No.

In the Supreme Court of the United States

PAMELA BONDI, PETITIONER

v.

MUK CHOI LAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 8 U.S.C. 1182(a), various categories of aliens, including those who have committed or been convicted of certain crimes, are "ineligible to be admitted to the United States" and subject to removal. 8 U.S.C. 1182(a)(2); see 8 U.S.C. 1229a. Under 8 U.S.C. 1101(a)(13)(C), a lawful permanent resident (LPR) who is returning to the United States after a trip abroad is generally not "regarded as seeking an admission into the United States" and is therefore not typically subject to the inadmissibility grounds in Section 1182(a). But that general rule does not apply to an LPR who "has committed an offense identified in section 1182(a)(2)"—*i.e.*, an offense that would render him inadmissible. 8 U.S.C. 1101(a)(13)(C)(v). The question presented is:

Whether, to remove an LPR who committed an offense listed in Section 1182(a)(2) and was subsequently paroled into the United States, the government must prove that it possessed clear and convincing evidence of the offense at the time of the LPR's last reentry into the United States.

RELATED PROCEEDING

United States Court of Appeals (2d Cir.):

Lau v. *Bondi*, No. 21-6623 (Mar. 4, 2025)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 130 F.4th 42. The decisions of the Board of Immigration Appeals (App., *infra*, 16a-27a) and the immigration judge (App., *infra*, 28a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2025. A petition for rehearing was denied on July 17, 2025. App., *infra*, 41a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix. App., *infra*, 42a-45a.

INTRODUCTION

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, makes various categories of aliens inadmissible to, and therefore removable from, the United States. 8 U.S.C. 1182(a). When returning from a trip abroad, a lawful permanent resident (LPR) will not ordinarily be subject to those inadmissibility grounds. But when a returning LPR "has committed an offense identified in section 1182(a)(2)"—*i.e.*, an offense that would render him inadmissible—the LPR shall "be regarded as seeking an admission into the United States." 8 U.S.C. 1101(a)(13)(C)(v).

Accordingly, when an LPR with a pending charge for a disqualifying offense seeks to reenter the United States, immigration officers routinely exercise their law-enforcement discretion to parole the LPR into the United States for the purpose of prosecution. See 8 U.S.C. 1182(d)(5)(A). The decades-long practice of granting parole in such circumstances benefits both the LPR and the government. The LPR gets to organize his criminal defense from inside the United States. And the government can enable his presence for the criminal trial (and the potential serving of any criminal sentence) without waiving a potential ground for removal.

The court of appeals, without hearing oral argument, upended that established practice—and created an acknowledged conflict in the circuits—by imposing a novel burden of proof on immigration officers considering whether to grant parole at the border. Under the decision below, it is not sufficient for the government to establish in removal proceedings, by clear and convincing evidence, that an LPR "has committed" a disqualifying offense and can therefore be "regarded as seeking an admission into the United States." 8 U.S.C.

1101(a)(13)(C)(v). Instead, the government must show that its officers possessed such evidence *at the time of the LPR's reentry* to the United States. The court therefore vacated the removal order for respondent—an LPR who had undisputedly committed and been charged with a disqualifying offense before seeking to reenter the United States. In the court's view, that pending charge did not give immigration officers sufficient evidence of the offense when they paroled respondent at the border, even though respondent had in fact committed the offense.

That rule has no basis in law or logic. Respondent's inadmissibility to the United States was decided in removal proceedings before an immigration judge. In those proceedings, the government established that respondent, having been paroled into the United States, was still seeking admission to the United States. He was therefore subject to removal on any applicable ground of inadmissibility, and the government was able to prove his inadmissibility under 8 U.S.C. 1182(a)(2)(A)(i)(I) by offering his state-court conviction for trademark counterfeiting.

Even if the government had to show that respondent was seeking admission on the earlier date of his reentry, the government met that burden. Respondent's conviction proved that he committed his offense *before* he sought to reenter the United States. Therefore, looking to either the date of reentry or the date of the removal order, respondent "ha[d] committed" a disqualifying offense and was subject to the inadmissibility grounds for removal. 8 U.S.C. 1101(a)(13)(C)(v).

In holding otherwise, the court of appeals effectively sought to review not respondent's order of removal, but the decision at the border to parole him into the United States. The court had no jurisdiction to review that de-

cision, which was made by immigration officers in the Department of Homeland Security (DHS), not the immigration judge. Even if the court could review that decision, respondent's parole was proper. DHS may parole "any alien applying for admission." 8 U.S.C. 1182(d)(5)(A). And under the INA's exceptions to the usual rule for LPRs, respondent was "regarded as seeking an admission" because he "ha[d] committed" a disqualifying offense before seeking reentry. 8 U.S.C. 1101(a)(13)(C)(v). Nothing in the INA suggests that line immigration officers must possess clear and convincing evidence of an offense before exercising their parole discretion.

This case satisfies the criteria for certiorari. As the court of appeals acknowledged, its rule is "[c]ontrary to [its] sister circuits' conclusion[s]." App., *infra*, 14a. And its decision carries significant practical consequences for DHS. The Second Circuit's rule would require line immigration officers defending our Nation's borders to take on the role of immigration judges—weighing burdens of proof before exercising their discretionary parole authority. And the circuit conflict risks significant confusion at the border, where officers will often be unable to predict which circuit's law will eventually be applied to their decisions, since venue in immigration cases turns on the location of the removal proceedings, not that of the port of entry. This Court should grant review to restore uniformity to the immigration laws.

STATEMENT

A. Statutory Background

1. The INA governs "how persons are admitted to, and removed from, the United States." *Pereida* v. *Wilkinson*, 592 U.S. 224, 227 (2021). Every day at our Na-

tion's borders and ports of entry, "immigration officers must determine whether to admit or remove" each of the "many aliens" seeking admission to the United States. *Jennings* v. *Rodriguez*, 583 U.S. 281, 285 (2018); see 8 U.S.C. 1225(a). Those decisions are generally "quickly made." *Jennings*, 583 U.S. at 286. But when additional consideration is required, Congress has authorized the detention or parole of aliens in certain circumstances. *Ibid.*

As relevant here, the Secretary of Homeland Security may "in [her] discretion parole into the United States temporarily under such conditions as [s]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." 8 U.S.C. 1182(d)(5)(A). Parole does not grant the alien "admission" to the United States. *Ibid.*; see 8 U.S.C. 1101(a)(13)(B). Instead, once the purposes of parole have been served, the "case shall continue to be dealt with in the same manner as that of any other applicant for admission." 8 U.S.C. 1182(d)(5)(A).

In 1952, when Congress codified the parole power, it was aware that the government had been using parole to permit "persons who stand excluded from the United States" to be released into the United States to do such things as "defend criminal prosecution[s]" or "testify in criminal cases for the Government." U.S. Dep't of Justice, *Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ended June 30, 1951*, at 48 (1951). Thus, the reports of the House and Senate Judiciary Committees about the INA stated that the Attorney General needed "broader discretionary authority" to grant parole "in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or *for*

purposes of prosecution." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 52 (1952) (emphasis added); accord S. Rep. No. 1137, 82d Cong., 2d Sess. 13 (1952).

2. Separately, the INA authorizes the removal of an alien who "is either 'inadmissible' under § 1182 or 'deportable' under [8 U.S.C. 1227]." *Campos-Chaves* v. *Garland*, 602 U.S. 447, 451 (2024) (quoting 8 U.S.C. 1229a(e)(2)). The basic procedure is the same whether an alien is charged with being inadmissible or deportable. See 8 U.S.C. 1229a. But the two tracks differ in important respects. Sections 1182 and 1227 identify "sometimes overlapping and sometimes divergent" substantive grounds for removal, including various criminal offenses. *Judulang* v. *Holder*, 565 U.S. 42, 46 (2011). And the two tracks carry different burdens of proof. An alien charged with being inadmissible is generally required to show "clearly and beyond doubt" that he is "not inadmissible under section 1182," whereas the government is required to prove by "clear and convincing evidence" that an admitted "alien is deportable." 8 U.S.C. 1229a(c)(2)(A) and (3)(A).

As a general matter, an LPR returning from a trip abroad "shall not be regarded as seeking an admission into the United States," and can be charged only with deportability, not inadmissibility. 8 U.S.C. 1101(a)(13)(C). But the INA provides six exceptions to that default rule, which—when applicable—subject an LPR to potential "removal from the United States on grounds of inadmissibility." *Vartelas* v. *Holder*, 566 U.S. 257, 263 (2012). One such exception is for an alien who "has committed an offense identified in section 1182(a)(2)," 8 U.S.C. 1101(a)(13)(C)(v), such as "a crime involving moral turpitude," 8 U.S.C. 1182(a)(2)(A)(i)(I). Counterfeiting offenses have long been considered crimes involving

moral turpitude. See *United States ex rel. Volpe* v. *Smith,* 289 U.S. 422, 423 (1933).

B. Proceedings Below

1. Respondent is a native and citizen of the People's Republic of China. App., *infra*, 17a. In September 2007, he was admitted to the United States as an LPR. *Id.* at 4a. In May 2012, respondent was arrested and charged with trademark counterfeiting in violation of N.J. Stat. Ann. § 2C:21-32(d)(2) (West 2012). App., *infra*, 28a. The charging document alleged that respondent, with intent to defraud, sold $282,240 worth of shorts bearing a counterfeit mark in March 2012. Administrative Record (A.R.) 339.

While awaiting trial, respondent left the United States. App., *infra*, 4a. In June 2012, he returned to John F. Kennedy International Airport (JFK). *Ibid.* An FBI records check revealed respondent's pending criminal charge. A.R. 250. An immigration officer therefore paroled respondent into the United States and did not admit him. App., *infra*, 4a. In June 2013, following a guilty plea in the Superior Court of New Jersey for Essex County, respondent was convicted of trademark counterfeiting and sentenced to two years of probation. *Id.* at 29a.

In March 2014, DHS initiated removal proceedings against respondent, charging him with inadmissibility on the ground that he had been "convicted of . . . a crime involving moral turpitude." App., *infra*, 4a-5a (quoting 8 U.S.C. 1182(a)(2)(A)(i)(I)). Respondent contended that he was not seeking admission when he arrived at JFK because he had not yet been convicted. *Id.* at 33a. Respondent also contended that trademark counterfeiting is a petty offense in New Jersey that does not trigger inadmissibility. *Id.* at 31a-33a. In the

alternative, he requested a discretionary waiver of inadmissibility. *Id.* at 34a. In March 2018, the immigration judge rejected each of respondent's arguments, determining that he was inadmissible as charged and ineligible for a discretionary waiver. *Id.* at 28a-40a. The judge ordered him removed to China. *Id.* at 40a.

In November 2021, the Board of Immigration Appeals (Board or BIA) affirmed. App., *infra*, 16a-27a. The Board held that respondent's trademark-counterfeiting conviction provided clear and convincing evidence that he had "committed an offense identified in [8 U.S.C 1182(a)(2)]" and was thus properly subject to removal on the grounds of inadmissibility. App., *infra*, 23a (quoting 8 U.S.C. 1101(a)(13)(C)(v)). The Board rejected, as foreclosed by Board precedent, respondent's contention that DHS had to show that he had "been *convicted* of trademark counterfeiting when he arrived at the port of entry." *Ibid.* (citing *In re Valenzuela-Felix*, 26 I. & N. Dec. 53 (B.I.A. 2012)) (emphasis in original). Instead, the Board concluded that DHS could use respondent's conviction "as proof in subsequent removal proceedings" that he had committed the offense. *Ibid.* The Board also concluded that New Jersey trademark counterfeiting is a crime involving moral turpitude, that the petty-offense exception did not apply, that respondent was ineligible for a waiver of inadmissibility, and that respondent received due process. *Id.* at 18a-22a, 24a-27a.

2. Respondent filed a petition for review of the Board's decision by the court of appeals, which did not hold oral argument before issuing, in March 2025, a published opinion granting the petition. App., *infra*, 1a-15a. The court framed the question as whether "DHS improperly classified [respondent] as an applicant for admission under 8 U.S.C. § 1182(d)(5)(A) by paroling

him into the United States." App., *infra*, 3a. The court concluded that respondent's parole was improper. *Ibid.*

The court of appeals noted that Section 1182(d)(5)(A) authorizes parole only for an "alien applying for admission to the United States" and that an LPR "shall not be regarded as seeking an admission into the United States" unless an exception applies. App., *infra*, 9a (first quoting 8 U.S.C. 1182(d)(5)(A); then quoting 8 U.S.C. 1101(a)(13)(C)) (emphasis omitted). The court recognized that an exception exists for an LPR who has "'committed' certain offenses" and that an LPR "commit[s]" an offense when he "'engages in criminal conduct,'" not when he is convicted. *Id.* at 9a-10a (first quoting 8 U.S.C. 1101(a)(13)(C)(v); then quoting *Centurion* v. *Sessions*, 860 F.3d 69, 75 (2d Cir. 2017)). But, in the court's view, DHS bears the "burden of demonstrating" by clear and convincing evidence "that a crime had been committed *at the time of an LPR's reentry*." *Id.* at 12a (emphasis altered). And criminal charging documents alone, the court concluded, cannot satisfy that burden. *Ibid.*

The court of appeals recognized that the Fifth and Ninth Circuits have held that DHS may use post-reentry convictions in removal proceedings to establish that an LPR is seeking an admission. App., *infra*, 13a. But the court "respectfully disagree[d] with [its] sister circuits." *Ibid.* In the Second Circuit's view, the INA is "definitive" that "DHS must determine whether an LPR is an applicant for admission as a threshold matter *before* it is authorized to parole (rather than admit) that individual." *Id.* at 14a.

3. The court of appeals subsequently denied the government's petition for rehearing en banc. App., *infra*, 41a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in requiring the government to possess clear and convincing evidence that an LPR has committed an offense that would render him inadmissible before deciding to parole the LPR into the United States. The court was reviewing respondent's order of removal, not the government's discretionary decision to grant parole. And when the immigration judge ordered respondent's removal, he had unquestionably committed a crime involving moral turpitude and could therefore be treated as seeking admission to the United States. Even winding the clock back to the date of respondent's reentry, he had, as a matter of fact, already "committed" a crime involving moral turpitude that allowed him to be treated as seeking an admission, as his subsequent conviction proved. 8 U.S.C. 1101(a)(13)(C)(v). Nothing in the INA requires the government to establish in a removal hearing that it *could* have proved such an offense by clear and convincing evidence at the time of reentry. The court of appeals' decision imposing such a requirement creates an acknowledged conflict in the circuits and presents significant operational difficulties for our Nation's immigration officers. This Court should grant review.

A. The Decision Below Is Incorrect

1. The court of appeals incorrectly vacated respondent's order of removal. In removal proceedings, an immigration judge must decide "whether an alien is removable from the United States." 8 U.S.C. 1229a(c)(1)(A). That present-tense phrasing looks to the state of the world at the time of the decision. See *Stanley* v. *City of Sanford*, 145 S. Ct. 2058, 2063-2064 (2025). And immigration judges have long evaluated aliens' admissibility "by focusing on the circumstances existing at the time

of the ultimate hearing before the Immigration Judge." *In re Valenzuela-Felix*, 26 I. & N. Dec. 53, 56 (B.I.A. 2012); see *In re Kazemi*, 19 I. & N. Dec. 49, 51 (B.I.A. 1984); *Klapholz* v. *Esperdy*, 201 F. Supp. 294, 298-300 (S.D.N.Y. 1961), aff'd, 302 F.2d 928 (2d Cir.), cert. denied, 371 U.S. 891 (1962).

During respondent's removal proceedings, he was seeking "to be admitted to the United States" and was therefore properly subject to removal on any applicable ground of inadmissibility. 8 U.S.C. 1182(a); see 8 U.S.C. 1229a(c)(2). But for his LPR status, there would be no question that respondent was seeking to be admitted. An alien "who arrives in the United States" is "an applicant for admission." 8 U.S.C. 1225(a)(1). And as a matter of historical fact, respondent was paroled into the United States and not "considered to have been admitted." 8 U.S.C. 1101(a)(13)(B). The only question for the immigration judge was whether respondent's LPR status changed that result because an LPR generally "shall not be regarded as seeking an admission into the United States." 8 U.S.C. 1101(a)(13)(C).

The answer to that question is no. The default rule that an LPR generally "shall not be regarded as seeking an admission" does not apply when, among other things, the LPR "has committed an offense identified in section 1182(a)(2)," such as a crime involving moral turpitude. 8 U.S.C. 1101(a)(13)(C)(v). To "[c]ommit" means "[t]o perpetrate, as a crime," or "to perform as an act." *Black's Law Dictionary* 273 (6th ed. 1990). And the phrase "has committed" is in the present-perfect tense, "which by definition focuses on the *present*." *Hewitt* v. *United States*, 145 S. Ct. 2165, 2172 (2025). The INA therefore requires the immigration judge in the present—*i.e.*, when resolving the charges of removal—to

determine whether the LPR has perpetrated a crime involving moral turpitude.

Although the INA's text does not address the burden of proof for showing that an LPR is seeking an admission, BIA precedent requires the government to make that showing "by clear and convincing evidence." *In re Rivens*, 25 I. & N. Dec. 623, 626 (2011). The government carried that burden here. In respondent's removal proceedings, the parties submitted his New Jersey judgment of conviction, which establishes that he committed trademark counterfeiting in March 2012. A.R. 278. From the perspective of the immigration judge adjudicating respondent's case in March 2018, respondent had "committed" a crime involving moral turpitude and was to be regarded as "seeking an admission into the United States." 8 U.S.C. 1101(a)(13)(C)(v). Respondent was therefore properly subject to removal on any applicable ground of inadmissibility. And because respondent had been "convicted of * * * a crime involving moral turpitude," he was in fact inadmissible. 8 U.S.C. 1182(a)(2)(A)(i)(I). The immigration judge therefore correctly ordered respondent's removal from the United States.

2. a. In concluding otherwise, the court of appeals asked the wrong question. Rather than asking whether respondent was properly found inadmissible and ordered removed, the court asked whether DHS had properly "parol[ed] [respondent] into the United States upon his return from abroad." App., *infra*, 3a. But the court was not reviewing DHS's parole decision, which is vested in the agency's discretion. See 8 U.S.C. 1182(d)(5)(A). The only decision before the court—and the only decision over which it had jurisdiction, 8 U.S.C. 1252(a)(1)—was respondent's final order of removal. The INA does not permit an alien to use a challenge to

a removal order to collaterally attack an earlier parole decision, which is made by a different agency (*i.e.*, DHS) and is not subject to the BIA's own review. See *Valenzuela-Felix*, 26 I. & N. Dec. at 62-63; *In re Arambula-Bravo*, 28 I. & N. Dec. 388, 394 (B.I.A. 2021).

Whether or not the parole decision was correct, respondent, as a factual matter, had been paroled into the United States and therefore had not been admitted as of his removal hearing. 8 U.S.C. 1101(a)(13)(B). If DHS had allowed respondent to reenter the United States without parole, the government could not have later charged him with being inadmissible on the theory that DHS *should* have paroled him. Conversely, where, as here, DHS has paroled an LPR, the LPR cannot ask the immigration judge to ignore the fact of his parole and treat him as if he were already admitted.

b. Even if the court of appeals could review DHS's decision to parole respondent into the United States, that decision was proper. Subject to limited exceptions not relevant here, DHS, in its discretion, may parole "any alien applying for admission to the United States." 8 U.S.C. 1182(d)(5)(A). Again, a returning LPR shall be regarded "as seeking an admission into the United States" when he "has committed an offense identified in section 1182(a)(2)," including a crime involving moral turpitude. 8 U.S.C. 1101(a)(13)(C)(v).

Those requirements were satisfied here. Respondent undisputedly committed his offense in March 2012, *before* DHS paroled him in June 2012. App., *infra*, 28a-29a. When he arrived at JFK Airport, respondent therefore "ha[d] committed" a crime involving moral turpitude, which meant that he could be "regarded as seeking an admission" under 8 U.S.C. 1101(a)(13)(C)(v), and was eligible for parole under Section 1182(d)(5)(A)'s

plain text. Respondent's later guilty plea and conviction proved that fact in his removal hearing.*

Nothing in the parole statute or any other provision of the INA limits the government, in meeting its burden of proof in the removal proceedings, to the evidence that it possessed on the date of the LPR's reentry. Every day, litigants prove facts about the state of the world as of a certain date using evidence that was created after that date. A plaintiff bringing a Title VII claim might offer her year-end tax form to establish that she was employed as of a particular date. A removing party asserting diversity jurisdiction might provide an affidavit as to where he resided on the date of the complaint's filing. Or a criminal defendant might assert that he was insane at the time of the offense by offering a later-in-time expert psychiatric report. Similarly, the government could properly use respondent's subsequent con-

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* In *Vartelas* v. *Holder*, 566 U.S. 257 (2012), this Court stated that Section 1101(a)(13)(C)(v), "on straightforward reading, appears to avert to a lawful permanent resident who has been convicted of an offense under § 1182(a)(2) (or admits to one)." *Id.* at 275 n.11. The court of appeals correctly did not rely on that dicta, which could suggest that the LPR must be *convicted* before he can be treated as seeking an admission. Section 1101(a)(13)(C)(v) requires that the alien "has committed" the offense, not that he has been convicted, and it cross-references a list of offenses in Section 1182(a)(2), not all of which even require a conviction. The difference between commission and conviction can carry significant consequences in immigration law. See *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013). And in applying another provision of the INA that turns on "when the alien has committed an offense referred to in section 1182(a)(2)," 8 U.S.C. 1229b(d)(1), this Court appears to have taken as given that the relevant temporal reference is "the date of [the] offense," *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 588 n.2 (2012). To the extent it suggests a different reading of that same language in Section 1101(a)(13)(C)(v), *Vartelas* is mistaken.

viction to prove that, when respondent arrived at JFK in June 2012, he was already someone who "ha[d] committed an offense" that triggered the exception in Section 1101(a)(13)(C)(v).

The court of appeals' reasoning for limiting the government to the evidence it possessed at the time of reentry is difficult to discern. The court cited one authority about the burden of proof: the BIA's decision in *Rivens*, which required the government to offer "clear and convincing evidence" that an LPR was seeking an admission. App., *infra*, 12a (quoting *Rivens*, 25 I. & N. Dec. at 625); see *id.* at 13a. But as the Board has explained, *Rivens* articulates the government's burden of proof "in the context of removal proceedings"; it does not affect "the *timing*" of when the government must satisfy that burden or suggest that it must meet that burden at the border. *Valenzuela-Felix*, 26 I. & N. Dec. at 57. Even if DHS had to determine at the border whether respondent was seeking an admission, there is no justification for the court's additional requirement that the government justify its discretionary parole decision by clear and convincing evidence that it possessed at the time.

3. The court of appeals' rule is also contrary to "good practical sense," "history," and "practice." *Munoz* v. *Holder*, 755 F.3d 366, 371-372 (5th Cir. 2014). Controlling "the movement of people and goods across the border * * * is a daunting task." *Hernandez* v. *Mesa*, 589 U.S. 93, 107 (2020). At ports of entry, immigration officers are "rightly" focused on "law enforcement responsibilities," not the "burden of proof in removal proceedings." *Munoz*, 755 F.3d at 371 (quoting *Valenzuela-Felix*, 26 I. & N. Dec. at 64); accord *Vazquez Romero* v. *Garland*, 999 F.3d 656, 664 (9th Cir. 2021). Yet the court's rule would require line immigration officers to

make an on-the-spot determination about whether the government possesses clear and convincing evidence when deciding whether to parole an LPR into the United States.

It is unclear how, exactly, the court of appeals expected officers to make that determination at the border. Given the volume of aliens seeking entry, admission decisions are generally "quickly made." *Jennings* v. *Rodriguez*, 583 U.S. 281, 286 (2018). A requirement that immigration officers hold mini-trials at ports of entry to assess the strength of the government's evidence would be unworkable in practice.

Indeed, immigration officers will frequently lack access to the relevant evidence when making a parole decision. Here, for example, New Jersey prosecutors may well have possessed clear and convincing evidence of respondent's offense before he arrived at JFK in June 2012. The May 2012 criminal complaint against respondent indicates that state authorities had found $282,240 worth of counterfeit shorts and obtained a recording implicating respondent. A.R. 339. But as federal immigration officers, DHS officials at JFK would not have had ready access to state prosecutors' files.

Given those administrative difficulties, the practical effect of the court of appeals' ruling could be to nullify the use of parole for prosecuting LPRs. That result would contradict both Congress's expectations and longstanding agency practice. When the INA codified the government's parole authority in 1952, an established and expected basis for granting parole was for the "purposes of prosecution." See pp. 5-6, *supra*. And the government has long used that authority for returning LPRs. See, *e.g.*, *In re K-*, 9 I. & N. Dec. 143, 154, 157 (Att'y Gen. 1961). In the ensuing decades, Congress has never questioned the practice, even as it has made

multiple amendments to the parole statute. *E.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 602(a), 110 Stat. 3009-689; Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 107-108. The decision below threatens to upend that status quo, forcing the government to allow LPRs into the United States who are, in fact, inadmissible by virtue of their previous criminal conduct.

B. The Decision Below Creates An Acknowledged Circuit Conflict

As the court of appeals acknowledged, its decision is "[c]ontrary" to decisions of the Fifth and Ninth Circuits. App., *infra*, 14a. The decision also conflicts with the Third Circuit's decision in *Doe* v. *Attorney General*, 659 F.3d 266 (2011). Although they employ different reasoning, the Third, Fifth, and Ninth Circuits have all denied LPRs' petitions for review in circumstances materially identical to those here.

The Third Circuit has held that an LPR's eligibility for parole must be assessed at the time of reentry, but probable cause (as demonstrated by a pending arrest warrant) suffices. *Doe*, 659 F.3d at 270; *Mensah* v. *Attorney Gen.*, 747 Fed. Appx. 904, 909 (3d Cir. 2018). That reasoning applies *a fortiori* here, where respondent had been both arrested and charged with a crime involving moral turpitude before his June 2012 arrival at JFK.

In reaching that result, the Third Circuit observed that the INA "does not specify either who bears the burden of proof" that the LPR has committed a disqualifying offense "or how heavy that burden is." *Doe*, 659 F.3d at 271. The court therefore endeavored to prescribe a burden "as a matter of federal common law" and concluded that a probable-cause standard is appro-

priate. *Id.* at 272. The court explained that a more demanding standard—which would require the government to "develop evidence sufficient to win its case before it can take the step of paroling a person for prosecution"—"would make little sense." *Ibid.* But the court thought that relying on "an immigration officer's say-so" at the border would violate "due process," based on its understanding that a grant of parole "strip[s] a lawful permanent resident of his protected status." *Id.* at 270, 272; but see *Valenzuela-Felix*, 26 I. & N. Dec. at 61 n.9 (explaining that the *Doe* court misunderstood the consequences of parole, which "does not remove the alien's status as a lawful permanent resident").

Although disagreeing with the Third Circuit's reasoning, the Fifth Circuit reached a similar result in *Munoz*, *supra*. That court found it "unambiguous" in the INA that "the determination that a lawful permanent resident is 'applying for admission' need not be made at the time of reentry." *Munoz*, 755 F.3d at 370 & n.5. Instead, the government can establish in the subsequent removal proceedings that the LPR "had been convicted of a crime involving moral turpitude." *Id.* at 370. The court observed that such a rule makes "good practical sense." *Id.* at 371. Immigration officers "must make quick judgments on the spot, and it would be impracticable to require [them] to gather and consider all the evidence" that the immigration judge will consider when giving the issue "more thorough consideration." *Ibid.*

The Ninth Circuit has also concluded that the government need not possess clear and convincing evidence at the time of reentry, deferring to the Board's decision to that effect under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), overruled by *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369

(2024). See *Vazquez Romero*, 999 F.3d at 664. The court concluded that the Board "could reasonably interpret[] the [INA] as allowing the government to exercise its discretion to parole a returning LPR into the United States for prosecution before satisfying its burden of proof." *Ibid.* "Second-guessing whether the immigration authorities properly paroled a returning LPR into the country," the court observed, would "interfer[e] with the government's exercise of its parole discretion." *Id.* at 665. Moreover, "it would be impractical and inefficient to require" the government to meet its "burden at the border," where agents are rightly focused on "'law enforcement responsibilities,'" not evidentiary burdens. *Id.* at 664 (quoting *Valenzuela-Felix*, 26 I. & N. Dec. at 64).

In rejecting the conclusions of the Fifth and Ninth Circuits, the Second Circuit acknowledged that it was creating a conflict. App., *infra*, 13a.

C. The Decision Below Warrants This Court's Review

That conflict in the circuits carries significant consequences for the enforcement of our Nation's immigration laws. While DHS does not track the number of LPRs with pending charges who are paroled into the United States for purposes of prosecution, the number of cases affected by the question is undoubtedly large. This Office is informed that every day last fiscal year, roughly 75,000 to 175,000 LPRs arrived at our Nation's ports of entry, seeking to reenter the United States. In a significant number of cases, the court of appeals' rule will almost certainly affect whether DHS may parole an LPR for purposes of prosecution.

The court of appeals noted that the government may in some cases (perhaps including this one) be able to seek removal under other authorities, including grounds of

deportability in 8 U.S.C. 1227. App., *infra*, 14a. But the grounds for inadmissibility and deportability are not co-extensive. *Judulang* v. *Holder*, 565 U.S. 42, 46 (2011). And the burdens of proof in the two types of removal proceedings differ. See 8 U.S.C. 1229a(c)(2) and (3)(A). Even if some cases may ultimately produce the same result, the court of appeals' limitation on the government's power to remove LPRs on the grounds of inadmissibility will have material effects on immigration enforcement.

In this context, the circuit conflict poses particular difficulties because it affects what officials must consider at the border. Venue in removal proceedings, however, is based on where the immigration judge completes the proceedings, not on the location of the alien's last entry. 8 U.S.C. 1252(b)(2). Immigration officers nationwide would therefore need to apply the Second Circuit's rule if subsequent removal proceedings were likely to occur in that circuit.

But venue for future removal proceedings is often difficult to predict. Newark Liberty International Airport, for example, is in the Third Circuit, where immigration officers need probable cause to parole an LPR. But if the LPR transits Newark on his way to New York, his removal proceedings might ultimately be reviewed in the Second Circuit, where clear and convincing evidence would be required. And if the LPR instead has a connecting flight to Texas or California, the Fifth or Ninth Circuit's rule—which imposes no burden at the border—might govern. Given that the circuits covering some of our Nation's largest ports of entry have taken opposing sides of the conflict—including four of the five airports with the most international-passenger traffic—the likelihood of daily on-the-ground uncertainty is high. See Office of the Ass't Sec'y for Aviation and Int'l

Affairs, U.S. Dep't of Transp., *U.S. International Air Passenger and Freight Statistics* Tbl. 6 (Dec. 2024) (noting that JFK, Los Angeles International Airport, San Francisco International Airport, and Newark are in the top five).

More generally, as explained, see pp. 15-16, *supra*, the court of appeals' rule poses significant operational difficulties for line immigration officers who are ill equipped to weigh evidentiary burdens while managing the flow of aliens at the border. And even if DHS could find a way to conduct hearings at the border, that result would not necessarily benefit LPRs. Parole itself does not affect an LPR's immigration status. *Valenzuela-Felix*, 26 I. & N. Dec. at 61 n.9; see *Leng May Ma* v. *Barber*, 357 U.S. 185, 190 (1958) ("The parole of aliens seeking admission * * * was never intended to affect an alien's status."). But parole allows the government to defer potential removal proceedings pending the result of the criminal case. That allows the LPR to organize his criminal defense from inside the United States. And if the LPR prevails in his criminal case, or negotiates a plea deal for an offense not covered by the INA, the LPR might avoid removal altogether. Without parole, by contrast, the government would have a strong incentive to initiate removal proceedings immediately, during which the LPR may be detained. 8 U.S.C. 1225(b)(2)(A); 8 U.S.C. 1226(a) and (c). That result would hardly redound to the benefit of LPRs in respondent's situation and only underscores the ill-considered consequences of the court of appeals' novel rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

D. JOHN SAUER
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BRETT A. SHUMATE
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OCTOBER 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022

Submitted: May 5, 2023
Decided: March 4, 2025

No. 21-6623

MUK CHOI LAU,

Petitioner,

v.

PAMELA BONDI, United States Attorney General,

*Respondent.**

Before: JACOBS, SULLIVAN, and KAHN, *Circuit Judges*.

Muk Choi Lau, a native and citizen of China, petitions for review of a final order of removal by the Board of Immigration Appeals (the "BIA") affirming a decision of an Immigration Judge that found Lau inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I) and ineligible for a waiver of inadmissibility under 8 U.S.C. § 1182(h) (a "212(h) waiver"). In ordering that Lau be removed,

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* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

the agency concluded—among other things—that Lau's conviction for trademark counterfeiting constituted a crime involving moral turpitude (a "CIMT"), that this crime did not qualify as an excepted "petty offense," that Lau was properly classified as an applicant for admission when he returned to the United States from abroad while this criminal charge was pending, and that he was not entitled to a 212(h) waiver. On appeal, Lau argues that the agency erroneously concluded that (1) his conviction for trademark counterfeiting constituted a CIMT, (2) the Department of Homeland Security ("DHS") properly treated him as an applicant for admission at the time of his reentry, and (3) he did not qualify for a 212(h) waiver. Because we agree with Lau that DHS improperly classified him as an applicant for admission under 8 U.S.C. § 1182(d)(5)(A) by paroling him into the United States upon his return from abroad, we need not address Lau's other claims of error. We therefore **GRANT** Lau's petition for review, **VACATE** the final order of removal, and **REMAND** this case to the agency with instructions to terminate removal proceedings against Lau on the basis of his inadmissibility under section 1182(a), without prejudice to any future deportation proceeding, such as one brought pursuant to 8 U.S.C. § 1227(a).

Mike P. Gao, Law Offices of Mike P. Gao, P.C., Flushing, NY, *for Petitioner*.

Kiley Kane, Senior Litigation Counsel; Stefanie A. Svoren-Jay, Trial Attorney, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, DC, *for Respondent*.

RICHARD J. SULLIVAN, *Circuit Judge*:

Muk Choi Lau, a native and citizen of China, petitions for review of a final order of removal by the Board of Immigration Appeals (the "BIA") affirming a decision of an Immigration Judge ("IJ") that found Lau inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I) and ineligible for a waiver of inadmissibility under 8 U.S.C. § 1182(h) (a "212(h) waiver"). In ordering that Lau be removed, the agency concluded—among other things—that Lau's conviction for trademark counterfeiting constituted a crime involving moral turpitude (a "CIMT"), that this crime did not qualify as an excepted "petty offense," that Lau was properly classified as an applicant for admission when he returned to the United States from abroad while this criminal charge was pending, and that he was not entitled to a 212(h) waiver. On appeal, Lau argues that the agency erroneously concluded that (1) his conviction for trademark counterfeiting constituted a CIMT, (2) the Department of Homeland Security ("DHS") properly treated him as an applicant for admission at the time of his reentry, and (3) he did not qualify for a 212(h) waiver. Because we agree with Lau that DHS improperly classified him as an applicant for admission under 8 U.S.C. § 1182(d)(5)(A) by paroling him into the United States upon his return from abroad, we need not address Lau's other claims of error. We therefore GRANT Lau's petition for review, VACATE the final order of removal, and REMAND this case to the agency with instructions to terminate removal proceedings against Lau on the basis of his inadmissibility under section 1182(a), without prejudice to any future deportation proceeding, such as one brought pursuant to 8 U.S.C. § 1227(a).

I. BACKGROUND

A. Facts

Between 2001 and 2004, Lau, a Chinese national, made several short trips to the United States. Over the next three years, Lau's trips to the United States became longer and more frequent. When Lau temporarily visited the United States during this period, he did so pursuant to a nonimmigrant visa. Lau was finally admitted to the United States as a lawful permanent resident (an "LPR") on September 7, 2007.

On May 7, 2012, Lau was charged with third-degree trademark counterfeiting in violation of New Jersey law. While awaiting trial, he temporarily left the United States. Upon his return on June 15, 2012, he presented himself to the immigration authorities at John F. Kennedy International Airport as a returning LPR. In light of Lau's pending charge, the immigration officer declined to admit him to the United States and instead paroled him for deferred inspection pursuant to 8 U.S.C. § 1182(d)(5)(A), which permits the Secretary of Homeland Security "in his discretion [to] parole into the United States temporarily . . . any alien applying for admission to the United States" under certain conditions.

Just over a year later, on June 24, 2013, Lau entered a guilty plea and was subsequently convicted of trademark counterfeiting in violation of N.J. Rev. Stat. § 2C:21-32(c). He was sentenced to two years' probation.

On March 13, 2014, DHS initiated removal proceedings against Lau, asserting that he was removable pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I), which provides that an alien is "ineligible to be admitted to the United States" if he has been "convicted of . . . a crime in-

volving moral turpitude." Lau sought to terminate these removal proceedings, arguing that DHS improperly classified him as "seeking admission . . . as an arriving alien" when he returned from his brief trip abroad, instead of admitting him as an LPR. Certified Admin. Rec. at 389-90. Lau also asserted that his conviction for trademark counterfeiting fell within the "petty offense" exception to section 1182(a)(2)(A)(ii)(II). *Id.* at 390.[1]

On April 20, 2016, Lau applied for a 212(h) waiver, which allows the Attorney General to waive grounds of inadmissibility in certain circumstances. To be eligible for such a waiver, the alien must have "lawfully resided continuously in the United States for a period of not less than [seven] years immediately preceding the date of initiation of proceedings to remove the alien." 8 U.S.C. § 1182(h). In applying for this waiver, Lau acknowledged that he had only been an LPR for approximately six years and seven months at the time his removal proceedings were initiated. He nevertheless argued that the time he spent in the United States prior to September 7, 2007, pursuant to a nonimmigrant visa, should be counted toward his period of continuous residency.

B. Procedural History

On March 20, 2018, the IJ issued an oral decision in which he determined that Lau's conviction for trademark counterfeiting constituted a CIMT and that Lau's conviction did not fall within the petty offense exception

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[1] The "petty offense" exception provides that an alien shall not be deemed inadmissible if the maximum possible penalty for the crime did not exceed imprisonment for one year and the alien was sentenced to a term of imprisonment of six months or less. *See* 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

because the maximum sentence for trademark counterfeiting was more than one year. The IJ also concluded that, because Lau had already committed the crime of trademark counterfeiting when he sought reentry into the United States, he was properly classified as "inadmissible" upon his arrival and was appropriately paroled even though he had not yet been convicted of trademark counterfeiting.

As to Lau's request for a 212(h) waiver, the IJ concluded that Lau was ineligible for such a waiver because he had not "resided continuously" in the United States for a period of seven years prior to the initiation of his removal proceedings. Certified Admin. Rec. at 64-65. In particular, the IJ determined that Lau was still a resident of China during the periods in which he was in the United States on a nonimmigrant visa and concluded that these periods could not be counted towards the residency requirement for a 212(h) waiver. The IJ further found that such trips to the United States were intermittent and did not constitute a period of "continuous" residency. *Id.* at 68.

On November 23, 2021, the BIA affirmed the IJ's decision and dismissed Lau's appeal. The BIA concluded that the IJ properly determined that Lau committed a CIMT, noting that Lau's conviction for trademark counterfeiting "conclusively establishe[d] that his conduct corresponded to the elements of that crime, including the intent and knowledge elements." *Id.* at 4-5. The BIA also rejected Lau's contention that his conviction was covered by the petty offense exception, agreeing with the IJ that the exception was inapplicable because Lau's crime of conviction carried a maximum sentence of five years' imprisonment.

The BIA additionally rejected Lau's argument that he was improperly classified as an applicant for admission when he returned to the United States from abroad while a criminal charge was pending against him. On this point, the BIA concluded that Lau's argument was foreclosed by *Matter of Valenzuela-Felix*, in which the BIA held that the Immigration and Nationality Act (the "INA") "does not purport to restrict the DHS's law enforcement authority to parole a returning [LPR] until pending criminal charges potentially giving rise to inadmissibility can be resolved" or "prevent the DHS from treating a returning resident as an arriving alien until an ultimate determination is made." 26 I. & N. Dec. 53, 57 (B.I.A. 2012). Because Lau failed to acknowledge or distinguish this case in his brief, the BIA deemed this decision controlling. Having concluded that Lau was properly removable, the BIA then considered whether Lau was eligible for a 212(h) waiver. The BIA rejected Lau's arguments that the time he spent in the United States pursuant to a nonimmigrant visa counted toward his continuous residence and that his Notice to Appear was defective such that he actually met the residency requirement.

On December 6, 2021, Lau filed the instant petition for review of the BIA's decision. Before us, Lau argues only that the agency erred in concluding that (1) DHS properly treated him as an applicant for admission when he reentered the United States while his trademark-counterfeiting charge was pending; (2) his conviction for trademark counterfeiting constituted a CIMT; and (3) he was ineligible for a 212(h) waiver.

We agree with Lau that a pending criminal charge does not provide the clear and convincing evidence of a

CIMT necessary for DHS to consider an LPR an applicant for admission at the time of reentry and then parole him under section 1182. We therefore grant his petition, without reaching his alternative arguments that his subsequent conviction for trademark counterfeiting does not constitute a CIMT or that he was improperly denied a 212(h) waiver of inadmissibility. *See Obeya v. Sessions*, 884 F.3d 442, 445 n.1 (2d Cir. 2018) (granting petition for review of BIA order affirming an IJ's removal order on one ground; acknowledging without deciding "alternative arguments" for granting petition).

II. STANDARD OF REVIEW

"When, as here, the BIA adopts and expands upon an IJ's decision, we review both the IJ and BIA decisions." *Jung Hee Jang v. Garland*, 42 F.4th 56, 59 (2d Cir. 2022); *see also Wala v. Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007). We review an IJ's legal conclusions—including whether a petitioner was properly treated as an arriving alien applying for admission—*de novo*. *See Ibragimov v. Gonzales*, 476 F.3d 125, 132 (2d Cir. 2007). We also review "BIA determinations of law *de novo*." *Nwozuzu v. Holder*, 726 F.3d 323, 326 (2d Cir. 2013). Of course, courts may give "[c]areful attention to the judgment of the Executive Branch" when interpreting a statute, but such careful attention must not prohibit courts from exercising "their independent judgment." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

III. DISCUSSION

Lau contends that we must vacate the BIA's order of removal because DHS improperly classified him as an applicant for admission and paroled him when he returned to the United States from a trip abroad, when it

should have admitted him. We begin our analysis with the statutory text. *See Nwozuzu*, 726 F.3d at 327. Section 1182 of the INA, titled "[i]nadmissible aliens," discusses the circumstances in which aliens are "ineligible to be admitted to the United States." 8 U.S.C. § 1182(a).[2] Section 1182 grants DHS discretion to "parole into the United States temporarily . . . *any alien applying for admission* to the United States" "for urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A) (emphasis added). Although an alien who is paroled is allowed to enter the country, he is not "considered to have been admitted" for the purposes of the immigration laws. *Id.* § 1101(a)(13)(B).

The INA makes clear that "alien[s] lawfully admitted for permanent residence in the United States"—LPRs—who are returning to the United States from visits abroad "shall not be regarded as seeking an admission into the United States," subject to certain enumerated exceptions. *Id.* § 1101(a)(13)(C). As relevant here, LPRs *may* be regarded as seeking admission to the United States if they "ha[ve] committed" certain offenses, *id.* § 1101(a)(13)(C)(v), including "crime[s] involving moral turpitude," *id.* § 1182(a)(2)(A)(i)(I). Accordingly, the plain language of section 1101 makes clear that LPRs are *not* considered to be "seeking . . . admission" upon reentry to the United States *unless* certain enumerated circumstances—including their having committed a CIMT—are present. *Id.* § 1101(a)(13)(C).

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[2] Notably, section 1182 is distinct from another provision of the INA—section 1227, titled "[d]eportable aliens"—which addresses the circumstances in which an alien who has *already been* "*admitted* to the United States shall . . . be removed" from the country. 8 U.S.C. § 1227(a) (emphasis added).

We have already had occasion to consider the question of *when* an individual is deemed to have "committed" a crime for the purposes of section 1101. In *Centurion v. Sessions*, we examined when the "legal consequences of [section] 1101(a)(13)(C)(v) attach" to an alien's criminal conduct and held that such consequences attach "when an alien engages in criminal conduct" as opposed to "once the offense has been adjudicated." 860 F.3d 69, 75 (2d Cir. 2017). To that end, we explained that section 1101(a)(13)(C)(v) does not "expressly require[] an alien to have been convicted of an offense for specific consequences to attach." *Id.* at 76. However, we noted that—although the legal consequences of a CIMT attach at the time of commission—"in practice, those consequences may not be enforceable in any meaningful way until after the [LPR] is convicted of the crime." *Id.* at 77. This is because it will generally be difficult for DHS to find, by clear and convincing evidence, that the alien has committed a qualifying crime at the time of admission if the admission precedes the LPR's criminal trial or admission of guilt. *See id.*; *see also Matter of Rivens*, 25 I. & N. Dec. 623, 625 (B.I.A. 2011) ("DHS bears the burden of proving by clear and convincing evidence that a returning [LPR] is to be regarded as seeking an admission."). The officer at the border will ordinarily do so by "check[ing] the alien's records for a conviction" and nothing else. *Centurion*, 860 F.3d at 77.

Here, we are presented with the question of whether DHS may parole an LPR at the border who has been charged with—but not yet convicted of—a CIMT. In analyzing this question, we heed *Centurion*'s holding that an LPR becomes an alien applying for admission for purposes of section 1101(a)(13)(C) upon the commis-

sion, rather than the conviction, of a crime. But we are also cognizant of the reality that, without a conviction, DHS will be hard pressed to prove by clear and convincing evidence that the LPR actually committed the crime in question at the time of reentry. If DHS fails to sustain its burden of proving otherwise, the default presumption governs that an LPR is not an applicant for admission.

In *Matter of Valenzuela-Felix*, the BIA addressed the issue currently before us, holding that DHS can rely on an alien's "subsequent conviction to sustain its burden of proving that he was properly charged as an [inadmissible] arriving alien" at the time of reentry. 26 I. & N. Dec. at 55. In so holding, the BIA determined that DHS's "authority to parole for purposes of prosecution is not limited to applicants for admission," *id.*, and rejected the notion that "DHS must meet a threshold standard before it may parole a returning [LPR] into the United States for prosecution and then charge him with inadmissibility on the basis of the results," *id.* at 62. Put simply, the BIA did not interpret the INA "to constrain the DHS in its ability to prove the applicability of one of the six enumerated exceptions in section [1101(a)(13)(C)] by limiting the DHS to using the evidence it already possesses when a returning [LPR] presents himself at a port of entry." *Id.* at 63-64. In essence, the BIA concluded that DHS officials had the authority to parole LPRs into the country at the time of reentry only to later reclassify their entry, *nunc pro tunc*, based on the subsequent results of the criminal prosecution.

We cannot agree with *Valenzuela-Felix*'s interpretation of the relevant provisions of the INA. The INA

explicitly provides that an LPR "*shall not* be regarded as seeking an admission into the United States," except in certain enumerated circumstances, 8 U.S.C. § 1101(a)(13)(C) (emphasis added)—including when the alien "has committed," *id.* § 1101(a)(13)(C)(v), a "crime involving moral turpitude," *id.* § 1182(a)(2)(A)(i)(I). Critically, the INA does not provide that an LPR may be treated as seeking admission when he has been "charged with a crime" or is "believed to have committed a crime;" it permits such treatment only when an LPR "has committed" a crime. *Id.* § 1101(a)(13)(C)(v). And because "DHS bears the burden of proving by clear and convincing evidence that a returning [LPR] is to be regarded as seeking an admission," *Rivens*, 25 I. & N. Dec. at 625, we do not see how charging documents alone —without more—could carry DHS's burden of demonstrating that a crime had been *committed* at the time of an LPR's reentry. *See United States v. Salerno*, 829 F.2d 345, 346 (2d Cir. 1987) (Newman, *J.*, concurring) (acknowledging that the clear-and-convincing-evidence standard is higher than that of probable cause).

The INA is also explicit that the parole process is authorized *only* for "alien[s] applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A); *see also Matter of Pena*, 26 I. & N. Dec. 613, 615 (B.I.A. 2015) ("[A]n alien returning to the United States who has been granted [LPR] status cannot be regarded as seeking admission and may not be charged with inadmissibility . . . if he does not fall within any of the exceptions in section [1101(a)(13)(C)] of the [INA]."). Based on this clear statutory directive, we cannot agree that the INA allows DHS to treat a returning LPR as an applicant for admission based on the *suspicion* that a CIMT has been committed, leaving open whether this suspicion will ever

be confirmed by a subsequent conviction. The parole procedure sanctioned by *Valenzuela-Felix* is therefore contrary to the INA's text, which nowhere authorizes DHS to treat LPRs as having "committed" unproven, charged crimes at the time of reentry by paroling them first and proving their guilt later.

We respectfully disagree with our sister circuits that the INA is unclear as to *when* DHS must determine whether an LPR is an applicant for admission. In *Munoz v. Holder*, the Fifth Circuit held that, because "[n]othing in the plain language of [the INA] limits the timing of the [section 1101(a)(13)(C)(v)] determination," DHS was empowered to use "subsequent convictions . . . to determine whether a[n] [LPR] was an applicant for admission" at the time of reentry. 755 F.3d 366, 370-71 (5th Cir. 2014); *see also Vazquez Romero v. Garland*, 999 F.3d 656, 664 (9th Cir. 2021) (deferring under pre-*Loper Bright* framework to BIA's interpretation of the INA "as allowing the government to exercise its discretion to parole a returning LPR into the United States for prosecution before satisfying its burden of proof"). As explained above, the INA is unmistakably clear that the default presumption is that LPRs will *not* be treated as seeking admission *unless* certain threshold determinations have been made. *See* 8 U.S.C. § 1101(a)(13)(C). Allowing DHS to defer such a determination and take a wait-and-see approach contingent on whether a conviction eventually materializes effectively nullifies this clear command. *See id.* § 1182(a)(2)(A)(i)(I) (providing that a CIMT renders an alien "inadmissible"); *see also Rivens*, 25 I & N Dec. at 625 (requiring DHS to meet its "burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission").

Contrary to our sister circuits' conclusion that the INA is silent on the issue of timing, we find that the INA is definitive on the question of *sequence*: DHS must determine whether an LPR is an applicant for admission as a threshold matter *before* it is authorized to parole (rather than admit) that individual. *See* 8 U.S.C. § 1101(a)(13)(C) (establishing a presumption that LPRs are not to be treated as seeking admission except upon a finding of certain specified conditions); *id.* § 1182(d)(5)(A) (authorizing parole only with regard to "alien[s] applying for admission to the United States"). Accordingly, we see no statutory basis to conclude that DHS is allowed to use a subsequent conviction to provide an after-the-fact justification for its prior decision to parole an LPR upon reentry.

Our decision does not leave DHS without lawful means to remove LPRs who have committed CIMTs. Section 1227 provides that any alien who "is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission" is deportable. 8 U.S.C. § 1227(a)(2)(A)(i)(I); *see also id.* § 1227(a)(1)(A) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."). The government did not seek to remove Lau under that section. Because the BIA's decision in this case constitutes a final agency determination, "we may consider only those issues that formed the basis for that decision." *Lin Zhong v. U.S. Dep't of Just.*, 480 F.3d 104, 122 (2d Cir. 2007), *abrogated on other grounds by Santos-Zacaria v. Garland*, 598 U.S. 411 (2023); *see also Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency

alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

IV. CONCLUSION

For the foregoing reasons, we conclude that the agency erred in finding Lau removable pursuant to section 1182(a)(2)(A)(i)(I). We therefore **GRANT** Lau's petition for review, **VACATE** the final order of removal, and **REMAND** this case to the agency with instructions to terminate removal proceedings against Lau on the basis of his inadmissibility under section 1182(a), without prejudice to any future deportation proceeding, such as one brought pursuant to 8 U.S.C. § 1227(a).

APPENDIX B

U.S. Department of Justice
Executive Office For Immigration Review
Board Of Immigration Appeals

MATTER OF:

Muk Choi LAU, A059-413-277

Respondent

FILED
Nov 23, 2021

ON BEHALF OF RESPONDENT: Jim Li, Esquire

IN REMOVAL PROCEEDINGS
On Appeal from a Decision of the Immigration Court,
New York, NY

Before: Gorman, Appellate Immigration Judge

Opinion by Appellate Immigration Judge Gorman

GORMAN, Appellate Immigration Judge

We affirm the Immigration Judge's March 20, 2018, decision ordering the respondent removed from the United States to his native China.[1]

The respondent argues on appeal that the Immigration Judge erroneously found him removable from the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an applicant for admission con-

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[1] The respondent's request for oral argument is denied. 8 C.F.R § 1003.1(e)(7). His request for waiver of the appeal filing fee is granted. 8 C.F.R § 1003.8(a)(3).

victed of a crime involving moral turpitude ("CIMT"). Alternatively, the respondent argues that the Immigration Judge improperly found him ineligible for a waiver of inadmissibility under section 212(h) of the Act. We address each argument in turn. In doing so, we review the Immigration Judge's decision de novo except for factual findings, which we review for clear error. 8 C.F.R § 1003.1(d)(3)(i), (n).

I. BACKGROUND

The respondent, a native and citizen of China (Hong Kong), was admitted to the United States as an immigrant on September 7, 2007, and has resided here as a lawful permanent resident ("LPR") ever since.

On May 7, 2012, the respondent was charged with third-degree "trademark counterfeiting" in violation of section 2C:21-32(c) of the New Jersey Statutes (hereafter "section 2C:21-32(c)"). *See also* N.J. STAT. ANN. § 2C:21-32(d)(2). While awaiting trial on that charge the respondent departed the United States temporarily, and on June 15, 2012, he arrived at the JFK International Airport port of entry in New York City and presented himself for inspection as a returning LPR. Based on his pending criminal charge, the immigration officer declined the respondent' request to reenter the United States and instead paroled him for deferred inspection. About one year later, on June 24, 2013, the respondent was convicted under section 2C:21-32(c) and sentenced to probation for 2 years.

On March 13, 2014, the Department of Homeland Security ("DHS") initiated these removal proceedings by filing a Notice to Appear ("NTA"), Form I-862, with the Immigration Court, charging the respondent with removability pursuant to section 212(a)(2)(A)(i)(I) of the

Act as an applicant for admission (or "arriving alien") convicted of a CIMT (Exh. 1). The respondent denied the charge and, in the alternative, requested a section 212(h) waiver, but the Immigration Judge found him removable and ineligible for section 212(h) relief. This timely appeal followed.

II. LEGAL DISCUSSION

A. Removability

1. Trademark Counterfeiting Under Section 2C:21-32(c)

The respondent disputes the Immigration Judge's removability determination on several fronts. First, he argues that section 2C:21-32(c) does not define a CIMT because it may allow conviction even if the accused did not know that the items he sold bore a counterfeit mark (R's Br. at 5-6). The argument is unpersuasive.

At all relevant times, section 2C:21-32(c) has provided as follows:

> A person commits the offense of counterfeiting who, *with the intent to deceive or defraud* some other person, *knowingly* manufactures, uses, displays, advertises, distributes, offers for sale, sells, or possesses with intent to sell or distribute within, or in conjunction with commercial activities within New Jersey, any item, or services, bearing, or identified by, a counterfeit mark. (Emphases added).

As this language makes plain, a person can be convicted under section 2C:21-32(c) only if there is proof beyond a reasonable doubt that he or she specifically intended to deceive or defraud someone by manufacturing or placing into the stream of commerce an item he or she knew

bore a counterfeit mark. *State v. Marchiani*, 765 A.2d 765, 767 (N.J. Super. Ct. App. Div. 2001). Knowledge and specific intent satisfy the "corrupt mental state" element of the CIMT definition. *Matter of Vucetic,* 28 I&N Dec. 276, 277 (BIA 2021) (holding that "a 'culpable mental state' requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness.") (citation omitted).[2]

The respondent also contends that his right to a fundamentally fair removal hearing was violated because he was not given a chance to testify about his lack of knowledge regarding the particular marks he was convicted of counterfeiting. That argument is also unconvincing. For immigration purposes, the respondent's conviction under section 2C:21-32(c) conclusively establishes that his conduct corresponded to the elements of that crime, including the intent and knowledge elements. The Immigration Judge cannot go behind his conviction or re-litigate his guilt or innocence. *Matter of Madrigal,* 21 I&N Dec. 323, 327 (BIA 1996); *Chiaramonte v. INS,* 626 F.2d 1093, 1097-98 (2d Cir. 1980). Nor could the Immigration Judge have entertained a collateral attack on the respondent's conviction; if the respondent believes he is not guilty of trademark counterfeiting, then his remedy is to seek post-conviction relief in the New Jersey courts. *Matter of Cuellar,* 25 I&N Dec. 850, 855 (BIA 2012).

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[2] The respondent does not dispute that the elements of section 2C:21-32(c) satisfy the CIMT definition's "reprehensible conduct" element. *Accord Matter of Kochlani* 24 I&N Dec. 128 (BIA 2007) (holding that trafficking in counterfeit goods or services under 18 U.S.C. § 2320 (2000) is a CIMT).

2. Petty Offense Exception

The respondent also argues that his conviction for trademark counterfeiting does not render him inadmissible, even if it is a CIMT, because it is covered by the "petty offense exception," which provides in relevant part that the inadmissibility ground relating to CIMTs

> shall not apply to an alien who committed only one crime if . . . (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Section 212(a)(2)(A)(ii)(II) of the Act. According to the respondent, the petty offense exception applies here because he was sentenced to mere probation and because the "maximum penalty possible" for his crime "did not exceed imprisonment for one year" (R's Br. at 6-7).

The respondent's conviction record reflects that his trademark counterfeiting offense was a "crime of the third degree" under New Jersey law, meaning that it was punishable by a statutory maximum term of imprisonment of five years. N.J. STAT. ANN. §§ 2C:21-32(d)(2), 2C:43-6(a)(3). Nevertheless, the respondent argues that the "maximum penalty possible" for *his* crime was in fact probation, i.e., the sentence he actually received. In support of the argument, the respondent points out that because he was a first offender, he was entitled to a robust presumption of non-imprisonment under section

2C:44-1(e) of the New Jersey Statutes, which provides that—

> [t]he court shall deal with a person convicted of an offense other than a crime of the first or second degree, who has not previously been convicted of an offense, without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public. . . .

See also State v. Gardner, 551 A.2d 981, 985 (NJ. 1989) (holding that "before the presumption against imprisonment of a first offender who pleads guilty to a crime of the third degree may be overcome, the sentencing court must be persuaded by a standard that is higher than 'clear and convincing' evidence that incarceration is necessary."). In essence, the respondent maintains that probation was the "maximum penalty possible" *for him* because it was the longest sentence the court could have imposed on the particular facts of his case. The argument is unpersuasive, however, because it misapprehends how the "maximum penalty possible" clause works in the petty offense exception context.

The petty offense exception contains two operative clauses, both of which must be satisfied before a CIMT qualifies as a "petty offense." The statute is divided in this way because the two clauses serve different purposes. First is the "maximum penalty possible" clause, at issue here, which gauges the objective seriousness of "the crime" in a generic sense, as measured by its maximum penalty. Second is the "sentenced to a term of imprisonment" clause, which gauges the seriousness of

the respondent's particular offense, as measured by the sentence actually ordered.

When understood in context, the "maximum penalty possible" clause thus plainly does not refer to the maximum sentence available *for the respondent*; it refers, rather, to the absolute maximum sentence available *for the crime,* viewed in the abstract. *Vartelas v. Holder*, 620 F.3d 108, 115-16 (2d Cir. 2010) (holding that the "maximum penalty possible" for a crime is the statutory maximum, not the upper end of the sentencing guideline range applicable to the particular offender), *rev'd on other grounds,* 566 U.S. 257 (2012); *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 557 (BIA 2011) (same). The respondent's contrary interpretation would largely collapse the distinction between the two clauses. *Mendez-Mendez v. Mukasey,* 525 F.3d 828, 833 (9th Cir. 2008) (holding that the "maximum penalty possible" is the statutory maximum, in part because the "sentenced to a term of imprisonment" clause "already takes into consideration the fact that the sentence imposed might be below the maximum penalty possible.").

Under the circumstances, we agree with the Immigration Judge that the "maximum penalty possible for the crime" of third-degree trademark counterfeiting under section 2C:21-32(c) was imprisonment for five years, despite the fact that the respondent's first-offender status made it highly unlikely (though not impossible) that this maximum penalty would be imposed on *him*. Hence, the petty offense exception is inapplicable.

3. Applicant for Admission

Finally, the respondent argues that the DHS improperly charged him with inadmissibility under section 212(a) of the Act because he is an LPR (R's Br. at 7-8).

Section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C), establishes a presumption against treating a returning LPR as an applicant for admission in removal proceedings.[3] That presumption may be rebutted, however, if the DHS establishes by clear and convincing evidence that one or more of six statutory exceptions applies. *Matter of Rivens*, 25 I&N Dec. 623, 626 (BIA 2011). Here, the DHS relied on the exception listed in section 101(a)(13)(C)(v) of the Act, which authorizes a returning LPR to be regarded as an applicant for admission if he has "committed an offense identified in section 212(a)(2). . . ." According to the DHS, the respondent is properly charged as an applicant for admission because when he presented himself for inspection as a returning LPR on June 15, 2012, he had committed third-degree trademark counterfeiting under section 2C:21-32(c)—a CIMT under section 212(a)(2).

In his brief, the respondent contends that the DHS improperly charged him as an applicant for admission because he had not yet been *convicted* of trademark counterfeiting when he arrived at the port of entry of June 15,2012. But that argument is foreclosed by *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012), wherein the Board held that when the DHS paroles a returning LPR into the United States for criminal prosecution, it is permissible for the DHS to rely on a later conviction resulting from that prosecution as proof in subsequent removal proceedings that the respondent was an applicant for admission under section 101(a)(13)(C)(v). *Id.* at 57-65; *see also Vazquez Romero v. Garland*, 999

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[3] Ordinarily, an LPR is removable only if described in one of the grounds of "deportability" listed in section 237(a) of the Act, 8 U.S.C. § 1227(a).

F.3d 656, 664-68 (9th Cir. 2021) (extending *Chevron* deference to *Valenzuela-Felix); Munoz v. Holder*, 755 F.3d 366, 372 (5th Cir. 2014) (same). The respondent does not acknowledge (much less establish grounds to distinguish) *Valenzuela-Felix* on appeal, so we deem it controlling. 8 C.F.R § 1003.1(g)(2).

4. Conclusion

In light of the foregoing, we discern no legal or clear factual error in the Immigration Judge's decision finding the respondent removable under section 212(a)(2)(A)(i)(I) of the Act. Thus, the respondent's appeal will be dismissed to the extent he disputes his removability.

B. Section 212(h) Waiver

Having determined that the respondent was properly found removable, we now turn to his eligibility for a waiver under section 212(h) of the Act.

The closing paragraph of section 212(h) provides as follows, in relevant part:

> [N]o 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.

The Immigration Judge determined that this language bars the respondent from being granted a section 212(h) waiver. For the following reasons, we agree.

The respondent was admitted to the United States as an LPR on September 7, 2007, and his removal proceed-

ings were initiated on March 13, 2014, the date when his NTA was filed in Immigration Court 8 C.F.R § 1003.14(a). Thus, to avoid the above-quoted preclusion the respondent must prove that he began to "lawfully resid[e] continuously in the United States" no later than March 13, 2007, irrespective of whether the period of lawful residence was as an LPR, *Matter of Rotimi,* 24 I&N Dec. 567, 569 (BIA 2008), *aff'd sub nom. Rotimi v. Holder,* 577 F.3d 133(2d Cir. 2009).

Though the respondent's continuous residence *as an LPR* did not begin until September 2007, he argues that his period of continuous lawful residence commenced somewhat earlier, when he was lawfully present in the United States on a B1/B2 nonimmigrant visa (R's Br. at 9). The argument lacks merit, however, because a person present in the United States on a B1/B2 visa is, as a matter of law, "an alien . . . having residence in a foreign country which he has no intention of abandoning." Section 101(a)(15)(B) of the Act. When the respondent visited the United States temporarily as a B1/B2 nonimmigrant, he continued to lawfully reside in China throughout the period of his visits. Thus, the respondent was properly found ineligible for section 212(h) relief.

On August 30, 2021, the respondent filed a "Motion to Terminate Proceedings or Alternatively Remand," in which he cites *Pereira v. Sessions,* 138 S. Ct. 2105 (2018), and *Niz-Chavez v. Garland,* 141 S. Ct. 1474 (2021), for the proposition that March 14, 2014, should not be considered "the date of initiation of proceedings to remove [him] from the United States." To be precise, the respondent contends that the filing of his NTA did not cut off his period of continuous lawful residence

under section 212(h) because the NTA failed to provide him with notice of the time and place of his initial removal hearing.

The argument mischaracterizes the record. The respondent's NTA clearly specifies both the time and place of his initial removal hearing (Exh. 1). Thus, *Pereira* and *Niz-Chavez* do not apply here, and we need not decide whether (or to what extent) the omission of time and/or place information from a NTA might affect calculation of the "date of initiation of proceedings" under section 212(h). *Accord Sharan v. Wilkinson,* 850 F. App'x 878, 881 (5th Cir. 2021) (noting the issue but finding it unnecessary to resolve it).

In conclusion, we discern no legal or clear factual error in the Immigration Judge's denial of the respondent's application for a section 212(h) waiver.

C. Due Process

Finally, we address the respondent's argument—raised for the first time on appeal—that he was denied due process of law because he was not provided with an interpreter for most of his hearings (R's Br. at 3).

To establish a violation of due process, the respondent must demonstrate that he lacked a full and fair opportunity to present his claims, and that prejudice resulted. *Garcia-Villeda v. Mukasey,* 531 F.3d 141,149 (2d Cir. 2008); *Burger v. Gonzales,* 498 F.3d 131, 134 (2d Cir. 2007). We find no due process violation here because the respondent waived his right to an interpreter through counsel, after consultation (Tr. at 96-97). The respondent does not allege that his former lawyer provided ineffective assistance of counsel in this respect, nor has he identified any material fact that he was una-

ble to communicate to the Immigration Judge due to the lack of an interpreter. Thus, he has not demonstrated prejudice.

III. CONCLUSION

In conclusion, the respondent's appeal does not establish error in the Immigration Judge's decision finding him removable under section 212(a)(2)(A)(i)(I) of the Act and ineligible for a section 212(h) waiver. Nor does the appeal establish that the conduct of the respondent's removal proceedings violated his right to due process of law.

Accordingly, the following order will be issued.

ORDER: The appeal is dismissed.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATTION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

File: A059-413-277 March 20, 2018
In the matter of

MUK CHOI LAU	)	IN REMOVAL
	)	PROCEEDINGS
RESPONDENT	)	

CHARGES: INA Section 212(a)(2)(A)(i)(I).

APPLICATIONS: Motion to Terminate and Section 212(h) waiver.

ON BEHALF OF RESPONDENT: CORY FORMAN

ON BEHALF OF DHS: ROBERT GUNDLACH; REBECCA FANTAUZZI

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of the People's Republic of China, herein China. On September 7, 2007, the respondent was admitted to the United States as a lawful permanent resident. See Exhibit 1. On May 7, 2012, the respondent was arrested and charged with criminal attempt of trademark counterfeiting in violation of New Jersey Penal Code Section 2C:21-32c. See Exhibits 1 and 10. Then on June 15, 2012, the respondent sought admission into the United States at JFK International Airport in New York, New York, and

was paroled for purposes of deferred inspection. Exhibit 9. On May 13, 2013, the respondent pled guilty to the charge of trademark counterfeiting. Exhibit 6. He was later convicted by the Superior Court of New Jersey, Essex County, on June 24, 2013 and sentenced to two years of probation. Id.

As a result, when the respondent appeared for inspection at JFK Airport on March 3, 2014, he was issued a Notice to Appear by the Department of Homeland Security, herein the Department. The Notice to Appear charged the respondent as an arriving alien, and the Department states he is removable pursuant to INA Section 212(a)(2)(A)(i)(I) as an alien who has been convicted of a crime involving moral turpitude. The filing of the Notice to Appear in the Immigration Court vested the Court with jurisdiction.

At a master calendar hearing, the respondent appeared with counsel and denied allegations 4 and 5. The respondent also denied the charge of removability and filed a motion to terminate proceedings. As set forth below, the Court finds that the Department established by clear and convincing evidence that the respondent is removable. See 8 C.F.R. Section 1240.8. As relief from removal, the respondent then filed an application for a waiver of inadmissibility pursuant to Section 212(h), herein 212(h) waiver.

STATEMENT OF THE LAW

An individual lawfully admitted for permanent residence is generally not regarded as seeking admission into the United States. 101(a)(13). However, where, inter alia, he has committed an offense identified in Section 212(a)(2), he will be regarded as seeking an admission. INA Section 101(a)(13)(C)(v). Nevertheless, if

the individual has a colorable claim to returning resident status, the Department will bear the burden to prove the charge of inadmissibility by clear, unequivocal, and convincing evidence. Matter of Wang, 19 I&N Dec. 749, 754 (BIA 1998); see also Landon v. Plasencia, 459 U.S. 21, 35-36 (1982), holding that a returning lawful permanent resident is entitled to protections ordinarily unavailable in exclusion proceedings. Since the respondent was admitted to the United States as a lawful permanent resident on September 7, 2007, the Department bears the burden to establish by clear, convincing, and unequivocal evidence that the respondent's conviction constitutes an offense under INA Section 212(a)(2)(A)(i)(I).

Pursuant to INA Section 212(a)(2)(A)(i)(I), a respondent convicted of or who admits having committed or who admits committing acts which constitute the essential elements of a CIMT, other than a purely political offense, or an attempt or a conspiracy to commit such a crime is inadmissible. The term moral turpitude generally refers to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or duties owed to society in general. Matter of Torres-Varela. 23 I&N Dec. 78, 83 (BIA 2001). Moral turpitude requires both reprehensible conduct and a culpable mental state. Matter of Silva-Trevenio, 26 I&N Dec. 826, 834 (BIA 2016).

Determining whether a conviction constitutes a CIMT involves a three-part analysis. Id. First, the Court must evaluate whether the conviction is one that categorically involves moral turpitude by examining the elements and the nature of the offense of conviction, rather than the particular facts relating to the petitioner's

crime, in order to determine whether the statute is one in which moral turpitude necessarily adheres. Wala v. Mukasey, 511 F.3d 102, 107 (2nd Cir. 2007). Moreover, the Court should determine whether there is a realistic probability that the state or federal criminal statute pursuant to which the respondent was convicted would be applied to each conduct that does not involve moral turpitude. Silva-Trevino, 26 I&N Dec. at 831-832. Second, if the analysis under the categorical approach is inconclusive because the statute is divisible, the Court should proceed to the modified categorical approach in which it should first examine whether the alien's record of conviction evidences a crime that in fact involved moral turpitude. Matter of Chairez, 26 I&N Dec. 819, 823. In the context of a guilty plea, the Court can only rely on those facts or elements to which the respondent pled that were necessary to establish that he violated a divisible statute in a matter that satisfies the ground for removability provision at issue. Wala, 511 F.3d at 107. Finally, when the record of conviction is inconclusive, Immigration Judges may, to the extent they deem necessary and appropriate, consider evidence beyond the formal record of conviction. Id.

The Court finds that the respondent's conviction for trademark counterfeiting pursuant to New Jersey Statute Section 2C:21-32d3 is a CIMT. Crimes requiring intent to defraud as an essential element have always been regarded as involving moral turpitude. Jordan v. De George, 341 U.S. 223, 232 (1951); see also In re Solon, 24 I&N Dec. 239 (BIA 2007). Fraud is characterized as a CIMT.

In his motion to terminate, the respondent made two alternate arguments First, he argues that his sole con-

viction falls within the petty offense exception set forth at INA Section 212(a)(2)(A)(ii)(II) of the Act. The petty offense exception is applicable under the following circumstances. One, he has committed only one moral turpitude offense ever; and, two, the offense carries a potential sentence of one year or less, and the respondent was sentenced to less than six months. The respondent has no prior criminal background or record, therefore, this one CIMT conviction is his only offense. Also, the respondent was sentenced to two years' probation. The respondent was convicted of trademark counterfeiting in the third degree under New Jersey Statute 2C:21-32d2. When determining whether the petty offense exception applies, the Court must determine the maximum penalty.

According to New Jersey Statute Annotated 20:43-63, in the case of a crime of the third degree the sentence shall be between three years and five years. The respondent alleges that he was sentenced according to New Jersey Statute Section 2C:44-1e, which states that, "a person convicted of an offense other than a crime of the first or second degree who has not been previously convicted of an offense, shall be dealt with without imposing a sentence of imprisonment unless, having regard to the nature and circumstances of the offense and the history, character, and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public under the criteria set forth in . . ."

In support of his position, the respondent submitted an affidavit executed by Donald Venezia, herein Judge Venezia, a retired New Jersey Superior Court judge. According to Judge Venezia, when sentencing someone

like the respondent, who had no prior convictions, the Court shall not impose a period of incarceration unless there are highly unusual factors, which were not present in the respondent's case. Section 2C:44-1e contains language that allows the Court to impose a sentence if, after considering the nature and circumstances of the offense and the history, character, and condition of the defendant, it is the court's opinion that his imprisonment is necessary for the protection of the public. Based on the aforementioned, the Court finds that a sentence could be imposed under New Jersey Statute Annotated 2C:44-1g, unless the court needs to consult the sentencing guidelines for convictions involving crimes of the third degree. Said sentencing guidelines indicate that there is a maximum five-year sentence under New Jersey Statute Annotated 2C:43-6. A fortiori, the petty offense exception is inapplicable because the maximum sentence is over one year.

The respondent alternatively argues that he was not properly paroled into the United States because at the time he attempted to enter the United States he had not yet been convicted of his crime, and thus the respondent was improperly classified as an arriving alien. The respondent was inspected by the Department officers on June 15, 2012, they deferred his inspection based on his pending criminal matter. Matter of Pena, 26 I&N Dec. 613 (BIA 2015). In Matter of Pena, the Board held that, "an alien returning to the United States who has been granted lawful permanent residence cannot be regarded as seeking admission and will not be charged with inadmissibility under Section 212(a) of the Act . . . if he or she does not fall within any of the exceptions in Section 101(a)(13)(C) of the Act." Id. at 613.

Here, the respondent falls within the exception highlighted in 101(a)(13)(C)(5) since the respondent has committed an offense in Section 212(a)(2). The respondent committed the offense of trademark counterfeiting on March 1, 2012. He was arrested on May 7, 2012. At the time of the respondent's application for admission, the respondent was inadmissible to the United States under INA Section 212(a)(2)(A)(i)(I). The inspection process was deferred and the respondent provided a disposition to the Department indicating that he subsequently was convicted of trademark counterfeiting on June 24, 2013, and the Department thus issued an NTA and personally served it on the respondent. Thus, the Court finds that there is no merit to the respondent's argument that he was not properly placed in proceedings, because he did commit his crime before his last entry, and thus, the Court finds that the respondent is removable as charged.

SUMMARY OF THE EVIDENTIARY RECORD

The parties submitted various documents. These documents appear in the record as Exhibits 1 through 10. The Court has considered all the documentary evidence cumulatively in evaluating the respondent's eligibility for relief, including that evidence not specifically referenced in this decision. In addition to the aforementioned exhibits, the parties have submitted legal briefs. The Court has considered all of the arguments set forth in their respective briefs.

The respondent seeks a waiver under 212(h) of the Immigration and Nationality Act. The Court finds that the respondent is not eligible to pursue this waiver. Specifically, the respondent shall have the burden of establishing that he is eligible for any requested benefit or

privilege, and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. 8 C.F.R. Section 1240.8(d). As relief from removal, the respondent filed a 212(h) waiver. As fully explored below, the Court finds that the respondent did not qualify for said waiver.

A 212(h) waiver allows the Attorney General in his discretion to waive certain grounds of inadmissibility for specific classes of aliens. See INA Section 212(a)(2)(A)(i)(I) through (II). The 212(h) waiver is unavailable to an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if the alien has been convicted of an aggravated felony since the date of such admission, or has not lawfully resided continuously in the United States for a period of at least seven years immediately preceding the date on which removal proceedings were initiated against him. INA Section 212(h); see also Matter of U. Singh, 25 I&N Dec. 670, 671-672 (BIA 2012); Matter of Pineda-Castellanos, 21 I&N Dec. 1017 (BIA 1997); Matter of Yeung, 21 I&N Dec. 610, 611-612 (BIA 1997).

In this case, the respondent has been admitted to the United States as a lawful permanent resident, so he is barred from receiving relief pursuant to a 212(h) waiver if he has not lawfully resided continuously in the United States for a period of at least seven years immediately preceding the date on which removal proceedings were initiated against him. Here, the respondent lacks the continuous physical presence prior to the issuance of the

Notice to Appear. In Matter of Rotimi, the Board of Immigration Appeals examined the meaning of residence as required under Section 212(h), and held that, "the meaning of the phrase lawfully resided is not self-evident and we consider it to be ambiguous." Matter of Rotimi, 24 I&N Dec. 567, 571 (BIA 2008); Rotimi v. Holder, 577 F.3d 133, 138 (2nd Cir. 2009), stating that the Court agrees with the Board's interpretation that the phrase lawfully resided continuously is ambiguous. Consequently, the Board looked at the meaning of the phrase as derived in the context of the immigration laws in order to help sort out this ambiguity. Id.

Although the Board focused mainly on determining what was considered lawful in the context, they also included important dicta on the definition of residence. Accordingly, the Board found that the phrase lawfully admitted connotes more than simple presence or residence. Matter of Rotimi, 24 I&N Dec. at 572. They determined that INA Section 101(a)(33) defines residence as the place of general abode, which is further defined as a person's principal actual dwelling, in fact, without regard to intent. Id. at 574; INA Section 101(a)(33). By extension, the Board held that an alien has not lawfully resided in the United States for purposes of qualifying for a Section 212(h) waiver during any periods in which the alien was an applicant for asylum or adjustment of status and lacked any other basis on which to claim lawful residence. Matter of Rotimi, 24 I&N Dec. at 577-578. However, Matter of Rotimi did not clearly hold whether or not an alien's time in valid nonimmigrant status or as an asylee or refugee may count towards the seven-year lawful continuous residence requirement. See id. at 572. Ultimately, the alien Rotimi overstayed his nonimmigrant visitor's

visa, and therefore any unlawfulness associated with his presence or residence voided when his nonimmigrant visa expired. Id. at 577.

In this case, the respondent entered the United States as a lawful permanent resident on September 7, 2007, and was issued a Notice to Appear on March 3, 2014. Therefore, the respondent needs another six months and four days in the United States to qualify for a 212(h) waiver. The respondent argues that he should be able to use the time spent in the United States while visiting on a B-1/B-2 visa to count towards the seven-year requirement. In response, the Department argues that the respondent cannot use his time on a B-1/B-2 visa because time spent on his tourist visa does not qualify as residence in the United States. The Department argues that the term residence should be defined strictly by the INA's definition for residence, such that the United Slates would have to be the respondent's principal actual dwelling place, in fact, without regard to intent. INA Section 101(a)(33).

Because the respondent came to the United States on a B-1/B-2 visa but kept his permanent residence in China with his family during these visiting periods, these time segments visiting the United States on a B-1/B-2 could not be counted towards the residency requirement for a 212(h) waiver. Moreover, in order to be eligible to obtain a B-1/B-2 visa, the respondent then had to show that he had a residence outside the United States in which he had no intention of abandoning. Exhibit 10, tab A. at 1. Therefore, his time spent in the United States on a B-1/B-2 visa did not change the respondent's actual place of residency in China.

Finally, the Department contends that the respondent's short trips to the United States on B-1/B-2 visas are best conceptualized as vacations, and to count vacations towards claims to residency in the country would be counterintuitive to the intent of placing minimum residency requirements to establish eligibility for relief. The respondent argues that the term residence should be more loosely defined. The respondent focuses on Matter of Rotimi and how the court in that case stated that the failure to accrue seven years of continuous residence as a lawful permanent resident is not decisive. Matter of Rotimi, 24 I&N Dec. at 570. Further, because the respondent was the beneficiary of an approved I-130, he traveled to the United States for short durations on a B-1/B-2 in order to set up his and his family's lives as immigrants in the United States, not to go on vacation. However, the United States Court of Appeals for the Eleventh Circuit held that an approved visa petition does not make a respondent an LPR for purposes of 212(h). This was because the approval of the visa petition was nothing more than a preliminary step in his application for adjustment of status. Vila v. U.S. Attorney General, 598 F.3d 1255, 1258 (11th Cir. 2010). Therefore, there is persuasive argument that the respondent's time spent in the United States setting up his family life as immigrants should not be counted towards 212(h) residency since it was nothing more than a preliminary step in his planning to become a lawful permanent resident.

Unlike the term residence, the word continuous is not defined in the INA. The Department argues that in order to define continuous, the Court should look to similar explanations of continuous as understood in the context of Temporary Protected Status, herein TPS, and can-

cellation for non-LPRs, herein cancellation 42B. According to the INA regarding TPS, the respondent must be residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent absence due merely to a brief temporary trip abroad. 8 C.F.R. Section 244.1. For cancellation 42B, the INA says that, an alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed the United States for any period in excess of 90 days, or for any period in the aggregate exceeding 180 days. INA Section 240A(d)(2).

The respondent had more than "brief, casual, and innocent absences" as he spent more time outside the United States than he did within the country. 8 C.F.R. Section 244.1. In addition, the respondent had periods in excess of 90 days outside the United States and his total aggregate exceeds 180 days outside of the United States. INA Section 240A(d)(2). While it is true that a 212(h) waiver may have different understanding of the term continuous than TPS or cancellation 42B, the definitions of continuous under these two forms of relief are a strong foundation to frame the definition under 212(h). the Department further argues that the respondent did not continuously reside in the United States because the 223 days accumulated in the country beginning in February of 2005 are minimal compared to the 721 days he spent in the same period outside of the United States. As the Department notes, the respondent's longest visit to the United States was for 101 days, but in contrast, his longest absence was for 222 days.

Respondent has essentially asked the Court to count in the aggregate his separate periods of time on separate trips into the United States. However, the respondent's trips were not continuous, but instead were intermittent and comprising a total of 223 days spread out from February 2005 until July of 2007. Therefore, the Court finds that these trips cannot be considered continuous for purposes of the seven-year lawful resident requirement for a 212(h) waiver.

The respondent has requested no other forms of relief other than the 212(h) waiver. Accordingly, the following orders will enter.

ORDERS

The respondent's motion to terminate is denied.

FURTHER ORDER: Respondent's application for a 212(h) waiver is pretermitted and denied.

FURTHER ORDER: The respondent is ordered removed to China on the charge set forth in the Notice to Appear.

EVALYN P. DOUCHY
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No 21-6623

MUK CHOI LAU, PETITIONER

v.

PAMELA BONDI, UNITED STATES ATTORNEY GENERAL, RESPONDENT

Filed: July 17, 2025

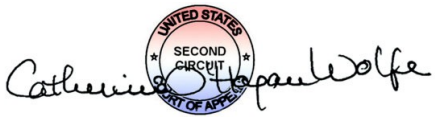
ORDER

Respondent, Pamela Bondi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



APPENDIX E

1. 8 U.S.C. 1101(a)(13) provides:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) 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 section 1182(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.

2. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign coun-

try relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

* * * * *

(d) Temporary admission of nonimmigrants

* * * * *

(5)(A) The Secretary of Homeland Security 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 Secretary of Homeland Security, 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.

* * * * *

3. 8 U.S.C. 1229a provides in pertinent part:

Removal proceedings

* * * * *

(c) Decision and burden of proof

* * * * *

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

* * * * *