No. 11-99

In the Supreme Court of the United States

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

v.

LISBETH DUQUE MOJICA

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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LISBETH DUQUE MOJICA

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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. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App. 4a-8a) and the immigration judge (App. 9a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2010. A petition for rehearing was denied on April 25, 2011 (App. 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. 14a-16a.

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 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 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 1993, at the age of eight, respondent, a native and citizen of Mexico, illegally entered the United States and thereafter resided in the United States with her parents. Administrative Record (A.R.) 96. Respondent's father had been granted lawful permanent resident (LPR) status in 1989. A.R. 127. In December 2005, at the age of 20, respondent obtained LPR status. App. 12a.

b. In August 2006, immigration officials apprehended respondent at the border for alien smuggling and subsequently served and filed a Notice to Appear charging her with being inadmissible on that basis under 8 U.S.C. 1182(a)(6)(E)(i). App. 10a-11a. Respondent contested her removability and also sought cancellation of removal pursuant to 8 U.S.C. 1229b(a). App. 10a-11a.

In January 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. 12a-13a. The IJ took notice 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 for the purpose of satisfying Section 1229b(a)(2)'s seven-year residency requirement. App. 12a.[1] The IJ, however, declined to extend the rea

[1] The IJ found that, pursuant to *Cuevas-Gaspar*'s imputation rule, respondent satisfied Section 1229b(a)(2)'s seven-year continuous residence requirement based on her father's years of lawful residence in the United States while respondent was residing with him after her own

soning of *Cuevas-Gaspar* to permit imputation to respondent of her father's earlier adjustment to LPR status, and her father's longer period of residence in that status, to satisfy the five-year LPR status requirement that she could not satisfy on her own. *Ibid.*

c. The Board of Immigration Appeals (Board) agreed that respondent was ineligible for cancellation of removal and dismissed her appeal. App. 5a-8a.

The Board agreed with the IJ's refusal 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. 7a-8a. The Board relied on its more recent precedential decision, *In re Escobar*, 24 I. & N. Dec. 231 (2007), in which it had explained its disagreement with *Cuevas-Gaspar* in declining to extend the imputation rule to Section 1229b(a)(1). App. 8a.

d. Subsequently, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the Board rejected an alien's invocation of imputation 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 would be 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 her cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-*

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illegal entry. App. 11a. It was undisputed that respondent had not been convicted of any aggravated felony, so she also satisfied Section 1229b(a)(3).

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 respect to Section 1229b(a)(2). 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.

4. The government petitioned for panel rehearing and asked the court of appeals to stay its consideration of the petition pending the Solicitor General's decision on whether to seek certiorari in *Sawyers* v. *Holder*, 399 Fed. Appx. 313 (9th Cir.), reh'g denied (9th Cir. Feb. 1, 2011), petition for cert. pending, No. 10-1543 (filed June 23, 2011), as well as any further review granted in that case. The court of appeals denied the petition. App. 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 petitions for a writ of certiorari currently pending before the Court. See *Gutierrez* v. *Holder*, 411 Fed. Appx. 121 (9th Cir. 2011), petition for cert. pending, No. 10-1542 (filed June 23, 2011); *Sawyers* v. *Holder*, 399 Fed. Appx. 313 (9th Cir. 2010), petition for cert. pending, No. 10-1543 (filed June 23, 2011). If the Court grants those petitions and concludes that imputation is not permitted to satisfy the eligibility cri-

teria 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 disposition of *Gutierrez* and *Sawyers*, including any subsequent proceedings on the merits, 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 *Gutierrez* and *Sawyers*, and disposed of as appropriate in light of those decisions.

Respectfully submitted.

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Solicitor General
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Assistant Attorney General
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JULY 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-73098
Agency No. A096-538-353

LISBETH DUQUE MOJICA, PETITIONER

v.

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

MEMORANDUM[*]

On petition for review of an order of the
Board of Immigration Appeals

Filed: Dec. 27, 2010
Submitted: [Dec. 14, 2010][**]

Before: GOODWIN, WALLACE, and W. FLETCHER, Circuit Judges.

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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).

Lisbeth Duque Mojica, a native and citizen of Mexico, petitions for review of the Board of Immigration 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, *Cerezo v. Mukasey*, 512 F.3d 1163, 1166 (9th Cir. 2008), and we grant the petition for review.

The BIA concluded that Duque Mojica could not rely on her father's period of legal permanent resident status to establish that she had been "an alien lawfully admitted for permanent residence for not less than 5 years." 8 U.S.C. § 1229b(a)(1). The BIA, however, did not have the benefit of our decision in *Mercado-Zazueta v. Holder*, in which we held that for the purpose of establishing the required five years of lawful permanent residence, "a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." 580 F.3d 1102, 1113 (9th Cir. 2009). We therefore remand for the BIA to reconsider Duque Mojica's eligibility for relief.

PETITION FOR REVIEW GRANTED; REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-73098
Agency No. A096-538-353

LISBETH DUQUE MOJICA, PETITIONER

v.

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

Filed: Dec. 27, 2010

ORDER

Before: GOODWIN, WALLACE, and W. FLETCHER, Circuit Judges.

We grant the government's motion to amend its petition for panel rehearing.

The government's petition for panel rehearing is denied as unnecessary.

APPENDIX C

[SEAL OMITTED]

U.S. Department of Justice
Executive Office for
Immigration Review

Board of Immigration
Appeals Office of the Clerk

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Name: DUDQUE MOJICA, LISBETH

A96-538-353

Date of this notice: 7/17/2007

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:
Pauley, Roger

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

File: A96 538 353 - San Diego, CA

Date: [July 17, 2007]

In re: LISBETH DUOUE MOJICA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Michael Franquinha, Esquire

ON BEHALF OF DHS:
Christopher J. Reeber
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: Termination of removal proceedings; cancellation of removal

ORDER:

PER CURIAM. The respondent appeals from an Immigration Judge's January 16, 2007, decision sustaining the charge of inadmissibility against her and pretermitting her application for cancellation of removal. The appeal is dismissed.

The respondent is a native and citizen of Mexico and a lawful permanent resident of the United States. On August 26, 2006, after traveling in Mexico, the respondent attempted to reenter the United States as a returning lawful permanent resident via the San Ysidro, California, port of entry. The Department of Homeland Security (the "DHS"), denied her request for reentry and placed her in removal proceedings as an arriving alien who is inadmissible by virtue of having assisted another alien to attempt to enter the United States in violation of law (Exh. l). *See* section 212(a)(6)(E)(i) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1182(a)(6)(E)(i).

The factual basis for the charge of inadmissibility is reflected in several documents submitted into evidence by the DHS at the respondent's removal hearing, including a Record of Deportable/Inadmissible Alien (Form I-213), prepared by an immigration inspector at the time of the respondent's attempted entry (Exh. 2). The Form I-213 contains the respondent's admission that she concealed her uncle in the rear part of her vehicle while she attempted to pass through the San Ysidro port of entry, knowing that he was an alien who had no documents authorizing him to be lawfully admitted to the United States. On the basis of the evidence, the Immigration Judge sustained the charge of inadmissibility and ordered the respondent removed from the United States.

On appeal, the respondent argues that the inculpatory statements she made to immigration inspectors at the time of her attempted entry—which are reflected on the Form I-213—should be suppressed on the ground that she was not given the proper notification under section 8 C.F.R. § 287.3 in accordance with our decision in

Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980). She further contends that the Immigration Judge erred in concluding that she was ineligible for cancellation of removal based on the finding that she did not accrue the requisite 5 years of lawful permanent residency for purposes of cancellation of removal prior to her attempt to smuggle her uncle into the United States.

First, the respondent waived all arguments as to the admissibility of the I-213 below. *See* Tr. at 16-17 (respondent's counsel indicating that there were no objections to the I-213 that was offered into evidence by the DHS). Because the respondent failed to raise this argument below, it is not appropriate for us to consider it for the first time on appeal. *See Matter of Edwards,* 20 I&N Dec. 191, 196-97 n.4 (BIA 1990).

We also find that the Immigration Judge did not err by finding that the respondent could not qualify for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The respondent was admitted as a lawful permanent resident on December 6, 2005 (Tr. at 3). The respondent's August 26,2006, attempt to smuggle her uncle into the United States in violation of law occurred before the respondent had acquired 5 years of lawful permanent residence for purposes of meeting the test for cancellation of removal for lawful permanent resident under section 240A(a) of the Act. *Matter of Perez,* 22 I&N Dec. 689 (BIA 1999). We decline to accept the respondent's argument, relying on *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013 (9th Cir. 2005), that we should impute her father's date of lawful admission to her, so that she can satisfy the continuous residence requirement. *See* Respondent's Brief at 10-13 (noting that the above-cited decision permitted a parent's years

of residence to attach to a child for purposes of meeting section 240A(a)(2)'s requirement of 7 years' residence after having been admitted in any status). As we recently stated in *Matter of Escobar,* 24 I&N Dec. 231 (BIA 2007), the United States Court of Appeals for the Ninth Circuit did not find, in *Cuevas-Gaspar v. Gonzales, supra,* that a parent's status as a lawful permanent resident could simply be imputed to a child to meet the eligibility requirements of section 240A(a)(1) of the Act. To permit this would ignore the requirement for compliance with the procedural and substantive eligibility provisions of the cancellation of removal statute. *See Matter of Koloamatangi,* 23 I&N Dec. 548, 550 (BIA 2003); *see also Monet v. INS,* 791 F.2d 752, 753 (9th Cir. 1986) (quoting *Longstaff v. INS,* 716 F.2d 1439,1441-42 (5th Cir. 1983)). We thus do not read *Cuevas-Gaspar, supra,* to extend to the facts of the instant case.

Accordingly, the respondent's appeal is dismissed.

/s/ ROGER [ILLEGIBLE]
ROGER ( )
FOR THE BOARD

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

File No.: A96 538 353

IN THE MATTER OF LISBETH DUQUE MOJICA,
RESPONDENT

Filed: Jan. 16, 2007

IN REMOVAL PROCEEDINGS

CHARGE:	Section 212 (a) (6) (E) (i) of the Immigrations and Nationality Act, an alien who knowingly aided and abetted an alien to enter the United States in violation of law
APPLICATIONS:	Section 240A(a) of the Act, cancellation of removal for a certain lawful permanent residence

ON BEHALF OF RESPONDENT:

Edward Orendain

ON BEHALF OF DHS:

Christopher Reeber

ORAL DECISION OF THE
IMMIGRATION JUDGE

Respondent is a 21-year old female, native and citizen of Mexico who is charged with being removable as noted above. The Government alleges that the respondent applied for admission to the United States at the San Ysidro, California port of entry on August 26, 2006 and presented her lawful permanent resident card.

The Government further alleges that at the time of her application for admission, the respondent knowingly aided and abetted an alien to try to enter the United States in violation of Law.

The respondent admitted factual allegations one, two and three but denied factual allegation number four and contested that she is removable as charged.

The Government filed with the Court and served on the respondent a form I-213, record of deportable/inadmissible alien document dated August 27, 2006. (See Exhibit 2). The Court has carefully reviewed the form I-213, and this Court finds that there is sufficient evidence contained in the I-213 to support the charge of removability against the respondent. According to said document, the respondent was the driver of a vehicle which contained four lawful permanent residents as it approached the San Ysidro, California port of entry. One individual was concealed in the rear of the vehicle under a blanket. The person being smuggled was identified as Juan Manuel Gonzales-Leal who was later discovered to be the uncle of the respondent.

The form I-213 indicates that the respondent underwent a sworn statement in which she admitted that the person being smuggled was her uncle. Respondent also

admitted that she was told that her uncle, Gonzales-Leal, was attempting to enter the United States illegally by use of a smuggler.

The respondent's uncle, Juan Manuel Gonzales-Leal, asked the respondent if she could assist him in crossing the border into the United States. According to the form I-213, the respondent agreed to assist her uncle in crossing the border illegally.

Considering the above facts, I must find that the respondent is removable as charged. The respondent had an opportunity to object to the form I-213. This Court served on the parties a Master Calendar order regarding opposition to Government documents. The respondent was informed as to exactly how to object to any documents submitted by the Government. (See Exhibit 3). The respondent failed to object to the form I-213 which was admitted into evidence.

APPLICATION FOR CANCELLATION OF REMOVAL PURSUANT TO SECTION 240A(a) OF THE ACT.

Section 240A(a) of the Act provides that the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of an aggravated felony.

In this particular case, the Court finds that the respondent's residence was imputed from her father. The Court finds that the respondent has to requisite seven years of residence to qualify for cancellation of removal.

The Court, however, finds that the respondent is statutorily ineligible for cancellation of removal because she has not been a lawful permanent resident for five years. The respondent became a lawful permanent resident on December 6, 2005. The Notice to Appear was served on the respondent on August 27, 2006. This Court takes notice of the case entitled Cuevas-Gaspar vs. Gonzales, 430 F.3d 1013 (9th Cir. 2005). In that case, the ninth circuit Court of Appeals held that for purposes of satisfying the seven years of continuing residence after having been admitted in any status required for cancellation of removal under Section 240A(a) of the Act, a parent's admission for permanent resident status is imputed to the parent's unemancipated minor children residing with the children.

While the Court states that the parent's residence is imputed to the unemancipated child who is residing with the parent, there is no finding by the ninth circuit Court of Appeals that the parent's status as a lawful permanent resident is imputed to the child. I must find that the respondent is statutorily ineligible for cancellation of removal because the respondent cannot prove that she has been a lawful permanent resident for five years. But considering the above, I must deny the application for a cancellation of removal pursuant to Section 240A(a) of the Act.

ORDER

IT IS HEREBY ORDERED that the application for cancellation of removal pursuant to Section 240A(a) of the Act be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico.

/s/ ANTHONY ATENAIDE
ANTHONY ATENAIDE
Immigration Judge

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.

(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.

* * * * *