U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: JOSEPH, ROBERSON

A 078-360-606

Date of this notice: 11/18/2013

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.
Greer, Anne J.
Pauley, Roger

TranC
Userteam: Docket

File: A078 360 606 - New York, NY

Date: NOV 18 2013

In re: ROBERSON JOSEPH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David M. Stern, Esquire

ON BEHALF OF DHS: Lawrence Arturo
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Waiver of inadmissibility under section 212(h)

By an order dated July 15, 2010, an Immigration Judge denied the respondent's application for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1182(h). The respondent, a native and citizen of Haiti, has filed a timely appeal of that decision. The appeal will be sustained and the record remanded to the Immigration Court.

This Board reviews an Immigration Judge's factual findings under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Hui Lin Huang v. Holder*, 677 F.3d 130, 134-35 (2d Cir. 2012); *Padmore v. Holder*, 609 F.3d 62, 66-67 (2d Cir. 2010). We review all remaining issues, including issues of law, discretion, and judgment, under a de novo standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii). There is no contention of clear error in any of the facts discussed in this opinion.[1]

I. FACTUAL AND PROCEDURAL HISTORY

The respondent first attempted to enter the United States on or around February 4, 1991, at the age of 17 (I.J. at 1-2, 5; Tr. at 74; Exh. 3-2; Exh. 3-3). Although the respondent was not then

[1] The Immigration Judge did not explicitly address the credibility of the respondent or his supporting witness (I.J. at 5). In the absence of an explicit negative finding, the REAL ID Act affords all witnesses with a presumption of credibility on appeal. *See* section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C). As that presumption has not been rebutted in this case, we shall credit the testimony of the respondent and his supporting witness.

admitted, he was, on February 21, 1991, paroled into this country pursuant to section 212(d)(5)(A) of the Act, 8 U.S.C. § 1182(d)(5)(A) (I.J. at 2, 5; Tr. at 169-72; Exh. 3-1). This initial period of parole ended on August 21, 1991 (I.J. at 2; Exh. 3-1).

According to the findings of the Immigration Judge, the respondent then proceeded to renew his parole approximately every 3 months until he eventually sought adjustment of status pursuant to the Haitian Refugee Immigration Fairness Act of 1998 ("HRIFA") (I.J. at 5-7; Tr. at 171-75). *See generally* 8 C.F.R. 1245.15 (discussing adjustment of status under HRIFA). He filed his application for adjustment of status on March 27, 2000 (I.J. at 2; Exh. 4-2). The application was approved on November 7, 2003, at which time the respondent was admitted to the United States as a lawful permanent resident ("LPR") (I.J. at 2, 5; Tr. at 5, 9-10, 169; Exh. 4-2).

Thereafter, on July 20, 2005, the respondent was convicted of possession of counterfeit Federal Reserve Notes with intent to defraud, a violation of 18 U.S.C. § 472, and sentenced to time served (I.J. at 2; Tr. at 5, 9-10; Exh. 5B; Exh. 2; Exh. 1). The respondent later traveled abroad and was detained, on August 18, 2007, by the Department of Homeland Security ("DHS") when he attempted to return to the United States (I.J. at 2, 5; Tr. at 146-47; Exh. 4-1; Exh. 1). The DHS issued a Notice to Appear the next day, charging the respondent with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act (I.J. at 2; Exh. 1).[2]

A prior Immigration Judge subsequently sustained the charge, after which the respondent sought to apply for a waiver of inadmissibility under section 212(h) of the Act (I.J. at 2; Tr. at 12-13). The DHS argued that the respondent had not lawfully resided continuously in the United States for 7 years prior to the commencement of proceedings, as required for applicants for section 212(h) relief who have previously been admitted as LPRs. The respondent contended, in turn, that his time as a parolee should be counted toward his time in lawful continuous residence.

The current Immigration Judge denied the respondent's waiver application, concluding that a parolee cannot accrue *any* period of lawful residence because he is not considered to be "within the United States" for purposes of this nation's immigration laws (I.J. at 6). Citing *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008), *aff'd, Rotimi v. Holder*, 577 F.3d 133 (2d Cir. 2009), the Immigration Judge likewise found the temporary nature of parole to indicate that a parolee cannot be found to be lawfully residing in this country for section 212(h) purposes (I.J. at 6-7). Consequently, the Immigration Judge determined that the respondent's time in continuous lawful residence did not commence until he adjusted his status to an LPR in November 2003. Therefore,

[2] Under the statute, an LPR returning from a trip abroad is generally not treated as an applicant for admission and consequently is subject only to the deportability rather than the inadmissibility grounds. However, an exception pertains when, *inter alia*, the alien has committed an offense identified in section 212(a)(2) of the Act and has not subsequently been granted relief under section 212(h) or section 240A(a) of the Act. *See* section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v); *see also Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); *see generally Matter of Valenzuela-Felix*, 26 I&N Dec. 53, 54-65 (BIA 2012) (addressing the scope of section 101(a)(13)(C)(v) of the Act).

he held the respondent had not accrued the requisite 7 years of such residence as of the time of initiation of the removal proceedings in August 2007 (I.J. at 8).[3]

II. ISSUE

The question presented is whether time spent in the United States pursuant to a grant of parole under section 212(d)(5)(A) of the Act ("parole") may be counted toward the time an alien has "lawfully resided continuously in the United States" for purposes of the restriction on eligibility for a waiver of inadmissibility under section 212(h) of the Act that applies to aliens who previously have been admitted to the United States as LPRs.

III. ANALYSIS

A. Matter of Rotimi

Section 212(h) of the Act permits the Attorney General, in his discretion, to waive various grounds of inadmissibility, including section 212(a)(2)(A)(i)(I) of the Act. While an inadmissible LPR may seek to waive the applicable ground of removability, his capacity to do so is not without limits. In particular, section 212(h) provides in pertinent part that:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . the alien has not *lawfully resided continuously in the United States* for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

(Emphasis added).

In *Matter of Rotimi*, *supra*, we examined whether an alien had "lawfully resided continuously in the United States" for purposes of section 212(h) of the Act during those periods in which he or she was applying for asylum or adjustment of status and lacked any other basis for claiming lawful residence. We found the phrase "lawfully resided" to be ambiguous, and held that an alien cannot begin accruing lawful residence by merely requesting an immigration benefit or by establishing the existence of some impediment to his or her actual physical removal from the United States. *See id.* at 568, 571-78; *see generally Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1259 (11th Cir. 2008) (deferring to the Board's interpretation of the phrase "lawfully resided continuously"). Instead, the appropriate inquiry examines whether the alien has received a *grant* of a specific immigration status, benefit, or other privilege that permits him or her to remain

[3] Aside from the issue of his continuous lawful residence in the United States, the respondent's eligibility for a section 212(h) waiver is not in dispute (I.J. at 5; Tr. at 228-30). The DHS, for instance, has not contended that the respondent's criminal conviction comes within the bar for aggravated felons.

in this country. *See id.* It is for that reason that we considered a nonimmigrant's time in the United States to be a period of *lawful* residence, despite the temporary period of stay that accompanies a grant of such status. *See id.* at 572, 576-77.

Here, unlike in *Rotimi*, the time that the respondent seeks to count toward his period of continuous lawful residence was initiated by an actual grant of an immigration benefit—parole. As with a nonimmigrant, an alien cannot become a parolee without first obtaining authorization from an immigration official. *See* section 212(d)(5) of the Act; 8 C.F.R. § 212.5. In addition, current parolees can obtain a variety of other immigration-related privileges, including adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). *See also* 8 C.F.R. § 1245.1(a). Depending on his or her length of time as a parolee, an alien may even constitute a "qualified alien" for purposes of eligibility for Federal public benefits.[4] *See* 8 U.S.C. § 1641(b)(4).

A grant of parole nevertheless is in many ways distinguishable from other forms of immigration status, benefit, or other privilege. The Immigration Judge focused on these differences in reaching his conclusion that the respondent was statutorily precluded from establishing his eligibility for relief. Given its unique features, we believe it appropriate to begin our analysis with an examination of the purpose and statutory development of parole.

B. The History of Parole

By at least the early 1920s, and probably before that, aliens seeking admission to the United States began seeking permission to *physically* enter the nation while they awaited the adjudication of their cases. *See, e.g., Kaplan v. Tod,* 267 U.S. 228, 229-31 (1925); *United States ex rel. Fink v. Tod*, 1 F.2d 246, 247 (2d Cir. 1924), *rev'd,* 267 U.S. 571 (1925); *see also Matter of L-Y-Y-*, 9 I&N Dec. 70, 71 (A.G., BIA 1960); *Matter of R-*, 3 I&N Dec. 45, 46 (BIA 1947). While there was no legal mechanism for these "parole" requests, they were regularly granted based on emergent or humanitarian circumstances. This was a significant benefit for the aliens, who often waited years to learn the final outcome of their applications for admission. There was, however, one way in which parole status was considered to be disadvantageous. Inasmuch as

[4] The term "qualified alien" is defined at 8 U.S.C. §§ 1641(b) and (c), and it includes LPRs, asylees, refugees, aliens who have been parolees for at least one year, and "Cuban and Haitian entrants." Notably, unless they meet an exception to the bar, qualified aliens who physically entered the United States on or after August 22, 1996, are currently barred from obtaining "federal means-tested public benefits" for a period of 5 years. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (as codified at 8 U.S.C. § 1612). While parolees are generally not exempt from the bar, "Cuban and Haitian entrants" are excluded, and that group includes any national of Haiti or Cuba who was *paroled* into the United States on or after October 10, 1980. *See* 8 U.S.C. §§ 1612(a)(2)(A)(iv), 1641(b)(7); *see also* 8 C.F.R. § 212.5(h)(1) (providing that any Cuban or Haitian national who was paroled into the United States on or after October 10, 1980, shall be considered to be a "Cuban and Haitian entrant," as that term is defined by section 501(e)(1) of the Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, 94 Stat. 1799); *see generally* 45 C.F.R. §§ 401.2, 401.12 (discussing the Cuban/Haitian Entrant Program).

parolees constructively remained outside our national borders, they were denied many of the immigration rights and benefits available to aliens considered to have already accomplished a *legal* entry into the country. *See id.*

For instance, in *Kaplan v. Tod, supra*, the Supreme Court denied the case of Esther Kaplan, a minor-aged alien who had been denied admission and ordered excluded but then was allowed to live with her father. She sought to become a United States citizen ("USC") by virtue of her father's naturalization. *Id.* at 229. At the time of her application for citizenship, a parent's naturalization could affect a minor child only if the child was "dwelling in the United States." *See id.* at 230. The Court focused on this requirement, concluding that although Esther Kaplan had been living here for more than 9 years, she could not become a USC because "[s]he was still in theory of law at the boundary line and had gained no foothold in the United States." *Id.*

Parole was eventually codified at section 212(d)(5) by the Immigration and Nationality Act of 1952 ("the 1952 Act"), Pub. L. No. 82-414, 66 Stat. 163 (1952), which, at the time, read as follows:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

In so providing, Congress gave statutory force and effect to the prior administrative practice. *See, e.g.,* S. Rep. No. 82-1137, at 12-13 (1952); *see also* Revision of Immigration, Naturalization, and Nationality Laws, Joint Hearings Before the Subcomm. of the Comm. on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., 713 (1951) (statement of Peyton Ford, Deputy Attorney General). The 1952 Act also solidified the legal distinction between aliens who were considered to have accomplished a legal entry into the United States and parolees who, while inside this country as a matter of fact, were still legally considered to be at the border. *Compare, e.g., Matter of K-*, 9 I&N Dec. 143, 148-58 (A.G. 1961, BIA 1959); *Matter of M-B-*, 8 I&N Dec. 406, 406-08 (BIA 1959); *with Matter of Pierre et al.*, 14 I&N Dec. 467, 468 (BIA 1973); *see generally Cruz-Miguel v. Holder*, 650 F.3d 189, 196 (2d Cir. 2011) (noting that the term "entry" was previously defined as "any coming of an alien into the United States, from a foreign port or place").

Aliens in the former category were subject to "deportation" proceedings, whereas those in the latter were placed in "exclusion" proceedings. The Supreme Court focused on this bright-line distinction in *Ma v. Barber*, 357 U.S. 185 (1958). The case involved Leng May Ma, a parolee, who sought to apply for withholding of deportation pursuant to former section 243(h) of the Act ("withholding of deportation"), 8 U.S.C. § 1253(h). The Court held that she was barred from seeking such relief because, as an excludable alien, she did not qualify as someone "within the United States," at that time a requirement for withholding of deportation, despite the fact that she

had been living here for almost 3 years at the time of her initial application.[5] *See id.* at 186-87; *see also Rogers v. Quan*, 357 U.S. 193, 194-96 (1958); *Ascencio-Rodriguez v. Holder*, 595 F.3d 105, 109 n.3 (2d Cir. 2010); *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 855 (9th Cir. 2004). As the Court stated, a grant of parole did nothing to alter Leng May Ma's status as an applicant for admission; rather, it was "simply a device through which needless confinement is avoided while administrative proceedings are conducted."[6] *Ma v. Barber*, *supra*, at 190.

Since the Supreme Court's decision in *Ma v. Barber*, *supra*, exclusion and deportation proceedings have been merged into a single set of "removal proceedings." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546. The definition of "entry" has also been replaced with that of "admission." *See Matter of Valenzuela-Felix*, *supra*, at 55. Irrespective of these and other changes to the Act, parole remains a temporary form of immigration status designed to permit an alien to come into the United States on a case-by-case basis for urgent humanitarian reasons or significant public benefit. *See* section 212(d)(5) of the Act; 8 C.F.R. § 212.5; *see also Cruz-Miguel v. Holder*, *supra*, at 193, 201-02; *Matter of Castillo-Padilla*, *supra*; *Matter of G-A-C-*, 22 I&N Dec. 83, 87, 89 (BIA 1998); *see generally* 8 C.F.R. § 1245.1(d)(1)(v) (defining "lawful immigration status," for purposes of rendering inapplicable the bar to adjustment of status at section 245(c)(2) of the Act, as including "parole status which has not expired, been revoked or terminated"); *Matter of Blancas*, 23 I&N Dec. 458, 460 (BIA 2002) (holding that the term "status" denotes "someone who possesses a certain legal standing, e.g., classification as an immigrant or nonimmigrant").

C. Section 212(d)(5) of the Act

Currently, the parole provision reads as follows:

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[5] At the time of the Supreme Court's decision in *Ma v. Barber*, *supra*, section 243(h) of the Act read as follows:

> The Attorney General is authorized to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

(Emphasis added).

[6] The form of parole to which the Supreme Court referred in *Ma v. Barber*, *supra*, is now more similar to conditional parole under section 236(a)(2)(B) of the Act, 8 U.S.C. § 1226(a)(2)(B), than parole pursuant to section 212(d)(5) of the Act. For instance, section 236(a)(2)(B) of the Act does not provide for any authorization of aliens to come into the United States, temporarily or otherwise. *See Matter of Castillo-Padilla*, 25 I&N Dec. 257, 259 (BIA 2010). "The alien is merely released from detention pending a decision on whether the alien is to be removed from the United States." *Id.* (internal quotations omitted).

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion *parole into the United States* temporarily under such conditions as he may prescribe only on a case-by-case basis for *urgent humanitarian reasons or significant public benefit* any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.[7]

Section 212(d)(5) of the Act (emphasis added); *see also* 8 C.F.R. § 212.5; *Matter of Castillo-Padilla*, *supra*. A parolee's authorization to enter and remain here is tied to the specific purpose for which his or her parole was granted; therefore, he or she must return to the custody of immigration officials once that purpose has been served. *See id.* The alien's case is then dealt with in the same manner as any other applicant for admission. *See id.*; *see generally Matter of Valenzuela-Felix*, *supra*, at 55-57; *Matter of Carrillo*, 25 I&N Dec. 644, 652 (BIA 2011). Thus, although a grant of parole will permit an alien to physically live in the United States for a certain period of time as matter of fact, it does not qualify as a legal admission to this country.[8] *See*

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[7] The language of section 212(d)(5)(A) of the Act appears to vest the Attorney General with the authority to parole aliens into the United States. However, following the dissolution of the Immigration and Naturalization Service ("INS") and the creation of the DHS, the authority was delegated to the Secretary of Homeland Security. *See* 8 C.F.R. § 212.5(a); *see also Cruz-Miguel v. Holder*, *supra*, at 194 n.10 (noting that parole authority under section 212(d)(5)(A) of the Act was transferred from the INS to the DHS by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135); *Matter of United Airlines Flight UA802*, 22 I&N Dec. 777, 782 (BIA 1999) (concluding that the Board could not review the INS's decision to parole an alien into the United States because the DHS had exclusive jurisdiction to parole under 8 C.F.R. § 212.5(a)).

[8] At the time of the respondent's initial period of parole in 1991, section 212(d)(5)(A) of the Act was worded in the following manner:

> [t]he Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for *emergent reasons or for reasons deemed strictly in the public interest* any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Section 212(d)(5)(A) of the Act (1991) (emphasis added). While the wording of the statute is largely the same, Congress has amended the language pertaining to the basis for a grant of parole.

section 101(a)(13)(B) of the Act, 8 U.S.C. § 1101(a)(13)(B); *see also Cruz-Miguel v. Holder*, *supra*, at 198; *Tanov v. INS,* 443 F.3d 195, 201 (2d Cir. 2006); *Matter of G-A-C-*, *supra*.

It is this dichotomy between permission to come into the United States and the absence of an admission that makes parole distinguishable from other forms of immigration status, benefit, or other privilege. It is also a key reason why we find the phrase "lawfully resided continuously in the United States" within section 212(h) of the Act to be ambiguous insofar as it relates to an alien who has been paroled under section 212(d)(5) of the Act. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion"). It is now our task to resolve that ambiguity by determining whether an alien's actual legal admission into the United States, as opposed to a grant of parole, is a necessary prerequisite to his or her ability to begin a period of *residence* for the purposes of section 212(h) of the Act.

D. Residence Pursuant to Section 101(a)(33) of the Act

Section 101(a)(33) of the Act defines the term "residence" as an alien's "principal, *actual dwelling place in fact*, without regard to intent." (Emphasis added); *see also Matter of Rotimi*, *supra*, at 574; *Matter of Blancas*, *supra*. The term was first placed into immigration law by the 1952 Act, the legislative history of which demonstrates that Congress intended the inquiry to be a *factual* question rather than a legal one. *See, e.g.,* S. Rep. No. 82-1137, at 4-5 (1952); H.R. Rep. No. 82-1365, at 33 (1952). Consequently, we conclude that any time an alien spends in this country under a grant of section 212(d)(5) parole will qualify as a period of lawful residence—*i.e.*, a period when the alien is officially permitted to maintain a dwelling place "in fact" in the United States—for the purposes of section 212(h), and that an actual admission is not required.[9]

[9] We recognize that we are construing section 212(h) of the Act differently from the provision for cancellation of removal for lawful permanent residents; however, we believe this to be appropriate given the actual differences in the two provisions. Section 240A(a)(2) of the Act requires an applicant to establish that he or she has continuously resided in the United States for 7 years after having been *admitted* in any status, while section 212(h) of the Act sets forth no requirement that the 7 years of continuous residence commence with an admission. *Compare* section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2), *with* section 212(h) of the Act. In *Matter of Rotimi*, *supra*, we held that another distinction between section 212(h) and section 240A(a)—i.e., that the former requires continuous "lawful" residence while the latter does not—warranted a conclusion that the former but not the latter required continuous maintenance of lawful status without having "fallen out." *Id.* at 573, distinguishing *Matter of Blancas, supra*, at 461. Thus, to require an admission for purposes of section 212(h) merely because it is required under section 240A(a) would be inconsistent with *Rotimi*.

We must take into account the factual focus of the statutory definition of "residence," as well as the evolution of the concept of parole since the time of *Ma v. Barber* to denote more than a mere device for avoiding confinement during removal proceedings. As previously discussed, parole is now treated as a lawful immigration status for purposes of determining the applicability of the bar to adjustment of status at section 245(c)(2) of the Act. *See* 8 C.F.R. § 1245.1(d)(1)(v). Indeed, the need for *either* a past admission *or* a past grant of parole is one of the threshold requirements under the general adjustment provision at section 245(a) of the Act, and conversely, the *absence* of *either* a past admission *or* a past grant of parole is usually critical to a determination of inadmissibility for unauthorized presence in the United States under section 212(a)(6)(A)(i) of the Act.

If a grant of parole under section 212(d)(5) today were still viewed as not affecting an alien's status for any purpose, as was arguably the case during the time of *Ma v. Barber*, it is difficult to fathom why the presence or absence of such a grant would assume such importance under the foregoing provisions. We instead are persuaded that to treat presence in the United States under a grant of section 212(d)(5) parole as qualifying as "residence" for the limited purpose of eligibility for a waiver under section 212(h) of the Act would be consistent with the treatment of parole under other provisions, and would not fundamentally conflict with the concept of parole as a temporary authorization of physical presence without admission. Accordingly, all that remains to be decided is whether, under the facts of this case, the respondent adequately established the requisite 7 years of *continuous* lawful residence in the United States. We conclude that he did.

The respondent was first paroled into this country in February 1991 (I.J. at 2, 5; Tr. at 74; Exh. 3-2; Exh. 3-3). He had to regularly renew his authorization to remain here. As the Immigration Judge found, and the DHS has not meaningfully disputed on appeal, the record does appear to reflect that he remained a parolee until he adjusted his status to that of an LPR in November 2003 (I.J. at 2, 5-7; Tr. at 5, 9-10, 169, 171-75; Exh. 4-2). The respondent then continued to accrue lawful residence until the initiation of his removal proceedings in August 2007 (I.J. at 2, 5; Tr. at 146-47; Exh. 4-1; Exh. 1). Given these facts, the respondent has adequately established that he may seek a waiver under section 212(h) of the Act.

In view of the foregoing, we will sustain the respondent's appeal and remand the matter to the Immigration Court.[10] Upon remand, the parties shall be given an opportunity to present

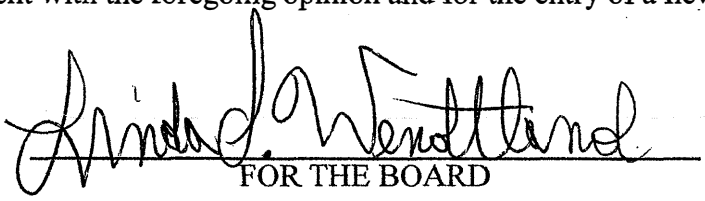
[10] The respondent also argues that he is eligible for relief because his adjustment of status does not constitute an "admission" for purposes of the reference in the "lawful continuous residence" language in section 212(h) to aliens previously "admitted" as LPRs, citing opinions from the United States Court of Appeals for the Fifth and Eleventh Circuits in support of his contention. *See Lanier v. U.S. Att'y Gen*, 631 F.3d 1363, 1366-67 (11th Cir. 2011); *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008); *see also Martinez v. Att'y Gen of U.S.*, 693 F.3d 408 (3d Cir. 2012); *Leiba v. Holder*, 699 F.3d 346, 355-56 (4th Cir. 2012); *Bracamontes v. Holder*, 675 F.3d 380, 386-87 (4th Cir. 2012); *Papazoglou v. Holder*, --- F.3d ----, 2013 WL 3991878, (7th Cir. Aug. 6, 2013); *cf. Hing Sum v. Holder*, 602 F.3d 1092, 1097 (9th Cir. 2010). *But see Matter of E.W. Rodriguez*, 25 I&N Dec. 784, (continued . . .)

further evidence pertaining to the respondent's application for a waiver under section 212(h) of the Act. The Immigration Judge should then consider the merits of that application, making all necessary findings of fact.

Based on these considerations, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

(. . . continued)
786-89 (BIA 2012). Given our disposition of the matter, we have no occasion to reach this argument.