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## *Déjà Vu* All Over Again: SCOTUS Takes Up Imputation and Retroactivity

*Edward R. Grant and Joshua A. Altman*

Sixty years ago, in a simpler time, the *auteur* of our title (and perhaps the winningest player in the history of baseball) won the American League most valuable player award, on the way to leading his New York Yankees to the third of five straight World Series crowns.

But the real drama took place directly across the East River, at a horseshoe stadium nestled in a hollow below Coogan's Bluff. There, as 4 o'clock approached on an early October afternoon, the unthinkable occurred: one Robert Brown Thomson, a native of Glasgow, Scotland, hit his 32nd home run of the playoff-extended season, a line drive into the lower left-field deck of the Polo Grounds. His New York Giants, down 13½ games in mid-August, thus won the pennant over the Brooklyn Dodgers and the right to face Yogi Berra's Yankees in the World Series.

Time can only tell whether baseball's remarkable night of September 28, 2011, capping the historic collapses of the Boston Red Sox and Atlanta Braves, and the thrilling heroics of the Tampa Bay Rays will endure in memory as long as Bobby Thomson's "Shot Heard Round the World." One suspects not. First, half the nation, rather than paying rapt attention to their radios as in 1951, was fast asleep. Second, the egregiously domed Tropicana Field (where Evan Longoria hit his Thomsonesque home run) dare not be mentioned in the same breath as the legendary Polo Grounds. Third, well, it's not as if Willie Mays was in the on-deck circle, Red Barber (radio) and Ernie Harwell (TV) were behind the microphones, or anything, anywhere or anytime, can replicate the rivalry of the Dodgers and the Giants before they decamped to the West Coast.

As fate would have it, the October 2011 term of the United States Supreme Court opened on the 60th anniversary of Bobby Thomson's "shot"—and this term may likewise be remembered as uniquely historic six decades hence. Cases involving health-care reform, state immigration

enforcement measures, same-sex marriage, and affirmative action, not to mention Bono's colorful Golden Globes acceptance speech, are on, or almost certain to be added to, the Court's docket. Already granted certiorari, however, are three cases that conjure up that little sense of *déjà vu*, as they return to the well-trod terrain of the rights of lawful permanent residents (LPRs). Two involve the Ninth Circuit's unique "imputation" doctrine to calculate eligibility for LPR cancellation of removal. *See* section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. 1229b(a). The other questions the retroactive effect upon LPRs of section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (defining "admission"). We'll address each issue in turn.

### *To Impute or Not To Impute: That Is the Question (Presented)*

> Impute. To ascribe or attribute; to regard (usu. something undesirable) as being done, caused, or possessed by <the court imputed malice to the defamatory statement>.

*Black's Law Dictionary* 774 (8th ed. 2004).

Over the past two decades, the Ninth Circuit has ruled that the lawful immigration status and residence of parents may be imputed to their unemancipated children, thus allowing such children to meet eligibility requirements for discretionary relief that they would be unable to meet of their own accord. More precisely, the Ninth Circuit will impute a parent's "status, intent, or state of mind" to the minor, *see Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1024 (9th Cir. 2005) (imputing a mother's continuous residence to her son for purposes of section 240A(a)(2) of the Act), but not a "state of being," such as physical presence, *see Saucedo-Arevalo v. Holder*, 636 F.3d 532, 534 (9th Cir. 2011) (finding that the parents' physical presence was not imputed for purposes of section 240A(b)(1)(A) of the Act).

Other circuits, and the Board, have rejected the imputation doctrine in this context. *See, e.g.*, *Deus v. Holder*, 591 F.3d 807 (5th Cir. 2009); *Augustin v. Att'y Gen. of U.S.*, 520 F.3d 264 (3d Cir. 2008); *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), *rejected by Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009) (finding that a father's 5 years of LPR status is imputed to his son for purposes of eligibility under section 240A(a)(1) of the Act); *see also Cervantes v. Holder*, 597 F.3d 229 (4th Cir. 2010). The conflict will now be resolved. *Sawyers v. Holder*, 399 F. App'x 313 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3004 (U.S. Sept. 27, 2011) (No. 10-1543), 2011 WL 2941573; *Gutierrez v. Holder*, 411 F. App'x 121 (9th Cir.), *cert. granted*, 80 U.S.L.W. 3004 (U.S. Sept. 27, 2011) (No. 10-1542), 2011 WL 2941556. The Ninth Circuit decisions under review are nonsubstantive; both are straightforward remands to the Board to apply *Cuevas-Gaspar* in light of the circuit's rejection of *Matter of Escobar* in *Mercado-Zazueta*.

"Imputation" is not a doctrine (or dispute) limited to the context of cancellation of removal. *See Vang v. INS*, 146 F.3d 1114, 1116–17 (9th Cir. 1998) (finding an alien ineligible for asylum since his parents permanently resettled in France while he was a minor); *Senica v. INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (finding that a mother's knowledge of fraud at the time of entry could be imputed to her children and preclude them from eligibility for waivers under former sections 212(k) and 241(f)(1) of the Act, 8 U.S.C. §§ 1182(k) and 1251(f)(1) (1988)); *Matter of Huang*, 19 I&N Dec. 749, 750 n.1 (BIA 1988) (noting that "the excludability of the children is dependent on the excludability of the female adult applicant"); *Matter of Zamora*, 17 I&N Dec. 395 (BIA 1980) (imputing to a minor the abandonment of LPR status by his parent); *Matter of Winkens*, 15 I&N Dec. 451 (BIA 1975) (same); *Matter of Ng*, 12 I&N Dec. 411, 412 (BIA 1967) (finding an alien ineligible for refugee classification because his residence as a minor with his family in Hong Kong was imputed to him as firm resettlement). *But see Singh v. Gonzales*, 451 F.3d 400 (6th Cir. 2006) (finding that parents' fraud cannot be imputed to their child for purposes of sustaining a charge under section 212(a)(6)(C)(i) of the Act). But it has come to its greatest prominence in determining eligibility for cancellation of removal for LPRs and its legacy form of relief, the section 212(c) waiver.

The Ninth Circuit, following the Second Circuit, first ruled in 1994 that the "lawful unrelinquished domicile" of a parent can be imputed to a minor child for purposes of qualifying for a discretionary waiver of deportation under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994). *Lepe-Guitron v. INS*, 16 F.3d 1021, 1024-25 (9th Cir. 1994) (citing the common law rule that the domicile of a child follows that of the parents);



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*see also Rosario v. INS*, 962 F.2d 220, 224-25 (2d Cir. 1992) (same; a parent's domicile in the United States can be imputed if the minor had a "significant relationship" with the parent during the time in question). The Third Circuit soon followed suit. *See Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996).

In repealing section 212(c) and replacing it with cancellation of removal under section 240A(a) of the Act, Congress opted to hinge eligibility for relief for LPRs on the length of continuous residence after lawful admission (plus 5 years in LPR status). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, §§ 304(a), (b), 110 Stat. 3009-546, 3009-594, 3009-597 ("IIRIRA"). As summarized by the Second Circuit, "residence" is an attribute "entirely different" from that of domicile:

> Domiciliaries are those who have a fixed, permanent and principal home and to which, whenever absent, they always intend to return. At the opposite end of the scale are transients, those persons who are just passing through a locality. In between these notions of permanence and transience are residents. Residency means an established abode, for personal or business reasons, permanent for a time. A resident is so determined *from the physical fact of that person's living in a particular place*. One may have more than one residence in different parts of this country or the world, but a person may have only one domicile.

*Rosario*, 962 F.3d at 224 (citations omitted) (emphasis added).

The Ninth Circuit eventually ruled that this was a difference without a distinction as far as eligibility for "LPR cancellation" was concerned. *Cuevas-Gaspar*, 430 F.3d at 1025-26. Reasoning that "the difference between 'domicile' and residence 'after having been admitted in any status' is not . . . so great as to be dispositive," *id.* at 1026, the court held in *Cuevas-Gaspar* that "for purposes of satisfying the seven-years of continuous 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 parent," *id.* at 1029.

The Board soon thereafter disagreed with the rationale in *Cuevas-Gaspar* and declined to extend its holding outside of the jurisdiction of the Ninth Circuit, finding that to do so would "essentially destroy the distinct tests mandated by Congress when it amended the statute to replace the former section 212(c) waiver with cancellation of removal." *Matter of Escobar*, 24 I&N Dec. at 234-35. The Board reasoned that the rationale of *Lepe-Guitron* should not apply because "residence is different from domicile" insofar as it, as stated by the dissenting judge in *Cuevas-Gaspar*, "contains no element of subjective intent." *Id*. at 233 (quoting *Cuevas-Gaspar*, 430 F.3d at 1031 (Fernandez, J., dissenting)) (internal quotation marks omitted).

Two years later, in *Mercado-Zazueta*, 580 F.3d 1102, the Ninth Circuit declined to accord "*Brand X* deference" to *Matter of Escobar*. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Instead, the Ninth Circuit extended the holding in *Cuevas-Gaspar* to the 5-year LPR status requirement in section 240A(a)(1) of the Act, concluding that "the holding, reasoning, and logic of *Cuevas-Gaspar* apply equally to the resident status requirements of both section 240A(a)(1) and 240A(a)(2), and thus imputation of the custodial parent's status to the minor is compelled." *Mercado-Zazueta*, 580 F.3d at 1108-09.

A companion ruling by the same Ninth Circuit panel concluded that for purposes of establishing eligibility for "special rule" cancellation of removal, an alien could not satisfy the 7-year physical presence requirement by having imputed to him the prior physical presence of his parents. *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *see also* Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, § 203, 111 Stat. 2160, 2193, 2196, *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997). Physical presence, the court held, is a "state of being," not dependent on status, intent, or "state of mind." *Barrios*, 581 F.3d at 863-64. Moreover, it need not be conferred, as is a parent's lawful residence, by government action. *Id*.

In *Sawyers* and *Gutierrez,* the Supreme Court will address the legitimacy of the Ninth Circuit's rulings in

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# CIRCUIT COURT DECISIONS FOR AUGUST 2011

*by John Guendelsberger*

The United States courts of appeals issued 232 decisions in August 2011 in cases appealed from the Board. The courts affirmed the Board in 203 cases and reversed or remanded in 29, for an overall reversal rate of 12.5% compared to last month's 10.8%. There were no reversals from the Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for August 2011 based on electronic database reports of published and unpublished decisions.

| Circuit | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| | | | | |
| First | 2 | 1 | 1 | 50.0 |
| Second | 27 | 25 | 2 | 7.4 |
| Third | 21 | 15 | 6 | 28.6 |
| Fourth | 15 | 15 | 0 | 0.0 |
| Fifth | 14 | 14 | 0 | 0.0 |
| Sixth | 11 | 9 | 2 | 18.2 |
| Seventh | 7 | 4 | 3 | 42.9 |
| Eighth | 7 | 7 | 0 | 0.0 |
| Ninth | 112 | 97 | 15 | 13.4 |
| Tenth | 4 | 4 | 0 | 0.0 |
| Eleventh | 12 | 12 | 0 | 0.0 |
| | | | | |
| All | 232 | 203 | 29 | 12.5 |

The 232 decisions included 115 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 51 direct appeals from denials of other forms of relief from removal or from findings of removal; and 66 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

| | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| Asylum | 115 | 97 | 18 | 15.7 |
| Other Relief | 51 | 45 | 6 | 11.8 |
| Motions | 66 | 61 | 5 | 7.6 |

The 18 reversals or remands in asylum cases involved credibility (4 cases); past persecution (2 cases); nexus (3 cases); disfavored group (2 cases); changed country conditions after finding of past persecution (2 cases); and a number of other issues, including the particularly serious crime bar and ineffective assistance of counsel.

The six reversals or remands in the "other relief" category addressed a variety of issues, including application of the modified categorical approach, aggravated felony grounds of removal, abandonment of lawful permanent resident status, and Board deference to Immigration Judge fact-finding.

The five reversals in motions cases, four of which are from the Third Circuit, included two motions to reopen based on changed country conditions, the post-departure bar on reopening, denial of a continuance, and the effect of a vacated conviction.

The chart below shows the combined numbers from January through August 2011 arranged by circuit from highest to lowest rate of reversal.

| Circuit | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| | | | | |
| First | 12 | 9 | 3 | 25.0 |
| Seventh | 38 | 31 | 7 | 18.4 |
| Ninth | 1326 | 1088 | 238 | 17.9 |
| Third | 232 | 206 | 26 | 11.2 |
| Tenth | 27 | 24 | 3 | 11.1 |
| Sixth | 75 | 69 | 6 | 8.0 |
| Eighth | 26 | 24 | 2 | 7.7 |
| Eleventh | 150 | 141 | 9 | 6.0 |
| Second | 382 | 362 | 20 | 5.2 |
| Fourth | 89 | 85 | 4 | 4.5 |
| Fifth | 105 | 102 | 3 | 2.9 |
| | | | | |
| All | 2462 | 2141 | 321 | 13.0 |

Last year's reversal rate at this point (January through August 2010) was 11.8%, with 2878 total decisions and 341 reversals.



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The numbers by type of case on appeal for the first 8 months of 2011 combined are indicated below.

| | Total | Affirmed | Reversed | % Reversed |
|---|---|---|---|---|
| Asylum | 1215 | 1051 | 164 | 13.5 |
| Other Relief | 515 | 433 | 82 | 15.9 |
| Motions | 732 | 657 | 75 | 10.2 |

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## RECENT COURT OPINIONS

***Second Circuit:***

*Tchitchui v. Holder*, No. 10-1953-ag, 2011 WL 4347961 (2d Cir. Sept. 19, 2011): The Second Circuit denied the petition for review of a Board decision affirming an Immigration Judge's ruling that the petitioner, a native and citizen of Cameroon, was barred from asylum because he was firmly resettled in a safe third country prior to entering the U.S. The petitioner lived in Guatemala for approximately 1 year beginning in 2001, during which time he owned an internet café. After returning to Cameroon for less than 4 months, he resided in Guatemala for 3 more years. During that time, he obtained lawful residence in Guatemala, sold his café for a profit, and bought a restaurant. When he was arrested, detained for 4 days, and beaten in Cameroon in January 2006 during a 3-week stay in that country, he subsequently returned to Guatemala for 8 weeks, sold his restaurant, applied for a culinary program in the U.S., and entered this country with a nonimmigrant visitor's visa. After overstaying his visa, the petitioner was placed in removal proceedings, where he was granted withholding of removal to Cameroon, but he was barred from asylum as one who was firmly resettled. On appeal, the petitioner did not contest the finding of firm resettlement; nor did he claim an exception under 8 C.F.R. § 1208.15(b) (involving restrictions on the terms of residence). Rather, he claimed to qualify for an exception under 8 C.F.R. § 1208.15(a), arguing that his entry into Guatemala was a necessary consequence of his flight from persecution; that he remained there only long enough to arrange onward travel; and that he did not establish significant ties in Guatemala. In making this claim, the petitioner argued that all the time he spent in Guatemala prior to his final departure from Cameroon on January 19, 2006, was irrelevant, because (1) he was not persecuted until January 13, 2006, and (2) the applicable regulation is meant to limit the scope of inquiry to post-persecution conduct. The court rejected that contention, observing that the purpose of the regulation is to ensure protection for "desperate refugees who reach our shores with nowhere else to turn." Holding that a "totality of the circumstances" test applies, the court found the totality of the petitioner's activities in Guatemala during all of his time spent there was relevant to the question whether he had a place to seek refuge when he fled Cameroon. The court also agreed with the holdings of the Sixth, Eighth, and Tenth Circuits that the temporal reference, "prior to arrival in the United States," contained in 8 C.F.R. § 1208.15 applies to all subsequent language in the regulation. The court thus found that since the petitioner had ongoing business activities, could work and travel at will, and enjoyed permanent residence in Guatemala, he had significant ties to that country, which afforded him a safe haven from persecution in Cameroon.

***Eighth Circuit:***

*Lopez-Gabriel v. Holder*, No. 10-3802, 2011 WL 3862586 (8th Cir. Sept. 2, 2011): The Eighth Circuit denied the petition for review of a Board decision upholding an Immigration Judge's order of removal and denying the petitioner's motion to suppress evidence. The petitioner had been pulled over by a police officer in Minnesota and was arrested for "No Minnesota Driver's License (No Proper Identification)." At the police station, he was questioned by ICE agents. He claimed that neither the police officer nor the ICE agents informed him of his right to remain silent, that he did not feel free to leave, and that he felt compelled to answer the ICE agents' questions because he was in jail. He added that he believes he was stopped and arrested because he is Latino. The Board ruled that the record failed to support the assertion that the stop was based on race and that the actions of the ICE agents did not establish a claim of improper conduct. The court noted that the exclusionary rule generally does not apply in civil deportation proceedings and that, to the extent it does (i.e., in the case of "egregious violations of Fourth Amendment or other liberties"), the case for exclusion is further weakened where the alleged misconduct was committed by "an agent of a separate sovereign," because the suppression of evidence in immigration proceedings would have a very limited impact on deterring the behavior of local police officers. The court agreed with the Board's conclusions, noting that the petitioner offered no facts to support his claim that his stop was motivated by race and merely stated his "feeling" and "belief" that this was the case. The court also noted that the DHS offered an unrebutted police report justifying the officers' actions (i.e., stating that the car was stopped because of a heavily



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cracked windshield and that the petitioner was arrested for failure to provide identification). Regarding the claimed involuntary nature of the petitioner's statements, the court held that absent more, the "prompt questioning of a handcuffed detainee by an armed and uniformed officer without *Miranda* warnings, and questioning by ICE agents after an arrest, are not sufficient . . . to justify suppression in an immigration proceeding." The court agreed with the Immigration Judge that the petitioner "did not submit evidence of 'promises, prolonged interrogation, interference with his right to counsel, or other indicia of coercion or duress' that might suggest that his statements were involuntary."

***Ninth Circuit:***

*Habibi v. Holder*, No. 06-72111, 2011 WL 4060417 (9th Cir. Sept. 14, 2011): The Ninth Circuit denied the petition for review of a Board decision dismissing the appeal from an Immigration Judge's order of removal. On appeal, the petitioner challenged the Immigration Judge's ruling that he was ineligible for cancellation of removal because he had been convicted of an aggravated felony under section 101(a)(43)(F), i.e., a crime of violence for which the term of imprisonment is at least 1 year. Both the Immigration Judge and the Board rejected the petitioner's argument that because his 365-day sentence corresponded with a leap year, his sentence was for a period of time less than 1 year. The Board relied on the Ninth Circuit's holding in *Matsuk v. INS*, 247 F.3d 999 (9th Cir. 2001), *overruled on other grounds*, finding the Board's interpretation of "1 year" as meaning 365 days to be reasonable in determining whether a sentence rendered the offense of conviction an aggravated felony. The Board further found that adopting the petitioner's argument would lead to "an inconsistent and absurd result," requiring the application of different sets of rules depending on whether or not an alien was sentenced during a leap year. The court agreed, finding the Board's interpretation to be "the most logical reading of the statute," and thus deferred to the unpublished Board decision pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (noting that *Chevron* deference is reserved for published Board decisions). The court rejected the petitioner's reliance on *Lagandaon v. Ashcroft*, 383 F.3d 983, 985 ((9th Cir. 2004). In that case, the court interpreted an entirely different provision of the Act, i.e., the requirement that an applicant for cancellation of removal must be present in the U.S. for 10 years. The court noted that in that context, interpreting 1 year as 365 days would lead to inconsistent outcomes depending on the date of entry, because the ensuing 10-year period could encompass 3, 2, or, in rare instances, only 1 leap year (since leap years are apparently skipped every 100 years, with an exception occurring every 400 years, so that 2000 was a leap year, but 2100 will not be one).

*Singh v. Holder*, No. 07-70056, 2011 WL 3927366 (9th Cir. Sept. 8, 2011): The Ninth Circuit granted the petition for review of a Board order that affirmed an Immigration Judge's decision pretermitting an asylum application as untimely. The petitioner, an Indian national, entered the U.S. as a nonimmigrant visitor on August 26, 1999. Although authorized to stay for 1 month, he was able to lawfully extend his stay for an additional 11 months. The petitioner, who the Immigration Judge found to be credible, claimed that he had been arrested and subjected to physical abuse in India on three occasions, because the Indian police mistakenly believed him to be a terrorist sympathizer. He stated that he extended his legal stay in the U.S. in the hopes that his family would reach an agreement with the Indian police that would allow him to return without being subjected to abuse or harassment. However, on September 6, 2000, the police arrested his wife and subjected her to detention, beatings, and rape. The petitioner filed for asylum 2½ months later. The Immigration Judge granted withholding of removal and CAT protection but denied the asylum application as untimely, finding that the petitioner failed to provide "clear and convincing evidence" that the settlement negotiations between his family and the Indian police constituted a changed circumstance. After the Board affirmed, the petitioner appealed to the Ninth Circuit. The case was remanded once to allow the Board to consider whether "exceptional circumstances" excusing the untimely application had been established based on the petitioner's extension of his nonimmigrant status. The Board held that exceptional circumstances had not been shown because the petitioner's nonimmigrant status was not directly related to the late filing, which was triggered by the wife's arrest. The Board also considered unreasonable the petitioner's delay in filing until 7 months after the expiration of the first visa extension and 3 months after the second extension had expired. The circuit court found that the Immigration Judge applied an incorrect legal standard in requiring the petitioner to establish "clear and convincing evidence" of changed circumstances. The court noted that an asylum applicant must show "clear and convincing evidence" of filing for asylum within 1 year of entry but need only provide evidence to the satisfaction of the Immigration Judge that he or she qualifies for an exception to that deadline.

The court also noted that the Immigration Judge did not consider whether the arrest of the petitioner's wife constituted a changed circumstance. The court rejected the Government's argument that the arrest of the wife did not constitute a changed circumstance but, rather, was further support for the petitioner's reasons for leaving his country in the first place, pointing to its finding to the contrary in *Fakhry v. Mukasey*, 524 F.3d 1057, 1063-64 (9th Cir. 2008). The court further disagreed with the Board's extraordinary circumstances analysis, holding that 8 C.F.R. § 1208.4(a)(5), which requires the relevant circumstances to be directly related to the failure to file the application within 1 year, requires the petitioner to show that the relevant circumstances were directly related to the reason for the *delay* in filing, and not to the reason the application was eventually *filed*. The court also found the length of the petitioner's delay in filing to be reasonable under prior circuit case law, particularly in light of the Government's 1-year delay in adjudicating the petitioner's first extension of stay request, and its 6-month delay in deciding his second such request. The record was therefore remanded.

*Osorio v. Mayorkas*, Nos. 09-56786, 09-56846, 2011 WL 3873797 (9th Cir. Sept. 2, 2011): The Ninth Circuit gave deference to the Board's precedent decision in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), which declined to expand the meaning of the automatic conversion and priority date retention provisions of the Child Status Protection Act ("CSPA") in section 203(h)(3) of the Act, 8 U.S.C. § 1153(h)(3). One of the provisions of the CSPA allows children who have "aged out" to "automatically convert" to a valid adult visa category while retaining the priority date from the petition originally filed on their behalf while they were still underage. The petitioners in this case were included as derivative children in immigrant visa petitions filed on behalf of their parents under preference categories F3 (married adult son or daughter of a U.S. citizen), or F4 (sibling of a U.S. citizen). The petitioner in each case aged out by reaching the age of 21 during the pendency of the petition. In a class–action lawsuit, the petitioners argued that under the CSPA, they should have been allowed to convert to an adult visa petition category while retaining the priority date from the petition filed on behalf of their parent when the petitioner was still a minor. The district court deferred to the Board's reasoning in *Matter of Wang* and granted summary judgment to the Government. On appeal, the Ninth Circuit focused on the meaning of the term "automatically converted," noting that this wording suggests that "the *same* petition, filed by the *same* petitioner for the *same* beneficiary, converts to a new category." The court observed that where a minor child under preference category F2A reaches the age of 21 and converts to an adult son or daughter under category F2B, both the petitioner and beneficiary remain the same. However, a conversion maintaining the same petitioner and beneficiary is not possible under the F3 or F4 preference categories. In both of these cases, the beneficiary, upon turning 21, cannot convert to a valid adult visa category involving the same petitioner, because no visa categories exist for the nephew (in the case of an F3 petition) or grandchild (in the case of an F4 petition) of a U.S. citizen. The petitioners claimed that since they were each a derivative child of their beneficiary parent, they should be allowed to convert to the "appropriate category" of F2B, i.e., the adult son or daughter of the same beneficiary parent, after the parent obtained lawful permanent resident ("LPR") status as a result of the F3 or F4 petition. While the court agreed that this category might be "appropriate," it noted that such a conversion cannot take place "automatically," as required by the statute, because a new petitioner (the LPR parent) is required. The petitioners further argued that even if automatic conversion cannot take place, the statutory language still unambiguously entitles them to priority date retention. The court disagreed, finding the statutory language to be ambiguous on this point. Deeming the legislative intent to be inconclusive, the court found the Board's holding in *Matter of Wang* to be both permissible and reasonable under *Chevron*. The court therefore accorded *Chevron* deference and affirmed the district court's decision.

*Luna v. Holder*, No. 08-71086, 2011 WL 4359843 (9th Cir. Sept. 19, 2011): The Ninth Circuit denied the petition for review of the Board's denial of a motion to reopen to allow the filing of a waiver under former section 212(c) of the Act. The petitioner was admitted to the U.S. in May 1990 as an immigrant. In September 1993, he was convicted of receiving stolen property and was sentenced to 1 year and 4 months in prison. As a result of his conviction, he was placed into removal proceedings on the grounds that he committed a crime involving moral turpitude within 5 years of entry and had been convicted of an aggravated felony. On December 11, 2000, he was found removable as charged, did not apply for relief, and waived appeal. He departed the U.S. that same month but subsequently reentered illegally. In February 2007, he filed a motion to reopen in order to file

a request for a section 212(c) waiver. The petitioner had missed a regulatory deadline of April 26, 2005, for the filing of such motions but argued that (1) the Immigration Judge violated his due process rights by failing to inform him at the December 2000 hearing of the deadline for filing a motion, and (2) that because of that failure to advise, the deadline should be equitably tolled, since the petitioner claimed to have filed within 90 days of learning of his right to seek relief from his present counsel. After the Immigration Judge denied the motion, the petitioner appealed to the Board, which affirmed. The Board found no misconduct by the Immigration Judge, because (1) the petitioner had not accrued the requisite 7 years of domicile when he entered his plea in 1993; (2) the Immigration Judge could not have advised the petitioner of the deadline for filing in December 2000 because the regulation establishing a time limit had not yet been promulgated; and (3) there was no basis for equitable tolling, because the Immigration Judge did not err in failing to inform the petitioner of section 212(c) eligibility and the petitioner had not established due diligence in discovering the deadline. On appeal to the Ninth Circuit, the petitioner renewed his previous arguments and further claimed that 8 C.F.R. § 1003.44, the regulation establishing the filing deadline, was unconstitutional. The court held that even if the Immigration Judge had not properly advised the petitioner, the latter still failed to file his motion in a timely manner. The court rejected the claim that the regulatory deadline was unconstitutional. Noting that the regulation was published in the Federal Register and provided adequate notice of the time to file special section 212(c) motions, the court found that the petitioner gave no explanation and cited no case law as to why such notification was insufficient. The court additionally found no support for the petitioner's contention that EOIR lacked the constitutional right to set a deadline to apply for relief under the Supreme Court's holding in *INS v. St. Cyr*, 533 U.S. 289 (2001). Lastly, the court found that the petitioner did not establish that he exercised the necessary due diligence required for equitable tolling.

## BIA PRECEDENT DECISIONS

In *Matter of Herrera del Orden*, 25 I&N Dec. 589 (BIA 2011), the Board considered whether new evidence may be submitted before an Immigration Judge when an alien is seeking review of the Department of Homeland Security's ("DHS") denial of a waiver under section 216(c)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4), of the joint petition requirement to remove the conditional basis of lawful permanent resident ("LPR") status. The respondent became a conditional lawful permanent resident through marriage to a United States citizen. He filed a petition to remove the conditional basis of his LPR status with the DHS, but the petition was denied because the marriage had ended in divorce. The respondent sought a waiver, which was denied because he did not submit evidence of the bona fides and subsequent dissolution of the marriage. When the respondent was placed in removal proceedings, he requested review of the denial of the waiver and sought to introduce new evidence. The Immigration Judge determined that the word "review" in 8 C.F.R. § 1216.5(f) limited her inquiry to whether the DHS acted correctly and did not permit her to take new evidence. The Board found that Immigration Judges have the authority and duty to receive evidence. While the regulation specifies that an alien may seek "review" of a decision by the DHS, there is no explicit restriction or indication of an intention to depart from the general authority and duties of an Immigration Judge. Further, there is nothing in the regulations that empower Immigration Judges to have appellate functions. Moreover, a respondent in removal proceedings has the statutory right to a reasonable opportunity to present evidence on his or her own behalf and the burden to prove eligibility for any requested relief. The Board found that absent a specific provision prohibiting the introduction of new evidence, it would not impair a respondent's ability to satisfy this burden by limiting these rights. Lastly, the Board noted that the administrative record generated by the DHS does not provide the same reliability and reviewability as a record created by the Immigration Judge because interviews are not recorded and transcribed. Therefore the Board held that an alien may introduce, and the Immigration Judge should consider, material and relevant evidence in proceedings to review a section 216(c)(4) waiver denial. Similarly, in *Matter of Figueroa*, 25 I&N Dec. 596 (BIA 2011), the Board held that an Immigration Judge who adjudicates a renewed application for Temporary Protected Status ("TPS") in removal proceedings may consider any material and relevant evidence, whether or not it was previously before the DHS. In this case, the respondent, a native and citizen of El Salvador, filed multiple applications for TPS. The DHS denied the applications based on the respondent's failure to submit sufficient evidence of his continuous residence during the required period. The respondent was placed in proceedings and sought to renew his application before



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the Immigration Judge, offering the testimony of several relatives in support of his claimed period of continuous residence. The Immigration Judge denied the renewed TPS application on the merits, finding that the respondent had not presented sufficient evidence or testimony to prove the required residence. On appeal, the respondent sought remand because of an incomplete transcript, and the DHS, in response, questioned the propriety of the respondent's introduction of new evidence of continuous residence to the Immigration Judge. In finding the new evidence appropriate, the Board reiterated its reasoning in *Matter of Herrera del Orden*, adding that Board precedents make it clear that an Immigration Judge considers TPS applications de novo.

In *Matter of Cruz de Ortiz*, 25 I&N Dec. 601 (BIA 2011), the Board addressed whether section 246(a) of the Act, 8 U.S.C. § 1256(a), which imposes a 5-year limitations period for rescinding adjustment of status, prohibits the institution of removal proceedings without a timely rescission where the alien was admitted to the United States with an immigrant visa. The respondent, a native and citizen of the Dominican Republic, was convicted of using an altered passport to try to gain admission to the United States in violation of 18 U.S.C. § 1543 and was ordered excluded from the United States on November 14, 1989. On February 9, 1995, she was admitted as a conditional lawful permanent resident and later removed the conditions on her status. The DHS filed a Notice to Appear alleging that the respondent was removable under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A), as an alien who was inadmissible at the time of entry because she had been convicted of a crime involving moral turpitude; she had procured her admission as a conditional lawful permanent resident by fraud or willful misrepresentation when she failed to disclose her attempted unlawful entry and conviction; and she had no valid entry document. The respondent admitted the factual allegations and conceded the charges in the Notice to Appear, but she disputed her removability, arguing that under the Third Circuit's decision in *Garcia v. Attorney General of the United States*, 553 F.3d 724 (3d Cir. 2009), the DHS was precluded from instituting removal proceedings under section 246(a) because it did not rescind her lawful permanent resident status within 5 years. The Immigration Judge agreed and terminated proceedings. The DHS argued that termination was inappropriate because section 246(a) of the Act does not apply to an alien, such as the respondent, who did not become a lawful permanent resident by adjustment of status but, rather, was admitted to the United States from abroad. The Board agreed with the DHS's argument, finding that the plain language of section 246(a) of the Act makes that section applicable only to cases that involve an adjustment of status, a subset of the concept of "admission." The alien in *Garcia* adjusted status, and the court gave no indication that section 246(a) applies to an alien who was admitted as a lawful permanent resident with an immigrant visa and whose status was therefore never adjusted. The Board concluded that section 246(a) relates only to adjustment of status and that its 5-year statute of limitation is therefore not applicable to an alien who was admitted from abroad with an immigrant visa issued through consular processing.

## REGULATORY UPDATE

**76 Fed. Reg. 60,518 (Sept. 29, 2011)**
DEPARTMENT OF HOMELAND SECURITY

**Notice of Discontinuation of H–2A and H–2B Temporary Worker Visa Exit Program Pilot CBP Dec. 11–16**
SUMMARY: This Notice announces that CBP is discontinuing the H–2A and H–2B Temporary Worker Visa Exit Program Pilot, effective September 29, 2011. The pilot began on December 8, 2009. It required temporary workers in H–2A or H–2B nonimmigrant classifications who enter the United States at the port of San Luis, Arizona, or the port of Douglas, Arizona, to depart (at the time of their final departure) from these respective ports and to submit certain biographical and biometric information at one of the kiosks established for this purpose.
DATES: The program pilot will be discontinued on September 29, 2011.

**76 Fed. Reg. 59,927 (Sept. 28, 2011)**
DEPARTMENT OF HOMELAND SECURITY
8 CFR Parts 216 and 245

**Treatment of Aliens Whose Employment Creation Immigrant (EB–5) Petitions Were Approved After January 1, 1995 and Before August 31, 1998**
SUMMARY: The Department of Homeland Security (DHS) is proposing to amend its regulations governing the employment creation (EB–5) immigrant classification. This rule only proposes requirements and procedures for special determinations on the applications and petitions of qualifying aliens whose employment-creation immigrant petitions were approved by the former Immigration and


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Naturalization Service (INS) after January 1, 1995 and before August 31, 1998. This rule would implement provisions of the 21st Century Department of Justice Appropriations Authorization Act.
DATES: You must submit written comments on or before November 28, 2011.

## ***Déjà Vu* All Over Again:** *continued*

*Cuevas-Gaspar* (imputing a parent's 7-year residence after admission) and *Mercado-Zazueta* (imputing a parent's 5 years in LPR status). The Solicitor General's petition for certiorari in *Gutierrez* argued that because the plain text and purpose of section 240A(a) of the Act foreclose imputation of another alien's status or period of residence or date of lawful admission, the questions presented can be resolved at step one of the analysis under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Petition for a Writ of Certiorari, *Holder v. Gutierrez*, 80 U.S.L.W. 3004 (U.S. Sept. 27, 2011) (No. 10-1542); Petition for a Writ of Certiorari, *Holder v. Sawyers*, 80 U.S.L.W. 3004 (U.S. Sept. 27, 2011) (No. 10-1543) (relying on the concurrently filed petition in *Gutierrez*). The petition further asserts that even if the statute is ambiguous, the Board's interpretation in *Matter of Escobar*, 24 I&N Dec. at 231, is reasonable and thus entitled to controlling deference at step two of the *Chevron* analysis. The Solicitor General also contended that the Ninth Circuit's reasoning—based on its precedents and policy determinations—fails on its own terms and conflicts with the decisions of the Third and Fifth Circuits. Petition for a Writ of Certiorari, *Gutierrez*, *supra*.

The oppositions to certiorari contended that IIRIRA's amendment to the provision was unrelated to the imputation rule and does not require a departure from the prior judicial consensus, that the Ninth Circuit's imputation rule is consistent with settled judicial and agency rulings regarding the imputation of various eligibility criteria for immigration benefits, and that the Government's assertion of a circuit conflict is exaggerated. Brief in Opposition, *Holder v. Gutierrez*, 80 U.S.L.W. 3004 (U.S. Sept. 27, 2011) (No. 10-1542); Respondent's Brief in Opposition, *Holder v. Sawyers*, 80 U.S.L.W. 3004 (U.S. Sept. 27, 2011) (No. 10-1543).

Congress no doubt intended that its language be plain; whether the Court will agree is one central issue in the case. Even if the Court finds the provision is "silent or ambiguous" on the issue of imputing residence after admission in any status, *see Cuevas-Gaspar*, 430 F.3d at 1021 (quoting *Chevron*, 467 U.S. at 843), the Court may defer to the Board's "straightforward" refusal "to read into the statute an [imputation] exception seemingly at odds with the statute's requirements," *Augustin*, 520 F.3d at 270. To counter this, the respondents will no doubt remind the Court that an applicant for cancellation must have acquired lawful permanent resident status on his own merits; Sawyers and Gutierrez are only requesting that the time-in-residence (and status) accrued by their parents, while they were unemancipated minors residing with their parents, be accounted so that they may pursue their right to apply for this relief. Recall that the Supreme Court has declared, in recent years, a right to file a timely motion to reopen and a right to request withdrawal of a grant of voluntary departure.

### *Does* Fleuti *Still Apply to LPRs Convicted of Crimes Before 1996?*

That sense of *déjà vu* is even stronger when one considers *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010), *cert. granted,* 79 U.S.L.W. 3594, 80 U.S.L.W. 3016 (U.S. Sept. 27, 2011) (No. 10-1211), 2011 WL 1032166. At issue is the retroactive effect of IIRIRA upon lawful permanent residents convicted of pre-IRIRA crimes—the issue first addressed in another famed Second Circuit case to reach the Supreme Court, *INS v. St. Cyr*, 533 U.S. 289 (2001). The Second Circuit, distinguishing *St. Cyr*, held in *Vartelas* that it is not impermissibly retroactive to identify a returning LPR as an applicant for admission based on a pre-IIRIRA crime. The Fourth and Ninth Circuits previously ruled to the contrary. *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007); *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004).

The petitioner is claiming the protection of the *Fleuti* doctrine—that his "innocent, casual, and brief" departure from the United States did not render him an applicant for admission upon his return, despite his conviction in 1994 for conspiracy to possess a counterfeit security. *See Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963). The enactment of section 101(a)(13) in 1996 is variously said to have abrogated, superseded, or codified *Fleuti*: a returning LPR is not deemed an applicant for admission unless one of five criteria are present, one of which is that the alien has committed an offense "identified in section 212(a)(2)" of the Act. Section 101(a)(13)(C)(v) of the Act; *see also Matter of Collado*, 21 I&N Dec. 1061 (BIA 1998) (stating that as a judicial doctrine, *Fleuti* does



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not survive enactment of the IIRIRA, and finding the alien inadmissible based on a 1974 sexual abuse conviction).

The petitioners in *Vartelas*, *Camins*, and *Olatunji* all claimed that under *St. Cyr*, they should be deemed to have entered their pre-IIRIRA guilty pleas in reliance on the continued availability of the *Fleuti* doctine should they depart the United States. *Olantunji* accepted the argument and rejected the Government's (and the dissent's) contention that the petitioner must show "subjective reliance" at the time of the guilty plea. *Olantunji*, 387 F.3d at 398. *Camins* agreed, holding that an LPR's ability to depart the United States to visit family or conduct business abroad is one of the most important "immigration consequences" that an alien is deemed to be aware of when pleading guilty. *Camins*, 500 F.3d at 885.

*Vartelas* disagreed with the Fourth and Ninth Circuits, both on the nature of the reliance interest and on the nature of the immigration consequences stemming from the application of section 101(a)(13)(C)(v). That provision, the court noted, applies to an alien who has *committed* an offense under section 212(a)(2). Thus, the alleged "reliance" interest must be assessed, not in reference to the decision to plead guilty, but to the decision to commit the offense. "Congress intended the focus to be on the alien's commission of the crime; and that is the event on which we focus in order to determine whether the new section unfairly unsettles any reasonable expectations." *Vartelas*, 620 F.3d at 119-20. The court noted that its own decision in *St. Cyr* rejected as "border[ing] on the absurd" the claim that an alien might have decided not to commit a crime had he known that, upon conviction, a discretionary waiver would be unavailable. *Id*. at 120 (quoting *St. Cyr v. INS*, 229 F.3d 406, 418 (2d Cir. 2000)) (internal quotation marks omitted); *see also Martinez v. INS*, 523 F.3d 365, 376 (2d Cir. 2008) (finding that the stop-time rule in section 240A(d)(1)(B) is not impermissibly retroactive when applied to the commission of an offense prior to IIRIRA). The petition for certiorari argued strenuously that a charge of inadmissibility under section 212(a)(2) cannot be sustained upon the mere "commission" of any offense, requiring instead a conviction for or an admission to committing acts of a crime involving moral turpitude. Petition for a Writ of Certiorari, *Vartelas v. Holder*, 79 U.S.L.W. 3594, 80 U.S.L.W. 3016 (U.S. Sept. 27, 2011) (No. 10-1211). That argument is offset to some degree by the fact that section 101(a)(13)(C)(v) does not use the phrase "is inadmissible."

Regarding the issue of "immigration consequences," *Vartelas* again saw things in a different light. The burden imposed by section 101(a)(13)(C)(v) is not on the alien's right to travel abroad, "but rather on the absoluteness of his right to enter the United States again—a matter that is squarely within the province of Congress to regulate." *Vartelas*, 620 F.3d at 120-21. This point will almost certainly require the Supreme Court to revisit, 48 years later, the nature of its ruling in *Fleuti*. Did that case create a substantive right on the part of an LPR to return after an "innocent, casual, and brief" departure? Or was the *Fleuti* rule (adopted by a mere 5-4 majority) more limited in scope and dependent to a large extent on the almost incidental (a single afternoon) nature of Fleuti's departure from the United States? *Fleuti*, 374 U.S. at 460 (referring to an alien who, like Fleuti, "steps across a border and, in effect, steps right back"). *Fleuti*, at least on its face, does not declare the broader right to travel overseas for business or pleasure, with the right to return, indicated by *Camins*. The broader reading of "innocent, casual, and brief"—based on the reference in *Fleuti* to a departure that was "meaningfully interruptive" of the alien's permanent residence, *id.* at 461-62—came in later cases. *See, e.g.*, *Carbajal-Gonzalez v. INS*, 78 F.3d 194 (5th Cir. 1996); *Jubilado v. United States*, 819 F.2d 210 (9th Cir. 1987); *Itzcovitz v. Selective Service*, 447 F.2d 888 (2d Cir. 1971).

If the Sage of Montclair were advising the Court, he might say: "When you come to a fork in the road, take it." Given the burdens facing the Justices this particular term, they might wish that things were, well, so simple.

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