Immigration Court: BIA

Case: ***Matter of Delcarmen-Lara*, 29 I&N Dec. 830 (BIA 2026)** **Date:** August 13, 2026

Adjudicated by: Gorman, Montante, Gallow **Opinion:** Gorman

Tags: Advance Parole, departure, *Matter of Arrabally and Yerrabelly*, Motion to Reopen

Question Presented: Does departing the US on advance parole constitute a "departure" within the meaning of the statute?

Holdings: "A departure from the [US] pursuant to a grant of advance parole is a 'departure' within the meaning of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II)."

- *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), overruled.
- **This interpretation to be applied prospectively only.** 836
- Also – MTR is denied as time-barred and number-barred. 836-37

Rationale: "We now clarify that the term 'departure' under this section of the INA does not include an exception for aliens who leave the country temporarily under a grant of advance parole." 830

Facts: 830-31 El Salvador. Ordered removed 2006. Respondent with DACA reentered the U.S. using advance parole, and subsequently applied for AOS. Needs to reopen case in order to adjust.

History of the Case:

- 2006: Ordered removed.
- 2008: BIA affirmed.
- 2013: granted DACA.
- 2014: Approved I-130 filed by USC spouse.
- 2015: Filed MTR in order to submit 601A waiver.
    - BIA denied this as untimely. Waiver would be barred bcz of order of removal.
- May 27, 2025: Respondent filed MTR to pursue AOS after returning to US on advance parole in 2024.

Appeals to Statute & Precedent:

- **INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II):** inadmissibility based on departure & return after unlawful presence of > 1 year (10-year bar).
- **INA § 245(a), 8 U.S.C. § 1225(a) (2024):** adjustment of status statute: you have to be "admissible."
- ***Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), overruled here:** held that "an alien who leaves the [US] temporarily pursuant to a grant of advance parole does

not hereby make a 'departure . . . from the [US]' within the meaning of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2024)." 830

- ***Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007) ("*Lemus I*"):** "departure" could be any kind of departure (*Arrabally & Yerrabelly* clarified that Advance Parole was an exception)
- ***Matter of Lemus*, 25 I&N Dec. 734 (BIA 2012) ("*Lemus II*"):** affirmed ^^^
- ***Matter of Rodarte*, 23 I&N Dec. 905, 909 (BIA 2006):** "The unifying theme of section 212(a)(9) is that all its subparagraphs seek to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing such violations to be lawfully readmitted thereafter." (in *Delcarmen Lara* at 833)
- ***Cheruku v. U.S. A.G.*, 662 F.3d 198, 207 (3d Cir. 2011):** acknowledging that such departures may lead to "a harsh result."
- ***Matter of Briones*, 24 I&N Dec. 355, 367-68 (BIA 2007):** reference unclear here (834), but probably waivers of inadmissibility.
- ***Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted):** "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."
- ***Matter of Cordero-Garcia*, 27 I&N Dec. 652, 658 (BIA 2019):** Factors testing for retroactivity (see below)
- ***Matter of H-Y-Z-*, 28 I&N Dec. 156, 161 (BIA 2020):** "recognizing that equities acquired while remaining unlawfully in the United States after being ordered removed generally do not warrant discretionary reopening." (*Delcarmen Lara* at 837)

Relevant U.S. History: Trump 2.0.

- **1996:** Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) as source of statutory text under examination.
- ***Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012):** gave us the advance parole loophole for adjustment & exception to the "departure" rule

Discussion:

- **Plain language of the statute argument. 832**
  - "In examining the plain meaning of the statutory text, we find insufficient evidence that Congress intended to limit the definition of the word 'departure.'" 832
- "The statutory text does not contain limiting language that exempts certain departures from this definition." 833

- **Legislative history argument. 833**
  - "Insufficient evidence" that advance parole was in the minds of the legislatures, notwithstanding the possibility of a discretionary waiver by the A.G (INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v)) 833

  - Other extensions of AOS have been made "unambiguously." 833 (*Lemus I* at 378)
    - E.g. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193 ("NACARA"), *as amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997) – waiver of inadmissibility grounds
    - E.g. Haitian Refugee Immigration Fairness Act, tit. IX, Pub. L. No. 105-277, Stat. 2681-538 ("HRIFA") (1998) – waiver of inadmissibility grounds
    - "Congress's express provision of waivers of inadmissibility for NACARA and HRIFA adjustment applicants supports a conclusion that Congress did not intend a 'departure' under section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), to exclude advance parolees." 833-34

  - Other parts of the statute have "clarified the consequences of departures for advance parolees": 834
    - INA § 201(c)(4)(A), 8 U.S.C. § 1151(c)(4)(A) (2024): "specifying that numerical limitations for family-sponsored immigrants include aliens who were paroled into the United States 'who did not depart from the United States (without advance parole) within 365 days' or meet certain other conditions" 834
    - INA § 245A(g)(2)(B)(ii), 8 U.S.C. § 1255a(g)(2)(B)(ii) (2024): "providing that periods outside the United States pursuant to advance parole procedures shall not be considered as a period outside the country for purposes of continuous physical presence required for legalization" 834

  - Some parts of statute have clarified the effects of brief departures:
    - INA § 240A(d)(2), 8 U.SC. § 1229b(d)(2) (2024): providing that a departure from the United States 'for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days' will trigger a finding that an alien has failed to maintain continuous physical presence in the United States for certain cancellation of removal applicants"
    - INA § 244(c)(4), 8 U.S.C. § 1254a(c)(4) (2024): stating that continuous physical presence in the United States for aliens eligible for TPS will not be affected by 'brief, casual, and innocent' absences.

- "We presume that Congress acted intentionally in treating departures pursuant to advance parole differently throughout the INA. It is therefore important that Congress did not explicitly exempt advance parolees from the definition of 'departure in section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II)." 834

- INS / DHS interpretation used to treat advance parole as a "departure":
  - Between IIRIRA in 1996 and *Arrabally & Yerrabelly* in 2012, the INS / DHS interpreted "departure" under advance parole to mean the kind of departure that gets you penalized for trying to reenter after >1 year of unlawful presence. 834
  - "Documents authorizing advance parole also explicitly warned that parolees may be deemed inadmissible and ineligible for adjustment of status without a valid waiver." 835

- "This evidence further supports a conclusion that **the Board impermissibly construed** the definition of 'departure' under section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. § 1182(a)(9)(B)(i)(II), to include an exception for aliens who left the country pursuant to a grant of advance parole." 835 (emphasis added)

- Clarifies that this is just about departures under advance parole and does not address departures that occur by accident, deception, threat, or violence. *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. at 775. 835

- **Test for retroactivity: 836**
  - *Matter of Cordero-Garcia* factors:
    (1) Whether the particular case is one of first impression
    (2) Whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law
    (3) The extent to which the party against whom the new rule is applied relied on the former rule
    (4) The degree of the burden which a retroactive order imposes on a party
    (5) The statutory interest in applying a new rule despite the reliance of a party on the old standard.

  - "This case is not one of first impression. However, we determine that the first three factors in the test articulated above support applying our holding prospectively because we are explicitly overruling *Matter of Arrabally and Yerrabelly*, a longstanding Board precedent." 836

- Also, this is a "significant change" in the definition of "departure" (and many people have presumably relied on the *Arrabally & Yerrabelly* interpretation till now). 836

- **Therefore, the present interpretation will only be applied <u>prospectively</u>.** (Which means it might not have affected Delcarmen Lara, except that the BIA didn't let her reopen her case.)

Commentary:

- For 14 years (2012-2026), the BIA held that noncitizens who had entered illegally and who were eligible for advance parole could leave the U.S. briefly and return, thus achieving a lawful entry that allowed them to adjust status in the U.S. This process was based on an **exception** to the rule about departures, which normally would impose a penalty of many years for those who tried to reenter the U.S. after more than one year of unlawful presence. This exception was **explicitly articulated by the BIA** in *Matter of Arrabally and Yerrabelly* (2012).

- Here, the BIA takes issue with the fact that the exception wasn't originally articulated in the IIRIRA of 1996, which imposed the reentry penalties to discourage illegal reentries. Because Congress *could have* explicitly stated this exception to the rule in the IIRIRA but didn't, the BIA was wrong to state it for them in 2012.

- The decision clarifies that this interpretation will only be applied **prospectively**; however, the Board did not specify at what stage of the process current adjustment applicants must be in order to avoid trouble. IOW:
  - We understand that this does not apply to someone who has **already** been granted AOS after having returned on advance parole.
  - What about someone who has already been admitted on advance parole and…
    - …is **waiting for their interview?**
    - …has been **interviewed and is waiting for a decision?**
    - …**intends to apply** for adjustment, having relied on *Arrabally & Yerrabelly* for permission to do so?
  - What about someone **who exited the U.S. on advance parole before this decision was published and has yet to return**—what happens upon their reentry? (See below for thoughts about this)
  - If there's a denial at any of these stages based on *Delcarmen Lara*, there may be an appealable issue based on the applicant's **reliance** on the former interpretation of the INA.

- This decision seems to completely reconfigure what "advance parole" means, in that by making a "departure" under INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) a noncitizen with advance parole now exposes herself to the penalties of IIRIRA upon her attempt to reenter the country. IOW, since an advance parolee would return through a POE, won't they now be denied entry and penalized under the reentry bars instead? Or is advance parole now a legal fiction that allows a reentry that isn't really an entry? Then what happens to the reentry bar? If we're going to have a legal fiction at the reentry end of things, why wouldn't we reconsider whether the departure with advance parole is really a "departure"?
    - These may be academic questions, since to have standing to challenge this decision, a person would have to test the law by leaving the country and attempting to return; and that sounds pretty iffy. But maybe someone in the gray areas above ^^^ could advance an argument along these lines.