Cancellation of Removal under INA § 240A(a)

A lawful permanent resident is eligible for cancellation of removal if he or she: (1) has been lawfully admitted for permanent residence for not less than five years; (2) has resided in the United States continuously for seven years after having been admitted in any status; and (3) has not been convicted of an aggravated felony. INA § 240A(a). However, an alien who is inadmissible under INA § 212(a)(3) or deportable under INA § 237(a)(4) for, *inter alia*, engaging in terrorist activities, is statutorily ineligible for relief. INA § 240A(c); *see also* INA §§ 212(a)(3)(B)(iii), (iv).

An applicant for cancellation of removal under INA § 240A(a) has the burden to prove that he satisfies the applicable eligibility requirements and merits a favorable exercise of discretion. INA § 240(c)(4)(A); 8 C.F.R. § 1240.8(d). In addition, an alien whose application was filed after May 11, 2005, must provide corroborating evidence requested by the Immigration Judge pursuant to INA § 240(c)(4)(B), unless it cannot be reasonably obtained. See Matter of Almanza-Arenas, 24 I&N Dec. 771, 774 (BIA 2009).

A. Lawfully Admitted for Permanent Residence for Not Less than Five Years

An alien who acquired permanent resident status through fraud or misrepresentation has never been lawfully admitted for permanent residence and is therefore ineligible for cancellation of removal under INA § 240A(a). Matter of Koloamatangi, 23 I&N Dec. 548 (BIA 2003); see also De La Rosa v. U.S. Dep't of Homeland Sec., 489 F.3d 551 (2d Cir. 2007). However, such a person may be eligible for a waiver of the fraud or misrepresentation under INA § 237(a)(1)(H). Koloamatangi, 23 I&N Dec. at 552.[1]

A parent's period of time in lawful permanent resident status cannot be imputed to a child in order to determine whether the child is eligible for cancellation of removal under INA § 240A(a). Holder v. Martinez Gutierrez, 132 S. Ct. 2011 (2012); see also Matter of Montoya-Silva, 26 I&N Dec. 123 (BIA 2013); Matter of Escobar, 24 I&N Dec. 231 (BIA 2007).

B. Resided in the United States Continuously for Seven Years After Admission

The time since the alien was admitted as a nonimmigrant may be considered in calculating the seven years of continuous residence, regardless of whether the alien fell out of status at some point after admission. Matter of Blancas-Lara, 23 I&N Dec. 458, 460-61 (BIA 2002). A grant of benefits under the Family Unity Program does not qualify as an "admission" for purposes of demonstrating residence after being "admitted in any status" under INA § 240A(a)(2). Matter of Fajardo Espinoza, 26 I&N Dec. 603 (BIA 2015) (reaffirming Matter of Reza-Murillo, 25 I&N Dec. 296 (BIA 2010)). Neither does parole into the United States qualify as an "admission" for purposes of establishing eligibility under INA § 240A(a)(2). Matter of Camarillo, 25 I&N Dec. 644, 652 (BIA 2011). Additionally, a grant of asylum is not an "admission" to the U.S. under INA § 101(a)(13)(A) (2006). Matter of V-X-, 26 I. & N. Dec. 147, 147 (BIA 2013).

[1] The BIA has cautioned that Koloamatangi is limited to situations regarding eligibility for relief from removal and not situations regarding removability. Matter of Pena, 26 I&N Dec. 613, 618-19 (BIA 2015).

A parent's period of continuous residence in the United States cannot be imputed to a child in order to determine whether the child is eligible for cancellation of removal under INA § 240A(a). Martinez Gutierrez, 132 S. Ct. 2011; see also Montoya-Silva, 26 I&N Dec. 123 (BIA 2013); Matter of Ramirez-Vargas, 24 I&N Dec. 599 (BIA 2008).

Pursuant to the "stop-time" rule, any period of continuous residence in the United States shall be deemed to end when the applicant is served with a Notice to Appear, or when the applicant commits an offense referred to in INA § 212(a)(2) that renders the applicant inadmissible to the United States under INA § 212(a)(2) or removable under INA § 237(a)(2) or INA § 237(a)(4), whichever is earliest. INA § 240A(d)(1); Reid v. Gonzales, 478 F.3d 510, 512 (2d Cir. 2007); see also Matter of Campos-Torres, 22 I&N Dec. 1289, 1294 (BIA 2000) (holding that a firearms offense that renders an alien removable under section 237(a)(2)(C) is not one "referred to in section 212(a)(2)" and thus does not stop the accrual of continuous residence for purposes of establishing eligibility for cancellation of removal). A Notice to Appear that was served on an alien but never resulted in the commencement of removal proceedings does not have "stop-time" effect for purposes of establishing eligibility for cancellation of removal under INA § 240A(d)(1). Matter of Ordaz, 26 I&N Dec. 637 (BIA 2015). A Notice to Appear cuts off an applicant's continuous physical presence if that Notice to Appear "is the basis for the proceedings in which cancellation of removal is being sought." Ordaz, 26 I&N Dec. at 643.

An alien need not be charged and found inadmissible or removable on a ground specified in INA §§ 212(a)(2), 237(a)(2), or 237(a)(4) in order for the alleged criminal conduct to terminate the alien's continuous residence. Matter of Jurado-Delgado, 24 I&N Dec. 29, 31 (BIA 2006). A single conviction for a crime involving moral turpitude that falls within the petty offense exception under INA § 212(a)(2)(A)(ii)(II) is not an offense referred to in INA § 212(a)(2) for the purpose of triggering the stop-time rule, even if it renders the alien removable under INA § 237(a)(2)(A)(i). Matter of Garcia, 25 I&N Dec. 332 (BIA 2010).

Absent a waiver of inadmissibility, INA § 240A(d)(1) does not permit the accrual of continuous residence to restart following the departure from, and re-entry to, the United States after a conviction for a crime that would otherwise stop the accrual of continuous residence required for cancellation of removal under INA § 240A(a). Matter of Nelson, 25 I&N Dec. 410, 410 (BIA 2011).

1. Perfecting Service of the Notice to Appear & Hearing Notice: Date & Time Requirements to Trigger the Stop-Time Rule

a. The Board of Immigration Appeals

In Matter of Camarillo, 25 I&N Dec. 644 (BIA 2011), the BIA held that, under the stop-time rule, any period of continuous physical presence is deemed to end upon the service of the Notice to Appear, even if the Notice to Appear does not include the date and time of the initial hearing. The Board examined the notice requirements enumerated under INA § 239(a)(1) and determined that INA § 240A(d)(1) does not "requir[e] the service of both the notice to appear and the notice of hearing to activate the 'stop-time' rule." Camarillo, 25 I&N Dec. at 651. Thus,

the key date for purposes of INA § 240A(d)(1) is the date when the alien was served with the Notice to Appear. Camarillo, 25 I&N Dec. at 651.

b. The Second Circuit

Shortly after the Board issued its decision in Camarillo, the Second Circuit issued Guamanrrigra v. Holder, 670 F.3d 404 (2d Cir. 2012). The Second Circuit addressed the notice requirements of INA § 239(a)(1), concluding that service of a Notice to Appear that indicates that the date and time of a hearing will be set in the future is perfected upon service of a separate notice specifying the precise date and time of the hearing. Guamanrrigra, 670 F.3d at 410. In other words, INA § 239(a)(1) can be satisfied by a combination of notices. Guamanrrigra, 670 F.3d at 410. The Second Circuit also gave Chevron deference to the BIA's holding in Camarillo "that service of a notice to appear suffices to trigger the stop-time rule regardless of whether it specifies the time and date of the initial hearing." Guaman-Yuqui v. Lynch, 786 F.3d 235, 241 (2d Cir. 2015).

2. Retroactivity of the Stop-Time Rule

Under the "stop-time" rule in INA § 240A(d)(1)(B), an offense is deemed to end an alien's continuous residence as of the date of its commission, even if the offense was committed prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546. Matter of Robles-Urrea, 24 I&N Dec. 22, 27-28 (BIA 2006); see also Matter of Jurado-Delgado, 24 I&N Dec. 29, 32 (BIA 2006); Matter of Nolasco-Tofino, 22 I&N Dec. 632, 640-41 (BIA 1999); Matter of Perez, 22 I&N Dec. 689, 691 (BIA 1999). The stop-time rule applies both in removal cases and in deportation or exclusion cases. Nolasco-Tofino, 22 I&N Dec. at 637; see also Matter of N-J-B-, 21 I&N Dec. 812, 817 (BIA 1997). Retroactive application of IIRIRA's stop-time rule does not violate due process when applied to suspension of deportation cases pending on April 1, 1997. Rojas-Reyes v. INS, 235 F.3d 115, 123 (2d Cir. 2000).[2]

C. Aggravated Felony Bar

A petitioner seeking cancellation of removal bears the burden of proof in showing that he has not been convicted of an aggravated felony. INA § 240(c)(4)(A); 8 C.F.R. § 1240.8(d). However, a petitioner has proven that he has not been convicted of an aggravated felony if is record of conviction does not conclusively show that his conviction is for an aggravated felony. Martinez v. Mukasey, 551 F.3d 113, 121-22 (2d Cir. 2008).

A petitioner who has been convicted of an aggravated felony may not obtain relief from removal through simultaneous applications for cancellation of removal under INA § 240A and a

[2] The United States District Court for the Southern District of New York has held that the clock-stopping provision *is* impermissibly retroactive when applied to respondents whose crimes were committed before IIRIRA but whose removal proceedings were commenced after IIRIRA's effective date. Henry v. Ashcroft, 175 F.Supp.2d 688, 693 (S.D.N.Y. 2001). Because the clock-stopping provision attaches new legal consequences to events completed before its enactment and impairs important rights, the Henry court held that the stop-time rule is impermissibly retroactive when applied to a respondent whose criminal act pre-dates, and charging document post-dates, April 1, 1997. Henry, 175 F. Supp. 2d at 694-95.

waiver of deportation under former INA § 212(c). Nunez Pena v. Lynch, – F.3d –, 2016 WL 2942931 (2d Cir. 2016); Peralta-Taveras v. Att'y Gen., 488 F.3d 580, 584-85 (2d Cir. 2007).

D. Discretion

In addition to demonstrating statutory eligibility, an applicant for cancellation of removal bears the burden of showing that relief is warranted in the exercise of discretion. INA § 240A(a); see also Matter of C-V-T-, 22 I&N Dec. 7, 10 (BIA 1998). The Board has held that the general standards developed for the exercise of discretion under former INA § 212(c) are also applicable to the exercise of discretion under INA § 240A(a). C-V-T-, 22 I&N Dec. at 10; see also Matter of Sotelo-Sotelo, 23 I&N Dec. 201, 203 (BIA 2001) (affirming C-V-T- and emphasizing that the discretionary determination "will depend in each case on the nature and circumstances of the ground of [removability] sought waived and on the presence of any additional adverse matters."). In keeping with the standards developed under former INA § 212(c), the Court should consider the record as a whole and balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his favor to determine whether a grant of relief would be in the best interest of this country. C-V-T-, 22 I&N Dec. at 11; Matter of Edwards, 20 I&N Dec. 191, 195 (BIA 1990); Matter of Marin, 16 I&N Dec. 581, 584 (BIA 1978).

There is no threshold requirement that the applicant demonstrate unusual or outstanding equities; rather, the Court must weigh the favorable and adverse factors to balance the "totality of the evidence" before reaching a conclusion as to whether the applicant warrants a grant of cancellation of removal in the exercise of discretion. Sotelo-Sotelo, 23 I&N Dec. at 204 (quoting C-V-T-, 22 I&N Dec. at 10). In some cases, the minimum equities required to establish eligibility for relief (i.e., residence for at least seven years and lawful permanent resident status for at least five years) may be may be sufficient to warrant a favorable exercise of discretion. C-V-T-, 22 I&N Dec. at 11; Marin, 16 I&N Dec. at 585. However, as the negative factors grow more serious, "it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities." C-V-T-, 22 I&N Dec. at 11-12. More serious misconduct necessarily weighs more heavily against the exercise of discretion than does less serious misconduct; therefore, the applicant must present additional favorable evidence to counterbalance an adverse factor such as serious criminal activity. Sotelo-Sotelo, 23 I&N Dec. at 203; see also Marin, 16 I&N Dec. at 585.

When exercising discretion in a cancellation of removal case, positive factors to be considered include, but are not limited to, family ties in the United States, residence of long duration in this country, evidence of hardship to the applicant and his or her family if removal occurs, a history of employment, existence of property or business ties, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the applicant's good moral character. C-V-T-, 22 I&N Dec. at 11; Edwards, 20 I&N Dec. at 195; Marin, 16 I&N Dec. at 584-85. Adverse factors to be considered include the nature and underlying circumstances of the removal ground at issue and any other evidence that could be indicative of an applicant's bad character or undesirability as a permanent resident. C-V-T-, 22 I&N Dec. at 11; Marin, 16 I&N Dec. at 584.