



Pro Bono Training:
The Essentials of Immigration Court Representation
CANCELLATION OF REMOVAL

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Cancellation of Removal for LPRs

Immigration & Nationality Act (“INA”)§240A(a);
8 U.S.C. § 1229b(a); 8 C.F.R. § §1240.11(a), 1240.20

1. Eligibility – The AG may cancel the removal of an LPR if he or she:
 - A. Has been “lawfully admitted for permanent residence” for 5 years;
 - B. Has resided in the U.S. continuously for 7 years after having been admitted in any status [INA §240A(a)(2)];
 - C. Has not been convicted of an aggravated felony; and
 - D. Warrants a favorable exercise of discretion.

Lawfully admitted for permanent residence for 5 years

- A person who obtained LPR status by fraud or mistake is deemed to have *not* been “lawfully admitted for permanent residence.” *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003).
 - *See also Ramos-Torres v. Holder*, 637 F.3d 544 (5th Cir. 2011) [a person who was given VD under threat of deportation broke physical presence for the 1986 amnesty and was never lawfully an LPR];

Has resided in the U.S. continuously for 7 years after having been admitted in any status [INA §240A(a)(2)]

- Continuous residence not required where the person has served in active duty status in the Armed Forces for a minimum of 24 months and if separated, was honorably discharged, and was in the U.S. at the time of enlistment or induction.
- Admission in “any status” includes admission as temporary resident, *Matter of Perez*, 22 I&N Dec. 689, 692 (BIA 1999), a nonimmigrant, *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002) [Mexican entered on border crossing card].
- Does not include time that person was paroled into the country, *Matter of Camarillo*, 25 I&N Dec. 644, 652 (BIA 2011).
- The 7-year period is deemed to end when the person is served with an NTA or has committed an offense referred to in INA 212(a)(2) that renders him or her inadmissible or removable under INA § §237(a)(2) or 237(a)(4).

Has not been convicted of an aggravated felony

- *Garcia-Jimenez v. Gonzales*, 488 F.3d 1082 (9th Cir. 2007) [where IJ granted §212(c) relief for pre-IIRIRA convictions, it could not grant cancellation for a post-IIRIRA conviction]
- A person convicted of an aggravated felony is ineligible for cancellation. The burden rests with the applicant to show he is not ineligible. INA §240(c)(4)(A); 8 C.F.R. §1240.8(d);

Warrants a favorable exercise of discretion

- Criteria utilized outlined under *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) and *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984) should be utilized.
- Positive Factors
 - Family Ties within the U.S.;
 - Residency of long duration in the U.S.;
 - Evidence of hardship to the respondent and family if deportation occurs;
 - Service in the Armed Forces;
 - History of employment;
 - Existence of property or business ties;
 - Existence of value and service to the community;
 - Proof of genuine rehabilitation if a criminal record exists;
 - Evidence attesting to a respondent's good character

- **Negative Factors**
 - Nature and underlying circumstance of grounds of removal;
 - Additional significant immigration violations;
 - Existence of criminal record;
 - Other evidence of bad character or undesirability.

- **Other Factors**
 - The IJ should also consider factors such as the potential or actual pregnancy of applicant or applicant’s partner. *Drobny v. INS*, 947 F.2d 241, 246 (7th Cir. 1991) [denial of waiver reversed where girlfriend’s pregnancy not considered].
 - The IJ should also consider the likelihood of persecution in determining hardship. *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992) [Iranian’s persecution for conversion to Christianity should be considered because “death is hardship”]

Cancellation of Removal for Non-LPRs

INA §240A(b); 8 U.S.C. §1229b(b); 8 C.F.R. §
§1240.11(a), 1240.20

1. Eligibility – The AG may cancel the removal and adjust the status of a non-LPR who is inadmissible or deportable if he or she:
 - A. Has been physically present in the U.S. for a continuous period of not less than 10 years immediately preceding the date of such application;
 - B. Has been a person of good moral character for 10 years;
 - C. Has not been convicted of an offense under INA § §212(a), 237(a)(2) or 237(a)(3);
 - D. Establishes that removal would result in exceptional and extremely unusual hardship to USC or LPR spouse, parent or child; and
 - E. Warrants a favorable exercise of discretion.

Has been physically present in the U.S. for a continuous period of not less than 10 years immediately preceding the date of such application

- Continuous residence not required where the person has served in active duty status in the Armed Forces for a minimum of 24 months and if separated, was honorably discharged, and was in the U.S. at the time of enlistment or induction.
- Under INA §240A(d)(1), continuous physical presence for purposes of cancellation is deemed to end upon service of an NTA, or upon commission of certain criminal acts. *See Stop-Time Rule (p.13)*
- The review of whether a person has met the 10-year requirement is subject to the substantial-evidence test. *Sanchez-Velasco v. Holder*, 593 F.3d 733 (8th Cir. 2010).
- Physical presence shall be broken if a person departs the U.S. for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days during the 10-year period.

Has been a person of good moral character for 10 years

- Finding of good moral character is a statutory [INA §101(f); 8 U.S.C. §1101(f)] and discretionary matter. *See Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967) [where conduct does not result in statutory ineligibility for GMC, the IJ may still consider it as a discretionary matter].
- The Board has “long held that good moral character does not mean moral excellence and that it is not destroyed by a ‘single incident.’” *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991).
- Under statutory definition, a person shall not be deemed to have good moral character if he or she was:
 - A habitual drunkard. INA §101(f)(1).
 - Polygamist, prostitute, smuggler, convicted of certain crimes involving moral turpitude (CIMTs), most drug offenses (except a single offense of simple possession of 30 grams of marijuana). INA §101(f)(3).
 - Person whose income is derived principally from illegal gambling. INA §101(f)(4).
 - Person who has given false testimony for purposes of obtaining any benefit under the INA.
 - Person who has been confined, as a result of any conviction, to a penal institution for an aggregate period of 180 days or more.

Has not been convicted of an offense under INA § §212(a), 237(a)(2) or 237(a)(3)

- A petty offense involving moral turpitude does not render an applicant ineligible for cancellation. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 592-93 (BIA 2003).
 - A conviction is considered a petty offense if the maximum penalty for the crime did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed). INA §212(a)(2)(A)(ii)(II).

Removal would result in exceptional and extremely unusual hardship to USC or LPR spouse, parent or child

- While the applicant's hardship is generally not relevant, "factors that relate only to the respondent may be considered to the extent that they affect the potential level of hardship to her qualifying relatives." *Matter of Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).
- A son/daughter's hardship may not be considered. *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144-45 (9th Cir. 2002) [definition of "child" does not include son/daughter who is 21 or over].
- Nor may hardship be to an unborn child, grandchild.

Continuous Residence/Physical Presence and the Stop-Time Rule – INA §240A(d)(1)

- The stop-time rule only applies to residence issues, *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006).
- Service of NTA – Under INA §240A(d)(1)(A), continuous residence is deemed to end upon service of an NTA. *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011) [rule applies when respondent is served with the NTA even if it does not contain a date and time of the hearing].
- Commission of Certain Crimes – Under INA §240A(d)(1)(B), continuous residence is deemed to end: “When the alien has committed an offense referred to in section 1182(a)(2)...that renders the alien inadmissible to the U.S. under section 1182(a)(2)...or removable...under section 1227(a)(2) or 1227(a)(4)...whichever is earlier.” The stop time rule therefore will apply upon the commission of an offense: (1) “referred to in section INA §212(a)(2)” and a conviction [or activity] that (2) “renders the alien inadmissible...or removable.”
- A petty offense does not trigger the stop-time rule.

Application

- Cancellation of removal application is submitted on Form EOIR-42 if before the Immigration Judge. Must submit fee when filing in conjunction with removal proceedings.
- Cancellation is Indefinite – If granted, it is granted indefinitely and returns the person to same LPR status previously held. It cannot be revoked.

Special Rule Cancellation for Battered Spouse or Child

PL 106-386 §1504(a)(2)(A)(II), 114 Stat. 1464(2000) *codified* at INA §240A(b)(2), 8 U.S.C. §1229b(b)(2)

Criteria

1. Person has been battered or subjected to extreme cruelty by a spouse or parent who is or was a USC or LPR (or is the parent of a child of a USC or LPR and the child has been battered or subject to extreme cruelty by the USC or LPR);
2. Person has been physically present in the U.S. for a continuous period of not less than 3 years immediately preceding the date of the application;
3. Person is of good moral character during the 3 years;
4. Person is not inadmissible under §§212(a)(2) or (3), is not deportable under §§237(a)(1)(G), (2), (3), or (4), and has not been convicted of an aggravated felony; and
5. Removal would result in extreme hardship to the person, the person's child or the person's parents.

The parent of an abused child, even if not married to the abuser, may make a claim under the statute based on the abuse to the child by his/her other USC/LPR parent. *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215 (9th Cir. 2011).