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# “MOMMY, WHERE IS HOME?”: IMPUTING PARENTAL IMMIGRATION STATUS AND RESIDENCY FOR UNDOCUMENTED IMMIGRANT CHILDREN

JOHANNA K.P. DENNIS\*

## I. INTRODUCTION

Carlos was among the many undocumented children in the United States. A native and citizen of Mexico, he entered the United States illegally when he was five years old.<sup>1</sup> Two years later, his father was granted legal permanent resident (LPR) status, but Carlos did not get LPR status until he was nineteen years old.<sup>2</sup> Two years after becoming a LPR, Carlos was arrested for smuggling, placed into removal proceedings, and he faced deportation back to Mexico.<sup>3</sup> Unfortunately for Carlos, he did not satisfy the requirements to obtain Cancellation of Removal, which is a common form of discretionary relief available in removal proceedings.<sup>4</sup>

For LPR Cancellation applicants, the applicant must have five years of residence as a LPR, have seven years' physical presence after admission to any status, and not have been convicted of an Aggravated Felony.<sup>5</sup>

When Carlos applied for Cancellation, he was faced with the problem that although he was physically present in the United States and living with his parents for sixteen of his twenty-one

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1. Appendix to the Petition for Writ of Certiorari at 12a, *Holder v. Martinez Gutierrez*, No. 10-1542 (2012) [hereinafter *The Gutierrez Appendix*].

2. *Id.*

3. *Id.* at 7a-9a, 18a.

4. *Id.* at 7a-9a (discussing Immigration and Nationality Act (INA) § 240A(a), 8 U.S.C. § 1229b(a) (2010)).

5. INA § 240A(a).

years, he had not had LPR status for five years, nor had he accrued seven years of presence post-admission.<sup>6</sup>

The government argued that the time requirements for Cancellation must be met using only the applicant's residence and admission.<sup>7</sup> Carlos argued that as an unemancipated minor living with his parents, his father's dates of admission and grant of LPR status should be imputed to him, which would render him eligible for Cancellation.<sup>8</sup> Along with a case involving similar issues, Carlos's case was heard in the U.S. Supreme Court in the October 2011 Term.<sup>9</sup>

This Article discusses whether the parent's time in residence and date of admission (immigration status) should be imputed to an unemancipated minor; the two recently decided U.S. Supreme Court cases addressing this issue; the policy implications and impact of an imputation rule on undocumented children; and the impetus and potential vehicles for changing the status quo.

## II. INTRODUCTION TO CARLOS AND DAMIEN

A tale of two immigrants formed the basis for the U.S. Supreme Court's consideration of the newest wrinkle affecting Cancellation of Removal.

Carlos Martinez Gutierrez, a native and citizen of Mexico, applied for Cancellation of Removal for Certain Legal Permanent Residents (LPR CoR).<sup>10</sup> Carlos, born in 1983, came to the United States illegally with his parents in 1989,<sup>11</sup> when he was just five years old. Carlos lived with his parents at all relevant times, and in 1991, when he was seven years old, Carlos's father became a LPR.<sup>12</sup> Carlos did not receive his LPR status until 2003, when he was nineteen years old and no longer a minor.<sup>13</sup> Two years later, he was detained following inspection and charged with alien<sup>14</sup>

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6. See The Gutierrez Appendix, *supra* note 1, at 17a-27a.

7. See Brief for Petitioner at 16-17, *Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (Nos. 10-1542, 10-1543) [hereinafter Petitioner's Consolidated Merits Brief].

8. Brief of Respondent at 40, 52-54, *Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (No. 10-1542), 2011 WL 6325857 [hereinafter Martinez Gutierrez Merits Brief].

9. Petition for Writ of Certiorari at 2, *Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (No. 10-1542).

10. Immigration and Nationality Act (INA) § 240A(a), 8 U.S.C. § 1229b(a) (2010).

11. The Gutierrez Appendix, *supra* note 1, at 12a.

12. *Id.*

13. *Id.*

14. "Alien" is used in the Immigration and Nationality Act to refer to any individual who is not a U.S. citizen (USC). This term encompasses Legal Permanent Residents as well as individuals without permanent status in the United States.

smuggling<sup>15</sup> of three undocumented minor children.<sup>16</sup> In removal proceedings, Carlos applied for LPR CoR, and since Carlos himself only had two years towards the five- and seven-year rules, relying on *Cuevas-Gaspar*, the Immigration Judge (IJ) allowed imputation of Carlos's father's time in residence and LPR status grant,<sup>17</sup> thus granting Carlos CoR in 2006. The government appealed the determination that Carlos was statutorily eligible for CoR on this basis to the Board of Immigration Appeals (BIA). On September 29, 2006, the Board reversed, ruling that imputation was not permissible to satisfy either the five- or seven-year requirements.<sup>18</sup> On remand to the Immigration Court, Carlos's removal to Mexico was ordered since he qualified for no other form of relief.<sup>19</sup> Carlos then appealed the removal order to the BIA, which affirmed on January 24, 2008.<sup>20</sup> Carlos further appealed to the Ninth Circuit, arguing that imputation should be permitted. On January 24, 2011, that court held, consistent with its line of precedent ending with *Mercado-Zazueta*, that imputation was allowed in CoR cases to satisfy both the five- and seven-year requirements.<sup>21</sup>

Like Carlos, Damien Antonio Sawyers, a native and citizen of Jamaica, applied for LPR CoR.<sup>22</sup> Damien, born in 1980, came to the United States as a LPR in October 1995 when he was fifteen years old.<sup>23</sup> Damien's mother had already been in the United States for six years following her lawful entry.<sup>24</sup> Damien was initially served with a Notice to Appear in removal proceedings based on a December 2005 conviction for criminal possession of a controlled substance, cocaine, in the fourth degree.<sup>25</sup> He was charged with being removable for illicit trafficking in a controlled substance (an Aggravated Felony)<sup>26</sup> and having been convicted of an offense "relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana."<sup>27</sup> After DHS withdrew the Aggravated Felony charge, it added a conviction record for Damien's August 2002

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15. INA § 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i) (2010).

16. The Gutierrez Appendix, *supra* note 1, at 18a.

17. *Id.* at 17a-27a.

18. *See id.* at 16a (noting the Board's reversal and order of removal).

19. *See id.* at 7a-9a (noting the IJ's unreported decision to order removal in Dec. 2006).

20. *See id.* 5a-6a (noting the Board's decision to reaffirm its prior holding).

21. *Martinez Gutierrez v. Holder*, 411 F. App'x. 121, 122 (9th Cir. 2011).

22. Appendix to the Petition for Writ of Certiorari at 10a, *Holder v. Sawyers*, No. 10-1543 (2012) [hereinafter *The Sawyers Appendix*].

23. *Id.*

24. *See Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (consolidated with *Holder v. Sawyers*, No. 10-1543).

25. *Id.*

26. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2010); INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2010).

27. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2010).

conviction for “maintaining a dwelling for keeping a controlled substance, specifically cocaine and marijuana.”<sup>28</sup> Damien then asserted a claim to U.S. citizenship, which was rejected by the IJ.<sup>29</sup> Damien then argued that the August 2002 conviction did not stop the period of continuous lawful residence<sup>30</sup> because it was possible he was convicted for possession of less than thirty grams of marijuana, which is an exception to the removability charge.<sup>31</sup> The IJ rejected this argument because Damien was convicted based on marijuana and cocaine, the latter for which there is no exception.<sup>32</sup> As a result, the IJ found Damien removable and that the August 2002 conviction stopped the period of lawful residence.<sup>33</sup> As of August 2002, Damien only had six years and ten months of lawful residence after being admitted as a LPR, and consequently he fell short of the seven-year requirement and was statutorily ineligible for CoR.<sup>34</sup> It is undisputed that Damien met the five-year requirement.<sup>35</sup> Although argued in Damien’s pretrial brief, the IJ’s decision did not address the issue of imputing Damien’s mother’s period of lawful residence to fulfill his seven-year requirement.<sup>36</sup>

Damien appealed to the BIA, and, on December 26, 2007, the Board dismissed the appeal. The BIA found harmless the IJ’s failure to address the imputation issue because it was the agency’s position that imputation was not permitted under *Escobar*, by which decision it considered itself bound because it came after the Ninth Circuit’s earlier decision in *Cuevas-Gaspar*.<sup>37</sup> Damien appealed to the Ninth Circuit. In its October 14, 2010 decision, the court rejected the Board’s reasoning that *Escobar*, not *Cuevas-Gaspar*, controlled, indicating that the court rejected the arguments made in *Escobar* in its later decision in *Mercado-*

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28. The Sawyers Appendix, *supra* note 22, at 11a.

29. *Id.* at 12a.

30. INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2) (2010) (stop-time rule).

31. The Sawyers Appendix, *supra* note 22 at 13a.

32. *Id.*

33. *Id.*

34. *Id.*

35. Petition for Writ of Certiorari at 5, *Sawyers*, 132 S. Ct. 2011 (2012) (No.10-1543) [hereinafter Sawyers Petition for Certiorari].

36. The Sawyers Appendix, *supra* note 22, at 6a.

37. *See* *Gonzales v. Dep’t of Homeland Sec.*, 508 F.3d 1227 (9th Cir. 2007); *see also* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2007) (discussing the appropriate deference in a similar situation); The Sawyers Appendix, *supra* note 22, at 7a (stating “the Ninth Circuit held in similar circumstances that it must give ‘Chevron deference’ to an agency’s statutory interpretation that conflicts with its own earlier interpretation,” and even when the court finds the “Board’s interpretation of an ambiguous provision to be “unreasonable,” the court “found that . . . it was required to defer to the subsequent interpretation by this Board.” The Sawyers Appendix, *supra* note 22, at 7a.

*Zazueta*,<sup>38</sup> which permitted the imputation of parental time.<sup>39</sup> Accordingly, the court remanded to the agency on an open record to "make findings in the first instance regarding the residency of [Damien's] mother and regarding whether [Damien] was a minor residing with her" and "when imputation should start."<sup>40</sup> Rehearing was denied on February 1, 2011.<sup>41</sup>

The government filed its petitions for certiorari in both cases in the U.S. Supreme Court on June 23, 2011,<sup>42</sup> and the Court granted certiorari in both cases on September 27, 2011, consolidating *Martinez Gutierrez* with *Sawyers*<sup>43</sup> and allocating joint oral argument time. Both cases were argued on January 18, 2012.<sup>44</sup> In its May 2012 decision, the U.S. Supreme Court addressed the questions of whether a parent's years of lawful permanent resident status and/or years of residence after lawful admission could 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 five-year requirement and 8 U.S.C. § 1229b(a)(2)'s seven-year requirement, respectively.<sup>45</sup> These questions implicate not only the meaning of "admission" and "legal permanent resident" status, but also who is "the alien" entitled to benefit therefrom.

The author contends that imputation of parental time in residence and date of immigration status grant should be permitted. The most compelling cases are those involving individuals who were physically present in the U.S. as unemancipated minors living with their LPR custodial parent during the entire period sought to be imputed, and who as adults with LPR status seek the benefit of their custodial parent's time in residence and/or date of LPR status grant. The most likely person to benefit from such a rule would be the individual who, like Carlos, was brought to the U.S. as an undocumented immigrant child, and who likely was not able to petition for immigration status until adulthood. Any contrary rule will unfairly penalize these children for the choices or ignorance of their parents as to the children's immigration status.

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38. *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1116 (9th Cir. 2009).

39. *Sawyers v. Holder*, 399 F. App'x 313, 314 (9th Cir. 2010).

40. *Id.*

41. The *Sawyers* Appendix, *supra* note 22, at 3a.

42. Petition for Writ of Certiorari, *supra* note 9, at 2; *Sawyers* Petition for Certiorari, *supra* note 26, at 2; Petitioner's Consolidated Merits Brief, *supra* note 7, at 2.

43. Petitioner's Consolidated Merits Brief, *supra* note 7, at 2.

44. Transcript of Oral Argument, *Martinez Gutierrez* (Nos. 10-1542, 10-1543) [hereinafter Transcript of Oral Argument].

45. *See Martinez Gutierrez*, 132 S. Ct. at 2014-15.

### III. ADMISSION

#### A. Generally

When an individual from a foreign country seeks permission to enter the United States, either temporarily<sup>46</sup> or permanently,<sup>47</sup> that individual is generally said to be seeking admission.<sup>48</sup> Individuals seeking admission must demonstrate that they are not inadmissible<sup>49</sup> under the Immigration and Nationality Act (INA). This admissibility/inadmissibility determination is triggered for lawful entrants at time of inspection,<sup>50</sup> anyone applying to adjust their status,<sup>51</sup> and lawful permanent residents in certain enumerated situations,<sup>52</sup> including, *inter alia*, “absen[ce] from the United States for a continuous period in excess of 180 days,”<sup>53</sup> and committing a criminal offense that triggers inadmissibility.<sup>54</sup> The general inadmissibility bars are for certain criminal convictions,<sup>55</sup> misrepresentations/fraud/prior illegal presence/prior removal,<sup>56</sup> health issues,<sup>57</sup> public charge,<sup>58</sup> security/terrorism,<sup>59</sup> and other miscellaneous categories.<sup>60</sup>

Individuals who enter the United States by means other than having been admitted after inspection and authorization by an immigration officer are said to have entered without inspection (EWI), which triggers inadmissibility.<sup>61</sup> The most recent estimate of the number of such uninspected individuals (unauthorized immigrants) living in the United States approximates at 11.5 million (see Figure 1), of whom 1.35 million (or 12%) are estimated to be minor children (see Table 1).

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46. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2010) (listing nonimmigrant visas).

47. Permanent admission means being admitted for legal permanent residence (or obtaining a “green card”).

48. See INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2010); see also INA § 101(a)(13)(B), 8 U.S.C. § 1101(a)(13)(B) (2010) (showing situations where lawful entry does not count as admission).

49. INA § 212, 8 U.S.C. § 1182 (2010).

50. INA § 101(a)(13)(A).

51. INA § 245, 8 U.S.C. § 1255 (2010).

52. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2010).

53. INA § 101(a)(13)(C)(ii), 8 U.S.C. § 101(a)(13)(C)(ii) (2010).

54. INA § 101(a)(13)(C)(v), 8 U.S.C. § 101(a)(13)(C)(v) (2010).

55. INA § 212(a)(2), 8 U.S.C. § 1182 (a)(2) (2010).

56. INA § 212(a)(6), (9), 8 U.S.C. § 1182(a)(6), (9).

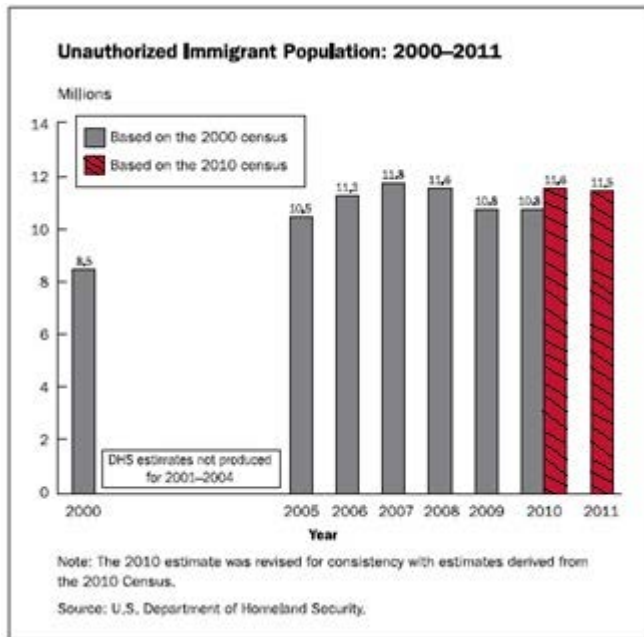
57. INA § 212(a)(1), 8 U.S.C. § 1182(a)(1).

58. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

59. INA § 212(a)(3), 8 U.S.C. § 1182(a)(3).

60. INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (documentation requirements); INA § 212(a)(8), 8 U.S.C. § 1182(a)(8) (ineligibility for citizenship); INA § 212(a)(10), 8 U.S.C. § 1182(a)(10) (miscellaneous).

61. INA § 212(a)(6), 8 U.S.C. § 1182(a)(6).

Figure 1<sup>62</sup>Table 1<sup>63</sup>

AGE	Total	
	Number	Percent
ALL AGES	11,510,000	100
UNDER 18 YEARS	1,350,000	12
18 TO 24 YEARS	1,610,000	14
25 TO 34 YEARS	3,730,000	32
35 TO 44 YEARS	3,070,000	27
45 TO 54 YEARS	1,290,000	4
55 YEARS AND OVER	470,000	4

Age of the Unauthorized Immigrant Population, as of January 2011

62. *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, DHS, Figure 1, (2012) [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf) (bars for 2010 census were not diagonally shaded in original).

63. *Id.* Table 5 (modified from original by author).



### B. LBR Admission

While it is generally the case that an individual who comes to the United States with the intention to permanently stay, but who has not applied for and been approved as a LPR, is inadmissible,<sup>64</sup> dual intent or later-formed-intent are also possible. As such, a person may come to the U.S. as a nonimmigrant, with the intention to return to their home country at the end of their lawful stay, and thereafter develop the intention to stay in the United States. Thus, if an individual entered the United States lawfully in a status other than as a LPR, he or she may be eligible to apply to adjust (change) their status to become a lawful permanent resident.<sup>65</sup> The two most common pathways leading to legal permanent residence are immigration through a qualifying family relationship and employment-based immigration.<sup>66</sup> One such qualifying relationship is that between a U.S. citizen parent (petitioner) and a noncitizen, non-LPR, foreign-born child (beneficiary),<sup>67</sup> which categorization allows the immediate (without a wait for a visa number)<sup>68</sup> immigration and/or adjustment of status for the beneficiary.<sup>69</sup> Another qualifying relationship is that between a LPR parent and a noncitizen, non-LPR, foreign-born child. Unlike the previous category, this categorization requires a wait for a visa number, which presently runs at about a two-and-one-half year wait.<sup>70</sup> The tangible result

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64. INA § 212, 8 U.S.C. § 1182.

65. INA § 245, 8 U.S.C. § 1255.

66. *Green Card (Permanent Residence)*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ae853ad15c673210VgnVCM100000082ca60aRCRD&vgnnextchannel=ae853ad15c673210VgnVCM100000082ca60aRCRD> (last updated May 13, 2011).

67. Immediate Relative classification includes child, spouse, and parent of USC, and permits immigration to U.S. as a legal permanent resident or adjustment of status for a person already in the U.S. to LPR status.

68. "Immediate" means the petitioner and beneficiary can immediately file the form applying to adjust status to LPR. In effect, the form demonstrating the qualifying relationship (I-130) is filed at the same time as the form applying to adjust status (I-485).

69. *Green Card Through Family*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=4c2515d27cf73210VgnVCM100000082ca60aRCRD&vgnnextchannel=4c2515d27cf73210VgnVCM100000082ca60aRCRD> (last updated May 13, 2011).

70. See *June 2012 Visa Bulletin*, U.S. DEPT OF STATE, 2 (2012) [http://travel.state.gov/pdf/visabulletin/visabulletin\\_June2012.pdf](http://travel.state.gov/pdf/visabulletin/visabulletin_June2012.pdf) (showing January 1, 2010 chargeability date for Family Preference 2A category, which amounts to a two-year-and-five-month wait between approval of the form demonstrating the qualifying relationship and eligibility to file the form to adjust status to LPR).

of obtaining LPR status is a card known as the "green card," so named for its original color,<sup>71</sup> valid for ten years,<sup>72</sup> and renewable indefinitely.<sup>73</sup> Generally, after five years of LPR status, an individual is eligible to apply to naturalize and become a U.S. citizen,<sup>74</sup> although there is no requirement that he or she do so. As of 2010, there were approximately 12.5 million LPRs, of whom two-thirds were eligible to naturalize and one-third was not eligible.<sup>75</sup> Unlike U.S. citizenship however, LPR status does not shelter an individual from being asked to leave (or forcibly removed from) the United States based on criminal activity<sup>76</sup> or another valid reason.<sup>77</sup> Thus, in effect two-thirds of all LPRs in the United States have an available guarantee of non-removal of which they have chosen not to avail themselves.

#### IV. REMOVABILITY BASED ON A CRIMINAL CONVICTION

In addition to LPRs, all non-LPRs are potentially removable if they engage in certain enumerated activities.<sup>78</sup> In 2010, 516,992 deportable aliens were located as a result of Department of Homeland Security (DHS) enforcement operations,<sup>79</sup> of which 427,940 were of Mexican nationality.<sup>80</sup> As compared to in 2001, this represents a 63% decrease in the number of deportable aliens who have been located in enforcement operations by DHS, or its predecessor, INS.<sup>81</sup> In contrast to the decline in the number of

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71. Recently issued green cards are once again green in color, after having been beige for a number of years.

72. With the exception of individuals who obtain conditional LPR status based on marriage to a USC and obtaining LPR status within two years of the date of the marriage.

73. See *Green Card (Permanent Residence)*, *supra* note 66; *Renew a Green Card*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=8ae33a4107083210VgnVCM100000082ca60aRCRD&vgnextchannel=8ae33a4107083210VgnVCM100000082ca60aRCRD> (last updated March 23, 2011).

74. Some exceptions are for spouses of USCs and VAWA applicants, who are eligible to apply to naturalize after three years. INA § 319, 8 U.S.C. § 1430 (2010) (also providing for other exceptions).

75. *Size of the Legal Permanent Resident Population*, DHS, Table 1 (2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_lpr\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2010.pdf) (in 2010, there were 12,630,000 LPRs, of which 8,070,000 were eligible to naturalize and 4,570,000 were not eligible to naturalize).

76. INA § 237(a)(2).

77. INA § 237.

78. See *id.* §§ 212, 237 (listing the enumerated activities that could lead to deportation).

79. *Yearbook of Immigration Statistics: 2010*, DEP'T OF HOMELAND SEC., Table 33, at 91, available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois\\_yb\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf) [hereafter DHS-2010 Yearbook].

80. *Id.*

81. *Id.*

deportable aliens being located, with the exception of the 2009 fiscal year,<sup>82</sup> 2010 saw the most removals ever reported from 1892 to present. Furthermore, there has been a steady increase in the number of removals since 1997, coinciding with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In 2010, 387,242 aliens were removed pursuant to an order of removal, and 476,405 aliens were returned (moved out of the United States not pursuant to an order of removal).<sup>83</sup> Of these, 282,003 (73%) and 354,982 (75%) were of Mexican nationality, respectively.<sup>84</sup>

Table 2

	Total			of Mexican Nationality			of Jamaican Nationality	
DEPORTABLE ALIENS LOCATED	516,992			427,940 (83%)			787 (<-1%)	
ALIENS REMOVED	Total	Criminal	Non-Criminal	Total	Criminal	Non-Criminal	Total	Criminal
	387,242	168,532	218,710	282,003 (73%)	127,728 (76%)	154,275 (71%)	1,475 (<-1%)	1,161 (<-1%)
ALIENS RETURNED	476,405			354,982 (75%)			508 (<-1%)	

\* Percentages for nationalities indicate the percentage of the numbers in Column 1 (Total).

## 2010 Statistics

A broad spectrum of conduct can make an alien removable from the United States either based on being inadmissible at time of entry or at the point when the alien sought admission,<sup>85</sup> or deportable after having been admitted in a particular status.<sup>86</sup> Only one of the many categories of either inadmissibility or deportability is based on criminal conduct.<sup>87</sup> As such, contrary to what may be public perception and what may be depicted in the media,<sup>88</sup> only 44% of aliens who were removed in 2010 had

82. *Id.*

83. *Id.*

84. *Id.*

85. INA § 212.

86. *Id.* § 237.

87. *Id.* § 212(a)(2); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2)(A) (2010).

88. See Alan Gomez and Kevin Johnson, *Most illegal immigrants deported last year were criminals*, USA TODAY, Oct 18, 2011, <http://www.usatoday.com/news/washington/story/2011-10-18/deportations-criminals-homeland-security/50807532/1>; see also Dave Blount, *Hundreds of Deportable Criminal Aliens Released*, RIGHT WING NEWS, <http://rightwingnews.com/immigration/hundreds-of-deportable-criminal-aliens-released/> (last accessed May 21, 2012) (showing the media depiction of immigrants' criminal pasts).

criminal convictions.<sup>89</sup>

#### V. CANCELLATION OF REMOVAL AS RELIEF FOR LPRS

Many aliens who end up in removal proceedings are eligible for relief from removal. Some forms of relief are based on how long the alien has been in the United States and the family and community ties he or she has formed here,<sup>90</sup> while others are based on humanitarian concerns.<sup>91</sup> Not all forms of relief result in the alien acquiring permanent status<sup>92</sup> or even staying in the United States;<sup>93</sup> sometimes the lesser evil is to leave the U.S. voluntarily rather than be ordered removed.<sup>94</sup> In fiscal year (FY) 2011, only 73,493 (24%) of completed cases in immigration court involved applications for relief.<sup>95</sup> As such, unsurprisingly, 159,743 (70%) cases in immigration court resulted in either a removal order or voluntary departure, meanwhile 67,810 (30%) cases resulted in the alien staying in the United States (either by relief, termination of proceedings by ICE, or administrative closure of the case).<sup>96</sup> Unfortunately, aliens who ultimately receive relief from removal generally wait more than twice as long (on average over seven hundred days)<sup>97</sup> as compared to the national average pendency of all removal cases,<sup>98</sup> and more than four times as long as compared to the national average pendency where a removal

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89. DHS-2010 Yearbook, *supra* note 79, Table 33, at 91.

90. For example, through Cancellation of Removal.

91. Examples include Asylum, Convention Against Torture, Withholding of Removal, Temporary Protected Status (TPS), Deferred Enforced Departure (DED).

92. Withholding of Removal does not yield a green card. Neither does TPS or DED.

93. An example would be Voluntary Departure.

94. INA § 212(a)(9). If an individual is ordered removed, he or she usually faces a multi-year bar to applying for re-admission (ten or twenty years), by contrast to the three-year bar for an individual who had not accumulated one year of unlawful presence and who voluntarily left the U.S.

95. *FY 2011 Statistical Yearbook*, U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, N1 (2012), <http://www.justice.gov/eoir/statspub/fy11syb.pdf> [hereinafter EOIR-2011 Yearbook].

96. *U.S. Deportation Outcomes by Charge: Completed Cases in Immigration Courts*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/deport\\_outcome\\_charge.php](http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php) (last visited Mar. 28, 2012).

97. As of March 28, 2012, the national immigration court processing time was 781 days in cases where relief was granted. *See Immigration Court Processing Time by Outcome*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/court\\_proctime\\_outcome.php](http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php) (last visited Mar. 28, 2012).

98. *Id.* (indicating 374 days as national immigration court processing time for all cases, as of March 28, 2012).

order is entered.<sup>99</sup> It is no surprise then that so many aliens choose to abandon their applications for relief, rather than be in immigration status limbo and/or detained for what can amount to more than two years.

Even with such bleak outcomes, LPRs in removal proceedings are wise to apply for a discretionary form of relief called Cancellation of Removal (CoR or Cancellation).<sup>100</sup> Requirements are less strict for LPR applicants,<sup>101</sup> who have demonstrably stronger ties to the United States than those who are not permanent residents. The major categorical bar to Cancellation for LPRs is a conviction for an Aggravated Felony,<sup>102</sup> which renders LPR aliens ineligible for Cancellation.<sup>103</sup> The only other requirements are that the alien must have “been an alien lawfully admitted for permanent residence for not less than 5 years,”<sup>104</sup> and that the alien has “resided in the United States continuously for 7 years after having been admitted in any status.”<sup>105</sup> In contrast, an alien who is not a LPR and who seeks Cancellation has a higher hurdle to cross, perhaps because if that alien receives Cancellation, he also becomes eligible to adjust status and become a LPR.<sup>106</sup> A non-LPR alien applying for CoR must not only show ten years of physical presence immediately preceding the date of the application, but also “good moral character during such period,” no convictions that would have made him inadmissible or removable, and the substantial hurdle of “exceptional and extremely unusual hardship” to a qualifying relative<sup>107</sup> as a result of the alien’s removal.<sup>108</sup> In order to be granted either form of CoR, the alien must first demonstrate that he is statutorily eligible for the relief by carrying his burden of showing that the requirements for LPR, CoR, or non-LPR CoR is met.<sup>109</sup> Thereafter, the alien must demonstrate that he warrants a favorable exercise of the Attorney General’s<sup>110</sup> discretion.<sup>111</sup>

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99. *Id.* (indicating 188 days as national immigration court processing time for all cases, as of March 28, 2012).

100. INA § 240(A), 8 U.S.C. § 1229(a) (2010).

101. *Id.*

102. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2010).

103. INA § 240A(a)(3).

104. *Id.* § 240A(a)(1).

105. INA § 240A(a)(2).

106. *Id.* § 240A(a)(1).

107. A qualifying relative is “the alien’s spouse, parent, or child” and such individual must be a USC or a LPR. INA § 240A(b)(1)(D).

108. *Id.* § 240A(b)(1)(A)-(D).

109. *See In re C-V-T*, 22 I. & N. Dec. 7, 10 (BIA 1998); INA § 240A(c)(4)(a)(i); 8 C.F.R. § 1240.8(d) (discussing the criteria for relief).

110. In removal proceedings, the IJ is the decisionmaker, not the actual Attorney General, though the IJs are appointed officials under the Department of Justice, Executive Office of Immigration Review.

111. *See C-V-T*, 22 I. & N. Dec. 7 at 10 (discussing the criteria for relief).

For both groups of aliens, LPRs and non-LPRs, the period of continuous physical presence is tolled at the earlier of either the service of the notice to appear in Immigration Court or when the alien commits an offense that renders him or her inadmissible or removable under the INA. Before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), LPRs could seek relief in section 212(c), which provided that "aliens legally admitted for permanent residence" who voluntarily went temporarily abroad and could be admitted to the U.S., so long as they were returning to "a lawful unrelinquished domicile of seven consecutive years," and they were not under order of deportation or "convicted of one or more aggravated felonies" for which they had served "a term of imprisonment of at least 5 years."<sup>112</sup>

While the number of LPRs who may receive relief under CoR or former section 212(c) is not restricted, there is an annual cap of 4,000 on the number of grants for non-LPR CoR or its predecessor, suspension of deportation.<sup>113</sup> Notwithstanding the fact that there is no statutory restriction on annual grants of CoR/212(c) relief for LPRs, the number of grants over the 2006-10 period has consistently hovered around 4,000.<sup>114</sup> In FY 2011, of the 303,287 cases that were completed,<sup>115</sup> LPR CoR or its predecessor relief, section 212(c), was granted in 4,886 cases.<sup>116</sup> Meanwhile non-LPR CoR or its predecessor relief, suspension of deportation, was granted in 4,371 cases (of which 3,937 were subject to the 4,000 annual cap), for a combined CoR grant in 9,257 cases (or 3% of all completed cases).<sup>117</sup> At present, Cancellation of Removal is not a floodgate of relief for aliens—be they LPRs or non-LPRs.

## VI. THE MEANING OF "RESIDENCE"

Turning back to Carlos and Damien's pleas for immigration mercy, their eligibility for CoR depends on whether they can demonstrate that they satisfied the residence and physical presence requirements. Their abilities to do so, thus, depend on the precise meaning on the relevant terms.

In cases of statutory analysis, the necessary inquiry begins with the language of the statute.<sup>118</sup> As immigration law involves

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112. INA § 212(c), U.S.C. § 1182(c) (1995) (repealed 1996).

113. The annual cap limits the number of aliens whose removal may be cancelled and status may be adjusted. Since LPR Cancellation applicants are not in need of an adjustment of status, the cap does not apply to them. INA § 240A(e)(1).

114. EOIR-2011 Yearbook, *supra* note 96, at R3 – Table 16.

115. *Id.* at N1.

116. *Id.* at R3 – Table 16.

117. *Id.*

118. *See* *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (stating,

applications of statutory provisions by administrative agencies, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* provides the relevant deferential standard.<sup>119</sup> *Chevron's* two-step analysis first requires a determination of whether the statute's language clearly addresses the issue.<sup>120</sup> If the statute clearly indicates Congress's intent, the inquiry ends there.<sup>121</sup> Both the agency and the courts "must give effect to the unambiguously expressed intent of Congress."<sup>122</sup> Second, if the statute is silent or ambiguous regarding the issue, then the court should afford deference to an agency's interpretation that is reasonable and "based on a permissible construction of the statute."<sup>123</sup> As to decisions involving Cancellation of Removal, the relevant language pertains to the meaning of "resided" in the statute,<sup>124</sup> and whether the statute's reference to "the alien"<sup>125</sup> necessarily precludes a custodial parent from satisfying the requirements on behalf of his or her minor child.

Prior to the enactment of IIRIRA, CoR relief was afforded by way of a 212(c) waiver.<sup>126</sup> That statute provided for relief from removal when certain criteria were met, with the most relevant criterion being a seven-year period of unrelinquished "domicile."<sup>127</sup> The statutory definition of domicile included the intent to remain in a particular place. Since minors are legally incapable of forming

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[a]s in all statutory construction cases, we begin with the language of the statute. The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." The inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent."

(quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337(1997)).

119. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (discussing the proper deference to agency heads).

120. *Id.* at 842.

121. *Id.*

122. *Id.* at 842-43.

123. *Id.* at 843.

124. INA § 240A(a).

125. *Id.*

126. *Id.* § 212(c). The text of that section in full was:

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

127. *Id.*

intent, a minor either had no place of domicile or was determined to share the domiciliary of his or her custodial parent.<sup>128</sup> When Congress changed the statutory relief to CoR, and removed "domicile" replacing it instead with the concept of "residence," two divergent positions as to its meaning emerged. One is that the meaning of "residence" is clear, as it is defined in the INA as being the "principal, actual dwelling place in fact, without regard to intent."<sup>129</sup> Thus, a child is legally capable of having a residence distinct from that of his or her parents. Alternatively, it may be argued that the meaning of "residence" is also clear, albeit with a different result, in that the legislative history surrounding the enactment of the CoR provisions and the change from "domicile" to "residence" was not for the purpose of removing intent from the equation. Instead, according to the history of courts' and agency interpretation of the CoR provisions, the change was made to bring the statute in line with other INA provisions and to resolve the issue of whether the entire seven years had to come after the LPR status grant.<sup>130</sup> Unfortunately, both "clear" interpretations cannot coexist, and the fact that two diametrically opposed positions can be argued for the meaning of the same term suggests that term to be ambiguous and not at all clear.

By contrast, the meaning of "the alien" should be more easily discernible, in that it relates only to the specific singular individual. However, the language "an alien" and "aliens lawfully admitted for permanent residence" as used in 212(c) are arguably similarly narrow in scope, yet imputation was permissible based on the overlay of domicile and intent. Thus, the fact that "the alien" in CoR does not explicitly include the parent does not necessarily exclude that parent from helping the minor child to meet the statutory requirements. As such, given the history of the intended scope and beneficiary of CoR, the term "the alien" has murky meaning. If this is the case, then *Chevron's* second step

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128. See *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992); *Lepe-Guitron v. INS*, 16 F.3d 1021, 1024-26 (9th Cir. 1994); *Morel v. INS*, 90 F.3d 833, 840-42 (1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998) (noting that a minor shares domiciliary with his or her parents, "since most children are presumed not legally capable of forming the requisite intent to establish their own domicile.")

129. INA § 101(a)(33); see also *In re Escobar*, 24 I. & N. Dec. 231, 233 (BIA 2007) (determining the definition of residence).

130. See *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1027-28 (9th Cir. 2005) (noting that "neither the language of the statute nor the legislative reports provide any insight into why Congress changed the residency requirement from the 'lawful unrelinquished domicile of seven consecutive years' under former § 212(c) to the two-part requirement [implicating "residence" under § [240A(a)]," and resolving the issue of whether the "alien could count a period spent in non-permanent status toward a total period of residence of seven years" by Congress creating two separate time requirements in section 240A(a)).



requires an evaluation of the reasonableness of the agency's construction of the statute.

A. *Ninth Circuit v. BIA*

Over the years, the BIA and the Ninth Circuit Court of Appeals have gone back and forth about the meaning of the language in the CoR statute and whether the language permits imputation of parental time for either the five- or seven-year requirements. Generally, the BIA has indicated that imputation is not permissible under the current statute for either time requirement, while the Ninth Circuit has held that imputation is allowed. The back and forth between the agency and the court is significant, and it helps set the stage for the discussion of the issue in other circuits and later in the U.S. Supreme Court.

Commencing with *Lepe-Guitron v. INS*, which involved the predecessor 212(c) statute, the Ninth Circuit held that since a child's domiciliary follows that of her parent, a parent's domicile is imputed to an unemancipated minor child for the purposes of 212(c)'s domicile requirement.<sup>131</sup> The court reasoned that the purpose of § 212(c) was to "provide relief from deportation for those who have lawfully formed strong ties to the United States,"<sup>132</sup> and "section 212(c)'s core policy concerns would be directly frustrated by the government's proposal to ignore the parent's domicile in determining that of the child"<sup>133</sup> because "children naturally form the strongest ties to the place where their parents are domiciled."<sup>134</sup> The court recognized that "a child's domicile follows that of his or her parents . . . because children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place."<sup>135</sup> Finally, the court noted that children are generally aggregated with their parents in immigration law, citing as examples the assignment of priority date and preference category in family-based immigration.<sup>136</sup>

Thereafter, directly addressing imputation for post-IIRIRA's CoR, in *Cuevas-Gaspar v. Gonzales*, the Ninth Circuit held that an alien who lived as an unemancipated minor with his or her LPR parent could seek the benefit of the parent's period of continuous residence after having been admitted in any status (the seven-year requirement).<sup>137</sup> The court recognized that immigration law is "replete with provisions 'giving a high priority to the relation between permanent resident parents and their children'" and

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131. *Lepe-Guitron*, 16 F.3d at 1025-26.

132. *Id.* at 1025.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Cuevas-Gaspar*, 430 F.3d at 1029.

“both the BIA and [the Ninth Circuit] repeatedly have held that a parent’s status, intent, or state of mind is imputed to the parent’s unemancipated minor child in many areas of immigration law, including asylum, grounds of inadmissibility, and legal residency status.”<sup>138</sup> *Cuevas-Gaspar* thus determined that the BIA’s refusal to permit imputation for CoR purposes conflicted with the agency’s prior “consistent willingness to impute a parent’s intent, state of mind, and status to a child,”<sup>139</sup> and it “afford[ed] less deference to the BIA’s interpretation.”<sup>140</sup> While noting that § 212(c) and § 240b(a) use different terms, the court determined that the “difference between ‘domicile’ and residence ‘after having been admitted in any status’ is not ‘so great as to be dispositive.’”<sup>141</sup> The court further noted that “admitted” in § 240b(a)(2) did not bar imputation by “requiring entry with inspection and authorization,” because to do so would “in effect be requiring of legal permanent residents more than the statute requires of non-permanent residents, [(mere physical presence, regardless of admission<sup>142</sup>)], thus frustrating Congress’s well-established policy of affording aliens with legal permanent resident status more benefits than non-permanent residents under the INA.”<sup>143</sup>

Subsequently, in *Escobar*, the BIA rejected the Ninth Circuit’s decision in *Cuevas-Gaspar* and declined to extend that decision’s holding regarding permissible imputation as to the seven-year rule to allow imputation to meet the five-year rule.<sup>144</sup> The agency based its decision on the reasoning that “domicile” from section 212(c) is different from “residence” in CoR, since the latter contains no element of intent, the change from one term to the other is significant, and imputation is improper.<sup>145</sup> The agency further reasoned that the *Cuevas-Gaspar* court’s rationale regarding how long a child has lived with a parent and the effect on residency was inapplicable to the critical question of how long the child had been lawfully accorded the *status* of a permanent resident, because the child’s status is severable from the parent’s.<sup>146</sup>

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138. *Id.* at 1024.

139. *Id.* at 1026.

140. *Id.*

141. *Id.*

142. INA § 240A(b)(1)(A).

143. *Cuevas-Gaspar*, 430 F.3d at 1028.

144. *See generally Escobar*, 24 I. & N. Dec. 231 (declining to extend the holding of the Ninth Circuit in *Cuevas-Gaspar*).

145. *Id.* at 233 (stating “we find that residence is different from domicile because it ‘contains no element of subjective intent’”).

146. *Cuevas-Gaspar*, 430 F.3d at 1028.

seven-year rule to allow imputation to meet the five-year rule.<sup>147</sup> The agency based its decision on the reasoning that “domicile” from section 212(c) is different from “residence” in CoR, since the latter contains no element of intent, the change from one term to the other is significant, and imputation is improper.<sup>148</sup> The agency further reasoned that the *Cuevas-Gaspar* court’s rationale regarding how long a child has lived with a parent and the effect on residency was inapplicable to the critical question of how long the child had been lawfully accorded the *status* of a permanent resident, since the child’s status is severable from the parent’s.<sup>149</sup> This decision was then appealed to the Ninth Circuit, which reversed the BIA decision, ruling that imputation was permissible for the five-year rule as well.<sup>150</sup> However, in the meantime, the BIA had reopened its case on Respondent’s motion to suppress,<sup>151</sup> such that by the time the Ninth Circuit decided the appeal, the issue was moot. Accordingly, the Ninth Circuit vacated its decision.<sup>152</sup>

In the interim, since the BIA had rejected the Ninth Circuit’s ruling on imputation to meet the seven-year requirement, it came as no surprise that the agency similarly refused to allow imputation as to the same requirement in the next case where it was faced with that question: *Ramirez-Vargas*.<sup>153</sup> There, the BIA found solace in *Brand X*,<sup>154</sup> as its justification for its ability to reach a result contrary to that articulated in a previous U.S. Court of Appeals case (here, *Cuevas-Gaspar*).<sup>155</sup> Thereafter, the BIA decided Carlos and Damien’s cases,<sup>156</sup> unsurprisingly ruling against imputation to satisfy both the five- and seven-year requirements. Subsequently, in *Mercado-Zazueta*,<sup>157</sup> the Ninth Circuit rejected the BIA’s restrictive interpretation of *Cuevas-Gaspar* and its reasoning based on *Brand X*<sup>158</sup> and permitted imputation to meet the five-year rule, which decision essentially

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147. See generally *In re Escobar*, 24 I. & N. Dec. 231. (declining to extend the holding of the Ninth Circuit in *Cuevas-Gaspar*).

148. See *id.* at 233 (stating “we find that residence is different from domicile because it ‘contains no element of subjective intent’”).

149. *Id.* at 234-35.

150. *Escobar v. Holder*, 567 F.3d 466, 478 (9th Cir. 2009).

151. *Escobar v. Holder*, 329 F. App’x 138 (9th Cir. 2009).

152. *Escobar v. Holder*, 572 F.3d 957 (9th Cir. 2009).

153. *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (BIA 2008).

154. *Brand X*, 545 U.S. 967.

155. *Ramirez-Vargas*, 24 I. & N. Dec. at 601.

156. The Sawyers Appendix, *supra* note 22; The Gutierrez Appendix, *supra* note 1.

157. *Mercado-Zazueta*, 580 F.3d at 1111-13.

158. *Id.* at 1114-15 (stating that “neither *Brand X* nor *Duran Gonzales* [*v. DHS*, 508 F.3d 1227 (9th Cir. 2007)] suggests that an agency may resurrect a statutory interpretation that a circuit court has foreclosed by rejecting it as unreasonable at *Chevron*’s second step.”).

resuscitated the court's analysis from its vacated *Escobar* decision.<sup>159</sup> Continuing with its line of cases holding imputation permissible, the Ninth Circuit then decided the cases at bar, indicating that imputation should be allowed<sup>160</sup> and remanding to the BIA to address CoR relief factoring in the imputation of parental time for both the five- and seven-year requirements, as relevant to each case.<sup>161</sup>

### B. *The Aftershock and Suggested Rule*

Accordingly, the BIA has held steadfast to not allowing imputation in CoR cases, even in the face of the series of decisions in the Ninth Circuit ruling that imputation is permissible. The BIA has repeatedly stated that it will not apply the imputation rule outside of cases in the Ninth Circuit.<sup>162</sup> The effect of this has been to create a sharp divide in outcome in the three circuits (the Third, Fifth and Ninth Circuits) that have addressed imputation in CoR cases.<sup>163</sup> In the cornerstone of these cases, *Augustin*, the Third Circuit rightfully denied imputation, as the individual seeking imputation was not even in the United States, let alone living with his LPR parents, during the period of time sought to be imputed.<sup>164</sup> Arguably, imputation for purposes of CoR should be limited to cases involving a minor unemancipated child who lived in the United States with his or her custodial parent who had LPR status during the entire time that is sought to be imputed. There is a crucial distinction between living outside the U.S. and seeking to impute the in-country time of one of the child's parents, and living in the U.S. with the parent whose time the child seeks to impute. In the former scenario, the child is not in the physical custody of the parent and she may not herself have had any legal U.S. immigration status during the time sought to be imputed

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159. *Mercado-Zazueta*, 580 F.3d at 1114-15.

160. As to the fact that the BIA acknowledges other provisions in the INA where imputation is permitted, but refused to allow imputation as to CoR time requirements, the court noted that "it is unreasonable to impute the abandonment of permanent resident status while refusing to impute the acquisition of such status under section 240A(a)." *Id.* at 1111.

161. *Id.* at 1110-11, 1113, 1115.

162. *See, e.g., Escobar*, 24 I. & N. Dec. at 235 (stating that the agency "will also not follow that decision ([*Cuevas-Gaspar* and the line of Ninth Circuit cases permitting imputation]) in cases arising outside the jurisdiction of the Ninth Circuit.").

163. *See, e.g., Augustin v. Attorney Gen.*, 520 F.3d 264, 271-72 (3d Cir. 2008); *Deus v. Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Mercado-Zazueta*, 580 F.3d at 1112 (addressing imputation); *see also Rosario*, 962 F.2d at 222-25 (approving of imputation as to former 212(c)); *Morel*, 90 F.3d at 840-42.

164. *See Augustin*, 520 F.3d at 266-67 (involving an individual who came to the U.S. as an unemancipated minor LPR and sought to benefit from his father's date of LPR admission, which predated the child's entry to the U.S. by six years, in order to satisfy LPR CoR's seven-year rule).

(which at minimum she must have to be eligible for LPR CoR).<sup>165</sup> Nor does she share the same “principal, actual dwelling place”<sup>166</sup> as her LPR parent. In cases where the unemancipated minor child is not physically in the United States living under the same roof as her LPR parent, and thus, the child’s physical residence is different from that of the parent, the child should not be able to benefit from immigration relief, such as CoR, predicated on the assumption that the beneficiary is physically present in the United States at all relevant times.<sup>167</sup>

In addition, although the Third Circuit’s precedent is consistently cited as the baseline rationale for rejecting imputation in practically all non-Ninth Circuit cases involving CoR and other forms of relief, *Augustin* is distinguishable from cases in the other circuits. The Third Circuit has not addressed the imputation issue in a case involving CoR where the alien seeks to impute time from when he or she was an unemancipated minor in the U.S. in the custody of his or her LPR parent. Yet, even with facts substantially different from those in *Augustin*,<sup>168</sup> in the only CoR case in the Fifth Circuit case involving imputation, the court rejected the possibility of imputing time and/or date of admission, based on it finding “persuasive the [admittedly distinguishable] rationale of the Third Circuit in *Augustin*.”<sup>169</sup> It appears that the BIA’s earlier statement of its rejection of an imputation rule

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165. See *infra* Section VII (discussing why the child must, in effect, have legal permanent resident status; what is being imputed is the *date* on which that status became effective, not the status itself).

166. INA § 101(a)(33).

167. See *Deus*, 591 F.3d at 811 (stating that where an individual did not actually dwell in the U.S. for the relevant time period,

the goal of maintaining relationships between legal permanent resident parents and their minor children could not alone form the basis to find [unreasonable] the BIA’s unwillingness to read into the statute an exception to the requirements for cancellation of removal for minors whose parents precede them in immigrating to the United States.

(citing *Augustin*, 520 F.3d at 269-70)).

168. *Id.* (noting that *Augustin*’s “decision may have rested in part on the facts presented” and “*Deus*’ facts are distinguishable from those in *Augustin*, in that it appears that she did actually reside in the United States with her legal permanent resident parent while a minor”).

In *Deus*, the individual who entered the U.S. illegally as a one-year-old child with her mother, who herself was granted LPR status on date of entry, and eventually obtained LPR status at seventeen years old, but committed a removable offense three years later, sought to impute time to satisfy LPR CoR’s seven-year requirement. *Id.* at 808. Arguably, if any factual scenario was amenable to imputation, it is this one where the unemancipated minor was literally an infant, incapable of objecting to the illegal entry and incapable of presenting herself to the inspecting officer. The fact that the LPR parent obtained that status on entry—the same entry as the child—and yet the child had no status, makes the case for imputation even stronger.

169. *Id.* at 812.

outside the Ninth Circuit<sup>170</sup> has had the effect of suggesting that the agency will fight to its dying breath with any court that dares to rule imputation permissible. The BIA essentially has told the other circuits, "don't even try it, or you're in for a fight," and the result has been rejection of the imputation rule in the circuits outside the Ninth, even when the facts are substantially distinguishable from *Augustin* and amenable to imputation.<sup>171</sup>

Further, the U.S. Courts of Appeals have justifiably rejected imputation in cases involving temporary protected status,<sup>172</sup> as in those cases, allowing imputation would result in the grant of legal status to someone who was not in the United States during the relevant time. For example, in *De Leon-Ochoa*,<sup>173</sup> the Third Circuit refused to extend *Cuevas-Gaspar's* reasoning, permitting imputation of parental time in residence, to "continuous residence" for purposes of TPS eligibility. There, the court reaffirmed its reasoning in *Augustin* for declining imputation. However, the court's analysis regarding TPS can be distinguished from CoR, since the "the TPS program was designed to shield aliens already in the country from removal when a natural disaster or similar occurrence has rendered removal unsafe."<sup>174</sup> Thus it logically follows that imputation should not be applied in TPS cases, where to do so would have the effect of "convert[ing] th[e] statute into a program of entry for an alien."<sup>175</sup> This is in stark contrast to CoR for LPRs, which is intended as a broad category of relief for those already in the country with legal permanent resident status.

More importantly, the application of an imputation rule to CoR cases would not have the effect of permitting entry or legal status for those who otherwise would not be allowed into the U.S. post-*Mercado-Zazueta* cases in the Ninth Circuit where the imputation rule has been applied have consistently involved aliens who are not merely attempting to claim benefit of parental time in residence or legal permanent resident status, but have been physically present in the U.S., specifically as an unemancipated minor living with that LPR parent, and at some point in time, were granted legal permanent resident status themselves.<sup>176</sup> The

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170. *Escobar*, 24 I. & N. Dec. at 235 ("Inasmuch as we disagree with that holding, we will also not follow that decision in cases arising outside the jurisdiction of the Ninth Circuit.").

171. *See supra* text accompanying notes 167-68 (discussing the relevant facts of *Deus v. Holder*).

172. *See, e.g.*, *De Leon-Ochoa v. Attorney Gen.*, 622 F.3d 341, 355 (3d Cir. 2010); *Ramos Cervantes v. Holder*, 597 F.3d 229, 236-37 (4th Cir. 2010) (rejecting imputation of temporary protected status).

173. *De Leon-Ochoa*, 622 F.3d 341.

174. *Id.* at 353.

175. *Id.* at 354.

176. *Compare* *Becerra v. Holder*, 411 F. App'x 67 (9th Cir. 2011) (imputation permitted), *Castellanos-Garcia v. Holder*, 391 F. App'x 592 (9th Cir. 2010)

requirement that the individual applying for CoR for LPRs must have his or her own green card is a cornerstone of the statute. Therefore, as the court stated in *Mercado-Zazueta*, since both Carlos and Damien have “actually . . . been admitted for permanent residence, it is beyond dispute that [they] ha[ve] satisfied the substantive and procedural requirements of admission for permanent residence.”<sup>177</sup> To impute either time in residence or legal permanent resident status to these individuals does not have the effect of making them eligible for admission or legal resident status when they were not already adjudicated by United States Citizenship and Immigration Services (U.S.C.I.S.) and afforded those benefits. Allowing imputation and restricting the amount of time to be imputed to time when the child lived in the United States with the LPR parent, only modifies the start date of the five- and seven-year clocks, it does not grant the child anymore legal status than he or she already has. In addition, these time requirements were only “imposed to probe the duration of an alien’s lawful ties to the United States.”<sup>178</sup> In cases such as these, where the individual requesting imputation has lived with their LPR parent for substantial periods of time, the issue of ties to the United States is moot.<sup>179</sup> Ultimately, the suggested rule would be to permit imputation in cases involving individuals who were physically present in the U.S. as unemancipated minors living with their LPR custodial parent during the entire period sought to be imputed, and who as adults with LPR status seek the benefit of their custodial parent’s time in residence and/or date of LPR status grant.

### C. Arguments in *Martinez Gutierrez* and *Sawyers*

In Carlos and Damien’s cases, a significant portion of the government’s argument rested on the fact that Congress changed

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(same), and *Mercado-Zazueta*, 580 F.3d 1102 (9th Cir. 2009) (same), with *Guardiano v. Holder*, 411 F. App’x 74 (9th Cir. 2011) (imputation denied where individual was not residing with the LPR parent), *Hernandez Barron v. Holder*, 411 F. App’x 85 (9th Cir. 2011) (cannot impute time of LPR spouse), *Saucedo-Arevalo v. Holder*, 636 F.3d 532 (9th Cir. 2011) (declining imputation for non-LPR CoR in NACARA case where individual was not physically present in U.S.), *De Escobedo v. Holder*, 400 F. App’x. 287 (9th Cir. 2010) (cannot impute time of parent who is not LPR), and *Ramos Barrios v. Holder*, 567 F.3d 451, 581 F.3d 849 (9th Cir. 2009) (declining imputation to meet NACARA seven-year physical presence requirement where individual not physically present in U.S.).

177. *Mercado-Zazueta*, 580 F.3d at 1110.

178. *Id.* (citing *Cuevas-Gaspar*, 430 F.3d at 1028-29).

179. *See id.* at 1111 (noting “congressional policy of recognizing that presence in the United States of an extended length gives rise to such strong ties to the United States that removal would result in undue hardship” (quoting *Cuevas-Gaspar*, 430 F.3d at 1029)).

the statutory language from domicile to residence. The Ninth Circuit addressed imputation as to section 212(c), which involved domicile, in *Lepe-Guitron*. In permitting imputation, the court rejected the "BIA's interpretation of section 212(c), which would require children to themselves obtain permanent resident status before their lawful domicile could accrue."<sup>180</sup> Yet, in the present cases, the government made the identical argument that was previously rejected by both *Lepe-Guitron* and *Cuevas-Gaspar*.<sup>181</sup> In its brief on the merits, the government's argument-in-chief was primarily based on the statutory text and a plain reading of the LPR CoR statute (INA § 240A(a), 8 U.S.C. § 1229b(a)).<sup>182</sup> It contended that since the statute refers in the singular to "the alien" and his or her ability to meet the admission and period of residence requirements, only time personally satisfied by the alien may be considered.<sup>183</sup> The government further articulated that the statute's failure to include a specific prohibition on imputation or complete silence regarding imputation should not be interpreted to permit imputation.<sup>184</sup> Further, the government argued that the absence of textual support for imputation is bolstered by absence of congressional intent indicating support for imputation, and that policy concerns for family unity may not override the statutory text. In any event, the government advanced the position that the Board's interpretation of the statutory provisions is reasonable and entitled to *Chevron* deference.<sup>185</sup> As such, regardless of any contrary precedent, history of court broadening of the meaning of the relevant terms using imputation, or policy reasons for imputation, the government contended that the text and legislative history dictated that the necessary outcome must be against imputation of parental time.<sup>186</sup> The effect of the government's argument is that children would need to seek out and obtain their own permanent resident status, separate from their parents, in order to start the clocks on the five- and seven-year rules.<sup>187</sup>

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180. *Lepe-Guitron*, 16 F.3d at 1026.

181. The Government's argument in chief focused on the plain meaning of the statute and its legislative history. See Petitioner's Consolidated Merits Brief, *supra* note 7, at 11-13.

182. *Id.* at III.

183. *Id.* at 16-17.

184. *Id.* at 20-21.

185. *Id.* at 33-39.

186. *Id.* at 24-33.

187. See Transcript of Oral Argument, *supra* note 44, at 27:24 to 28:6 (noting by the attorney for Respondent Martinez Gutierrez that: "[T]he requirements for which there is imputation, status and residency, are matters that are not within the capacity or the control of a minor. A minor does not decide whether or when a parent will apply for LPR status for him or her. He does not control the—the maintenance of that status over a period of years, and he also does not control where he resides.").



Furthermore, it is significant that once Carlos's father received his LPR status, Carlos became eligible for LPR status also, even if Carlos had not been eligible to be listed as a dependent on his father's adjustment application.<sup>188</sup> If his father had filed an I-130 relative petition at this time, Carlos would have been a family preference category 2A, which using the current wait times, would have been a two-year-and-five-month wait for an available visa.<sup>189</sup> It is the family member with LPR status who has to apply for the beneficiary (here, the child). The child cannot file his or her own I-130 application to start the process.<sup>190</sup> Thus, without Carlos's father (or later, possibly, his mother) initiating the process, Carlos could not have received LPR status through their family relationship. As such, for the government to take the position of "blaming" the child for not "being admitted in any status" and not having LPR status, triggering the start of the seven- and five-year time periods, respectively, is ludicrous.<sup>191</sup>

By contrast, respondents Carlos and Damien argued that the BIA's position was inconsistent with the agency's own acceptance of imputation under similar statutes and with Congress's pre-existing and unchanged intent, permitting imputation in section 212(c), and that a contrary rule would run afoul of CoR and section 212(c)'s "objectives of 'providing relief to aliens with strong ties to

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188. See Petitioner's Consolidated Merits Brief, *supra* note 7, at 31-32 n.9 (showing examples of situations in which a LPR parent cannot immediately get the same status for his or her spouse or child).

189. See *June 2012 Visa Bulletin*, *supra* note 70 (showing visa wait times).

190. The person filing the I-130 is the petitioner, who is the U.S. citizen or LPR asserting the familial relationship with the intended beneficiary. The Form is appropriately titled "Petition for Alien Relative" (emphasis added) and serves the purpose of being the form "[f]or [a] citizen or lawful permanent resident of the United States to establish the relationship to certain alien relatives who wish to immigrate to the United States." *I-130 Form*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/> (last visited Aug. 4, 2012) (click on "Forms", then "Petition for Alien Relative").

The first part of the form indicates: "You are the petitioner. Your relative is the beneficiary," and it continues by asking the petitioner to identify the relationship to the beneficiary by completing the following sentence and checking the appropriate relationship: "I am filing this petition for my: Husband/Wife[,] Parent[,] Brother/Sister[,] Child." *Id.*

191. See also *Mercado-Zazueta*, 580 F.3d at 1112-13 (stating it is "absurd to penalize [the child] for his parents' failure to assist him with the adjustment process" and

while unemancipated minors may be technically capable of attaining lawful permanent resident status without their parents' assistance, it is not reasonable to expect them to do so. The imputation of both domicile and permanent resident status to minor children is appropriate, so far as cancellation of removal is concerned, "precisely because the minor either [is] legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent of his parents."

(quoting *Barrios*, 567 F.3d at 463)).

the United States' and 'promoting family unity'.<sup>192</sup> Respondents also argued that the BIA did not understand that it had discretion to permit or deny imputation, wrongly believing that Congress's silence translated into a rejection of imputation.<sup>193</sup> Finally, respondents heavily argued that since imputation was permitted for "domicile," which included intent and was thus a stricter requirement than the non-intent focused "residence", the latter, more lenient term necessarily allowed imputation as well.<sup>194</sup>

Also, one amicus party, National Immigration Justice Center, filed a merits brief in support of respondents, arguing, *inter alia*, that the BIA should not be entitled to *Chevron* deference based on its unique characteristics and history regarding unreasonable case load and case turnover rate, and amount of reversals and erroneous determinations.<sup>195</sup>

## VII. THE WAY IT SHOULD BE

The author suggests that when a LPR in removal proceedings seeks CoR, he or she should be able to benefit from their former (if the LPR is now an adult) or current custodial parent's time in residence and/or date of LPR status grant, when the individual seeking imputation was physically present in the U.S. as an unemancipated minor living with his or her LPR custodial parent during the entire period to be imputed.

### A. Implications of Using the Real Admission Date

As discussed above, there are significant implications to using only "the alien's" admission date and actual time in residence for minor children. For children, who typically rely on their parents, immigration status is inseparable from any other basic need the child has, for which the parent provides. The parent is responsible for providing the child with food, shelter, safety, and nurture, and concomitant with this set is the security of lawful status and protection from dislodgement from the child's home. A child should not have to live in fear of deportation; this is especially so when the child's parent has lawful status to which the child should

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192. Martinez Gutierrez Merits Brief, *supra* note 8, at 40, 52-54; Brief for Respondent at 13, 37, 41, Holder v. Sawyers, 2012 WL 2507513 (9th Cir. 2012) (No. 10-1543), 2011 WL 6282150 [hereinafter Sawyers Merits Brief].

193. See Sawyers Merits Brief, *supra* note 192, at 38-39 (arguing for BIA's discretion in imputation).

194. Transcript of Oral Argument, *supra* note 44, at 28:13 to 29:03, 33:12 to 34:02, 45:10 to 51:05.

195. See generally Brief of the National Immigration Justice Center as Amicus Curiae in Support of Respondents, *Martinez Gutierrez*, 132 S. Ct. 2011 (2012) (No. 10-1542) and *Sawyers*, 2012 WL 2507513 (9th Cir. 2012) (No. 10-1543), 2011 WL 6468696 (arguing that the BIA should not be entitled to *Chevron* deference).

derivatively benefit. Even if the child was not an eligible derivative beneficiary at the time the parent filed for LPR status, the child became an eligible beneficiary based on a family-preference category the moment her mother or father received the green card. Unfortunately, in either case, the child relies on the parent to initiate the paperwork necessary for her to obtain LPR status. Often money is the primary reason for the delay in filing the applications necessary for the child to receive her LPR status; it is rarely because the parent does not want the child to benefit from lawful status, nor because the child independently decides that she does not want lawful status. As such, it is unfair to penalize the child for a circumstance over which she had no control. She could not anymore have applied for LPR status as she could have taken a bus back to Mexico and re-enter the U.S. to lawfully seek admission. With the Supreme Court's acceptance of the government's position, relying on *Chevron* deference to pretend that its hands were tied, the Court has clearly answered the pleas of the millions of undocumented children in the U.S. When these children ask "Mommy, are the men in the vans going to come get us?" and "Daddy, will you protect me from them?" their mothers and fathers should explain that the immigration officers may only be coming for the child and that Mommy and Daddy have their green card safety nets. When the child asks "Mommy, where is home?", his mother should reply, "You don't have one until you can file your own immigration petition and application. I cannot afford to protect you."

*B. Impact of the Suggested Imputation Rule on Non-LPR CoR*

If imputation of parental time for LPRs is limited to circumstances in which the minor child is physically present in the U.S. living with a LPR parent, then there will be no effect on a non-LPR CoR. This is because a non-LPR CoR already has a lower threshold for its time requirement—"continuous physical presence" regardless of status—than does its LPR counterpart. As a result, to require the child's physical presence with the parent whose time is sought to be imputed would result in the child him or herself always meeting the continuous physical presence requirement by mere fact of meeting the prerequisites for imputation. Put another way, if the child must live with his parent for the ten years for which the child wishes to benefit, then the child simultaneously fulfilled his ten-year requirement of continuous physical presence without the need to impute any of his parent's time. If the child leaves the U.S. and thus has a break in physical presence, then he also has a break in the time he lived with his parent, and thus cannot seek benefit of the time while he is away. As a result, non-LPR CoR cases will not be affected by allowing imputation for LPRs.

### VIII. THE WAY IT IS RIGHT NOW: THE U.S. SUPREME COURT RESOLUTION

At oral argument,<sup>196</sup> the justices repeatedly expressed concern whether a proposed imputation rule would benefit children who were living with others (not their parents) or living outside the United States.<sup>197</sup> This suggested that the Justices were considering the impact of imputation and the scope of such a rule.

However, in unanimously reversing the Ninth Circuit in both cases, the Court held reasonable the BIA's interpretation of the CoR rule (INA § 240A, 8 U.S.C. § 1229b) to deny imputation for the five- and seven-year requirements.<sup>198</sup> The reasonableness of the Board's decision however, only comes as the secondary consideration—before which the Court must have determined that the statute does not clearly evince Congress's intent. Accordingly, by assessing whether the Board's construction of the statute is reasonable, the Court impliedly held that the statute was silent or ambiguous as to imputation.

One argument could be made that there was either clear congressional intent to leave undisturbed the history of imputation under section 212(c) or there was no clear intent to destroy the availability of imputation, and that the change of language had a separate and distinct purpose than to affect imputation. Yet, the Court avoided addressing this *Chevron* first prong issue, skipping to the second prong by indicating that "the Board's approach is consistent with the statute's text" claiming that "respondents tacitly concede[d]" this point.<sup>199</sup> Stating that the statute is silent as to imputation, a *Chevron* second prong issue, the court focused on the meaning of "the alien," distinguishing it from "the alien or one of his parents," suggesting that had Congress intended for the former term to carry the meaning of the latter, it would have used the latter language. However, this argument belies the fact that former section 212(c) also used arguably narrow language, referring to those eligible for a waiver as "[a]liens lawfully admitted for permanent residence." Were the Court's reasoning and the government's argument applied to this language, it would necessarily exclude a child who himself was not a LPR from qualifying for the 212(c) waiver. In section 212(c) cases, the basis for permitting imputation was the meaning of domiciliary, and had nothing to do with whether the child was an "alien[] lawfully admitted for permanent residence." As such, there is more to the

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196. The cases were argued on January 18, 2012, with respondents arguing separately.

197. Transcript of Oral Argument, *supra* note 44, at 31-32, 38-39, 41-42, 44.

198. *Martinez Gutierrez*, 132 S. Ct. at 2014-15.

199. *Id.* at 2017. The text of a statute is the primary clue to Congress's intent. Thus, if the agency's interpretation is consistent with the text, usually the agency's interpretation parallels congressional intent.

story than simply the term used to describe the individual who has applied for relief. However, given respondents' arguments, consistent with this point,<sup>200</sup> the Court indicated that reliance on imputation in former 212(c) and the lack of a clear statement by Congress to eradicate it was unfounded since Congress did not merely reenact section 212(c) "without relevant change."<sup>201</sup>

The Court also rejected respondents' arguments that "family unity" would be thwarted, indicating that such are not the "INA's only goals . . . pursue[d] . . . to the *n*th degree."<sup>202</sup> Further, although recognizing other statutes where the BIA had imputed "parental attributes" to children<sup>203</sup> even where those statutes are silent as to imputation, the Court reasoned under *Escobar* that "the Board imputes matters involving an alien's state of mind, while declining to impute objective conditions or characteristics."<sup>204</sup> Thus, the practical effect after the Court's decision of Congress's change from INA 212(c)'s "domicile" (state of mind) to "residence" (objective condition or characteristic) is to remove the availability of imputation.

Finally, the Court rationalized the BIA's explanation that to allow imputation in CoR cases would create administrative anomalies, by "permitting even those who had not obtained LPR status—or could not do so because of a criminal history—to become eligible for [C]ancellation of [R]emoval."<sup>205</sup> This thinly veiled justification by the BIA is without merit; CoR for LPRs is only available to individuals who at time of application possess their own LPR status. Had the Court allowed imputation of parental time, all prospective beneficiaries would still need to be LPRs in some capacity in order to apply for LPR CoR and the Court's ruling could have been narrowly tailored to reflect that fact, based not only on the BIA's concerns but on the differences between CoR and other forms of relief or status grant.

The Court's rejection of the Ninth Circuit's imputation rule and affirmation of the BIA's inflexible policy has grave implications for prospective cancellation applicants,

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200. *Id.* at 2017-18 ("[T]he Board's history of permitting imputation under similarly 'silent' statutes supports this construction" and "none of this language 'forecloses' imputation.").

201. *Id.* at 2018 ("[T]h[e] alteration" of the seven-year domicile rule to a seven-year post-admission rule and five-year residence rule "dooms respondents' position, because the doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change.").

202. *Id.* at 2019.

203. INA § 212(k), 8 U.S.C. § 1182(k) (2010) (permitting parent's knowledge of inadmissibility or lack thereof to be imputable to child); INA § 211(b), 8 U.S.C. § 1181(b) (2010) (permitting parent's abandonment or non-abandonment of LPR status to be imputable to child).

204. *Escobar*, 24 I & N Dec. at 233-34 n.4.

205. *Martinez Gutierrez*, 132 S. Ct. at 2021.

undocumented and newly documented children with LPR parents, and immigration practitioners. Each individual, regardless of age, emancipation, dependency, is a distinct person for purposes of immigration status and admission. Similarly, under the Supreme Court's recent ruling, a child or recently emancipated adult cannot benefit from a parent's legal permanent resident status or lawful admission apart from the parent actively transferring a benefit to the child by way of family-based immigrant petition for LPR status. If the LPR parent declines or is unable to do so, the five- and seven-year clocks will not start until the child is admitted and becomes a LPR, both of which may not occur until after the child emancipates. Subsequently, if the recent adult is put in removal proceedings unless he or she can independently satisfy the requirements for relief from removal, he or she will be left without recourse. Regardless of whether imputation is allowed in the future, practitioners need to remind clients who are applying for LPR status that they need to include any potential and eligible dependents at the time of application; that they should file petitions as soon as possible to start the five- and seven-year clocks; and based on the current law, delaying or deferring the application for a dependent impacts the start date for Cancellation of Removal, if ever needed, because only the dependent's time and status counts.

## IX. IS THIS THE END OF THE ROAD?

### A. *Congress and the Administration Have the Power to Change Course*

As with all statutory provisions, if Congress believes that the judiciary has misinterpreted or misapplied the rule or intent thereof, Congress is free to modify, clarify, or otherwise restate the specific rule and contexts in which it should be applied. Similarly, as the branches of the Department of Homeland Security are charged with effecting admission and removal policies, the Administration has the power to direct the agency's priorities and guidelines. Given the effect that the Supreme Court's resolution of *Holder v. Martinez Gutierrez* and *Holder v. Sawyers* will have on legalized individuals who were undocumented as children, at minimum, either Congress or the Administration needs to explicitly provide an imputation rule or policy for CoR, and more generally, Congress should resolve the "domicile" versus "residence" issue as it relates to imputation.

Congress and the Obama Administration have already demonstrated leniency and flexibility regarding undocumented children, those who have great potential to contribute to U.S. society, and those who are not dangerous threats to the country, particularly individuals who have lived in the U.S. for practically

their whole lives.<sup>206</sup> While all LPR CoR applicants likely have criminal records, since they have done something to trigger their removability,<sup>207</sup> this fact should not deter Congress from permitting imputation, particularly for individuals who were “brought to the US through no fault of their own as children.”<sup>208</sup> The CoR statute contemplates that LPRs seeking that form of relief from removal will not necessarily have clean criminal histories, and Congress has already decided that only LPRs who have committed enumerated offenses labeled as Aggravated Felonies<sup>209</sup> should be statutorily barred from CoR based on their criminal history. Furthermore, if Congress and the Obama Administration are willing to extend a temporary, but renewable form of amnesty to undocumented young people, these lawmakers should be even more so willing to permit relief from removal for ex-undocumented young people; people like Carlos and Damien who have substantially strong ties to the U.S. by nature not only of how long they have lived here, but that they are LPRs. Further, the suggested imputation rule is specific and narrow, and could be

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206. See Development, Relief, and Education for Alien Minors (DREAM) Act of 2009 & DREAM Act of 2010, H.R. 1751, H.R. 6327, H.R. 6497, S. 729, S. 3827, S. 3963, S. 3992, 111th Cong. (2009-10); Memorandum from John Morton, Director of Immigration and Customs Enforcement (ICE), to All Field Office Directors, All Special Agents in Charge, All Chief Counsel, (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (stating that Department of Homeland Security, Immigration and Customs Enforcement resources should be focused on deporting undocumented immigrants who are dangerous criminals, over individuals with no criminal records, and ICE prosecuting attorneys are permitted to exercise discretion by either dismissing or opting not to prosecute cases warranting that discretion). This was not a “new” policy. In fact, in June 2010, a memorandum from then Assistant Secretary Morton cautioned ICE officers to exercise “[p]articular care . . . when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens.” Memorandum from John Morton, Assistant Secretary of ICE, to All ICE Employees (June 30, 2010), *available at* [http://www.ice.gov/doclib/detention-reform/pdf/civil\\_enforcement\\_priorities.pdf](http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf). In June 2012, the Obama Administration extended the Morton Memo’s prosecutorial discretion policy directive by sheltering about 880,000 young people (would be DREAM Act applicants) from deportation and permitting eligibility for a work permit. See Kevin Loria, *DREAM Act stalled, Obama halts deportations for young illegal immigrants*, THE CHRISTIAN SCI. MONITOR, June 15, 2012, <http://www.csmonitor.com/USA/Politics/2012/0615/DREAM-Act-stalled-Obama-halts-deportations-for-young-illegal-immigrants-video> (reporting that Homeland Security Secretary Janet Napolitano stated that while the policy will not grant any permanent immigration status, “young people who were brought to the US through no fault of their own as children and who meet certain criteria will be eligible to receive deferred action for a period of 2 years and that period will be subject to renewal.”).

207. INA § 237.

208. Loria, *supra* note 206 (quoting Homeland Security Secretary Janet Napolitano).

209. INA § 101(a)(43); INA § 240A(a)(3).

implemented either by Congress via statutory process, or by the Administration via a policy directive.

*B. Change Comes from Within (the Agency—U.S.C.I.S.)*

While an explicit imputation rule would benefit individuals who have already received their LPR status, but could potentially be removed for filing the five- and seven-year requirements in LPR CoR due to parental filing delays, this rule does nothing for currently undocumented children of LPR parents. The rule would only help them in the event they were in removal proceedings after receiving their own LPR status.<sup>210</sup> To assist in "documenting" the many undocumented children, some of whom are children of LPRs and are thus eligible for LPR status as well, the Department of Homeland Security, U.S. Citizenship and Immigration Services<sup>211</sup> could level the playing field by extending the existing fee waiver application. U.S.C.I.S. could permit an undocumented child of LPR parentage to apply for fee waiver for the I-130, Petition for Alien Relative, and I-485, Application to Register Permanent Residence or Adjust Status, if the child is able to demonstrate inability of the parents to pay<sup>212</sup> the requisite fees<sup>213</sup> and the child would meet the imputation rule or definition if the child was a LPR adult. This second criteria, tying the fee waiver eligibility to the suggested imputation rule, would ensure that children eligible for the fee waiver must be physically present in the U.S. living with their LPR parent at time of application and when the parent had received his or her LPR status.<sup>214</sup> Children who are living abroad with other relatives, living in the U.S. with other non-custodial relatives, or otherwise unable to prove that they were living with their LPR parent in the U.S. at the time the parent received the

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210. The imputation rule does not benefit an individual who is not a LPR, because the rule only provides for modifications to the start date and does not confer any status the individual did not already have. If the individual is not a LPR, then he must apply for non-LPR CoR, for which this specific imputation rule is inapplicable. It is arguable that no imputation rule should be allowed for non-LPR CoR, since to permit imputation there would be akin to permitting imputation in TPS cases (which is not done), and would result in the conferring of immigration status on the individual.

211. U.S. Citizenship and Immigration Services (U.S.C.I.S.) is the agency office responsible for immigration benefits.

212. *Form I-912*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/> (click on "Forms", then "Request for Fee Waiver"); *Form I-912P*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/> (click on "Forms", then "HHS Poverty Guidelines for Fee Waiver Request").

213. As of June 2012, the filing fee for the I-130 is \$420, and the filing fee for the I-485 is \$985, plus \$85 for biometrics. *See Forms*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/> (discussing fees) (click on "Forms"). If the beneficiary is under the age of 14, there is no biometrics fee. *Id.*

214. Similar to Carlos, but unlike Damien.



green card<sup>215</sup> would all be ineligible for the fee waiver. Allowing a fee waiver for the adjustment of status to LPR process is not unheard of. The agency already allows a fee waiver for Special Immigrant Juveniles (children who are in the U.S. and deemed to be orphans) and VAWA<sup>216</sup> applicants, among others.<sup>217</sup> Providing a fee waiver in this circumstance is not only consistent with the current policies favoring undocumented children, but also encourages commitment to U.S. society and permanency and disclosure of physical presence in the U.S. (decreasing the undocumented population).

#### IX. CONCLUSION

After the U.S. Supreme Court's resolution of the imputation question in *Martinez Gutierrez* and *Sawyers*, present undocumented children and LPR adults who were undocumented as children face one more obstacle. It is now up to lawmakers to explicitly provide for imputation of parental time in residence and date of LPR admission, which will reinstate the full extent of CoR's intended effect as a means of relief for individuals with substantial ties to the U.S.

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215. This last category would discourage LPRs from bringing in undocumented children after receiving the green card solely for the purpose of avoiding the filing fees.

216. Violence Against Women Act of 1994, 42 U.S.C. §§ 13925-14045D (2010).

217. See *Fee Waiver Guidance*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/> (discussing fee waivers) (click on "Forms", then "Fee Waiver Guidance" under "Fees" in right column). There is also no fee for the I-485 if the applicant is admitted to the U.S. as a refugee, but this is different from a fee waiver. *Id.*