr. Grande, then filed a motion to withdraw and substitute counsel [with] Mr. David Horowitz. Mr. Horowitz appeared at another master calendar in April of 2007 requesting time to prepare. At that master calendar Mr. Horowitz contested the charge and denied allegation number 4.

Government counsel then filed in May a pre-hearing statement on eligibility for relief arguing that even assuming the respondent would have the seven years un-

der the *Cuevas-Gaspar* ruling, she would not have the five years [for] the five years [] from the parents cannot be imputed to her.

Respondent filed a pre-hearing statement on eligibility on May of 2007 arguing that she is eligible for cancellation under the *Cuevas-Gaspar* ruling and that the [lawful permanent residence] period from the parents should be imputed to her under the principle announced in the *Cuevas-Gaspar* ruling for minors and the interest [that] should be observed regarding minors.

The respondent's attorneys then filed an additional motion to substitute counsel whereby Mr. Aguirre requested to substitute for the respondent's representation [in place] of Mr. Horowitz.

At a master calendar on May 25, 2007 the Court allowed Mr. Aguirre to substitute for Mr. Horowitz because the respondent wanted Mr. Aguirre to be her attorney and he was not present so the case was continued [to another master calendar] so Mr. Aguirre could be present.

On today's date, Mr. Aguirre was not present because he had an illness he had to attend to, a matter related [to a] hospitalization. However, Mr. Grande, who used to be respondent's attorney[,] appeared for Mr. Aguirre who had the medical emergency[,] as a friend of the Court.

The Court notes that this matter has been pending since August 31t of last year and the respondent [by none of] the attorneys that she has had has not filed any objections or motion to suppress in relation to the Government evidence which has been provided to her

through her attorneys as far back as November of 2006. The respondent, through one of her attorneys Mr. Haine at that time, did address the matter of the withdraw[al] but only indicated that the concessions "were the result of unreasonable professional judgement." And that respondent's counsel, Mr. Haine, admitted that advising her to conceding removability was [done] without completely reviewing the evidence provided by the Government [without] exercising reasonable professional judgment and requested permission to [be] allow[ed to] withdraw.

Government counsel noted today that this matter has been pending for some time and that there should be a resolution [to] it. I noted that the respondent indicated through Mr. Grande that her position was going to be that even assuming that she did help in hiding the young alien, Ortiz, under the seat that she would not be removable under the principles and analysis in the case of [*Altamirano*], 427 F.3rd 586.

The Court agrees with Government counsel in that there has to be a resolution in this case and upon reviewing the record I do find that I have offered the respondent and her many attorneys ample opportunit[ies] to state a clear position on the charges in this case. The position that respondent has taken through her attorneys is[,] with respect to the [withdrawal of the plea] not very clear and I do not believe that they have really indicated to the Court sufficient reasons to allow the Court to consider the exceptional circumstance of [incompetency of] the respondent's prior counsel to withdraw their concession.

In any event, no objections have been presented to the evidence presented by the Government and no motion to suppress or any similar motion has been filed by the respondent or by any of her many attorneys throughout the pendency of these proceedings despite the fact that the Court expressly indicated that such motion should be filed by a certain date. The Court therefore finds that the document[s] submitted by the Government which are collectively marked as group Exhibit 2, Exhibit 1 being the Notice to Appear are sufficient and are admitted and they by themselves establish in a clear and convincing manner that the respondent is removable as charged. Pursuant to the holding of *Matter of Baicenas*, 19 I&N Dec. 609 the respondent has [the] burden of coming forward with sufficient of a challenge to these documents and respondent has not done that. Instead, what the record shows is that there has been a succession of attorneys that have come into the case and withdrawn possibly creating simply a situation of delay so that proceedings could be extended and hopefully reach the point where the respondent would have the five years.

I do not believe that the Court should allow these proceedings to continue given the possibility that the continuances have been used to delay proceedings unnecessarily for the purpose of making the respondent eligible for relief.

I believe I have given the respondent ample time to challenge the evidence of the Government and present a plausible theory as to why she is not removable assuming the [prior] concessions should be allow[ed] to be withdrawn, she has not done that.

I find that the situation here in her assisting the young alien, Ortiz, to hide under the seat is sufficient to place her beyond the [*Altamirano*] ruling, the respondent by committing that act knowing that the young alien was not authorized to be admitted to the United States did commit and act of assistance and encouragement in the attempt to bring this young alien illegally into the United States and, therefore, she is subject to the charge of removability in this case. *See Urzua v. Gonzales*, 487 F.3d 742 (9th Cir. 2007).

The respondent at this time is not eligible for the relief of cancellation. She does not appear to be eligible for any other relief, therefore, the Court issues the following orders.

ORDERS

Based on the evidence presented by the Government which has not been objected or opposed the Court finds that the respondent is removable as charged.

The respondent is ordered removed to Mexico based on the charge in the charging document.

So ordered.

[RECEIVED AND REVIEWED ON [Jan. 10, 2008] WITHOUT BENEFIT OF RECORD OF PROCEEDINGS]

ILLEGIBLE
IGNACIO P. FERNANDEZ
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before IGNACIO P. FERNANDEZ in the matter of:

KARINA PIMENTEL-ORNELAS

A 73 949 310

San Diego, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

RHONDA S. SMITH
RHONDA S. SMITH (Transcriber)
Deposition Services, Inc. 6245
Executive Boulevard Rockville,
Maryland 20852
881-3344
Dec. 3, 2007
(Completion Date)

APPENDIX D

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.

* * * * *

(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.

* * * * *

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) 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.

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