

A. An Increasing Number of Judges for This Court Have Written That The holding in Romalez-Alcaide improperly infers rules that are not explicitly stated in the INA.

Seven Judges from this Circuit wrote a dissent from the denial of rehearing en banc in Vasquez-Lopez v. Ashcroft, 343 F.3d 969 (per curiam), reh'g denied 343 F.3d 961 (9th Cir. 2003), stating clearly and concisely the reasons they believe not only was the decision in Vasquez-Lopez incorrect, but why the Romalez-Alcaide decision itself improperly read provisions into the law which did not exist. The dissent found no provision of law stating that accepting voluntary departure operated to automatically terminate an alien's continuous physical presence. Specifically, the dissent made note of the "stop time" provisions contained in the INA and stated that,

“Congress could have made the “stop time” rule apply to aliens who take voluntary departure in lieu of being served with a Notice to Appear, but chose not to do so.”

In Romalez-Alcaide the Board concluded that because 8 U.S.C. § 1229b(d)(2) did not specifically state that all departures under 90 days do not interrupt continuous physical presence, that some departures will so interrupt; then because unrelated provisions of the INA make reference to departure “under threat of deportation” ending physical presence, Congress must have meant to include that as an exception to 8 U.S.C. § 1229b(d)(2); and then finally, that the “departure

under threat of deportation” exception inferred by the Board is itself a rule without exceptions.

The dissent in Vasquez-Lopez v. Ashcroft, supra., states that the Board makes too broad of a leap in its decision and the Ninth Circuit majority is upholding an improper extension of the authority of the Attorney General in interpreting congressional intent.

Mr. Gomez respectfully requests that this Court find that the aliens in his situation, with the requisite ten years continuous physical presence before their brief departure from the United States, who departed voluntary under no threat of deportation, may apply for and be granted cancellation of removal if they are otherwise qualified.

III. The Board erred in failing to find a *due process violation* present where an unrepresented alien is persuaded to accept voluntary departure or expedited removal without being informed that by doing so he is terminating his continuous physical presence in the U.S. and will no longer be entitled to any relief for which such physical presence is required.

Mr. Gomez did not “voluntarily return” to Mexico “under threat of deportation,” but rather under the threat of the initiating of full removal proceedings before the Immigration Judge. Had Mr. Gomez not been persuaded to accept voluntary return or expedited removal to Mexico, he would not have been deported. Rather, he would have been detained, issued a Notice To Appear (NTA) and removal proceedings would have begun. *This is a vital distinction and a*

constitutional due process matter which this Court can no longer allow the BIA to ignore!

By failing to provide Respondent with a complete explanation of his situation, the Immigration Service Officers persuaded him to accept a voluntary return or an expedited removal, rather than bring his case before an Immigration Judge. In his declaration, which was attached as Exhibit 3 to the Motion To Reopen before the BIA, Mr. Gomez Relative to his one day departure and return to the United States, in his Declaration, Respondent states that,

“Had I known that conceding to expedited removal or voluntary return would terminate my physical presence, I never would have accepted this fate. I would have demanded to present my case for cancellation of removal to an Immigration Judge.”

Had the Service placed Mr. Gomez in removal proceedings instead of making an instant removal, he would have been able to present evidence of his 12 years of continuous physical presence and show the hardship to his U.S. citizen children.

Had Mr. Gomez been immediately placed in removal proceedings on July 4, 2002, he would have been eligible for cancellation of removal, even under **Romalez-Alcaide**, and given his presence in the U.S. since 1989 and the hardship to his U.S. citizen children, he would have been able to present a very strong case.

In fact, Mr. Gomez *did* present his cancellation application to the Immigration Judge, but the case was pretermitted based on the Board's holding in **Romalez-Alcaide**. The holding in **Romalez-Alcaide** was not based on black letter law, however.

The INA does not state that voluntary departures or expedited removals “under threat of deportation” will interrupt continuous physical presence for purposes of eligibility for cancellation of removal.

The Attorney General created this rule by inference, and the Board upheld his actions. The dissent in **Vasquez-Lopez**, supra., concluded the following:

1. **“Congress could have continued to include the “brief, casual, and innocent” standard in the post-IIRIRA INA for purposes of continuous physical presence. It did not.**
2. **Congress could have made administrative voluntary departures a ground of ineligibility for cancellation of removal. It did not.**
3. **Congress could have applied the “stop time” rule to illegal aliens who accept administrative voluntary departures, rather than requiring a Notice to Appear to end the accrual of continuous physical presence. It did not.” Id. (Emphasis Added)**

The trend toward curtailing the harsh and unlegislated effects of **Romalez-Alcaide**, supra., is clear and the instant case begs the question: Did this Court intend for aliens like Mr. Gomez, who are otherwise qualified for cancellation of removal and have a critically ill U.S. citizen daughter to care for to be summarily removed? We suggest that clearly, it did not.