NON-DETAINED

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:)
)
OROZCO, Brian) File No.: A077 981 235
)
In Removal Proceedings)

GOVERNMENT'S BRIEF AND MOTION TO REMAND TO IMMIGRATION COURT

The Department of Homeland Security (Department) respectfully submits this brief subsequent to the reopening of the respondent's case by the Board of Immigration Appeals (Board) following the decision by the U.S. Court of Appeals for the Ninth Circuit in *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir.2008), *vacated by* 546 F.3d 1147 (9th Cir. 2008). For the reasons heretofore stated in this brief, the Department respectfully moves the Board to remand the respondent's case to the Immigration Judge (IJ) for further proceedings.

ISSUES PRESENTED ON REOPENING

I. Whether the respondent has met his burden of establishing that he was "admitted" to the United States within the meaning of the Immigration and Nationality Act (INA or Act).

II. Whether the respondent would have been "admitted" to the United States for purposes of the Act by purportedly obtaining entry through the use of a counterfeit permanent resident card.

PROCEDURAL HISTORY

In 2005, the respondent, Brian Orozco, was arrested by the U.S. Border Patrol and placed in removal proceedings as an alien present in the United States without being admitted or paroled under section 212(a)(6)(A)(i) of the Act. *Orozco*, 521 F.3d at 1070. The Department specifically alleged in the Notice to Appear (NTA) issued against the respondent that in 1996 he entered the United States at or near San Ysidro, California, without being admitted or paroled after inspection, i.e. by crossing the border illegally. *Id.* The Department later amended the NTA to charge the respondent with removability under section 237(a)(l)(A) of the Act as an alien inadmissible at the time of entry based on the respondent's uncorroborated claim that he presented himself for inspection with a counterfeit permanent resident card at the San Ysidro port of entry in 1996.

The IJ sustained the amended charge of removability. The respondent applied for adjustment of status, but the IJ denied that application. *Id.* The IJ held that the respondent is not statutorily eligible for adjustment of status, as he was not admitted" as required under section 245(a) of the Act. *Id.*

The respondent appealed the denial of his application for adjustment of status to the Board. The Board dismissed the respondent's appeal, but granted the respondent voluntary departure. The respondent filed a petition for review (PFR) with the Ninth Circuit Court of Appeals. The court denied the respondent's PFR, holding that the IJ and the Board were correct in their rulings that the respondent is ineligible for adjustment of status under section 245(a) of the Act because he did not lawfully enter the United States. *Id.* at 1072. The parties moved to reopen the case with the Board. The Board reopened proceedings and the Ninth Circuit subsequently vacated its decision. *See* 546 F.3d 1147. The proceedings currently remain reopened before the Board.

DISCUSSION

As the joint motion to reopen filed with the Board stated, there exists an incongruity between, on the one hand, the IJ's finding that the respondent is removable under section 237(a)(l)(A) of the Act as an alien "in and admitted to the United States" and inadmissible at the time of his entry in 1996 and, on the other hand, the IJ's conclusion that the respondent is ineligible for adjustment of status under section 245(a) of the Act because he was not "inspected and admitted."

For the reasons discussed more fully below, the Department intends to amend the NTA to charge the respondent with removability under section 212(a)(6)(A)(i) of the Act as an alien present in the United States without being admitted or paroled. By regulation, the Department is

permitted to lodge at any time additional or substituted charges of removability. *See* 8 C.F.R. §§ 1003.30, 1240.10(e). As the IJ will need to make appropriate factual findings based on the amended charge of removability, this matter will require remand to the IJ. *See generally* 8 C.F.R. §§ 1003.1(d)(1)(ii) (authorizing the Board to "take any action consistent with [its] authorities under the Act and the regulations as appropriate and necessary for the disposition of the case), (3)(iv) (stating that the Board will not engage in factfinding).

I. The Respondent Has Failed to Establish That He or She Procured an "Admission" within the Meaning of the Act.

In removal proceedings, the burden of proof is on an alien to show the time, place, and manner of his or her entry into the United States. INA § 291. Thus, an alien bears the burden of establishing that he or she has been "admitted" to the United States within the meaning of the Act. *See id.* § 240(c)(2)(B) (stating that in removal proceedings the alien has the burden of establishing an admission by clear and convincing evidence); *see also Matter of Areguillin*, 17 I&N Dec. 308, 310 (BIA 1980) (noting that "[t]he respondent . . . bears the burden of proving that she did, in fact, present herself for inspection").

In *Matter of Areguillin*, the Board reaffirmed that an "admission" occurs when an inspecting officer communicates to an applicant for admission the former's determination that the applicant is not inadmissible and permits the applicant to pass through the port of entry. *See* 17 I&N Dec. at 310 n.6 (citing *Matter of V-Q-*, 9 I&N Dec. 78 (BIA 1960)). In 1996, Congress amended section 101(a)(13) of the Act to define the terms "admitted" and "admission" to "mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 301(a), 110 Stat. 3009-546,

3009-575. There is no indication, however, that by amending section 101(a)(13), Congress meant to repeal the Board's prior interpretation of the term "admission." *See* H.R. Rep. 104-828, at 207 (1996) (Conf. Rep.), 1996 WL 563320 (brief discussion on IIRIRA § 301(a)). Indeed, it has been well-documented that through the amendment Congress simply sought to eliminate that aspect of the "entry doctrine" which permitted aliens who had entered without inspection to have greater procedural and substantive rights in deportation proceedings than aliens who would present themselves for inspection at a port of entry and were placed in exclusion proceedings. *See* H.R. Rep. 104-469, at 225-26 (1996) (accompanying H.R. 2022), 1996 WL 168955; Memorandum from David Martin, General Counsel, Immigr. and Naturalization Service (INS), to Michael L. Aytes, Ass't Comm'r, Office of Benefits, INS (Feb. 19, 1997), *reprinted in* 74 Interpreter Releases, No. 11, March 24, 1997, app. II at 516-22 (discussing, *inter alia*, the amendment to section 101(a)(13)); *see also* IIRIRA § 301 (entitled "Treating Persons Present In The United States Without Authorization As Not Admitted").

Presumably, Congress was aware of the Board's definition of "admission" when it amended section 101(a)(13)(A) of the Act, *see Lorillard v. Pons*, 434 U.S. 575, 581 (1978), and the definition in section 101(a)(13)(A) can in fact be read to remain consistent with *Matter of Areguillin*. Under section 101(a)(13)(A), "admission" is defined as "the *lawful* entry of [an] alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A) (emphasis added). Although the word "lawful" is not defined in the Act, it is generally understood to mean "being in harmony with the law" or "constituted, authorized, or established by law." *Matter of Rotimi*, 24 I&N Dec. 567, 574 (BIA 2008) (quoting *Merriam-Webster's Collegiate Dictionary* 658 (10th ed. 2002)). It would be easy to assume that based on this understanding, use of the word "lawful" in section 101(a)(13)(A) denotes compliance with

substantive legal requirements, rather than procedural regularity. The Board has construed the related term "lawfully" in this manner for purposes of section 101(a)(20) of the Act and in other contexts. *See Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003) (holding that an alien who acquires permanent resident status through fraud or misrepresentation is not "lawfully" admitted for permanent residence within the meaning of section 101(a)(20)); *see also Matter of Rotimi*, 24 I&N Dec. at 574-76 (holding that to be "lawful" for purposes of section 212(h) of the Act, an alien's residence must stem from valid grant of specific privilege to stay in the United States); *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981) (holding that to be regarded "lawful" for purposes of former section 212(c) of the Act, an alien's "domicile" must be in substantive compliance with the immigration laws), *aff'd sub nom. Lok v. INS*, 681 F.2d 107 (2d Cir. 1982).

It is not so clear, however, that "lawful" in section 101(a)(13)(A) must have the exact same meaning as in other statutory provisions of the Act. Importantly, to be accorded the status defined by section 101(a)(20) of the Act, one has to be "lawfully admitted," and under section 101(a)(13)(A), to be "admitted" means that one has to have a "lawful entry." But if "lawful" in section 101(a)(13)(A) meant compliance with substantive legal requirements, use of the term "lawfully" in section 101(a)(20) would become superfluous. This would be true of other instances in the Act where "lawful" or "lawfully" appear before the words "admission" or "admitted," respectively. *See, e.g.*, INA §§ 214(n)(2)(A) ("lawfully admitted into the United States"), 240A(a)(1) ("alien lawfully admitted for permanent residence"), 245(b) (record of "lawful admission"), 245A(a) ("alien lawfully admitted for temporary residence"), 248 ("alien lawfully admitted to the United States as a nonimmigrant"), 249 ("lawful admission for permanent residence"), 318 ("lawfully admitted to the United States for permanent residence"), 320(a)(3) ("lawful admission for permanent residence"). As a result, when section

101(a)(13)(A) is considered in light of other provisions in the Act where "lawful" and "lawfully" appear before "admission" and "admitted," respectively, it becomes apparent that there exists ambiguity as to whether the term "lawful" as used in section 101(a)(13)(A) is intended to denote compliance with substantive legal requirements. *See generally Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007) (Statutory interpretation should not be confined "to examining a particular statutory provision in isolation. Rather, the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks, alterations and citations omitted). In light of this fact, the meaning of the phrase "lawful entry" as used in section 101(a)(13)(A) of the Act is not entirely self-evident. *Cf. Matter of Rotimi*, 24 I&N Dec. at 571 (finding "that the meaning of the phrase 'lawfully resided' is not self-evident").

To resolve any ambiguity, the term "lawful" *as used in section 101(a)(13)(A) of the Act* should be construed to denote procedural regularity, rather than compliance with substantive legal requirements.[1] When section 101(a)(13)(A) is read in this manner, the use of "lawful" and

[1] This construction is permissible because the presumption that the term "lawful" must be interpreted in the same manner everywhere that it and the related word "lawfully" appear in the Act is not irrebuttable. As the Supreme Court has stated:

> [P]rinciples of statutory construction are not so rigid. Although we presume that the same term has the same meaning when it occurs here and there in a single statute . . . . [w]e also understand that '[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.' Thus, the 'natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.' A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.
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> The point is the same even when the terms share a common statutory definition . . . .
>
> . . . .

"lawfully" to modify "admission" and "admitted," respectively, in other statutory provisions of the Act retains meaning. To put it another way, in those statutes where "lawful" and "lawfully" modify "admission" and "admitted," respectively, the statutory language not only signifies that an alien has obtained admission by undergoing inspection and receiving the authorization of an immigration officer (the "lawful entry" component), but also that the alien has complied with the substantive legal requirements for his or her particular admission (the "lawful admission" or "lawfully admitted" component). *Cf. Matter of Wong*, 14 I&N Dec. 12, 14 (BIA 1972) (finding that aliens who possessed visas to which they were not entitled had been admitted to the United States, but had not been lawfully admitted). To interpret section 101(a)(13)(A) otherwise so that, as discussed above, it renders the terms "lawful" and "lawfully" in other statutory provisions of the Act superfluous is a result generally disfavored in statutory construction. *See, e.g., Cooper Industries, Inc. v. Aviall Services, Inc.* 543 U.S. 157, 167 (2004) (noting "the settled rule that [a court] must, if possible, construe a statute to give every word some operative effect"); *Bailey v. United States*, 516 U.S. 137, 145-46 (1995) (finding that Congress is presumed to intend that each word in a statute has meaning and is not superfluous).

Construing "lawful" to denote, in the context of section 101(a)(13)(A), procedural regularity is reasonable when one further considers the fact that it is used to modify the term

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> . . . There is, then, no 'effectively irrebuttable' presumption that the same defined term in different provisions of the same statute must 'be interpreted identically.' *Context counts*.

Environmental Defense v. Duke Energy Corp., 127 S.Ct. 1423, 1432-33 (2007) (emphasis added) (citations omitted); *see Baile v. United Statesy*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context.") (internal quotation marks, alterations and citations omitted); *Leach v. FDIC*, 860 F.2d 1266, 1270 (5th Cir. 1988) ("[E]ven apparently plain words, divorced from the context in which they arise and in which their creators intended them to function, may not accurately convey the meaning the creators intended to impart. It is only, therefore, within a context that a word, any word, can communicate an idea."), *cert. denied*, 491 U.S. 905 (1989); *cf. Matter of Rotimi*, 24 I&N Dec. at 571 (stating that the meaning of the phrase "lawfully resided" in section 212(h) of the Act "needs to be derived in the context of the immigration laws"); *id.* at 573 (rejecting the argument that the term "residence" must be interpreted the same for purposes of sections 212(h) and 240A(a) of the Act).

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"entry." The term "entry" was formerly defined in section 101(a)(13) to be "any coming of an alien into the United States, from a foreign port or place or from an outlying possession." INA § 101(a)(13) (1952-96). The Board, upon examination of relevant judicial and administrative decisions, construed the term "entry," as defined in former section 101(a)(13), to involve the following test: (1) a crossing into the territorial limits of the United States, i.e. physical presence; (2) an inspection and admission by an immigration officer or actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint. *Matter of Pierre*, 14 I&N Dec. 467, 468 (BIA 1973); *see, e.g., Matter of Jimenez-Lopez*, 20 I&N Dec. 738, 741 (BIA 1993); *Matter of Patel*, 20 I&N Dec. 368, 370 (BIA 1991); *Matter of Ching and Chen*, 19 I&N Dec. 203, 205 (BIA 1984); *Matter of Lin*, 18 I&N Dec. 219, 220 (BIA 1982). Presumably, when it incorporated the term into the current definition of "admission," Congress was aware of this longstanding construction of "entry." *See Lorillard*, 434 U.S. at 581. Thus, Congress knew that an "entry" either involved "an inspection and admission by an immigration officer" or "actual and intentional evasion of inspection." Congress might well have inserted "lawful" before "entry" to reinforce the use of the language "after inspection and authorization by an immigration officer" in section 101(a)(13)(A); that is, use of the term "lawful" emphasizes that an "admission" is, as the statute expressly provides, an entry involving "an inspection and authorization by an immigration officer." *See Matter of Rosas*, 22 I&N Dec. 616, 628, 631 (BIA 1999) (Rosenberg, Lory, concurring and dissenting) (interpreting "lawful entry" as used in section 101(a)(13)(A) to refer to an entry following inspection and authorization); *cf. Matter of Rotimi*, 24 I&N Dec. at 576 (construing "lawfully" in section 101(a)(20) of the Act as reinforcing the phrase "in accordance with the immigration laws" and thus denoting legally substantive compliance).

A contrary interpretation of section 101(a)(13)(A) of the Act would significantly affect the applicability of other statutory provisions in the Act. When Congress amended former section 101(a)(13), it also amended section 237(a) of the Act to require that an alien be "in and admitted to the United States" in order to be subject to the various grounds of deportability. *See* IIRIRA § 301(d)(1) (striking "in the United States" and inserting "in and admitted to the United States"). Accordingly, in removal proceedings, the Department must establish that an alien has been "admitted" and is deportable by clear and convincing evidence. INA § 240(c)(3)(A). To impose on the Department the burden of showing that the alien's "admission" was substantively legal before showing that the alien is deportable would add a requirement not contemplated in the Act. *See* 8 C.F.R. § 1240.8(a) (describing the Department's burden of proof with respect to deportability under the Act). Moreover, it would be inconsistent with section 237(a)(1)(A) of the Act, a ground of deportability applicable to aliens who were admitted, but whose admission was defective in some manner.[2]

Moreover, interpreting the term "admitted" under section 101(a)(13)(A) to require an entry in compliance with substantive legal requirements, rather than with procedure, would effectively render section 237(a)(1)(H), a waiver of deportability expressly available to aliens who obtained admission by fraud or misrepresentation, a nullity. *See United States v. Menasche*, 348 U.S. 528, 538 (1955) (noting that a "cardinal principle" of statutory construction is not to destroy parts of a statute, but to give effect, if possible, to every clause and word); *see also, e.g.*, *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516 (3d Cir. 1998) (stating that a statute must be

[2] It is of no significance that section 237(a)(1)(A) expressly uses the term "entry," rather than "admission." The introductory clause at section 237(a) makes clear that an alien deportable under any of the subsequent paragraphs must be an alien "in and *admitted* to the United States." INA § 237(a) (classes of deportable aliens) (emphasis added). Moreover, subparagraph (H) of section 237(a)(1) provides a potential waiver of deportability for certain aliens removable under subparagraph (A), and it specifically refers to such aliens as being "inadmissible at the time of *admission*." *Id.* § 237(a)(1)(H) (emphasis added).

construed to give effect to all its provisions, so that no part will be inoperative, superfluous, void, or insignificant); *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (stating that a provision in a statute should not be interpreted in a manner that would render other provisions in the same statute inconsistent, meaningless, or superfluous). As the Board itself has recognized, section 237(a)(1)(H) specifically contemplates that an alien may obtain admission either by fraud or by misrepresentation, whether innocent or not. *See Matter of Fu*, 23 I&N Dec. 985 (BIA 2006) (holding that section 237(a)(1)(H) authorizes a waiver of removability under section 237(a)(1)(A) based on charges of inadmissibility at the time of admission under section 212(a)(7)(A)(i)(I), as well as under section 212(a)(6)(C)(i) for fraud or willful misrepresentation of material fact, where there was a misrepresentation at the time of admission, whether innocent or not); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) (remanding for further consideration of waiver of deportability under section 241(a)(1)(H), the immediate predecessor to section 237(a)(1)(H), to an alien who procured admission as an immigrant by fraud and misrepresentation). That Congress retained section 237(a)(1)(H) at the same time that it amended former section 101(a)(13) demonstrates that Congress understood that an "admission" within the meaning of the Act could occur notwithstanding any non-compliance with substantive legal requirements. *See generally* IIRIRA § 305(a) (redesignating former INA § 241 as current INA § 237). The same reasoning can be applied to section 237(a)(1)(G) of the Act, a ground of deportability that expressly contemplates that an alien may procure an "admission" as an immigrant by marriage fraud. *See generally id.*

Furthermore, if an "admission" under section 101(a)(13)(A) of the Act were to require an entry in compliance with substantive legal requirements, rather than with procedure, the waiver of inadmissibility under section 212(h) would become available to aliens who had procured

lawful permanent residence by fraud or misrepresentation, contrary to the Board's holding in *Matter of Ayala*, 22 I&N Dec. 398 (BIA 1998). This waiver of inadmissibility is generally not available to "an alien who has *previously been admitted* to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or 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." INA § 212(h) (emphasis added). In *Matter of Ayala*, the respondent argued that because he had engaged in criminal activity prior to his last admission to the United States as lawful permanent resident, he had procured that admission by fraud or misrepresentation, concealing his criminal activity. *Matter of Ayala*, *supra*, at 400. Thus, the respondent argued that he was not barred from seeking a waiver of inadmissibility under section 212(h). *Id.* The Board rejected the respondent's argument, noting that the statute only required that an alien "ha[ve] previously been admitted to the United States" as a lawful permanent resident. *Id.* at 401-02 (quoting INA § 212(h)). Thus, the statutory bar in section 212(h) applies to any alien who previously gained admission as a lawful permanent resident, notwithstanding any fraud or misrepresentation in procuring that admission. If the term "admitted" as used in section 212(h) inherently required compliance with substantive legal requirements, the Board's holding in *Matter of Ayala* would not have been possible.

Thus, an "admission" within the meaning of section 101(a)(13)(A) is an entry that is procedurally regular. An alien who seeks to establish that he or she has been "admitted" to the United States must generally demonstrate that an immigration officer inspected the alien and authorized the alien to enter the country following a determination of admissibility. Under this interpretation, an alien who has gained entry by fraud or misrepresentation has been "admitted"

to the United States for purposes of the Act. *See Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008) (ruling that an alien who enters the United States after inspection and authorization has been "admitted" even if she obtained admission by fraud or misrepresentation); *see also Bolvito v. Mukasey*, 527 F.3d 428, 431 (5th Cir. 2008) (stating that under section 245(a) of the Act, an "admitted" alien is "an individual who has presented himself for inspection by an immigration officer and who has been allowed to enter the country") (citing INA § 101(a)(13)(A)).

In this case, the respondent simply claims to have presented himself for inspection by an immigration officer using a counterfeit permanent resident card. This claim, without more, is insufficient to meet his burden of proof. It follows that the respondent should properly be charged with removability under section 212(a)(6)(A)(i) of the Act as an alien present without being admitted or paroled.

II. Assuming the Respondent's Alleged Time, Place and Manner of Entry Were True, the Respondent Would Not Have Been "Admitted" for Purposes of the Act.

The Board essentially held in *Matter of Areguillin* that an admission occurs as long as it is procedurally regular. Under the interpretation discussed above, section 101(a)(13)(A) of the Act, as amended by IIRIRA, does not abrogate that holding. Section 101(a)(13)(C) of the Act, on the other hand, does modify *Matter of Areguillin* to the extent that an alien falsely presents himself or herself for inspection by an immigration officer as a returning lawful permanent resident (LPR). This statute provides that:

> **An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission** into the United States for purposes of the immigration laws unless the alien—
> (i) has abandoned or relinquished that status,
> (ii) has been absent from the United States for a continuous period in excess of 180 days,

> (iii) has engaged in illegal activity after having departed the United States,
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
> (v) has committed an offense identified in section1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

INA § 101(a)(13)(C) (emphasis added). Thus, under the statute, an alien who presents himself or herself for inspection as a returning LPR is not, for purposes of the Act, treated as an applicant for admission unless one or more of the specified exceptions apply. *See generally Matter of Collado*, 21 I&N Dec. 1061 (BIA 1997) (interpreting INA § 101(a)(13)). To put it another way, the statute treats returning LPRs as if they have not departed the United States. It follows that an alien who is permitted to enter the United States as a returning LPR, regardless of whether the alien actually has such status, does not accomplish an "admission" for purposes of the Act.[3]

In this case, the respondent claims that he presented himself for inspection at the port of entry as a returning LPR, using a counterfeit permanent resident card, and that an immigration inspector allowed him into the United States as a returning LPR. Assuming *arguendo* that the respondent's claim is true, he was not, pursuant to section 101(a)(13)(C) of the Act, treated as an applicant for admission; rather, he was treated as if he had never departed the United States. Therefore, his purported entry did not constitute an "admission" for purposes of the Act. That being the case, he would properly be charged with removability under section 212(a)(6)(A)(i) of the Act as an alien present in the United States without being admitted or paroled.

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[3] Such treatment under the immigration laws is not completely unprecedented. Because United States citizens are exempt from inspection, an alien who is permitted to enter the United States by making a false claim to U.S. citizenship has bypassed inspection and is properly charged as being removable under section 212(a)(6)(A)(i) of the Act as an alien present without being admitted or paroled. *See Reid v. United States*, 420 U.S. 619, 625 (1975); *Matter of Wong*, 12 I&N Dec. 733 (BIA 1968); *Matter of Woo*, 11 I&N Dec. 706 (BIA 1966); *Matter of S*, 9 I&N

CONCLUSION

The respondent has not met his burden of establishing, by clear and convincing evidence, that he was previously admitted to the United States. Therefore, he is properly removable under section 212(a)(6)(A)(i) of the Act as an alien present in the United States without being admitted or paroled. Even assuming that his claim of entry into the United States as a returning LPR were true, he would not have procured an "admission" for purposes of the Act, in which case he would still be removable under section 212(A)(6)(A)(i) of the Act. For these reasons, the Department intends to amend the NTA appropriately, and respectfully requests that the Board remand this case to the IJ for further proceedings.

Respectfully submitted,

Dated: 12/29/08

For Ronald A. Lapid
Deputy Chief, Appellate and Protection Law Division

Dec. 599 (BIA 1962); *Matter of F*, 9 I&N Dec. 54 (R.C. 1960).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of: OROZCO, BRIAN, In Removal Proceedings	File No.: A 77 981 235

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing:

GOVERNMENT'S BRIEF AND MOTION TO REMAND TO IMMIGRATION COURT

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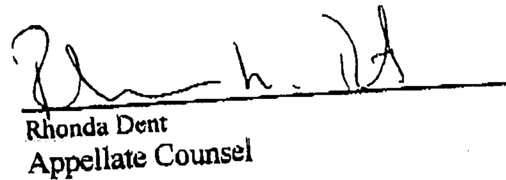

Rhonda Dent
Appellate Counsel