Cancellation of Removal under INA § 240A(b)(1)

An alien who is inadmissible or deportable from the United States is eligible for cancellation of removal and adjustment of status to that of a lawful permanent resident if he: (a) has been continuously physically present in the United States for not less than ten years immediately preceding the date of such application; (b) has been a person of good moral character during that ten-year period; (c) has not been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3), unless a domestic violence waiver pursuant to INA § 240A(b)(5) is granted; and (d) establishes that removal would result in exceptional and extremely unusual hardship to the alien's United States citizen or lawful permanent resident spouse, parent, or child. INA § 240A(b)(1). 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).

The applicant bears the burden to prove that he is statutorily eligible 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).

Immigration judges and the Board may deny without reserving decision or may pretermit those suspension of deportation or cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief. The basis of such denial or pretermission may not be based on an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically note in INA § 101(f), a failure to establish exceptional or extremely unusual hardship to a qualifying relative in cancellation cases, or a failure to establish extreme hardship to the applicant and/or qualifying relative in suspension cases. 8 C.F.R. § 1240.21(c)(1).

A. Continuous Physical Presence

A departure from the United States for a period in excess of ninety days, or 180 days in the aggregate, cuts short an applicant's period of continuous physical presence. INA § 240A(d)(2). Moreover, a departure from the United States for any period of time constitutes a break in an alien's continuous physical presence if he departs "with the knowledge that he does so in lieu of being placed in proceedings" and after making "an admission to facts that rendered him inadmissible." Rosario-Mijangos v. Holder, 717 F.3d 269, 279 (2d Cir. 2013) (citing Matter of Romalez-Alcaide, 23 I&N Dec. 423, 429 (BIA 2002) and Ascencio-Rodriguez v. Holder, 595 F.3d 105, 113 (2d Cir. 2010)). However, where an alien has the right to a hearing before an Immigration Judge, a voluntary departure or return does not break the alien's continuous physical presence for purposes of cancellation of removal under section 240A(b)(1)(A), in the absence of evidence that he or she was informed of and waived the right to such a hearing, regardless of whether the encounter occurred at or near the border. Matter of Garcia-Ramirez, 26 I&N Dec. 674 (BIA 2015).

An immigration official's refusal to admit an alien at a land border port of entry will not constitute a break in the alien's continuous physical presence unless there is evidence that the alien

was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw his or her application for admission, or was subjected to any other formal, documented process pursuant to which the alien was determined to be inadmissible to the United States. Matter of Avilez-Nava, 23 I&N Dec. 799, 805-06 (BIA 2005). The "formal, documented process" required by Avilez-Nava may include procedures not specifically contemplated by statute or regulation, provided that documentation exists to show that the alien waived his right to proceedings before an immigration judge, conceded inadmissibility, and departed the United States. Rosario-Mijangos, 717 F.3d at 279-80 (holding that an alien's period of continuous presence was broken when he signed Form I-826, Notice of Rights and Request for Disposition, admitting that he was in the United Stated illegally, waiving his right to appear before an immigration judge, and electing to return to his country of origin). An alien's departure subsequent to a criminal conviction for illegal entry under INA § 275(a)(1) involves such a "formal, documented process" because it establishes facts demonstrating an alien's inadmissibility, even if an immigration court never makes an explicit finding of inadmissibility. Matter of Velasquez-Cruz, 26 I&N Dec. 458, 463 (BIA 2014); Ascencio-Rodriguez, 595 F.3d at 114.

Pursuant to the "stop-time" rule, any period of continuous physical presence 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). INA § 240A(d)(1); see also Reid v. Gonzales, 478 F.3d 510, 512 (2d Cir. 2007). 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. A Notice to Appear that fails to designate the specific time and place of the noncitizen's removal proceedings does not trigger the stop-time rule. Pereira v. Sessions, 138 S.Ct. 2105 (2018).[1]

[1] An Order to Show Cause ("OSC"), while functionally equivalent to an NTA, may not be governed by the Supreme Court's decision in Pereira v. Sessions. 138 S.Ct. at n. 9 (stating in *dicta* that an OSC is an entirely different document than an NTA, and did not necessarily include time and place information which is statutorily mandated in an NTA). INA § 239(a)(1)(G) requires that an NTA include "time and place at which the proceedings will be held," but former INA § 242B(1) does not state that an OSC must include the same information. Rather, the notice of time and place of proceedings is discussed under a separate section, former INA § 242B(2). This implies that a separate written notice regarding the time and place of proceedings was appropriate pre-IIRAIRA because an OSC did not require a time and place of proceedings as its "essential character," in the way that an NTA is defined by this requirement. Pereira v. Sessions, 138 S.Ct. at 2116.

In Matter of Bermudez-Cota, 27 I&N Dec. 441 (BIA 2018), the Board noted Pereira's narrow issue: the stop-time rule as it relates to Cancellation of Removal applications. In Bermudez, the Respondent argued that if the failure to specify the date and time of a hearing renders an NTA defective under INA § 239(a)(1) for purposes of the "stop-time" rule, then it renders it defective for all purposes. However, the BIA disagreed and found that so long as a notice of hearing specifying the time and place of an alien's initial removal proceedings is later sent to the alien, NTAs that do not specify the time and place of an alien's initial removal hearing nonetheless vest IJs with jurisdiction and meet the requirements of INA § 239(a).

However, 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 return to, the United States after a conviction for a crime that would otherwise stop the accrual of continuous residence required for cancellation of removal. See Matter of Nelson, 25 I&N Dec. 410 (BIA 2011).

In 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.

1. Retroactivity of the Stop-Time Rule

The Board has held that the "stop-time" rule described in INA § 240A(d)(1) applies retroactively. Matter of Nolasco-Tofino, 22 I&N Dec. 632, 640-41 (BIA 1999); Matter of Perez, 22 I&N Dec. 689 (BIA 1999). It applies in removal proceedings as well as in deportation or exclusion proceedings. Nolasco-Tofino, 22 I&N Dec. at 637. The stop-time rule is triggered by the commission of an offense described in INA § 240A(d)(1) even if the offense was committed before the passage of INA § 240A. Perez, 22 I&N Dec. at 691. The relevant date is the date on which the alien commits the offense. Baraket v. Holder, 632 F.3d 56 (2d Cir. 2011); Perez, 22 I&N Dec. at 693. 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, 123-24 (2d Cir. 2000).[2]

B. Good Moral Character

An alien bears the burden of demonstrating that he or she has been a person of good moral character for a continuous period of at least ten years immediately preceding the date of his or her application. INA § 240A(b)(1). The ten-year period is calculated backward from the date on which the final administrative decision is entered by the Immigration Judge or the Board. Matter of Ortega-Cabrera, 23 I&N Dec. 793, 797-98 (BIA 2005). Good moral character is defined in INA § 101(f).

[2] The U.S. 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.

A CIMT conviction that falls under the petty offense exception at INA § 212(a)(2)(A)(ii)(II) does not bar an applicant from establishing good moral character under INA § 101(f)(3) for purposes of cancellation of removal. Matter of Garcia-Hernandez, 23 I&N Dec. 590, 593 (BIA 2003). An alien cannot establish good moral character under section 101(f)(6) of the INA if, during the period for which it is required, he or she gives false testimony under oath in proceedings before an Immigration Judge with the subjective intent of obtaining immigration benefits. Matter of Gomez-Beltran, 26 I&N Dec. 765, 770 (BIA 2016).

C. Disqualifying Convictions

An alien is ineligible for cancellation of removal under INA § 240A(b)(1) if he has been convicted of an offense under INA §§ 212(a)(2),[3] 237(a)(2) or 237(a)(3). See INA § 240A(b)(1)(C). If the alien filed for cancellation after the enactment of the REAL ID Act of 2005, it is the alien's burden to prove eligibility, including demonstrating that he has no disqualifying convictions. Almanza-Arenas, 24 I&N Dec. at 774-75.

To determine which offenses are "under" INA §§ 212(a)(2), 237(a)(2), and 237(a)(3), "only language specifically pertaining to the criminal offense, such as the sentence imposed or potentially imposed, should be considered." Matter of Ortega-Lopez, 27 I&N Dec. 382, 391-98 (BIA 2018); Matter of Cortez, 25 I&N Dec. 301, 307 (BIA 2010). By contrast, "statutory language…pertaining only to aspects of immigration law, such as the requirement [under INA § 237(a)(2)(A)(i)] that the alien's crime be committed 'within five years…after the date of admission,' is not considered." Cortez, 25 I&N Dec. at 307. An alien whose conviction precedes the effective date of INA § 237(a)(2)(E) is not "convicted of an offense under" that section and is therefore not barred from establishing eligibility for cancellation of removal. Matter of Gonzalez-Silva, 24 I&N Dec 218 (BIA 2007).

An alien who has been convicted of a crime involving moral turpitude that falls within the "petty offense exception" in INA § 212(a)(2)(A)(ii)(II) is not ineligible for cancellation of removal because he or she "has not been convicted of an offense under INA § 212(a)(2)." Matter of Garcia-Hernandez, 23 I&N Dec. 590, 592-93 (BIA 2003); see also Matter of Pedroza, 25 I&N Dec. 312 (BIA 2010). Nevertheless, a crime involving moral turpitude that falls under INA § 237(a)(2)(A)(i) (i.e., a crime involving moral turpitude for which a sentence of one year or longer may be imposed) will render an alien ineligible for cancellation, even if the alien is an "arriving alien" and his or her conviction would fall under the "petty offense" exception at INA § 212(a)(2)(A)(ii)(II). Cortez, 25 I&N Dec. at 307 (affirming Almanza-Arenas, 24 I&N Dec. at 776). If the statute of conviction is divisible, it is the alien's burden to prove the conviction was not pursuant to any part of the statute that reaches conduct involving moral turpitude, including producing corroborating evidence such as the transcript of criminal proceedings. Almanza-Arenas, 24 I&N Dec. at 775-76.

[3] The phrase "convicted of an offense under section 212(a)(2)" encompasses all the provisions of section 212(a)(2) that are based on an alien's conviction, including section 212(a)(2)(B)," which relates to multiple criminal convictions for which the aggregate sentences imposed were five years or more. Matter of Pina-Galindo, 26 I&N Dec. 423 (BIA 2014).

A waiver under INA § 212(h) cannot cure the effect of a conviction for an offense under INA § 212(a)(2) to overcome the bar to cancellation of removal under INA § 240A(b)(1)(C). Matter of Bustamante, 25 I&N Dec. 564 (BIA 2011) (holding that § 212(h) only waives the ground of inadmissibility resulting from the conviction, not the conviction itself or any other immigration-related consequences).

In determining if an alien is ineligible for cancellation of removal for having committed an offense under INA § 237(a)(2)(E)(ii) (for having been convicted of violating an order of protection), the Immigration Judge need only decide whether the alien has been convicted within the meaning of INA § 101(a)(48)(A) and whether that conviction is for violating a protection order under INA § 237(a)(2)(E)(ii). Matter of Medina-Jimenez, 27 I&N Dec. 399 (BIA 2018). An alien who would otherwise be ineligible for cancellation due to a conviction under INA § 237(a)(2)(E)(i) or (ii) may be granted a domestic violence waiver under INA § 240A(b)(5). That waiver is contained in INA § 237(a)(7), which states that certain crimes of domestic violence and stalking may be waived in the case of :

> an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship… upon a determination that (I) the alien was acting [in] self-defense; (II) the alien was found to have violated a protection order intended to protect the alien; or (III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime…that did not result in serious bodily injury; and…where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

INA § 237(a)(7).

D. Exceptional and Extremely Unusual Hardship

To establish "exceptional and extremely unusual hardship," the applicant must show that his qualifying relative would suffer hardship substantially beyond that which would ordinarily result from an alien's removal. See Matter of Monreal, 23 I&N Dec. 56, 59 (BIA 2001). However, the alien need not show that such hardship would be unconscionable. See Monreal, 23 I&N Dec. at 61. Only hardship to the alien's qualifying relative is considered, although hardship to the alien may be evaluated insofar as it affects his or her qualifying spouse, parent, or child. INA § 240A(b)(1)(D); Monreal, 23 I&N Dec. at 63.

A "child" must be unmarried and under the age of twenty-one to serve as a qualifying relative. INA § 101(b)(1). An applicant whose son or daughter met the definition of a "child" when the application was filed but turned twenty-one before the Immigration Judge adjudicated the application no longer has a qualifying relative under INA § 240A(b)(1)(D). Matter of Isidro-Zamorano, 25 I&N Dec. 829 (BIA 2012). A stepparent who qualifies as a "parent" under INA § 101(b)(2) at the time of the proceedings is a qualifying relative for purposes of establishing exceptional and extremely unusual hardship for cancellation of removal under INA § 240A(b)(1)(D). Matter of Morales, 25 I&N Dec. 186 (BIA 2010). Similarly, a stepchild who

meets the definition of a "child" under INA § 101(b)(1)(B) is a qualifying relative. Matter of Portillo-Gutierrez, 25 I&N Dec. 148 (BIA 2009).

Factors to be considered in determining the level of hardship include the qualifying relative's age, health,[4] length of residence in the United States, and family and community ties in the United States and abroad. Monreal, 23 I&N Dec. at 63 (citing Matter of Anderson, 16 I&N Dec. 596, 597 (BIA 1978)). A lower standard of living, diminished educational opportunities, poor economic conditions, and other adverse country conditions in the country of removal are also relevant factors, but will generally be insufficient, in and of themselves, to support a finding of exceptional and extremely unusual hardship. Matter of Andazola-Rivas, 23 I&N Dec. 319, 323-24 (BIA 2002); Monreal, 23 I&N Dec. at 63-64. However, all hardship factors should be considered in the aggregate to determine whether the qualifying relative will suffer hardship that is exceptional and extremely unusual. Monreal, 23 I&N Dec. at 64. For example, the Board has determined that diminished educational and economic opportunities in the country of removal, when combined with the financial burden on the adult respondent, who was sole financial provider for her six children, four of whom were United States citizens, the children's unfamiliarity with the language in the country of removal, the lawful residence of the respondent's immediate family in this country, and the lack of family ties in the country of removal, among other factors, cumulatively rendered the hardship "well beyond that which is normally experienced in most cases of removal." Matter of Recinas, 23 I&N Dec. 467, 472 (BIA 2002).

[4] Failure to consider any medical conditions of the respondent's qualifying relatives constitutes legal error. Mendez v. Holder, 566 F.3d 316, 323-24 (2d Cir. 2009).