Immigration Court: BIA

Case: ***Matter of Arrabally & Yerrabelly*****, 25 I&N Dec. 771 (BIA 2012)** **Date: August 16, 2012**

Adjudicated by: Wendtland, Greer, Pauley **Opinion:** Wendtland **Dissent:** Pauley

Tags: Advance Parole, departure, § 212(a)(9)(B)(i)(II), adjustment of status

Question Presented: "Whether the respondents, who left the [U.S.] temporarily under a grant of advance parole, thereby effected a 'departure,' which resulted in their inadmissibility under section 212(a)(9)(B)(i)(II)." 771

Holdings: "[W]e hold that an alien who has left and returned to the United States under a grant of advance parole has not made a 'departure . . . from the United States' within the meaning of section § 212(a)(9)(B)(i)(II) of the Act." 779

Rationale: "When section § 212(a)(9)(B)(i)(II) is understood in context, it becomes clear to us that Congress did not intend it to cover aliens—like the respondents—who have left and returned to the United States pursuant to a grant of advance parole." 775-76

Facts: (772-773) Husband and wife are natives & citizens of India. Husband became beneficiary of approved I-140 with priority date 4/27/2001 (so 245(i) eligible). While waiting for visa number, they traveled to India on Advance Parole.

Procedural History:

- **2008 USCIS:** Denied I-485s because they left country & returned & were now subject to 10-year bar.
- **2008 DHS:** Commenced removal proceedings
- **2009 EOIR:** IJ found them removable because of 10-year bar

Appeals to Statute & Precedent:

- **INA § 212(a)(9)(B)(i)(II):** Inadmissible if seeking admission after having been present for >1 year, departed, and seeking admission. (10-year bar)

- ***Matter of Lemus*****, 24 I&N Dec. 373, 376-77 (BIA 2007):** BIA gave "departure" a broad construction in the 10-year bar context. (IOW, not confined to "voluntary departure"). BIA still thinks this is true when respondent is leaving U.S. under their own steam, but that this term does not encompass a departure under advance parole. (775)

- ***Cheruku v. A.G.*****, 662 F.3d 198 (3d Cir. 2011):** affirming unpublished decisions concluding that advance parole leads to inadmissibility under INA § 212(a)(9)(B)(i)(II).

- ***Matter of G-A-C-*****, 22 I&N Dec. 83, 88 (BIA 1998):** advance parole

- **8 C.F.R. § 245.2(a)(4)(ii)(A):** advance parole

Relevant U.S. History:

- **Section § 212(a)(9)(B)(i)(II)** "was enacted pursuant to section 301(b) of the [IIRAIRA] of 1996."
- "The legislative history of section § 212(a)(9)(B)(i)(II) is rather sparse. Nevertheless, the manifest purpose of the provision (and of the related provisions surrounding it) is to 'compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the [U.S.] after committing such violations to be lawfully readmitted thereafter.'" 776 (q.)

Respondents' Arguments:

- "The respondents' first argument on appeal is that their departures from the United States under a grant of advance parole were not the sort of 'departures' that render aliens inadmissible under section 212(a)(9)(B)(i)(II) of the Act." 774

Discussion:

- "The terms 'depart' and 'departure' are employed in numerous different contexts throughout the Act, but they are not statutorily defined. This is understandable. It would be a daunting task for any statutory draftsman to supply a single comprehensive definition for terms of such broad and variable application." 774
- "We continue to espouse the view that an alien like the respondent in *Lemus I*—who accrued more than 1 year of unlawful presence in the United States and then departed of his own volition without having obtained advance permission to return—fell within the class of individuals that Congress intended to cover when it enacted section § 212(a)(9)(B)(i)(II). *See Lemus II*, 25 I&N Dec. 734." 775

- "Specifically, as this case illustrates, immigration adjudicators have interpreted our 'any departure' statement to cover departures made pursuant to a grant of advance parole." 775

- "Section § 212(a)(9)(B)(i)(II) thus places most aliens who are unlawfully present in the [U.S.] for a significant period of time on fair notice that if they leave this country—whether through removal, extradition, formal 'voluntary departure,' or other means—they will be unwelcome to return for at least 10 years thereafter. But the same cannot be said for the respondents, who left the [U.S.] and returned with Government authorization pursuant to a grant of advance parole." 776

- "Advance parole can be requested from abroad or at a port of entry, but typically it is sought by an alien who is already inside the United States and who wants to leave temporarily but fears that he will either be excluded as an inadmissible alien upon return or be deemed to have abandoned a pending application for an immigration benefit." 777

- "The DHS takes the position that a grant of advance parole does not technically authorize such an alien to *depart* from the United States. . . . But as a practical matter, the DHS is well aware that aliens who are inside the United States only request advance parole in order to facilitate foreign travel. By granting advance parole, the DHS thus understands that, as a discretionary humanitarian measure, it is telling the alien that he can leave the [U.S.] with assurance that his pending applications for immigration benefits

will not be deemed abandoned during his absence and 'that he will be *paroled* back into the [U.S.] upon return, under prescribed conditions, if he cannot establish that he is admissible at that time.'" 778 (q. *Matter of G-A-C-* at 88)

- "In short, **an undocumented alien's departure under a grant of advance parole is qualitatively different from other departures, because it presupposes both that he will be permitted to return to the United States thereafter and that he will, upon return, continue to pursue the adjustment of status application he filed before departing**." 778

- "A grant of advance parole before the alien's trip abroad simply provides him with a practical expectation that, so long as circumstances do not meaningfully change and the DHS does not discover material information that was previously unavailable, the DHS's discretion to parole him at the time of his return to a port of entry will likely be exercised favorably." 778n6

- "**We do not believe that Congress intended an alien to become inadmissible under section 212(a)(9)(B)(i)(II) and, by extension, ineligible for adjustment of status solely by virtue of a trip abroad that (1) was *approved* in advance by the [U.S.] Government on the basis of an application demonstrating the alien's qualification for and worthiness of the benefit sought, (2) presupposed the alien's *authorized return* thereafter, and (3) was requested solely for the purpose of *preserving* the alien's eligibility for adjustment of status**." 778

- "Applying section § 212(a)(9)(B)(i)(II) to such an alien vindicates none of the purposes for which the statute was enacted, largely defeats the regulatory purpose of preserving advance parolees' eligibility for adjustment of status, and has the paradoxical effect of transforming advance parole from a humanitarian benefit into a means for barring relief." 778-79

Commentary:

- There might be some circumstance under which even advance parole won't help you with the bans, e.g. if you have criminal convictions. But that does not apply in this case. 780