# CANCELLATION OR REMOVAL, SUSPENSION OF DEPORTATION 212(c) WAIVER, AND VOLUNTARY DEPARTURE

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# Cancellation of Removal, Suspension of Deportation, 212(c) Waivers, and Voluntary Departure

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**Varick Immigration Court**
**New York, New York**

## GENERAL CONSIDERATIONS.

The legal procedures covered in this presentation are all ways of avoiding an order of removal or deportation. Such procedures are referred to as "relief from removal", "discretionary relief" etc. These forms of relief dealt, if granted, result in the alien either obtaining lawful permanent residence (LPR status) or retaining that status.

These forms of relief have certain requirements which must be met before the relief can be granted. The requirements include:

- basic practical steps, such as filling out written applications, paying filing fees to DHS [for a list of applicable fees, see 8 CFR 103.7(b)(1)], and submitting fingerprints, photos, etc.;
- meeting objective legal criteria, such as establishing that the alien has previously been admitted as a lawful resident, or that the alien has been physically present in the U.S. for a certain period; and
- the subjective or equitable issue of convincing the IJ that the alien deserves the relief as a matter of discretion, in view of all the positive and negative factors shown in the record.

Although the requirements for these relief applications are similar, an IJ risks being reversed if he or she fails to keep in mind the statutory distinctions. For example, cancellation for a non-resident under Section 240A(b) of the Immigration & Naturalization Act ["the Act"], requires good moral character for a continuous period of ten years before filing the application, but cancellation of removal for a lawful permanent resident under Section 240A(a) of the Act does not require any period of good moral character (although good moral character may be one factor considered when exercising discretion).

When reviewing and applying these statutory provisions, the IJ should keep in mind that several sources of legal authority exist. These include the statute itself, the implementing regulations in 8 CFR, the instructions in the prescribed application form *which are given the force of regulation* by 8 CFR 103.2(a)(1), and decisions which stand as binding precedent, whether issued by the Board of Immigration Appeals, the Attorney General, the applicable circuit court, or the Supreme Court, as well as any federal district court rulings in the same case.

## CANCELLATION OF REMOVAL FOR LAWFUL PERMANENT RESIDENTS.

Statute: Section 240A INA, subparts (a), (c), & (d).
Regulation: 8 CFR 240.20.
Leading BIA decision: *In Re C-V-T-*, 22 I&N 7 (BIA 1998).
Application: EOIR 42A.

Cancellation of removal was created in 1996. It is often thought of as combining elements of its statutory predecessors, 212(c) and suspension of deportation, but the distinctions among these three provisions are significant. Cancellation for an LPR is often referred to as "cancellation A" or "240A(a) cancellation" to distinguish it from cancellation for an alien who is not an LPR, under Section 240A(*b*) of the Act.

Cancellation may only be sought or granted by an IJ in a removal proceeding. It cannot be granted by DHS. 8 CFR 240.20. Cancellation of removal for an LPR leaves the alien in the LPR status which existed before.

Objective legal criteria: The applicant for relief must establish all of the following:

- Not less than five years as an alien "lawfully admitted for permanent residence."
- Seven years of continuous residence in the U.S. "after having been admitted in any status."
- No conviction for an aggravated felony.

***" 'Lawfully admitted for permanent residence'*** means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." Sec. 101(a)(20), INA. "Such status terminates upon entry of a final administrative order of exclusion or deportation." 8 CFR 1.1(p).

An alien who has been granted LPR status due to fraud or misrepresentation of a material fact has not been "lawfully admitted for permanent residence" and therefore is not eligible for cancellation as an LPR. *In re Koloamatangi*, I.D. 3486 (BIA 2003).

***Seven years of continuous residence*** in the United States, following an admission in any status: the term "residence" here does not mean LPR status, but rather the ordinary legal meaning of residence. "Admission" here does not mean admission as an LPR, but it does mean a lawful admission, since that is an element of the INA definition of "admission": "the lawful entry of an alien ... after inspection and authorization by an immigration officer." Sec. 101(a)(13) INA.

The continuous residence begins when the alien has been admitted in any status, which

be read to mean that cancellation *may* be granted if the three criteria are met, and *may not* be granted if any requirement is not established.

- In *C-V-T-*, the Board indicated that the framework for evaluating discretionary factors, which it developed in a line of earlier cases relating to 212(c) relief applications, could be applied in the context of cancellation for an LPR. It also held that caselaw on discretionary issues developed under former section 244(a)(1) of the Act, for suspension of deportation, should generally not be relied upon when adjudicating applications for cancellation made by LPR's, as the two statutes were not sufficiently analogous. Relief under section 212(c) is often considered as the predecessor of cancellation for an LPR; those cases are summarized elsewhere in this outline. However, the Board also suggested that the highest level of positive factors, which it had previously categorized as "unusual or outstanding" factors, might be moot in the cancellation context since the need for such very strong positives would be triggered by very serious negative factors, and such strong negatives would often render the alien statutorily ineligible for the relief (particularly, as constituting aggravated felonies).

- Subsequently the Board "clarified" *C-V-T-* by ruling that in context of cancellation for an LPR, it would not be necessary to establish "unusual or outstanding equities" to counterbalance very strong negative factors. *In re Sotelo*, I.D. 3460 (BIA 2001). It premised this conclusion by reference to a decision on 212(c) relief, *Matter of Edwards*, 20 I&N 191 (BIA 1990), which the Board in *Sotelo* described as holding that "unusual or outstanding equities" were never an absolute requirement. A careful reading of *Edwards*, however, will show that the Board there held that "unusual or outstanding equities" are required when certain types of criminal convictions are present.

> Such a heightened showing is required when an alien has been convicted of a serious drug offense, particularly one relating to the trafficking or sale of drugs.

*Edwards*, 20 I&N at 195 (*citing Matter of Marin*, 16 I&N 581, 586 n.4). The Board's statement in *Sotelo* may have been an erroneous reference to the holding it did make in *Edwards*, which is that *rehabilitation* is not an absolute requirement for 212(c) relief. A more accurate summary of the holding in *Edwards* would be that unusual and outstanding equities are required in some 212(c) cases, but that even if they are required "a proper determination of whether an alien has demonstrated unusual or outstanding equities can only be made after a complete review of the favorable factors in his case." *Edwards, supra*, 20 I&N at 196, fn. 3.

**Grounds of Ineligibility for Cancellation.**

The Act specifies certain factors which bar an alien from qualifying for either type of

makes relief unavailable based on the commission of a crime, rather than the conviction. It raises potential difficulties. For example, the dates of commission of some offenses may not be clearly established by the record; sex offenses involving minors and embezzlement-type crimes are often charged as having occurred between two dates. Also, if the commission of the crime is not enough to make the alien removable, the record must still establish a conviction. For example: an alien may be inadmissable under Section 212(a)(2)(C) INA if the INS has "reason to believe" that the alien "is or has been an illicit trafficker in any controlled substance". Such reason to believe can be much less than proof beyond a reasonable doubt, and this provision does not require a conviction. *Matter of Rico*, 16 I&N 181 (BIA 1977). *See also Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000) ["reason to believe" requires reasonable, substantial and probative evidence]. If the record establishes that there is "reason to believe" the respondent has been trafficking drugs on trips out of the U.S. since three years after he became an LPR, but he has never been convicted of any crime, does his drug trafficking activity prevent him from establishing the necessary seven years of continuous residence?

The provision to deem the continuous residence terminated when the crime is committed, rather than when the conviction occurs, was upheld by the Board in the face of a contention that the statute was impermissably retroactive. *In re Perez*, ID 3389 (BIA 1999). The crime in that case was committed in 1992, but the alien was not convicted until 1997. Until the conviction occurred, the alien was not "removable" due to his commission of the crime, since the removability provision requires a final conviction.

This provision raises complex issues. For example, when an alien is charged as removable under the provision for multiple criminal convictions, he might not be removable for a crime committed in 1995 unless and until he is convicted of another crime in 2003. Can the seven year period between the two convictions constitute an independent period of continuous residence to satisfy the statutory requirement?

Also, although the offense may bar cancellation whether it makes the alien "inadmissable" or "removable", the offense must also be one "referred to in section 212(a)(2)", which states the "criminal and related grounds" of inadmissability. A significant point is that a conviction for a crime involving a firearm, although it may make the alien subject to removal under sec. 237(a)(2)(C), does not terminate the applicant's continuous residence for purposes of cancellation, because such convictions are not a ground of inadmissability under sec. 212(a)(2). *In re Campos-Torres*, ID 3428 (BIA 2000). Note, likewise, that although the provision refers to aliens removable under sec. 237(a)(4), which covers a wide range of security and terrorist-related conduct, the alien's terrorist conduct must have resulted in a conviction under sec. 212(a)(2).

## CANCELLATION FOR ALIENS WHO ARE NOT PERMANENT RESIDENTS.

Statute: Section 240A INA, subparts (b), (c), (d) & (e).
Regulation: 8 CFR 240.20-21.

Sec. 240A(b)(1)(B). "Good moral character" is a term of art in immigration law. A list of factors which preclude an alien from establishing GMC is set out in sec. 101(f) INA. A separate but similar definition applies in the context of naturalization (allocated to DHS). *See* 8 CFR 316.10. Even if an applicant is not statutorily barred from establishing GMC under sec. 101(f), the IJ may find the applicant lacks the necessary good moral character. For example, a persistent failure to support one's legal dependents, despite the practical ability to do so, might show a lack of GMC.

- The applicant has not been convicted of an offense covered by sections:
  --212(a)(2) [the general criminal grounds of inadmissability],
  --237(a)(2) [the general criminal grounds of deportability including crimes of moral turpitude, drugs, firearms, and various others], or

  --237(a)(3) [crimes relating to alien registration, use of false immigration documents, false claim to citizenship, etc.]
  --There is a limited waiver available under sec. 237(a)(7) for convictions under sec. 237(a)(2)(E)(i) [domestic violence, stalking, child abuse] where the alien convicted can show certain mitigating factors. Sec. 240A(b)(1)(C).

Note that there is a close relationship between the previous requirement for ten years of GMC and this requirement that the alien not have been convicted of certain crimes, since many types of criminal convictions make an applicant unable to show the necessary GMC. However, the two provisions are distinct and do not cover exactly the same factual situations.

- The applicant establishes that his or her removal would result in "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child, who is a citizen or LPR. That person is often referred to as the "qualifying relative". Sec. 240A(b)(1)(D).

- *The degree of hardship required by the statute is extremely difficult to meet.* Possibly no other legal issue poses such a significant barrier for applicants who "seem to be eligible" for this form of cancellation. Because hardship involves more abstract considerations than, for example, physical presence in the U.S., it often cannot be assessed without a full hearing. However, the IJ should give some consideration to this requirement before devoting a full hearing to the application. For example, if the applicant has one U.S. citizen child age 16 who lives with grandparents in another state, and whom the applicant has not seen or supported for five years, it may be obvious that the necessary degree of hardship simply cannot be established.

- Hardship to the applicant is irrelevant, unless it can be shown to result in hardship for the qualifying relative. For example, the applicant would be completely unable to find employment, and no social services exist, and the

resolve as to whether the applicant had lost or abandoned LPR status.

**Cancellation for a Non-resident who is a Battered Spouse or Child.**

The cancellation statute sets out a separate procedure to grant cancellation of removal to an applicant who has been affected in certain ways by spouse or child abuse inflicted by a U.S. citizen or LPR spouse, and even by a putative spouse where the marriage is not legitimate due to bigamy on the part of the batterer. Sec. 240A(b)(2)(A)(i). The provisions of this subsection are fairly complicated, have not been the subject of much interpretation by the Board or federal courts, and will not be set out in detail here. Whenever the record, or a respondent's behavior in court, suggests that spouse or child abuse may be a factor in the case, the IJ should review these provisions, consider whether the respondent may be eligible for such relief, and also determine whether the hearings and record of proceedings should be sealed under 8 CFR 3.27(c). *See also* OPPM 97-07 "Procedures for Identifying Battered Spouse/Child Cases."

The special cancellation provisions for battered spouses and children make the following changes in the general requirements for cancellation for a non-resident:

- Physical Presence: A continuous period of *three years* physical presence in the U.S. is sufficient to qualify, and this period is *not* tolled by issuance of the Notice to Appear. Sec. 240A(b)(2)(A)(ii). Further, no part of an absence which is "connected to" the battering counts toward the 90-day or 180-day limits established in sec. 240A(d)(2).

- Good Moral Character: An act or conviction which would preclude the alien from establishing GMC during the three years of presence will not bar a finding of GMC if:

- it does not make the alien inadmissable under certain provisions (see below); and

- it was "connected to" the alien having been battered .

- Inadmissability: The applicant is not inadmissable under paragraphs (2) or (3) of section 212(a) INA [criminal and security grounds], is not deportable under 237(1)(G) [marriage fraud] or 237(a)(2) through (a)(4) [criminal grounds, registration and false documents violations, security grounds] and has not been convicted of an aggravated felony.

- Hardship: It is sufficient if the alien's removal would result in "extreme hardship" to the alien, the alien's child, or the alien's parent [i.e., not the spouse]. Extreme hardship is a less difficult standard that "exceptional and extremely unusual hardship," and in this context only, hardship to the alien is a factor.

**Numerical Limitation on Grants of Cancellation for Non-Residents. Sec. 240A(e) INA.**

The Act establishes an annual limit of 4,000 aliens who may be granted cancellation of removal, or suspension of deportation under the predecessor statute, and adjustment of status to lawful residence. The annual period is based on the government fiscal year (October lst to September 30th). *See* OPPM 99-2.

The limitation does not apply to cancellation for LPR's under sec. 240A(a), because that cancellation provision does not involve the subsequent adjustment of status (which the applicant must already have).

There are also exceptions for:

- Aliens described in a savings clause provision of IIRIRA (1996 amendments to the INA) as amended by the Nicaraguan Adjustment and Central American Relief Act [NACARA].

- Aliens who were in deportation proceedings before April, 1997, who applied for suspension of deportation under sec. 244(a)(3) INA as in effect before the enactment of IIRIRA.

Sec. 240a(e) INA.

**Limitation on Grant of Suspension or Cancellation When Another Form of Relief Is Granted.**

Due to the annual limitation on the grant of suspension and cancellation of removal for non-LPR's, the Attorney General has required by regulation that these applications shall be denied as a matter of discretion if the alien has a concurrent application for asylum or adjustment of status which will be granted. 8 CFR 240.21(c)(2). The effect of this regulation is to ensure that the limited number of suspension and cancellation cases to be granted will be reserved for aliens who have no other means to avoid deportation.

**Inter-relationship of Cancellation for Non-Residents and Suspension of Deportation.**

Cancellation of removal for aliens who are not LPR's is a form of relief analogous to suspension of deportation under the earlier statutory scheme which existed until the 1996 amendments. Although there are significant differences between them (e.g., cancellation sets a stricter standard for discretion, and suspension was not available to arriving aliens), both feature the following:

- The issuance of the charging document (Notice to Appear in removal cases, Order to Show Cause in deportation cases) now terminates the accrual of time toward the necessary physical presence requirement.

**Ten-year Suspension of Deportation.** Former sec. 244(a)(2) INA.

The applicant has to establish that she or he:

- Is deportable under [former] sec. 241(a)(2), (3), or (4) INA. These were, respectively, the provisions relating to criminal convictions, document fraud and alien registration, and security grounds.
- Has been physically present in the U.S. for a continuous period of at least 10 years "immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation."
- Has been and is a person of good moral character during all of that period.
- Whose deportation would result in "exceptional and extremely unusual hardship" to the applicant or to a spouse, parent or child who is a USC or LPR.
- Deserves the relief as a matter of discretion.

**Suspension for Battered Spouses and Children.** Former sec. 244(a)(3) INA.

This provision was inserted in 1994, and was not the subject of much case interpretation before being effectively replaced by the similar provisions for cancellation of removal for battered spouses and children. The applicant has to establish that he or she:

- Is deportable under any section of law except sec. 241(a)(1)(G) [marriage fraud] and the provisions referred to in 10-year suspension.
- Has been physically present in the U.S. for a continuous period of 3 years before applying.
- Is the victim of domestic abuse in the U.S. (battering or extreme cruelty) by a USC or LPR spouse or parent, or is the parent of a child so abused.
- Has been a person of good moral character throughout the three-year period.
- Whose deportation would result in "extreme hardship" to the alien or to the alien's parent or child. The statute does not require the parent or child to be a USC or LPR.
- Deserves the relief as a matter of discretion.

innocent," and accordingly was not an arriving alien subject to exclusion proceedings upon return to the U.S. Because *Fleuti* applied only to LPR's, the effect of the doctrine was not somewhat different in that context than in relation to suspension. The author believes *Fleuti* arose from the language of the former INA definition of "entry", and that Congress's 1996 substitution of the "arrival" concept for "entry" has removed the statutory basis for the *Fleuti* doctrine, which is now of mainly historic interest.

***Extreme Hardship:*** The meaning of this term was developed by case law. However, after the prospective repeal of the suspension statute, a list of factors which might be considered as relevant to determining extreme hardship was promulgated by regulation. 8 CFR 240.58. The list of factors is non-exclusive. The regulation by its terms applies to seven-year suspension and suspension for battered applicants. It makes no reference to ten-year suspension, possibly because by the time this regulation was published, there were few if any ten-year suspension cases which could be considered on the merits.

**Termination of continuous physical presence upon issuance of the charging document.**

A respondent stops accruing credit for time spent in the U.S., with reference to suspension of deportation and cancellation of removal, when the alien is served with a Notice to Appear, or an Order to Show Cause in deportation proceedings. Sec. 20A9d)(1) INA.

- *Matter of Nolasco,* ID 3385 (BIA 1999). *Matter of Mendoza,* ID 3426 (BIA 2000).

- Accord: *McBride v. INS,* 238 F.3d 371 (5th Cir. 2000).
  *Ram v. INS,* 243 F.3d 510 (9th Cir. 2001).
  *Sibanda v. INS,* 282 F.3d 1330 (10th Cir. 2002).
  *Najjar v. Ashcroft,* 257 F.3d 1262 (11th Cir. 2001).

However, applicants under the battered spouse or child provision for suspension do not cease to acquire credit for physical presence upon service of the charging document. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

**Limitation on Grant of Suspension or Cancellation When Another Form of Relief Is Granted.**

Due to the annual limitation on the grant of suspension and cancellation of removal for non-LPR's, the Attorney General has required by regulation that these applications shall be denied as a matter of discretion if the alien has a concurrent application for asylum or adjustment of status which will be granted. 8 CFR 240.21(c)(2). The effect of this regulation is to ensure that the limited number of suspension and cancellation cases to be granted will be reserved for aliens who have no other means to avoid deportation.

by October 1, 1990, or the principal was granted such relief while the offspring was less than 21 years old.

***Jurisdiction.*** Most of the possible NACARA cases can be adjudicated by DHS. Those for which the immigration court has jurisdiction are applications by an alien who has been placed in deportation or removal proceedings, once the charging document has been filed with the court, except:

- Certain *ABC* class members: Registered *ABC* class members, i.e., members who properly submitted registration forms to INS by the applicable dates, see 8 CFR 240.60 [definitions], *and* whose immigration proceedings have been administratively closed or continued by the BIA or IJ, *and* who are eligible for the benefits of the ABC settlement, *and* who have not yet had a *de novo* adjudication of their asylum claim, and have not moved for and been granted recalendaring of proceedings before EOIR to request suspension.

- Dependent relatives [see above] for whom the principal alien has had immigration court proceedings administratively closed for consideration of the relief application by the Service.

**Special provisions for NACARA applications:**

Issuance of the charging document does not terminate the accrual of credit for physical presence in the U.S.

A single absence of not more than 90 days, or several absences which do not total more than 180 days, "shall be considered brief."

For suspension applicants, longer absences must be shown to be "casual and innocent", not a meaningful interruption of continuous physical presence.

For cancellation applicants, longer absences prevent the applicant from establishing the necessary physical presence, and the applicant has the burden to prove that any absence less than 90 days was not a meaningful interruption of continuous physical presence.

***Types of absence which automatically terminate continuous physical presence:*** Removal or deportation of the applicant, voluntary departure (i.e., granted as an alternative to deportation), and departure to commit an unlawful act.

Continuous physical presence is not required for veterans who have served in active-duty status for 24 months in the U.S. armed forces, left the service under honorable conditions, and was enlisted or inducted inside the U.S.

respects. First, it is one of the very few relief provisions which can be granted to an alien convicted of an aggravated felony. Second, its scope and applicability have evolved so dramatically through case law that there is no other provision of the INA for which the actual effect of the statute is so different from the actual text. Like suspension of deportation, relief through the waiver provisions of former section 212(c) of the Act now exists only in relation to past events. Unlike suspension, the 212(c) waiver can also be sought in a removal proceeding. Under present interpretation and DOJ policy, this waiver will remain available for an indefinite time in reference to criminal convictions which occurred, and guilty pleas which were entered, before the statute was amended and then repealed.

***Text of the former statute*** as it existed before April 25, 1996:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [that is, the grounds of inadmissability set out in section 212(a) INA] (other than paragraphs (3) and (9)(c)) [security grounds, international child abduction]. ... The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

By its terms, the waiver allows a resident to return to the U.S. despite the existence of one or more factors which make the resident inadmissable. To qualify, the alien must be:

- a lawful resident;
- returning from a temporary voluntary absence;
- lawfully domiciled in the U.S. for seven consecutive years;
- deserving of the waiver as a matter of discretion; and
- cannot have served five years or more for aggravated felony convictions.

***The lawful admission as an LPR*** was generally held to require that the alien must have obtained the LPR status properly. *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986) [failed to disclose foreign conviction when applying for LPR status].

***Constructive or imputed domicile:*** One court held, in a creative decision, that an alien who immigrated to the U.S. while still a minor, to join a petitioning parent who had been domiciled in the U.S. while maintaining a close relationship with the child, could benefit from implied or derived domicile in the U.S. through the parent, so as to satisfy the

after his probation expired]. *Which alien had the necessary domicile to apply for 212c)?*

**Extension and Broadening of 212(c) Waivers Through Court Interpretation.**

This waiver, addressed to the inadmissability of an LPR in exclusion proceedings, returning to the U.S. after a brief trip abroad, was extended by case law to aliens in deportation proceedings who may have never left the U.S., but who were combining the 212(c) waiver with a new application for adjustment of status, and who were therefor seen as analogous to an alien seeking to enter the U.S., since the inadmissability provisions also apply to aliens seeking adjustment of status. An LPR might need to make such a combined application to overcome certain types of criminal records. *See Matter of Gabryelsky,* 20 I&N 750 (BIA 1993).

The waiver was also extended by case law to LPR's in deportation proceedings who faced charges that they were deportable because they had been inadmissable at the time of their last arrival in the U.S. [e.g., due to a criminal conviction which INS was unaware of until later).

***Francis v. INS:*** Eventually, a federal court held that it was a denial of equal protection to make the waiver available to any LPR seeking to return to the U.S., and to some who were in deportation proceedings, but to preclude the waiver to many LPR's whose ties to the U.S. were arguably stronger, since they might have never departed from the U.S. at all. *Francis v. I.N.S.*, 532 F.2d 268 (2d Cir. 1976). The Department of Justice decided to accept the holding in *Francis* on a nationwide basis. *Matter of Silva,* 16 I&N 26 (BIA 1976). The waiver then became available to LPR's who had never left the U.S., and who may have had no intention of ever doing so. Congress, however, never amended the Act to reflect the broader scope of the waiver.

***Comparable Grounds of Inadmissability:*** The question of how to apply the waiver in deportation proceedings spawned further interpretation by the Board and the federal courts. LPR's in deportation proceedings faced charges based on the deportation provisions of former section 241 of the Act. These provisions were not exactly the same as the inadmissability provisions in section 212, and some provisions had no counterpart. For example, a firearms offense was not a basis of inadmissability, but (depending on the type of firearm) it could be a basis of deportability.

To resolve this problem in applying the *Francis* doctrine to deportation cases, the Board issued several decisions in which it tried to determine whether the deportability charge at issue was "comparable to" a ground of inadmissability which could be waived by sec. 212(c), or had a "counterpart" in sec. 212(a). *Matter of Granados,* 16 I&N 726 (BIA 1979) [conviction for possession of sawed-off shotgun is not comparable]; *Matter of Wadud,* 19 I&N 182, (BIA 1984) [conviction for aiding and abetting another alien to obtain a visa through fraud is not comparable to a ground of inadmissability]; *Matter of Salmon,* 16 I&N 734 (BIA 1978) [conviction of crime involving moral turpitude is waivable].

At present, there is no clear controlling authority to show whether several significant types of aggravated felonies can be waived under 212c. For example, "crimes of violence" with a sentence imposed of at least one year, are aggravated felonies. Sec. 101(a)(43)(F) INA. Many if not most of these crimes would be crimes involving moral turpitude, which are generally waivable under 212c. But 212(a) has no reference to "crimes of violence" in those terms. Likewise, sec. 101(a)(43)(A) classifies "murder, rape, and sexual abuse of a minor" as aggravated felonies, without regard to any sentence imposed or other criteria. Is it sufficient that all of these crimes would be considered crimes involving moral turpitude?

***Five years served for one or more aggravated felonies:*** Do not confuse this provision with sec. 241(b)(3)(B), which makes an alien ineligible for withholding of removal if he has been sentenced to an aggregate term of imprisonment of five or more years. The Board held that the five years must actually have been served. It reversed an IJ who denied 212c relief on the basis that the applicant, serving a 15-year sentence in state prison, would inevitably serve more than five years before he was released. *Matter of Ramirez-Somera,* 20 I&N 564 (BIA 1992). The Board did suggest that it would be permissible for INS to defer instituting the deportation proceeding until after the alien served at least five years. *Id.* at 566.

***Concurrent sentences:*** The length of the longest sentence is determinative. *Matter of Aldebesheh,* 22 I&N 983 (BIA 1999).

***Application:*** The 212c application is made on form I-191. Fingerprints are not actually required, although many trial attorneys expect them. Photos are not required. The application form is little more than a page long, and is one of the least helpful data-collection devices in the immigration field. Unlike other applications, it does not provide a list of required or useful evidence to be submitted. The IJ should emphasize to the alien (and alien's counsel) that the simplicity of the form is deceiving, and that a substantial volume of supporting evidence is normally necessary.

The 212(c) waiver may be sought "affirmatively" before the INS district director. 8CFR 212.3(b). If denied by INS, it may be renewed in expulsion proceedings, and is adjudicated *de novo.* 8 CFR 212.3(e).

***Effect of Approval:*** The waiver if granted waives permanently any basis of inadmissability (subject to waiver) which is disclosed in the record. 8 CFR 212.3(d); *Matter of Przygocki,* 17 I&N 361 (BIA 1980); *see also Matter of Gordon,* 20 I&N 52 (BIA 1989) [improper to reopen on theory that subsequent conviction proves original finding of rehabilitation was erroneous; but possibly proper to reopen on basis that applicant concealed one past conviction, leading to unjustified finding of rehabilitation].

# Cancellation of Removal for Lawful Permanent Residents: *Section 240A(a) of the Act*

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## Overview:

A. Cancellation of Removal for Lawful Permanent Residents is a form of relief from removal. It only comes into play if the alien is first found removable.

B. The statutory eligibility requirements found in Section 240A(a) for lawful permanent resident cancellation of removal are:

1. *Lawfully admitted for permanent residence for not less than 5 years*
2. *Resided in the U.S. continuously for 7 years after admission in any status*
3. *No aggravated felony convictions*

C. If the alien meets these three statutory requirements, then the Immigration Judge, upon review of the record as a whole, must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his or her behalf to determine whether the granting of relief appears in the best interest of this country. Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998).

D. A grant of cancellation of removal allows the alien to retain his/her lawful permanent residency. An alien can be granted cancellation of removal (or suspension of deportation, or 212(c) relief) only one time.

E. The REAL ID Act requires that the alien answer the questions in the application. The respondent bears the burden of proof and is expected to present evidence that is reasonably obtainable. A proper background check is required before any application for cancellation can be granted.

## Determining Eligibility:

1. *Has the respondent been convicted of an aggravated felony?*

   a. An alien convicted of an aggravated felony at any time is not eligible for cancellation for lawful permanent residents.

   b. An aggravated felony conviction which was waived for purposes of

a. Section 240A(c)(6) of the Act states that: "An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996."

b. In Garcia-Jimenez v. Gonzales, 472 F.3d 679 (9th Cir. 2007), the Court of Appeals for the Ninth Circuit held that INA § 240A(c)(6) makes clear that an alien who has received 212(c) relief at any time bars 240A(a) cancellation of removal and rejects the argument that these two forms of relief may be afforded simultaneously. Check your circuit.

6. *Has the respondent resided in the United States continuously for 7 years after having been admitted in any status?*

a. What terminates continuous residence/presence?

i. See section 240A(d)(1). Service of the Notice to Appear or commission of a criminal offense referred to in section 212(a)(2) of the Act, whichever is earliest. See Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2001).

ii. The full section reads: 240A(d)(1): "For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 239(a), or (B) when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest."

b. *What was the date of respondent's first lawful admission into the United States?*

i. Matter of Robles, 24 I&N Dec. 22 (BIA 2006) (continuous residence stops on the date offense committed, not date of conviction; continuous residence stops on date offense is committed even if committed prior to Illegal Immigration Reform and Immigrant Responsibility Act of 1996 - April 1, 1997), Matter of Perez, 22 I&N Dec. 689 (BIA 1999), reaffirmed.

ii. Matter of Blancas, 23 I&N Dec. 458 (BIA 2002): The Board stated that INA 240A(a)(2) requires only seven years continuous residence after being admitted in any status. Here the respondent was admitted in 1986 as a visitor with a border crossing card and the NTA was served more than seven years later.

(2) Matter of Deanda-Romo, 23 I&N Dec. 597 (BIA 2003) (respondent, who was convicted of two misdemeanor crimes involving moral turpitude, was not precluded by the provisions of section 240A(d)(1)(B) from establishing the requisite 7 years of continuous residence for cancellation of removal under section 240A(a)(2), because his first crime, which qualifies as a petty offense, did not render him inadmissible, and he had accrued the requisite 7 years of continuous residence before the second offense was committed).

v. Be aware of Circuit peculiarities:

(1) In Sinotes-Cruz v. Gonzales, 468 F.3d 1190 (9th Cir. 2006) (the Court found that the 240A(d)(1)(B) stop-time rule should not be applied to a conviction obtained pursuant to a guilty plea for a crime that did not render an alien deportable at the time of the plea. The Court notes that the Third Circuit has reached a contrary result on the retroactivity of the criminal offense cutoff, but without analysis, in Hernandez v. Gonzales, 437 F.3d 341 (3d Cir. 2006)).

9. *Did the respondent serve in active duty?*

a. The requirement of continuous residence shall not apply to an alien who has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and at the time of the alien's enlistment or induction was in the United States. Section 240A(d)(3) of the Act.

10. If there is no issue as to statutory eligibility you could simply sum up as follows: "The respondent has been a lawful permanent resident for more than 5 years, and he/she also has resided in the United States continuously for seven years after having been admitted in any status. Although the respondent has been convicted, his/her conviction is not for an aggravated felony. The issue in the discretionary balance of factors within the framework of Matter of C-V-T-, supra.

## The balance of factors:

In addition to satisfying the three statutory eligibility requirements noted above, an applicant for relief under Section 240A(a) of the Act must establish that he or she warrants such relief as a matter of discretion. The general standards developed in Matter of Marin, 16 I&N Dec. 581 (BIA 1978) for the exercise of discretion under Section 212(c) of the Act are applicable to the

effective if you try to recite standard language in explaining your conclusion. With experience you will see recurring themes, and at times you will see unusual facts and circumstances you will never see again. It is best to know your record, listen closely to the testimony, take good notes, and then articulate to the best of your ability why you reach the decision you do.

240A(a) ORAL DECISION WORKSHEET - HPI

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**SAN DIEGO, CALIFORNIA**

File No: A_____

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| _____ | ) | IN REMOVAL PROCEEDINGS |
| | ) | |
| Respondent | ) | |

CHARGE(S):

APPLICATION(S): Cancellation of removal for lawful permanent resident

| ON BEHALF OF RESPONDENT: | ON BEHALF OF DHS: |
|---|---|
| _____, Attorney at Law | _____ |
| | Assistant Chief Counsel |

**ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE**

The respondent is a __ year old, single/married, male/female, native and citizen of _____. The United States Department of Homeland Security brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act. Proceedings were commenced with the filing of a Notice To Appear with the Immigration Court. See Exhibit 1.

The respondent designated _____ as the country of removal should that become necessary. The respondent applied for relief from removal in the form of cancellation of removal for a lawful permanent resident. The respondent's application for cancellation of removal is contained in the record at Exhibit __. Prior to admission of the application the respondent was given the opportunity to make any necessary corrections to the application, and then swore or affirmed before this court that the application as corrected was all true and correct to the best of his knowledge.

## STATEMENT OF THE LAW

To be eligible for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act, an alien must demonstrate that he has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of an aggravated felony.

In addition to satisfying these three statutory eligibility requirements, an applicant for relief under Section 240A(a) of the Act must establish that he warrants such relief as a matter of discretion. The general standards developed in Matter of Marin, 16 I&N Dec. 581 (BIA 1978) for the exercise of discretion under Section 212(c) of the Act are applicable to the exercise of the discretion under Section 240A(a). See Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998). An Immigration Judge, upon review of the record as a whole, must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his or her behalf to determine whether the granting of relief appears in the best interest of this country. The applicant for cancellation, however, need not first meet a threshold test of showing unusual or outstanding equities. See Matter of Sotelo, 23 I&N Dec. 201 (BIA 2001).

As was explained in Matter of C-V-T-, supra, factors pertinent to the exercise of discretion under section 212(c) are equally relevant to the exercise of discretion under section 240A(a) of the Act. For example, favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or deportation (now removal) that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Id. In some cases, the minimum equities required to establish eligibility for relief under section 240A(a) (i.e., residence of at least 7 years and status as a lawful permanent resident for not less than 5 years) may be sufficient in and of themselves to warrant favorable discretionary action. However, as the negative factors grow more serious, it becomes incumbent upon the alien to introduce

## ANALYSIS AND FINDINGS

Statutory Eligibility questions:

1. *Has the respondent been convicted of an aggravated felony?*

   a. An alien convicted of an aggravated felony at any time is not eligible for cancellation for lawful permanent residents

   b. An aggravated felony conviction which was waived for purposes of inadmissibility or removability still bars an alien from receiving cancellation. Becker v. Gonzales, ___ F.3d ___, 2007 WL 60840 (9th Cir. Jan. 10, 2007) (finding that even if alien were able to waive his 1978 aggravated felony conviction for possession of marijuana for sale under § 212(c), it would nonetheless remain an aggravated felony for purposes of precluding his application for cancellation of removal based on 2004 conviction); see Matter of Balderas, 20 I&N Dec. 389, 391 (BIA 1991) (the grant of a 212(c) waiver does not eliminate or erase the underlying conviction). Check your circuit.

2. *Is the respondent a Lawful Permanent Resident (LPR)?*

   a. The phrase "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residence permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." Section 101(a)(20) of the Act.

   b. How did the respondent obtain LPR status?

   c. Was the respondent actually entitled to receive LPR status? Lawful permanent residence must have been obtained lawfully. Monet v. INS, 791 F.2d 752 (9th Cir. 1986) (citing Longstaff v. INS, 716 F.2d 1439 (5th Cir. 1983); Matter of Koloamatangi, 23 I&N Dec. 548 (BIA 2003) (fraud); Lai Haw Wong v. INS, 474 F.2d 739 (9th Cir. 1973) (no fraud).

3. *Has the respondent been a LPR for 5 years?*

i. See section 240A(d)(1). Service of the Notice to Appear or commission of a criminal offense referred to in section 212(a)(2) of the Act, whichever is earliest. See Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2001).

ii. The full section reads: 240A(d)(1): "For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 239(a), or (B) when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest."

b. *What was the date of respondent's first lawful admission into the United States?*

i. Matter of Robles, 24 I&N Dec. 22 (BIA 2006) (continuous residence stops on the date offense committed, not date of conviction; continuous residence stops on date offense is committed even if committed prior to Illegal Immigration Reform and Immigrant Responsibility Act of 1996 - April 1, 1997), Matter of Perez, 22 I&N Dec. 689 (BIA 1999), reaffirmed.

ii. Matter of Blancas, 23 I&N Dec. 458 (BIA 2002): The Board stated that INA 240A(a)(2) requires only seven years continuous residence after being admitted in any status. Here the respondent was admitted in 1986 as a visitor with a border crossing card and the NTA was served more than seven years later.

c. In certain circuits, the time the respondent lived in the household of a LPR parent while the respondent was an un-emancipated minor (under 18) will be imputed to the respondent for purposes of the 7 years. See Cuevas-Gaspar v. Gonzales, 430 F.3d 1013 (9th Cir. 2005).

7. *Was respondent's 7 years cut off by service of the NTA?*

a. The date the Notice to Appear is served counts toward the period of continuous presence. See Lagandaon v. Ashcroft, 383 F.3d 983, 988 (9th Cir. 2004) (rejecting the government's contention that the period ends the day preceding the date the Notice to Appear is served; The time of day is irrelevant).

v. Be aware of Circuit peculiarities:

(1) In Sinotes-Cruz v. Gonzales, 468 F.3d 1190 (9th Cir. 2006) (the Court found that the 240A(d)(1)(B) stop-time rule should not be applied to a conviction obtained pursuant to a guilty plea for a crime that did not render an alien deportable at the time of the plea. The Court notes that the Third Circuit has reached a contrary result on the retroactivity of the criminal offense cutoff, but without analysis, in Hernandez v. Gonzales, 437 F.3d 341 (3d Cir. 2006)).

9. *Did the respondent serve in active duty?*

a. The requirement of continuous residence shall not apply to an alien who has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and at the time of the alien's enlistment or induction was in the United States. Section 240A(d)(3) of the Act.

10. If there is no issue as to statutory eligibility you could simply sum up as follows: "The respondent has been a lawful permanent resident for more than 5 years, and he/she also has resided in the United States continuously for seven years after having been admitted in any status. Although the respondent has been convicted, his/her conviction is not for an aggravated felony. The issue in the discretionary balance of factors within the framework of Matter of C-V-T-, supra.

How many arrests over what period of time?:

How old was the respondent was he/she committed the offenses?:

Evidence of gang membership?:

Failure to pay child support?:

Misuse of government benefits?:

POSITIVE FACTORS

Current age:

Age first came to US:

Number of years total in US:

Number of years as LPR:

Immediate Family ties in the US:

Extended family ties in the US:

Medical Concerns:

Register for selective service / service in armed forces:

Assets:

Volunteer activities:

Letters of support in the record:

- evidence respondent accepts responsibility for his own actions

- attendance at classes (domestic violence, anger management, drug program, AA, NA)

- time between last conviction and the NTA (recency of criminal conduct):

- evidence respondent realizes that this would be last chance

The key to a successful decision is taking the information you have gathered and then clearly explaining why you reach the conclusion you do. How do the relevant facts you have gathered combine within the confines of the law to lead you to the conclusion that the respondent does or does not deserve a second chance to remain in the United States? It is essential to give a clear finding on the credibility of the witness. Articulate why you do or do not believe the testimony of the witness and what weight you believe the testimony should be given. Each case will be different. While there are sample decisions you can follow, any sample will become effective for you only when you work with it to make it your own. There is no universal standard language you can recite when balancing the factors, and your decision will be wooden and less effective if you try to recite standard language in explaining your conclusion. With experience you will see recurring themes, and at times you will see unusual facts and circumstances you will never see again. It is best to know your record, listen closely to the testimony, take good notes, and then articulate to the best of your ability why you reach the decision you do.

# Cancellation of Removal for Non-Lawful Permanent Residents: *Section 240A(b)(1) of the Act.*

Henry P. Ipema, Jr.
Immigration Judge,
San Diego, California

## Overview:

A. Cancellation of Removal for Non-Lawful Permanent Residents is a form of relief from removal. It only comes into play if the alien is first found removable.

B. The statutory eligibility requirements for non-lawful permanent resident cancellation of removal are:

1. *Physically present in the U.S. for a continuous period of 10 years preceding date of application*
2. *Ten-year period of good moral character*
3. *No convictions for an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act*
4. *Removal would cause exceptional and extremely unusual hardship to spouse, parent or child who is a USC or LPR*

C. The exceptional and extremely unusual hardship standard is developed through case precedent. The Board of Immigration Appeals currently has three cases interpreting hardship: Matter of Recinas, 23 I&N Dec. 467 (BIA 2002); Matter of Andazola, 23 I&N Dec. 319 (BIA 2002); Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).

D. The REAL ID Act requires that the alien answer the questions in the application. The respondent bears the burden of proof and is expected to present evidence that is reasonably obtainable. A proper background check is required before any application for cancellation can be granted.

E. A grant of cancellation of removal under section 240A(b)(1) adjusts the alien's status to that of a lawful permanent resident. The Attorney General may not cancel the removal or suspend the deportation of a total of more than 4,000 aliens in any fiscal year. Section 240A(e).

## Determining Eligibility:

A. Continuous Physical Presence: To meet the time requirement for cancellation the respondent must show entry into the United States at least by 10 years prior the service of the Notice to Appear, and that she maintained continuous physical presence since that time.

and conditions of his departure were clearly specified, and he was not statutorily barred from immediately reapplying for admission to the United States, his being turned away at the border did not have the same effect as an administrative voluntary departure and did not itself interrupt the accrual of an alien's continuous physical presence. Tapia v. Gonzales, 430 F.3d 997 (9th Cir. 2005).

(3) The record must contain substantial evidence that would support the conclusion that the respondent knowingly and voluntarily accepted administrative voluntary departure. For the voluntary departure to be under "threat" of deportation, the terms and conditions of the departure must be clearly specified. The respondent must be informed of and accept the terms. He should leave with the knowledge that he does so in lieu of being placed in proceedings and therefore has no legitimate expectation that he may reenter and resume continuous presence. Ibarra-Flores v. Gonzales, 439 F.3d 614 (9th Cir. 2006).

(4) Where an alien departed the United States for a period less than that specified in section 240A(d)(2) of the Immigration and Nationality Act, and unsuccessfully attempted reentry at a land border port of entry before actually reentering, physical presence continued to accrue for purposes of cancellation of removal under section 240A(b)(1)(A) unless, during that attempted reentry, the alien was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw an application for admission, or was subjected to some other formal, documented process pursuant to which the alien was determined to be inadmissible to the United States. Here, the respondent's 2-week absence from the United States did not break her continuous physical presence where she was refused admission by an immigration official at a port of entry, returned to Mexico without any threat of the institution of exclusion proceedings, and subsequently reentered without inspection. Matter of Avilez-Nava, 23 I&N Dec. 799 (BIA 2005).

(5) Before it may be found that a presence-breaking voluntary departure occurred, the record must contain some evidence that the alien was informed of and accepted its terms. Reyes-Vasquez v. Ashcroft, 395 F.3d 903 (8th Cir. 2005).

(6) Whereas service of the OSC or NTA, or commission of a qualifying offense stops time forever under 240A(d)(1), a break in time under 240A(d)(2) is just a break; you can begin counting anew after the break. Matter of Mendoza-Sandino, 22 I&N Dec.

2. Section 240A(b)(1)(C) of the Act requires that an applicant for cancellation "has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3)."

3. There is no time limit

4. In Gonzalez-Gonzalez v. Ashcroft, 390 F.3d 649 (9th Cir. 2004), the Ninth Circuit affirmed a BIA decision interpreting this language to read "convicted of an offense *described* under." Thus, alien convicted of crime of domestic violence described in 237(a)(2)(E)(i) of Act was ineligible for cancellation under section 240A(b)(1)(C) even though he could not be charged with removability under section 237. Petty offense has no application under section 237(a)(2)(E)(i) and is therefore not a defense.

D. Exceptional and extremely unusual hardship:

1. *Who are the qualifying relatives for purposes of cancellation of removal?*

2. An adult daughter twenty-one years of age or older does not qualify as a "child" for purposes of cancellation of removal. Montero-Martinez v. Ashcroft, 277 F.3d 1137 (9th Cir. 2002).

3. Consider the context of aliens trying to come to the United States lawfully.

4. Compare the facts of the case with the controlling precedent: Matter of Recinas, 23 I&N Dec. 467 (BIA 2002); Matter of Andazola, 23 I&N Dec. 319 (BIA 2002); Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).

5. The circuit court lacks jurisdiction to review the agency's discretionary determination that an applicant failed to establish the requisite hardship for cancellation of removal or suspension of deportation. Martinez-Rosas v. Gonzales, 424 F.3d 926, 930 (9th Cir. 2005).

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**SAN DIEGO, CALIFORNIA**

File No: A_____ Date:

In the Matter of )
_____ ) IN REMOVAL PROCEEDINGS
)
Respondent )

CHARGE(S): Section 212(a)( )( ) [Or 237(a)( )( )] of the Immigration and Nationality Act -

APPLICATION(S): Cancellation of removal for non-permanent resident; voluntary departure

ON BEHALF OF RESPONDENT:

_____, Attorney at Law

ON BEHALF OF DHS:

_____
Assistant Chief Counsel

**ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE**

The respondent is a ___ year old, single/married, male/female, native and citizen of _____. The United States Department of Homeland Security (DHS) brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act (the Act). Proceedings were commenced with the filing of the Notice to Appear (NTA) with the Immigration Court. See Exhibit 1.

The respondent admits as alleged in the Notice to Appear that (for example): S/He entered the United States on or about _____ at or near _____. S/He further concedes that s/he is inadmissible as charged under section 212(a)(6)(A) of the Act as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

On the basis of the respondent's admissions (and the supporting I-213/other records admitted into evidence) I find that the respondent's removability has been established –

[HPI - 42B cancellation sample]

To establish exceptional and extremely unusual hardship an applicant must demonstrate that a qualifying relative would suffer hardship that is substantially different from or beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be "unconscionable." The hardship must be beyond that which was required in suspension of deportation cases. Hardship factors relating to the applicant may be considered only insofar as they might affect the hardship to a qualifying relative. Matter of Recinas, 23 I&N Dec. 467 (BIA 2002); Matter of Andazola, 23 I&N Dec. 319 (BIA 2002); Matter of Monreal, 23 I&N Dec. 56 (BIA 2001).

## SUSTAINING BURDEN AND CREDIBILITY

The provisions of the "REAL ID Act of 2005" apply to the respondent's application as it was filed on or after May 11, 2005. Section 240(c)(4)(B) and (C) of the Act state as follows:

(B) SUSTAINING BURDEN- The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) CREDIBILITY DETERMINATION- Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

## ANALYSIS AND FINDINGS

[HPI - 42B cancellation sample]

i. See section 240A(d)(2). Absence from the United States for any single period in excess of 90 days or for any aggregate periods exceeding 180 days will break the respondent's continuous physical presence.

(1) A departure that is compelled under threat of the institution of deportation or removal proceedings is a break in physical presence for purposes of cancellation of removal. Matter of Romalez, 23 I&N Dec. 423 (BIA 2002); Vasquez-Lopez v. Ashcroft, 315 F.3d 1201 (9th Cir. 2003) (per curium), as amended upon denial of rehearing en banc, 343 F.3d 961 (9th Cir. 2003).

(2) Where the alien was turned around at the border without entering into a formal agreement with the government whereby the terms and conditions of his departure were clearly specified, and he was not statutorily barred from immediately reapplying for admission to the United States, his being turned away at the border did not have the same effect as an administrative voluntary departure and did not itself interrupt the accrual of an alien's continuous physical presence. Tapia v. Gonzales, 430 F.3d 997 (9th Cir. 2005).

(3) The record must contain substantial evidence that would support the conclusion that the respondent knowingly and voluntarily accepted administrative voluntary departure. For the voluntary departure to be under "threat" of deportation, the terms and conditions of the departure must be clearly specified. The respondent must be informed of and accept the terms. He should leave with the knowledge that he does so in lieu of being placed in proceedings and therefore has no legitimate expectation that he may reenter and resume continuous presence. Ibarra-Flores v. Gonzales, 439 F.3d 614 (9th Cir. 2006).

(4) Where an alien departed the United States for a period less than that specified in section 240A(d)(2) of the Immigration and Nationality Act, and unsuccessfully attempted reentry at a land border port of entry before actually reentering, physical presence continued to accrue for purposes of cancellation of removal under section 240A(b)(1)(A) unless, during that attempted reentry, the alien was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw an application for admission, or was subjected to some other formal, documented process pursuant to which the alien was

cancellation of removal under section 240A(a)(2), where his first crime, which qualifies as a petty offense, did not render him inadmissible, and he had accrued the requisite 7 years of continuous residence before the second offense was committed. Matter of Deanda-Romo, 23 I&N Dec. 597 (BIA 2003).

ii. An alien who has committed a crime involving moral turpitude that falls within the "petty offense" exception is not ineligible for cancellation of removal under section 240A(b)(1)(B) of the Act, because commission of a petty offense does not bar the offender from establishing good moral character under section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3). However, an alien who has committed more than one petty offense is not ineligible for the "petty offense" exception if "only one crime" is a crime involving moral turpitude. Matter of Garcia-Hernandez, 23 I&N Dec. 590 (BIA 2003).

C. Statutory Bars under 240A(b)(1)(C):

1. *Has the respondent been convicted of an offense barring him from cancellation under section 240A(b)(1)(C) of the Act?*

2. Section 240A(b)(1)(C) of the Act requires that an applicant for cancellation "has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3)."

3. There is no time limit

4. In Gonzalez-Gonzalez v. Ashcroft, 390 F.3d 649 (9th Cir. 2004), the Ninth Circuit affirmed a BIA decision interpreting this language to read "convicted of an offense *described* under." Thus, alien convicted of crime of domestic violence described in 237(a)(2)(E)(i) of Act was ineligible for cancellation under section 240A(b)(1)(C) even though he could not be charged with removability under section 237. Petty offense has no application under section 237(a)(2)(E)(i) and is therefore not a defense.

d. Exceptional and Extremely Unusual Hardship

No one questions the respondent's motivation or desire to remain in the United States. However, the context for cancellation of removal cases includes the fact that many individuals are waiting in line for their legal opportunity to come to the United States through a family or employment-based visa. Many, particularly in countries like _____, where the respondent is from, have been waiting for years for their visa number to become available. They had and still have the same hopes and dreams of living in the United States as does the respondent. The respondent here however, and many others with cancellation requests, in effect did not wait in the line, but simply bypassed the line, and arguably have been living for years off the opportunities that

health was fine. The Board of Immigration Appeals in the case noted that there would be reduced economic and educational opportunities for the children in Mexico, but the Board found that the respondent had failed to establish exceptional and extremely unusual hardship to either of her two children.

This Court has weighed all the evidence of record both individually and cumulatively on the issue of exceptional and extremely unusual hardship. [The key questions to be asked are: What hardship would ordinarily be expected to result from the alien's deportation? And: Is the hardship here substantially different from or beyond that ordinarily expected? In defining the terms the BIA did say that they expected the "exception to the norm to be very uncommon," see Monreal, supra, at 59 or "limited to 'truly exceptional' situations," Id. at 62.]

Upon examination, the Court concludes that there are:

1. Insufficient facts to meaningfully distinguish this case from the result in [Matter of Monreal], [Matter of Andazola]. **OR,**

2. There are a number of distinguishing factors that warrant a favorable finding to the respondents.

    a. Examples of a few potential distinguishing factors to watch for:

        i. Parents from different countries
        ii. The number of siblings - primarily as an economic factor
        iii. Sibling separation - (if a natural outcome, not if manufactured separation)
        iv. Respondent substantially older - fewer job possibilities
        v. Teenager who spent formative years in the United States. See Matter of OJO, 21 I&N Dec. 381 (BIA 1996) where the BIA gave great weight to the alien's having spent his formative years here in the US.
        vi. If respondents have grandchildren
        vii. The unavailability of 212(a)(9)(C)(v) waiver to reenter.

CONSIDERATIONS:

1. Credibility of respondent and any witnesses:

2. Financial means: The respondent expressed concern that if deported his economic circumstances may result in exceptional and extremely unusual hardship to his qualifying relatives.

    a. The respondent is ____ years old and in good health. Like in Monreal, there is "nothing to show that he would be unable to work and support his United States citizen children in Mexico." This exact finding was made in Monreal even

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1995).

3. Presence of children in home country: Here, like in Monreal and in Matter of Pilch, 21 I&N Dec. 627 (BIA 1996), a suspension of deportation case, the respondent has a child or children in the home country and therefore already has immediate family member obligations in the home country that must be attended to.

4. Children in the United States: (*If children are staying in United States*):

   i. The respondent testified that her children would not be going with her if she were required to leave the United States. Thus I do not consider societal or physical detriment to the child in the parent's native country, such as fewer economic advantages or educational opportunities. I do however consider the hardship from emotional separation to both the parents and the children.

   ii. If a young child were to be separated from his or her parents due to the parents' deportation, hardship to the family members due to separation must be considered. Perez v. INS, 96 F.3d 390 (9th Cir. 1996). In Matter of Ige, 20 I&N Dec. 880 (BIA 1994), it was stated that "Where an alien alleges extreme hardship will be suffered by his United States Citizen child were the child to remain in the United States upon his parent's deportation, the claim will not be given significant weight absent an affidavit from the parent stating that it is his intention that the child remain in this country, accompanied by evidence demonstrating that reasonable provisions will be made for the child's care and support." The court in Perez v. INS, supra, found this to be a valid evidentiary requirement. Here the respondent has not submitted the required Ige affidavit.

   iii. [Following part of Ige was overruled by Perez v. INS: "Assuming a United States Citizen child would not suffer extreme hardship if he accompanies his parent abroad, any hardship the child might face if left in the United States is the result of parental choice, not of the parent's deportation." Attributing separation hardship to parental choice as was done in Ige was found in Perez v. INS to be a per se rule and therefore inappropriate.]

5. Children in the United States: (*If children are going to parent's homeland*):

   a. Economic and Educational Opportunities: The fact that economic and educational opportunities for the child might be better in the United States than in the parent's homeland does not itself establish the requisite hardship. See Matter of Kim, 15 I&N Dec. 88 (BIA 1974); see also Matter of Pilch, 21 I&N Dec. 627 (BIA 1996); Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986) (all suspension

not be as good as they are in this country does not itself establish exceptional and extremely unusual hardship to the child. See Matter of Correa, 19 I&N Dec. 130 (BIA 1984) (a suspension of deportation case cited for comparison purposes only).

i. Consider factors reflecting children in good health vs. health problems

6. Separation from family:

a. Family ties: Note and describe family ties / immigration status / degree of closeness / special emotional and financial concerns / emotional impact on respondent of taking children to native country or leaving them in the United States.

b. Monreal: The separation of the children from the grandparents and friends was not found to be sufficient.

c. Separation from friends and family members in the United States is a common result of deportation. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

d. Respondent would be reunited with other family members in her native country. These family members may be able to provide financial base of support as they (own their own homes; have jobs; etc). If not more, these family members may be able to provide an emotional base of support during the respondent's time of readjustment. Matter of Pilch, 21 I&N Dec. 627 (BIA 1996).

7. Parents as qualifying relatives: In Monreal the parents of the respondent had been LPRs for 3 years; they had no special health concerns; and the BIA noted that the respondent had siblings in Dallas who "presumably" could help parents if necessary.

8. Other factors:

a. Other Adjustment possibilities

i. The respondent did / did not investigate the possibility of her employer filing a visa petition on her behalf.

ii. The respondent is the beneficiary of an approved visa petition. Although not currently available, the respondent then does have the potential for returning to the United States as an immigrant in the not too distant future. (If waiver to 10 year bar is available)

b. Breakup of community ties causing emotional strain on parents or children:

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(maximum 60 calendar days from the date of this order).

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the amount of $_____ with the Department of Homeland Security on or before _____ (five business days from the date of this order).

IT IS FURTHER ORDERED that, if required by the DHS, the respondent shall present to the DHS all necessary travel documents for voluntary departure within 60 days.

IT IS FURTHER ORDERED that, if the respondent fails to comply with any of the above orders, the voluntary departure order shall without further notice or proceedings vacate the next day, and the respondent shall be removed from the United States to _____ on the charge(s) contained in the Notice to Appear.

WARNING TO THE RESPONDENT: Failure to depart as required means you could be removed, you may have to pay a civil penalty of $1000 to $5000, and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for 10 years to come.

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before 30 calendar days from the date of service of this decision.

_____
Henry P. Ipema, Jr.
U.S. Immigration Judge

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