Cancellation and Suspension for Non-Permanent Resident Aliens

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CHAPTER EIGHT

CANCELLATION AND SUSPENSION FOR NON-PERMANENT RESIDENT ALIENS

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)[1], respondents could apply for a generous form of relief called *suspension of deportation*. Post-IIRAIRA, however, cancellation of removal replaced suspension of deportation. This chapter covers both of these forms of relief as well as one variation of cancellation of removal for abused immigrant women and a special-rule cancellation of removal and suspension of deportation for certain nationals of El Salvador, Guatemala, and certain former Soviet-bloc countries under the Nicaraguan Adjustment and Central American Relief Act (NACARA).[2] Those respondents who succeed on these applications obtain adjustment of status and thus become lawful permanent residents (LPRs).

FORMER SUSPENSION OF DEPORTATION

Before the enactment of IIRAIRA in 1996, individuals in what were then called *deportation* proceedings could apply for a remedy called *suspension of deportation* under §244(a) of the Immigration and Nationality Act (INA).[3] Under the former INA §244(a), the Executive Office for Immigration Review (EOIR) could exercise discretion to grant suspension of deportation to an individual who proved that he or she had both seven years of continuous physical presence in the United States and good moral character during all that time, and also that deportation would cause extreme hardship to the applicant or the applicant's U.S. citizen or lawful permanent resident (LPR) spouse, parent, or child. If EOIR granted suspension of deportation, the individual would become an LPR as of the date of the EOIR order.

IIRAIRA Changes

With the passage of IIRAIRA, Congress changed the former *deportation* proceedings into *removal* proceedings. In addition, IIRAIRA deleted suspension of deportation, except in certain circumstances, and replaced it with cancellation of removal under INA §240A. The passage of IIRAIRA also ushered in the follow changes:

- Increased the continuous physical presence requirement from seven years to ten years, which also increased the length of time in which an applicant must demonstrate good moral character;

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[1] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

[2] Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–201 (1997).

[3] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq*.).

- Heightened the hardship standard from extreme hardship to exceptional and extremely unusual hardship;
- Eliminated the ability to prove hardship to the applicant and restricted the demonstration of hardship to the applicant's U.S. citizen or LPR spouse, parent or child;
- Established a numerical cap that limits cancellation of removal grants to only 4,000 per year; and
- Established the so-called stop-time rule, which stops the accrual of physical presence in the United States at the moment removal proceedings are initiated against the individual (that is, upon issuance of the notice to appear (NTA)). The stop-time rule also ends the accrual of physical presence on the commission of a criminal offense that renders the individual inadmissible to the United States. Before the enactment of IIRAIRA, continuous physical presence could continue to accrue until a final order of deportation was issued.

In *Matter of N–J–B–*,[4] the Board of Immigration Appeals (BIA) held that the stop-time rule applied retroactively to individuals placed in deportation proceedings even before IIRAIRA went into effect on April 1, 1997. This decision had drastic consequences for many individuals applying for suspension of deportation on April 1, 1997, who, under IIRAIRA, no longer met the continuous physical presence requirement. Notably, Salvadorans and Guatemalans who had become plaintiffs in a class action lawsuit against the Immigration and Naturalization Service (legacy INS), *American Baptist Churches (ABC) v. Thornburgh*,[5] mobilized and lobbied for legislation that would restrict the retroactive application of the stop-time rule to members of the *ABC* class. Congress subsequently enacted legislation—NACARA—that allowed Salvadorans and Guatemalans who arrived in the United States by a certain date to apply for suspension or cancellation without regard to the stop-time rule. (See discussion of NACARA below.)

Current Standard and Procedure for Suspension Applicants

Even though the suspension statute was repealed by IIRAIRA, effective April 1, 1997, this relief remains available to respondents in deportation proceedings that were initiated prior to April 1, 1997. Not only must the applicant for suspension meet the statutory eligibility requirements, the applicant also must demonstrate that suspension is merited as a matter of discretion. Suspension is available to undocumented as well as to documented foreign nationals. If the foreign national establishes statutory eligibility, and if the immigration judge (IJ) exercises his or her discretion favorably, the ground of deportability is waived and the applicant becomes eligible for LPR status.

Eligibility

To qualify for suspension of deportation under former INA §244(a)(1), the applicant must establish the following:

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[4] *Matter of N–J–B–*, 21 I&N Dec. 812 (BIA 1997).

[5] *American Baptist Churches (ABC) v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

- Seven years of continuous physical presence in the United States;
- Good moral character during those seven years; and
- That deportation would result in extreme hardship either to the applicant or to his or her LPR or U.S. citizen spouse, parent, or child.

Exchange visitors, crew persons, and persons who have engaged in Nazi-sponsored persecution of others are statutorily barred from relief through suspension of deportation.[6]

For foreign nationals who are deportable for serious offenses (*e.g.*, narcotics offenses or crimes involving moral turpitude), the suspension requirements are stricter. The continuous physical presence requirement is increased to 10 years "immediately following the commission of an act ... constituting a ground for deportability ...."[7] "Furthermore, the hardship proved must be "'exceptional and extremely unusual.'"[8]

Continuous Physical Presence

The statute requires respondents to have been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [the] application."[9] Respondents who are deportable because of criminal convictions, failure to register, falsification of documents, having a final civil document fraud order, or security or related grounds must establish 10 years of continuous physical presence *following* the commission of the act or assumption of the status that rendered the foreign national deportable under these provisions. The 10-year period requirement severely limits the availability of suspension to foreign nationals who are deportable for these offenses.

The continuous physical presence requirement does not apply to foreign nationals who, while in the United States, enlisted in or were inducted into the U.S. armed forces, served for at least 24 months in an active-duty status, and, if separated from such service, were separated under honorable conditions.[10]

The suspension statute allows foreign nationals to continue to maintain *continuous physical presence* despite brief departures from the United States. A respondent is not to be considered to have failed to maintain continuous physical presence "if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence."[11] The "brief, casual, and innocent" standard no longer applied following the enactment of IIRAIRA and the amendments to the law made by NACARA. After November 19, 1997, a respondent is not eligible for suspension of de-

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[6] Former INA §244(f).

[7] Former INA §244(a)(2).

[8] *Id*.

[9] Former INA §244(a)(1).

[10] Former INA §244(b)(1).

[11] Former INA §244(b)(2).

portation if he or she was absent from the United States for more than 90 days in one trip or a total of more than 180 days in several trips.[12]

Two provisions of IIRAIRA place a further severe restriction on suspension applicants seeking to meet the continuous physical presence requirement. INA §240A(d)(1) provides that for purposes of the *cancellation of removal* defense to removal, an individual's period of continuous physical presence is deemed to end when the foreign national is served an NTA for removal proceedings under INA §239(a), or on the commission of certain criminal offenses. On its face, this provision applies only to cancellation of removal in removal proceedings, and IIRAIRA's general rule is that the new removal provisions apply only to cases initiated on or after April 1, 1997. However, IIRAIRA §309(c)(5) provides, in a paragraph titled "Transitional Rule with Regard to Suspension of Deportation," that INA §240A(d) "shall apply to notices to appear issued before, on, or after the date of the enactment of this Act."

The BIA construed this provision to apply not only to NTAs for removal proceedings, but also to orders to show cause (OSCs) for deportation proceedings.[13] The BIA further ruled that the service of an OSC on a suspension applicant that occurred before IIRAIRA's enactment nonetheless terminated his or her accrual of time toward the required period of continuous physical presence.

Partly in response to litigation, the BIA's decision subsequently was vacated by the attorney general (AG).[14] However, in November 1997, Congress passed NACARA, including §203(a)(1), which provided that the stop-time rule applies to OSCs issued before, on, or after the date of enactment of NACARA.[15] Thereafter, the stop-time rule applied to suspension cases (except for NACARA and Violence Against Women Act (VAWA)[16] applications). Not only does the stop-time rule bar the accrual of continuous physical presence after the NTA is served, but administrative closure does not restart the clock for accumulating continuous physical presence.[17]

Proposed Rule on Repapering

On November 30, 2000, legacy INS proposed a rule explaining the circumstances and procedure for terminating deportation proceedings and initiating removal proceedings.[18] This procedure is called *repapering*, and would allow non-LPRs to qualify for the so-called

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[12] IIRAIRA §309(c)(5)(A), as amended by NACARA, Pub L. No. 105-100, tit. II, §203(a), 111 Stat. 2193 (1997), amended by Pub. L. No 105-139, 111 Stat. 2644 (1997).

[13] *See Matter of N–J–B–*, 21 I&N Dec. 812 (BIA 1997); *see also Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011).

[14] *Matter of N–J–B–*, 22 I&N Dec. 1057 (BIA 1999).

[15] NACARA, Pub. L. No. 105-100, tit. II, §203(a), 111 Stat. 2193 (1997), amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997). *See also Matter of Nolasco*, 22 I&N Dec. 632 (BIA 1999).

[16] Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, 119 Stat. 2960 (2006).

[17] *Arca-Pineda v. U.S. Att'y Gen.*, 527 F.3d 101, 105 (3d Cir. 2008).

[18] 65 Fed. Reg. 71273.

cancellation of removal Part B (under INA §240A(b)), where they would have been eligible for a seven– or 10-year suspension but for the stop-time rule created by IIRAIRA. Though proposed rules were published in the *Federal Register* on November 30, 2000, to date, interim or final regulations have not been promulgated. In lieu of regulations, a legacy INS memorandum states the policy on when to repaper,[19] and the memorandum from the Office of the Chief Immigration Judge (OCIJ) discusses the policy for administrative closure.[20] The proposed rule, referring to a legacy INS system, states that qualified applicants should submit a written request to the appropriate district counsel, which is now known as the U.S. Immigration Customs and Enforcement (ICE) Office of Chief Counsel (OCC). To qualify for repapering, an applicant must be in deportation proceedings, not have received a final administrative deportation order, and establish prima facie eligibility for cancellation. The OCIJ issued a memorandum on December 9, 1998, stating that an LPR requesting repapering may request administrative closure of his or her deportation or exclusion case to take advantage of the opportunity for repapering.[21] If the request for repapering is granted, ICE then would move the IJ or BIA to terminate deportation proceedings. Upon termination of deportation proceedings, ICE then would initiate removal proceedings by serving the foreign national with an NTA.

Non-LPRs who were disqualified from suspension of deportation by retroactive application of the stop-time rule (service of the OSC occurring before they had acquired seven years of physical presence), but who would qualify for cancellation under INA §240A(b), would benefit from such a request. These respondents now must have at least 10 years of continuous presence and would not be affected by the stop-time rule if the OSC is withdrawn and they are served with an NTA. They must be in removal proceedings, not have received a final administrative deportation order, and establish prima facie eligibility for cancellation (note the necessity for a qualifying U.S. citizen or LPR relative). In practice, ICE very seldom repapers for this beneficial purpose, according to practitioner anecdotes.

Good Moral Character

INA §101(f) precludes the IJ from finding that an applicant has good moral character if he or she either currently is, or during the period for which good moral character is required was, one of the following:

- An habitual drunkard;[22]

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[19] Legacy Immigration and Naturalization Service (INS) memorandum, Bo Cooper, "Administrative Closure of EOIR Proceedings for Non-Lawful Permanent Resident Aliens Eligible for Repapering" HQCOU 90/16.1-P (Dec. 7, 1999), AILA Doc. No. 99122371.

[20] *See* Executive Office for Immigration Review (EOIR) Memorandum, M. Creppy, "Administrative Closure of Cases in Which an Alien Is Eligible for Cancellation of Removal for LPRs in Removal Proceedings," (Dec. 9, 1998), AILA Doc. No. 99121760, *available at www.justice.gov/eoir/chip3.pdf*. *See also Alcaraz v. INS*, 384 F.3d 1150 (9th Cir. 2004) (describing process that Office of Chief Counsel and EOIR should follow for cases qualifying for repapering).

[21] *Id*.

[22] *But see Ledezma-Cosino v. Lynch*, No. 12-73289, slip op. (9th Cir. March 24, 2016) (holding that the "habitual drunkard" statutory bar to establishing good moral character violates the Equal Protection

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- One who was convicted of, or who admitted the elements of, a crime that would make him or her inadmissible (whether or not the individual is found to be inadmissible), except for:

  (a) convictions described in INA §212(a)(2)(e) (government representatives who asserted immunity to avoid prosecution in the United States); and

  (b) controlled-substance convictions in which the only offense is a single case of simple possession of 30 grams or less of marijuana;
- One who engaged in foreign-national smuggling as described in INA §212(a)(6)(E) (whether or not found to be inadmissible);
- A practicing polygamist;
- One whose income is derived principally from illegal gambling activities;
- One who has been convicted of two or more gambling offenses committed during the period for which good moral character is required;
- One who has given false testimony for the purpose of obtaining any benefits under the INA;
- One who, during the period for which good moral character is required, has been confined, as a result of a conviction, to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense or offenses for which he or she has been confined were committed within or outside the required period; or
- One who, at any time, has been convicted of an aggravated felony (on or after November 29, 1990).

In addition, the IJ has broad discretion to find that the respondent does not possess the requisite good moral character, even in cases where there is no statutory preclusion. For example, IJs can deny suspension applications for lack of good moral character where the applicant was convicted of crimes many years ago and where the applicant concealed prior marriages or bigamy. The seven-year period of good moral character is measured backward from the final IJ or BIA decision.[23] For a discussion of good moral character, refer to Chapter 11.

Extreme Hardship

Of the three elements that must be present for a respondent to be eligible for suspension, the one that usually is the most difficult to establish is that the respondent, or his or her LPR or U.S. citizen spouse, parent, or child, would experience extreme hardship should he or she be deported. Because only limited review of the respondent's case is available on appeal, it is crucial that his or her representative establish a record during deportation proceedings that documents the respondent's contention that hardship would

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Clause because a person's medical disability lacks any rational relation to his classification as a person with bad moral character, and therefore is unconstitutional).

[23] *Duron-Ortiz v. Holder*, 698 F.3d 523, 528 (7th Cir. 2012); *Matter of Castro,* 19 I&N Dec. 692 (BIA 1988).

follow if the foreign national were deported. Although the INA does not specify the hardship factors that must be considered, case law provides guidance on the types of evidence that are persuasive.[24] Factors considered in one such case, *Matter of Anderson,* include:

- Length of residence in the United States;
- Family ties in the United States and abroad;
- Health-related issues;
- Financial situation, including business or occupation;
- The possibility of other means of adjustment of status;
- Immigration history;
- Position in the community;
- Age both at the time of entry and at the time of relief; and
- The economic and political conditions in the respondent's home country.[25]

Economic hardship alone generally is not enough to meet the eligibility test, but severe economic detriment may constitute extreme hardship.[26] If the IJ does not consider economic hardship factors, this constitutes an abuse of discretion.[27] Although the statute allows a respondent to establish extreme hardship based solely on hardship to him- or herself, the BIA rarely has found extreme hardship in the absence of hardship to a qualifying relative.[28] If the respondent has a minor child who is a U.S. citizen and who would be forced either to remain behind or be uprooted and moved to a strange place, this in itself does not constitute hardship extreme enough to merit suspension of deportation. However, evidence of the adverse effects of uprooting a U.S. citizen child from this country, especially if he or she has entered school, is very important to establishing extreme hardship.[29] Note that if the child is gifted or talented, that is just as important as if the child has a learning disability or requires tutoring.[30] A psychologist's report evaluating the effects of such a disruption, for example, could be very effective evidence to support an application for suspension.[31] Chapter 6, pertaining to waivers of grounds of inadmissibility and deportability as relief from removal, discusses extreme hardship further.

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[24] *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

[25] *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

[26] *Mejia-Carrillo v. INS*, 656 F.2d 520 (9th Cir. 1981).

[27] *Barrera Leyva v. INS*, 637 F.2d 640, 644 (9th Cir. 1980); *Villena v. INS*, 622 F.2d 1352 (9th Cir. 1980) (*en banc*).

[28] *Matter of O–J–O–*, 21 I&N Dec. 381 (BIA 1996).

[29] *Babai v. INS*, 985 F.2d 252 (6th Cir. 1993).

[30] *See*, *e.g.*, *Matter of X–*, (Unpublished, BIA Nov. 19, 2012) (placing significant emphasis on the hardship of respondent's U.S. citizen 11-year-old daughter's inability to continue her dance career where the record reflected that she is a gifted dancer), *available at https://dl.dropboxusercontent.com/u/27924754/BIAu%2011-19-12.pdf* (last visited June 1, 2016).

[31] *Ravancho v. INS*, 658 F.2d 169 (3d Cir. 1981).

Case law following *Matter of Anderson* developed and expanded the list of factors that are relevant to an extreme hardship claim. Additional relevant hardship factors include:

- Ability to raise children if family members are not available to help;[32]
- Quality of life factors in the home country;[33]
- Educational opportunities for children who do not speak, read, or write language;[34]
- Separation from family members, especially in single-parent situations;[35]
- Separation from family members when a qualifying relative is ill or elderly;[36]
- Significant health conditions when medical care is unavailable;[37]
- Violence and damage from civil war and disasters in home country;[38]
- Psychological effects, including depression and trauma;[39] and
- Political persecution.[40]

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[32] *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002) (BIA considered that the non-citizen depended on her legal resident mother to assist her in the care of her U.S. citizen children).

[33] *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999) (noting that quality of life factors were relevant to the extreme hardship inquiry.)

[34] *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002) (considering whether the U.S. citizen children were able to read, write and speak in the language of the country of deportation).

[35] *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002) (considering that the U.S. citizen children were entirely dependent on the noncitizen because the parents were divorced and the father was not involved).

[36] *Mendez v. Holder*, 566 F.3d 316, 322 (2d Cir. 2009) ("Petitioner's daughter suffers from severe asthma. Petitioner testified that she has about twenty-five asthma attacks a year and that her condition requires the use of a home nebulizer as well as an inhaler. She also requires regular visits to the emergency room for serious attacks…. Petitioner's son was diagnosed with Grade II Vesicoureteral Reflux.").

[37] *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999) (BIA reviewed expanded hardship factors following *Matter of Anderson* in 212(i) waiver application).

[38] *Matter of L–O–G–* 21 I&N Dec. 413, 420 (BIA 1996). ("Nicaragua is an extremely poor country, still in political turmoil, with a shattered economy, very high unemployment and minimal government.")

[39] *Lam v. Holder*, 698 F.3d 529, 534 (7th Cir. 2012) ("Lam submitted a letter from his wife's psychologist, who stated that Ms. Lin suffered from 'severe' postpartum depression and that she was 'truly psychologically unable to care' for their children."); *Ravancho v. INS*, 658 F.2d 169 (3d Cir. 1981) ("[p]sychological trauma may be a relevant factor in determining whether a United States citizen child will suffer 'extreme hardship' within the statute.").

[40] *Gutierrez-Centeno v. INS*, 99 F.3d 1529, 1534 (9th Cir. 1996) ("Gutierrez and her family have had a history of conflict with the Sandinistas. In light of the political instability in Nicaragua and the power which the Sandinistas continued to wield after the election of the Chamorro government, the political situation in Nicaragua is also a factor that should have been considered.')"; *Blanco v. INS*, 68 F.3d 642, 646 (2d Cir. 1995) ("incidents of violence that have been and would be directed at her in El Salvador. Her affidavit in support recounted the killing of her common-law husband, her father, and her uncle; the murder of a neighbor; threats against her by guerrillas; injury to her child from a bomb blast outside her home; and child kidnapping from a school attended by one of her children.").

The BIA's decision in *Matter of Kao and Lin* provides an example of the application of extreme hardship in the context of suspension of deportation.[41] Mr. Kao and Ms. Lin were a married couple from Taiwan who lived in the United States for more than 17 years. They had five children, all of whom were citizens of the United States, and were expecting a sixth child. The children spoke limited Chinese,[42] and the parents testified that they could not afford the tuition for an English school in Taiwan. The respondents owned a house in Texas and would lose money if they had to sell it.

The BIA examined the factors established by regulation and case law and found that Mr. Kao and Ms. Lin had not established hardship to themselves. They had, however, established that their deportation would cause extreme hardship to qualifying relatives, namely their U.S. citizen children. The BIA placed special emphasis on the children's lack of fluency in Chinese and their integration into the United States. In particular, the BIA believed that uprooting the oldest child a 10-year-old daughter, and moving her to a Chinese-only environment would be a significant disruption in her education and her social development. Therefore, for children who are in school and older, practitioners should highlight the assimilation difficulties they would encounter. This should include leaving behind any close friends and teachers as well as extracurricular activities and sports.[43]

No Alternate Means of Immigration

One of the *Matter of Anderson* factors requires the respondent to demonstrate that there is no means of adjustment of status other than a grant of suspension of deportation. In the cancellation of removal context, one U.S. court of appeals has held that because there may be an alternative means of immigration does not necessarily undercut the hardship of the qualifying relative.[44] "[T]he sick parent or child who dies in the meantime, or the child who permanently loses the opportunity to receive special education or therapy during the critical years that it is needed will not experience a reduction in the hardship as the result of the applicant's eventual return."[45] Practitioners should use a similar argument before an IJ who places particular importance on this factor.

Discretion

An IJ grants suspension as a matter of discretion. This means that the IJ could deny relief even where the respondent has met the statutory requirements discussed above if he or she determined that the respondent does not merit suspension.[46] Suspension has been denied in the IJ's discretion where the applicant received public assistance, became a

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[41] *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001).

[42] Although the official language of Taiwan is Mandarin Chinese and most of the population speaks Taiwanese Hokkien, the BIA referred to the language as Chinese.

[43] For preparation into possible IJ and Immigration Customs and Enforcement (ICE) Office of Chief Counsel (OCC) arguments regarding extreme hardship, refer to the dissenting opinion in *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001).

[44] *Arteaga de Alvarez v. Holder*, 704 F.3d 730, 740–41 (9th Cir. 2012).

[45] *Id*. at 740.

[46] *Kalaw v. INS*, 133 F.3d 1147 (9th Cir. 1997).

public charge, or had a preconceived intent at the time of entry. The standard for review of the IJ's exercise of discretion is whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[47] Chapter 6, pertaining to waivers of inadmissibility and deportability as a form of relief from removal, also discusses discretion.

CANCELLATION OF REMOVAL FOR NON-LPRS

Cancellation of removal is a form of discretionary relief from removal that is available only in removal proceedings initiated on or after April 1, 1997. This relief is not available to respondents in deportation or exclusion proceedings, unless ICE brings new charges against them to institute removal proceedings. There are four forms of cancellation of removal relief with different statutory eligibility requirements and, in addition to those, a requirement that the respondent prove merit of relief as a matter of discretion:

- Cancellation for LPRs (addressed in Chapter 7);
- Cancellation for non-LPRs;
- Cancellation for a battered spouse or child; and
- Cancellation pursuant to NACARA §203.

Jurisdiction over an application for cancellation of removal lies solely with the IJ.[48] To apply for cancellation of removal, the respondent must file an original Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents,[49] with the immigration court.[50] Detailed instructions accompany the form, including filing requirement information regarding fees, fee waivers, photographs, fingerprinting, and supporting documentary evidence. If the respondent requests a fee waiver for the application fee, the IJ must grant the fee waiver first and evidence of such grant must be sent to U.S. Citizenship and Immigration Services (USCIS).[51] The practitioner should ensure compliance with the EOIR biometrics process by sending a copy of the application along with the application fee or fee waiver order from the IJ and the biometrics fee, which is not waivable, to the designated USCIS address.[52] Given that individual hearings are being scheduled very far into the future and that biometrics expire after 15 months, the practitioner should ensure that the biometrics are still valid for the date of the individual hearing.[53]

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[47] *See*, *e.g.*, *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001); *Judulang v. Holder*, 565 U.S. 42 (2011), 132 S. Ct. 476 (2011).

[48] 8 CFR §1240.20(a).

[49] Available on the EOIR website at *www.usdoj.gov/eoir/formslist.htm* (last visited May 29, 2016).

[50] *Id*.

[51] *Id*.

[52] 8 CFR §§1003.24(a), 103.7(a)(1), 103.7(a)(3). For the filing fee amount for Form EOIR-42B, see 8 CFR §103.7(b)(4)(i). The filing amount is currently $100.

[53] *See https://my.uscis.gov/helpcenter/article/should-i-schedule-a-biometrics-appointment-or-wait-to-be-scheduled* (last visited Aug. 29, 2016).

Upon properly filing Form EOIR-42B during the master calendar hearing, the respondent will be eligible to apply for an employment authorization document (EAD) based on the pending Form EOIR-42B.[54] Practitioners should ask the immigration court to stamp the respondent's copy of the application. With this stamped copy in hand, practitioners can file Form I-765, Application for Employment Authorization, under category (c)(10) with USCIS and include this stamped copy as evidence that the application is pending.[55]

Tip: If removal proceedings are dismissed, Form EOIR-42B will no longer be pending. Therefore, should the ICE OCC offer dismissal of proceedings as a form of prosecutorial discretion, consider awaiting the adjudication of the EAD before accepting dismissal of proceedings or counter-offer administrative closure, as the Form EOIR-42B will be considered pending under administrative closure.

Eligibility

Cancellation of removal for non-LPRs under INA §240A(b)(1) is analogous to suspension of deportation relief in deportation proceedings. To be eligible for this relief, however, respondents must establish that:

- They have been physically present in the United States for a continuous period of not less than 10 years immediately preceding their application for relief;
- They have had good moral character during the 10-year period prior to the entry of a final administrative decision in the case;
- They have not been convicted of an offense that would make them inadmissible or deportable under INA §§212(a)(2), 237(a)(2) , or 237(a)(3); and
  - The BIA has held that individuals convicted of a crime involving moral turpitude (CMT) for which a sentence of a year or longer may be imposed have been convicted of an offense "described under" INA §237(a)(2), regardless of eligibility for the petty offense exception.[56] However, a conviction for a CMT does not render individuals ineligible for cancellation of removal if the crime is punishable by imprisonment for a period of less than a year and qualifies for the petty offense exception under INA §212(a)(2)(A)(ii)(II).[57]
  - A respondent seeking non-LPR cancellation may not request a waiver of a criminal ground of inadmissibility under INA §212(h) to overcome the statutory bar to cancellation of removal.[58] In *Matter of Bustamante,* the respondent's conviction for the possession of a small amount of marijuana precluded his eli-

[54] 8 CFR §274a.12(c)(10).

[55] *Id. See also* USCIS "Employment Authorization," *available at www.uscis.gov/working-united-states/information-employers-employees/employer-information/employment-authorization* (last visited Aug. 28, 2016).

[56] *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).

[57] *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010).

[58] *Matter of Bustamante,* 25 I&N Dec. 564 (BIA 2011).

gibility to file for non-LPR cancellation. The respondent requested a §212(h) waiver in order to meet the qualifications for cancellation of removal. The BIA held that the INA §240A(b)(1)(C) bar to cancellation of removal may not be overcome with an INA §212(h) waiver.[59]

- Their removal would result in *exceptional and extremely unusual hardship* to the foreign national's U.S. citizen or LPR spouse, parent or child.

The physical presence, good moral character, and exceptional and extremely unusual hardship requirements are further discussed below.

Continuous Residence or Physical Presence

Special rules govern the determination of continuous residence or physical presence for purposes of eligibility for cancellation. All four forms of cancellation require that the respondent establish either continuous residence or continuous physical presence in the United States for a specified period of time. These requirements do not apply to a respondent who, while in the United States, enlisted in or was inducted into the U.S. armed forces, served at least 24 months in an active-duty status, and, if separated from such service, separated under honorable conditions.[60] The physical presence period is deemed to end when the noncitizen is served an NTA, or when the noncitizen has committed an offense making him or her inadmissible or deportable because of a criminal conviction.[61] In other words, the noncitizen generally must have accumulated the required period of continuous residence or physical presence prior to service of the NTA and prior to commission of a deportable offense. According to the BIA, the NTA triggers the "stop-time" rule regardless of whether the date and time of the hearing have been included in the document.[62] However, according to the U.S. Court of Appeals for the Third Circuit, the NTA must include all statutory stipulations in order to stop the time for purposes of continuous physical presence, stipulations that include the date and time of the removal hearing.[63]

Commission or conviction of a crime of moral turpitude (CMT), however, will not cut off accrual of continuous residence or physical presence if it falls within one of the INA §212(a)(2)(A)(ii) exceptions. Under these exceptions, certain offenses committed while the individual is under 18, or petty offenses,[64] do not make the individual inadmissible on the basis of a conviction or commission of a CMT and, therefore, do not cut off the accrual of continuous residence or presence. These two INA §212(a)(2)(A)(ii) exceptions

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[59] *Id.* at 570.

[60] INA §240A(d)(3).

[61] INA §240A(d); *see also Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004) (a respondent's period of continuous physical presence in the United States is deemed to end when he or she is served with the charging document that is the basis for the current proceeding).

[62] *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2012).

[63] *Orozco-Velasquez v. U.S. Att'y Gen.*, No. 13-1685, 2016 WL 930241 (3d Cir. 2016) (holding that the BIA approach contradicts the plain text of the INA's "stop time" and NTA provisions and omits the requirement that full notice be provided to noncitizens facing such critical proceedings).

[64] *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003).

allow time to continue to accrue through the commission of one qualifying crime, and up until a second qualifying crime is committed. However, a CMT for which a sentence of a year or longer may be imposed is an offense for which an individual may be deported under §237(a)(2); he or she also will be ineligible for cancellation of removal under §240A(b)(1)(C) despite the respondent's eligibility for the petty offense exception.[65] A conviction for two or more offenses for which the aggregate sentences imposed were five years or more also renders one ineligible for cancellation of removal under §240A(b)(1)(C).[66]

A period of continuous physical presence is cut off by a departure for a single period of more than 90 days or by periods of 180 days in the aggregate.[67] There is an exception to this rule for certain VAWA[68] cancellation applicants, discussed below. Therefore, a respondent who departed the United States for a period of less than 90 days or for any periods that in the aggregate do not exceed 180 days, and unsuccessfully attempted re-entry at a land border port of entry before actually reentering, does not terminate continuous physical presence.

Continuous physical presence is terminated by an order of deportation, expedited removal, or voluntary departure.[69] In *Matter of Romalez-Alcaide*,[70] the BIA held that continuous physical presence is also cut off when the individual departs under the threat of the institution of deportation or removal proceedings, even if he or she subsequently returns before triggering the time bars in INA §240A(d)(2). However, in *Matter of Avilez-Nava*,[71] the BIA held that continuous physical presence also can continue to accrue where a respondent previously departed under no such threat of deportation, expedited removal, or voluntary departure, is then denied admission by an immigration official without any such threat, and subsequently reenters without inspection before triggering the time bars. Therefore, continuous physical presence can continue to accrue when, for example, an individual departs under no such threat, is then denied admission by an immigration official without any such threat, and subsequently re-enters without inspection before triggering the time bars.[72]

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[65] *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).

[66] *Matter of Pina-Galindo*, 26 I&N Dec. 423 (BIA 2014).

[67] INA §240A(d)(2).

[68] VAWA 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

[69] *Landin-Zavala v. Gonzales*, 488 F.3d 1150, 1153 (9th Cir. 2007); *Juarez-Ramos v. Gonzales*, 485 F.3d 509, 511 (9th Cir. 2007); *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002).

[70] *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002).

[71] *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005).

[72] *Id.*; *Tapia v. Gonzales*, 430 F.3d 997 (9th Cir. 2005) (The exception for brief absences cannot be denied simply because an alien attempted to re-enter illegally or the statute would have no meaning; this is the case even where the person was repeatedly apprehended while attempting to re-enter, and even though photographs and fingerprints were taken, and information about him was entered into the government's database); *Reyes-Vasquez v. Ashcroft,* 395 F.3d 903 (8th Cir. 2005) (being turned around

Continued

In *Morales-Morales v. Ashcroft*,[73] the U.S. Court of Appeals for the Seventh Circuit paved the way for the BIA's holding in *Matter of Avilez-Nava*. The court held that a foreign national who repeatedly had been taken to the border by U.S. Border Patrol, then entered Mexico voluntarily, did not have a break in her *continuous physical presence* in the United States. Morales was a Mexican citizen who lived in the United States since June 1985. She was married to an LPR and had four U.S. citizen children. In March 1999, she left the United States for the first time to visit her sick mother in Mexico. When she attempted to return to the United States, she was stopped informally by U.S. Border Patrol and returned to Mexico. This process was repeated three times in the next six days. Morales never appeared before an IJ and no removal proceedings were initiated. On her fifth attempt to enter illegally, Morales was arrested and removal proceedings were initiated upon her release. The court concluded that the facts did not demonstrate that Morales "voluntarily departed under threat of proceeding" and that returning her to the border did not constitute a threat of removal proceedings. Thus, she was not subject to the break in continuous physical presence. Similarly, the Ninth Circuit held prior to the *Matter of Avilez-Nava* decision that "being turned away at the border by immigration officials does not have the same effect as an administrative voluntary departure and does not itself interrupt the accrual of an individual's continuous physical presence."[74]

Procedural due process in removal proceedings also matters for determining if physical presence has terminated. Where a respondent has the right to a hearing before an IJ, a voluntary departure or return does not break the respondent's continuous physical presence for purposes of cancellation of removal 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.[75] Evidence that the respondent was fingerprinted and/or photographed before being allowed to voluntarily depart is not enough, in itself, to demonstrate a waiver of the right to a hearing or to show a process of sufficient formality to break continuous physical presence.[76] Moreover, the BIA has also held that a new period of continuous presence can begin after a departure and a subsequent return, even if that return is without inspection or admission and even though, under the stop-time rule, the service of an NTA had stopped accumulation of the prior period of presence before the departure and subsequent re-entry.

Good Moral Character

The calculation of good moral character during the 10-year period is calculated differently than the physical presence requirement. In *Matter of Ortega-Cabrera*,[77] the BIA

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at the border upon attempted re-entry does not break continuity of presence); *Morales-Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004) (same).

[73] *Morales-Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004).

[74] *Tapia v. Gonzales*, 430 F.3d 997 (9th Cir. 2005).

[75] *Matter of Garcia-Ramirez*, 26 I&N Dec. 674 (BIA 2015).

[76] *Id.*

[77] *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005).

held that the 10 years needed for good moral character is calculated backward from the date on which the application finally is resolved by the IJ or BIA. The 10 years of physical presence is calculated differently, as described below. Further, the BIA clarified that the requirement in the regulations that an applicant for INA §240A(b) cancellation of removal demonstrate statutory eligibility prior to the service of an NTA[78] applies only to the physical presence requirement, and not to other requirements—*e.g.*, good moral character, qualifying relatives, and exceptional and extremely unusual hardship—that can continue to be considered and developed until the time the application finally is decided.[79] This means that unlike physical presence, the respondent can continue to accrue good moral character factors after the issuance of the NTA.

Tip: If a respondent has negative moral character factors within the past 10 years, the practitioner should seek a continuance of the master calendar hearing in accordance with *Matter of Hashmi*[80] or ensure that the individual hearing is scheduled on or after the respondent's negative moral character factors fall outside the 10 years. Alternatively, if the negative moral character factors are recent and concerning, practitioners should consider seeking administrative closure to allow the respondent time to "rehabilitate." The respondent can seek an EAD while the case is administratively closed based on the pending EOIR-42B.

The U.S. Court of Appeals for the Ninth Circuit recently ruled that the "habitual drunkard" statutory bar to establishing good moral character violates the Equal Protection Clause because a person's medical disability lacks any rational relation to his classification as a person with bad moral character, and therefore is unconstitutional.[81] The respondent suffered from chronic alcoholism for 10 years during which he drank an average of one liter of tequila each day and therefore developed acute alcoholic hepatitis, decompensated cirrhosis of the liver, and alcoholism leading to at least one DUI. The IJ denied cancellation of removal, but the BIA affirmed solely on the ground that the respondent was ineligible because he lacked good moral character as a "habitual drunkard." The Ninth Circuit granted the petition for review, reasoning that the government's theory "that alcoholics are blameworthy because they could simply try harder to recover is an old trope not supported by the medical literature; rather, the inability to stop drinking is a function of the underlying ailment."[82]

Exceptional and Extremely Unusual Hardship

Qualifying Family Members

The hardship requirement for cancellation of removal is significantly more restrictive than that for suspension of deportation. Instead of *extreme hardship*, the respondent must

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[78] 8 Code of Federal Regulations (CFR) §1003.23(b)(3).

[79] *Matter of Bautista-Gomez*, 23 I&N Dec. 893 (BIA 2006).

[80] *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

[81] *Ledezma-Cosino v. Lynch*, No. 12-73289, slip op. (9th Cir. March 24, 2016).

[82] *Id*. at 10.

establish *exceptional and extremely unusual* hardship.[83] Moreover, this standard may not be satisfied by showing hardship to the respondent, but rather the respondent must establish that the hardship will be suffered by a U.S. citizen or LPR spouse, parent, or child.[84] An unborn child is not a "child" under INA §101(b)(1) for purposes of acting as a qualifying relative for cancellation of removal.[85] The Ninth Circuit has held that an adult daughter does not qualify as a "child" for cancellation of removal purposes,[86] nor does a granddaughter, even when the grandparent has legal custody and guardianship.[87] A stepchild who meets the definition of a "child" under INA §101(b)(1)(B) is a qualifying relative for cancellation of removal purposes.[88] A stepparent who qualifies as a "parent" under INA §101(b)(2) at the time of the proceedings is a qualifying relative for cancellation of removal.[89] The BIA addressed the timing of the definition of child for hardship purposes in *Matter of Isdro.*[90] In *Matter of Isdro*, the respondent's qualifying relative, his U.S. citizen child, was under 21years of age when the removal proceeding began but turned 21 in the course of the proceedings. The BIA held that after the child turned 21, he no longer met the definition of child and the applicant could not demonstrate hardship to the required qualifying relative. However, in an unpublished decision, the BIA rejected the Department of Homeland Security's (DHS) argument that the respondent's son could no longer be considered a qualifying relative because he had turned 21 by the time of the appeal.[91]

The BIA also has established evidentiary requirements for cases in which the U.S. citizen child would suffer hardship. In showing that a U.S. citizen child would suffer hardship were the child to remain in the United States upon the parent's or parents' deportation, the BIA held in *Matter of Ige* that the respondent parent must execute an affidavit stating that the child will remain in the United States and provide evidence demonstrating that "reasonable provisions will be made for the child's care and support."[92] The BIA modified this requirement in *Matter of Calderon-Hernandez*,[93] holding that the affidavit

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[83] INA §240A(b)(1)(D).

[84] *See Matter of Morales*, 25 I&N Dec. 186 (BIA 2010) (holding that a step-parent is a parent for purposes of establishing exceptional and extremely unusual hardship to a qualifying relative for cancellation of removal); *see also Matter of Portillo-Gutierrez*, 25 I&N 148 (BIA 2009) (holding that a stepchild that meets the definition of child under the statute is a child for cancellation of removal purposes).

[85] *Partap v. Holder*, 603 F.3d 1173 (9th Cir. 2010).

[86] *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002).

[87] *Moreno-Morante v. Gonzales*, 490 F.3d 1172 (9th Cir. 2007).

[88] *Matter of Portillo-Gutierrez*, 25 I&N Dec. 148 (BIA 2009).

[89] *Matter of Morales*, 25 I&N Dec. 186 (BIA 2010).

[90] *Matter of Isdro,* 25 I&N Dec. 829 (BIA 2012).

[91] *Epifanio Martinez Juarez*, A095 194 852 (BIA March 21, 2011) (holding that the respondent's eligibility should be based on the son's age when the matter was before the immigration court), *available at www.scribd.com/doc/175148703/Epifanio-Martinez-Juarez-A095-194-852-BIA-March-21-2011* (last visited May 26, 2016).

[92] *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994).

[93] *Matter of Calderon-Hernandez*, 25 I&N 885 (BIA 2012).

mandated in *Matter of Ige* would not be required if the child were to remain in the United States with another parent, even if the other parent is in this country unlawfully.[94]

In *Matter of Dorman*,[95] the AG vacated a decision of the BIA on the Defense of Marriage Act (DOMA) and directed that the case be remanded to the BIA for review. One of the issues that the case raised was whether the respondent's same-sex partnership or civil union qualifies him to be considered a "spouse" under New Jersey law which would in turn allow the respondent to have a qualifying relative for purposes of cancellation of removal. Although the BIA has not specifically reviewed *Matter of Dorman*, following the U.S. Supreme Court decision in *U.S. v. Windsor*,[96] the BIA held that a valid same-sex marriage performed anywhere would be considered a marriage for the purposes of immigration law.[97] Then, on February 10, 2014, former AG Eric Holder issued a memorandum entitled "Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples" and addressed to all Department of Justice employees stating:

> Consistent with the Supreme Court's *Windsor* decision and the Department's policy of treating all individuals equally, regardless of sexual orientation, the Department will interpret the terms "spouse," "marriage," "widow," "widower," "husband," "wife," and any other term related to family or marital status in statutes, regulations, and policies administered, enforced, or interpreted by the Department, to include married same-sex spouses whenever allowable. The Department will take the same position in litigation, to the extent consistent with the lawful statutes, regulations, and policies over which other agencies bear primary administrative, enforcement, or interpretive responsibility. The Department will recognize all marriages, including same-sex marriages, valid in the jurisdiction where the marriage was celebrated to the extent consistent with law.[98]

Hardship Standard Cases

In *Matter of Monreal*,[99] the BIA reviewed the exceptional and extremely unusual hardship standard. This was the first published case evaluating the meaning of the term "exceptional and extremely unusual hardship," as used in INA §240A(b)(1)(D), since Congress replaced the suspension of deportation provisions of the INA with cancellation of removal for non-LPRs. The BIA stated that Congress *narrowed* the class of respondents who could qualify for relief by replacing suspension of deportation with cancellation of removal.[100] It was obvious, said the BIA, that the hardship standard for cancellation of

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[94] *Id.* at 886.

[95] *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011).

[96] *U.S. v. Windsor*, __U.S. __ (2013), 133 S. Ct. 2675 (2013).

[97] *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013).

[98] Memorandum from the Attorney General on Department Policy on Ensuring Equal Treatment of Same-Sex Married Couples to Department Employees (Feb. 10, 2014), *available at www.justice.gov/iso/opa/resources/ss-married-couples-ag-memo.pdf* (last visited June 3, 2016).

[99] *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

[100] *Id.* at 58.

removal is a higher one than that required for suspension of deportation.[101] The BIA concluded that Congress intended cancellation of removal to be available only in compelling and truly exceptional cases, involving harm substantially beyond that which ordinarily would be expected to result from the respondent's deportation.

The BIA listed various factors to consider in determining whether exceptional and extremely unusual hardship had been demonstrated.[102] Many of those factors are the same ones considered in determining extreme hardship for purposes of suspension of deportation, but they must be weighed according to the higher standard required for cancellation.[103]

The factors identified by the BIA to determine exceptional and extremely unusual hardship include the ages, health, and circumstances of qualifying LPR and U.S. citizen relatives. For example, an applicant who has elderly parents in this country, parents who are dependent entirely on the applicant for support, might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school.[104] A lower standard of living or adverse country conditions in the country of return are factors to consider, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship.[105]

Tip: As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. Therefore, practitioners should argue and demonstrate that the hardship factors in the aggregate amounts to exceptional and extremely unusual hardship. Remind the IJ that the BIA emphasized that each case must be assessed and decided on its own facts.

In *Matter of Monreal*, the respondent was a 34-year-old citizen of Mexico who had entered the United States when he was 14.[106] His wife, who was not a citizen or resident of the United States, had returned to Mexico with the couple's infant child shortly before respondent's individual hearing.[107] The couple's other two children, 12 and 8 years old, lived with Monreal.[108] All three children were U.S. citizens. Monreal had worked continuously since 1991 and was the sole support of his family.[109] His parents and seven of his siblings were LPRs, and he had one brother living in Mexico.[110] The BIA found that Monreal had not established that his removal would cause exceptional and extremely unusual hardship to a qualifying relative. The BIA also noted that hardship to the respond-

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[101] *Id*. at 59.

[102] *Id*. at 63–64.

[103] *Id*. at 66–68.

[104] *Id*. at 63.

[105] *Id*.

[106] *Id*.

[107] *Id*.

[108] *Id*.

[109] *Id*.

[110] *Id*.

ent cannot be considered in an application for cancellation of removal for non-LPRs.[111] The BIA commented, however, that had this been an application for suspension, Monreal might well have been found eligible for the relief thereby underscoring the harsh changes brought by IIRAIRA.

During 2002, the BIA twice more revisited the exceptional and extremely unusual hardship standard.

First, in *Matter of Andazola*,[112] the BIA held that a 30-year-old unmarried mother from Mexico did not establish eligibility for cancellation of removal for non-LPRs because she failed to demonstrate that her removal would cause exceptional and extremely unusual hardship to her U.S. citizen children who were ages 6 and 11. In fact, the BIA compared *Andazola* with *Monreal*[113] by noting that the facts presented in *Andazola* were "common" and the "hardships that the Respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country."[114] The BIA reasoned that because Andazola still lived with the father of her children, who sometimes provided support to the family and who had only temporary permission to be in the United States, the father would be able to help support her and the children if she were to return to Mexico.[115] Although Andazola had lived in the United States since August 1985, the BIA determined that she was still young and able to work and that she would be able to use the job skills that she had developed in the United States to help her establish herself back in Mexico.[116]

Moreover, the BIA found it "significant" that Andazola had many assets in the United States that also could help establish her in Mexico.[117] The BIA viewed negatively that, even though all of Andaloza's siblings lived in the United States, none of them had lawful status. Although Andazola argued that her children would have diminished educational opportunities in Mexico, the BIA determined that there was no showing that her children would be completely deprived of education in Mexico. Moreover, the BIA noted that "a finding that diminished educational opportunities result in 'exceptional and extremely unusual hardship' would mean that cancellation of removal would be granted in virtually all cases involving Respondents from developing countries who have young U.S. citizen or LPR children. This view is not consistent with congressional intent."[118]

Second, in *Matter of Recinas,*[119] the BIA stated that cancellation of removal cases before IJs and the BIA "must be examined under the standards set forth in *Matter of Mon-*

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[111] *Id*. at 58.

[112] *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

[113] *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

[114] *Matter of Andazola*, 23 I&N Dec. 319, 324 (BIA 2002).

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*. at 320.

[119] *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

real[120] and *Matter of Andazola*[121] "because they are the 'seminal' cases on the meaning of exceptional and extremely unusual hardship." Perhaps most notably, the BIA stated that the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.[122] *Matter of Recinas* involved a 39-year-old citizen of Mexico who was the single mother of six children, four of whom were U.S. citizens ages 12, 11, 8, and 5 years. The two non-U.S. citizen children, aged 15 and 16, were co-respondents in the case. The three respondents had lived in the United States since 1988. Recinas also had two LPR parents and five U.S. citizen siblings living in the United States. She had no immediate relatives living in Mexico. Recinas's mother lived nearby and cared for her children while Recinas managed her own vehicle inspection business. Recinas's mother had a close relationship with the children. Unlike Recinas, the father of the children was not involved in their lives and was in immigration proceedings at the same time that Recinas was in proceedings.

In reviewing all the factors in this case, the BIA determined that this case was different from *Monreal*[123] and *Andazola*[124] in the degree of hardship that would be suffered by the qualifying family members. In particular, the BIA relied on seven factors to find that Recinas demonstrated that exceptional and extremely unusual hardship would occur to her four U.S. citizen children. First, the BIA noted that Recinas and her family had lived in the United States since 1988, and that her children did not know any other life.[125] Moreover, the children did not speak Spanish well, nor could they read or write it.[126] The BIA also noted that the four U.S. children were entirely dependent on Recinas for support because the father was not involved in their lives.[127] As a single mother in Mexico, Recinas would not only have to find employment, but also support the children's emotional needs, which would be very difficult on her own without help.[128]

The BIA also pointed to Recinas's LPR mother taking care of Recinas's children while Recinas formed a business and that this was a stable environment for the children.[129] By contrast, in Mexico, without family support, Recinas would have difficulty finding work and creating a supportive environment for her children.[130] The U.S. citizen children also would suffer significant hardship from the mother's loss of her economic

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[120] *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

[121] *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

[122] *Matter of Recinas*, 23 I&N Dec. 467, 470 (BIA 2002).

[123] *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

[124] *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

[125] *Matter of Recinas*, 23 I&N Dec. 467, 468 (BIA 2002).

[126] *Id*. at 470.

[127] *Id*. at 471.

[128] *Id*.

[129] *Id*. at 470.

[130] *Id*. at 471.

stake in the United States, coupled with the difficulty she would have in establishing any comparable economic stability in Mexico.[131] In conjunction with this, the BIA emphasized that Recinas was a single mother of six children *and* had no family in Mexico.[132]

Finally, the BIA noted that Recinas's prospects for immigration through her U.S. citizen siblings or LPR parents were unrealistic because of the backlog in the visa availability preference system for Mexico.[133] There were no other apparent methods for her to adjust status. Separately, after granting Recinas cancellation of removal, the BIA remanded the case back to the IJ for the other two minor respondents, with the order to hold their cases in abeyance until Recinas received lawful permanent residence.[134] This way, the two children would eventually be able to apply for cancellation of removal based on their relationship to their LPR mother.[135]

Tip: Practitioners should highlight similarities between clients and Recinas's case while arguing that the cumulative factors present are unusual and demonstrate how the client has more hardship factors than those seen in *Matter of Monreal* and *Matter of Andazola*.

Many respondents fail on cancellation of removal for non-LPRs because of this high hardship standard. And while respondents can and do appeal all the way up to the U.S. courts of appeals, these appeals are usually dismissed because hardship determinations are deemed as discretionary instead of legal questions and therefore not subject to judicial review.[136] As such, practitioners must establish the best record possible before the IJ. Practitioners should look primarily to unpublished BIA decisions to determine what facts have amounted to a finding of exceptional and extremely unusual hardship. The Immigrant and Refugee Appellate Center (IRAC) publishes a monthly Index of Unpublished BIA Decisions and is the recommended source for unpublished BIA decisions.[137] Unpublished BIA decisions found in the IRAC Index discuss a respondent's husband suffering from hepatitis, her daughter suffering from excessive tearing in her left eye, and her son suffering from hyperactivity, excessive vomiting and fevers, and speech delays as a case in which the BIA overturned the IJ and found exceptional and extremely unusual hardship.[138] Another unpublished BIA decision held that the respondent's U.S.

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[131] *Id*.

[132] *Id*.

[133] *Id*. at 472.

[134] *Id*. at 473.

[135] Currently, those minors in similar situations could, for example, apply for DACA and advance parole or seek voluntary departure before the age of 18 and a half (when six months of unlawful presence would accrue) so that they could consular process via the parent.

[136] 8 USC §1252(a)(2)(B)(i); *see e.g.*, *De La Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006); *Okpa v. INS*, 266 F.3d 313, 317 (4th Cir. 2001). See Chapter 13 for more on this point.

[137] *www.irac.net/unpublished/index/* (last visited May 26, 2016).

[138] *Y–Y–C–*, AXXX XXX 786 (BIA Aug. 4, 2015), *available at www.scribd.com/doc/274518776/Y-Y-C-AXXX-XXX-786-BIA-Aug-4-2015* (last visited May 26, 2016).

citizen daughters being subject to female genital mutilation (FGM) in Senegal amounted to exceptional and extremely unusual hardship.[139]

Grounds of Ineligibility

Apart from the requirements listed in INA §240A(b)(1), under INA §240A(c), a non-LPR is ineligible for this relief if any of the following applies:

- He or she entered the United States as a crewman subsequent to June 30, 1964;[140]
- He or she was admitted as an *exchange alien* or acquired such status in order to receive graduate medical education or training;
- He or she was admitted or acquired *exchange alien* status for other purposes, but was subject to the two-year foreign residence requirement and failed to fulfill that requirement (or have it waived);
- He or she is inadmissible or deportable under the security and related grounds;
- He or she ordered, incited, assisted, or otherwise participated in the persecution of others; or
- He or she previously was granted cancellation of removal, suspension of deportation, or a §212(c) waiver.

4,000 Annual Cap

Under INA §240A(e)(1), the immigration court or the BIA can cancel the removal and adjust the status of no more than 4,000 people during the fiscal year. The date on which an order granting cancellation of removal and adjustment of status becomes final is the date on which the foreign national is recorded as having received lawful permanent residence in the United States as long as the foreign national's case is within the 4,000 annual cap. If the 4,000 annual cap has been reached, however, the IJ or the BIA will reserve decision on an application for cancellation of removal until a number becomes available in the next fiscal year, or the court or BIA can deny the applications based on statutory grounds other than hardship.[141]

CANCELLATION OF REMOVAL FOR ABUSED WOMEN AND CHILDREN

Foreign nationals, both women and men, often are trapped in abusive relationships because they fear deportation and separation from their children. Congress recognized the impact of domestic violence on foreign nationals and in 1994 passed the Violence

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[139] *K–C–*, AXX XXX 101 (BIA June 23, 2014), *available at www.scribd.com/doc/237870289/K-C-AXX-XXX-101-BIA-June-23-2014* (last visited May 27, 2016).

[140] *Matter of G–D–M–*, 25 I&N Dec. 82 (BIA 2009).

[141] 8 CFR §240.21(c). For more information on this procedure, refer to the February 3, 2012, Department of Justice Operating Policies and Procedures Memorandum 12-01: "Procedures on Handling Applications for Suspension/Cancellation in Non-Detained Cases Once Numbers are no Longer Available in a Fiscal Year," *available at www.justice.gov/sites/default/files/eoir/legacy/2012/02/03/12-01.pdf* (last visited May 26, 2016).

Against Women Act (VAWA),[142] then re-authorized and modified it in 2000 (VAWA 2000),[143] 2005,[144] and 2013.[145] Despite the name, these forms of relief are available to both women and men. VAWA affords two forms of relief for battered immigrants abused by their U.S. citizen or LPR spouses or parents:

- "Self-petition"[146] for LPR status without the cooperation of the abusive spouse or parent using Form I-360 that is filed with USCIS;[147] and
- Cancellation of removal as a defense to removal when the noncitizen is in removal proceedings before an immigration court. This chapter discusses only VAWA cancellation of removal.[148]

A respondent in removal proceedings should consider both a self-petition and VAWA cancellation of removal, but may not qualify for a self-petition. Those who would not qualify for a self-petition, but would qualify for VAWA cancellation are:

- those whose marriage to the abuser was terminated by death or a divorce (related to the abuse) over two years ago,
- those whose abusive spouse lost or renounced citizenship or permanent resident status over two years ago,
- those whose U.S. citizen son or daughter is at least 21 years of age and died over two years ago,
- those abused stepchildren whose parent has been divorced from the abusive parent for over two years, and
- those abused children who cannot establish that they have resided with the U.S. citizen or permanent resident abuser parent for two years.[149]

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[142] Violence Against Women Act of 1994, Pub. L. No. 103-322, §§40701–03, 108 Stat. 1796, 1953–55 (1994).

[143] Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B, 114 Stat 1464, 1491–539 (2000).

[144] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

[145] Violence Against Women Reauthorization Act of 2013 Pub. L. 113-4, 127 Stat. 110, 111-118, 140, 144, 156-159 (2013).

[146] "Self-petitioning" denotes the abused spouse or child of a lawful permanent resident or a U.S. citizen, or the parent of an abused child filing a family preference visa petition on his or her own behalf without the participation of the abusive spouse or parent.

[147] INA §204(a)(1)(A)(iii).

[148] INA §240A(b)(2).

[149] *Compare* 8 CFR §204.2(b)(1) *with* 8 CFR §1240.58(c); *see also* Legacy INS Memorandum, P. Virtue, "Supplemental Guidance on Batter Alien Self-Petitioning Process and Related Issues" (May 6, 1997), *reprinted in* 74 *Interpreter Releases* 971 (June 16, 1997) ("It is important to note, however, that some individuals who are ineligible for status pursuant to the self-petitioning provisions will be eligible for cancellation (*e.g.*, where the marriage has been terminated).").

Like cancellation of removal under INA §240A(b), to apply for VAWA cancellation, the respondent must submit Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents,

Requirements

INA §240A(b)(2) provides that the applicant for VAWA cancellation of removal must:

- Have been battered by or suffered extreme cruelty from a spouse or parent who is or was a U.S. citizen or LPR, or is the parent of a child in common with the U.S. citizen or LPR abuser, and the child has suffered abuse;
- Have been present physically in the United States for three years before applying;
- Have been a person of good moral character during the period of physical presence;
- Have not be inadmissible under INA §212(a)(2) (criminal grounds) or §212(a)(3) (security grounds);
  - The BIA has held that this §240A(b)(2)(A)(iv) bar cannot be overcome by use of a §212(h) waiver.[150]
  - The VAWA 2000 reforms created a limited waiver under INA §237(a)(7) for certain domestic violence victims deportable for having a conviction of domestic violence, stalking, or violation of a protective order.
- Not be inadmissible or deportable due to certain criminal, security, or marriage fraud violations; and
- Demonstrate that removal from the United States would result in extreme hardship[151] to the respondent, or the respondent's child, or, in the case of a respondent's child, to the respondent's parent.

Despite its overall stringent provisions, IIRAIRA did exempt VAWA recipients from part of the ground of inadmissibility based on unlawful presence in the United States[152] and from the requirement that family-based petitioners file enforceable affidavits of support to overcome the public charge ground of inadmissibility.[153]

Remember that due to IIRAIRA, those who received charging documents (Orders to Show Cause) before April 1, 1997, may pursue VAWA suspension of deportation and those who received charging documents (Notices to Appear) after that date may pursue VAWA cancellation of removal.[154] This distinction is important for respondents now eligi-

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[150] *Matter of Y–N–P–*, 26 I&N Dec. 10 (BIA 2012).

[151] The Victims of Trafficking and Violence Prevention Act of 2000 eliminated the extreme hardship requirement for self-petitioners, but not for VAWA cancellation.

[152] INA §§212(a)(6)(A)(ii) and (a)(9)(B).

[153] INA §212(a)(4)(C)(i).

[154] 8 CFR §§240.40 (OSCs), 240.30 (1-122s).

ble to file the new VAWA motions to reopen thanks to the Battered Immigrant Women Protection Act of 2000.[155] The Battered Immigrant Women Protection Act of 2000 established generous motions to reopen for VAWA cancellation applicants.[156] It exempted VAWA cancellation applicants from the NTA "stop-time" provisions cutting off accrual of the required three-years' continuous presence, the INA §240(c) bars, and the "living in marital union" requirement for three-year naturalization. Further, it mandated parole for VAWA cancellation derivatives until they can adjust on their own.

The following individuals are eligible to apply for VAWA cancellation and suspension:

- Abused sons and daughters of U.S. citizens and LPRs;
- Non-abused parents of abused children of U.S. citizens or LPRs, even if not married to the abuser;
- Abused spouses or former spouses of U.S. citizens and LPRs;
- Abused intended spouses of U.S. citizens or LPRs. The term *intended spouse* means a foreign national who went through a marriage ceremony and believed that he or she married a U.S. citizen or LPR, but whose marriage is not legitimate solely because of the U.S. citizen's or LPR's bigamy;[157] and
- A lawful permanent resident who qualifies as a battered spouse.[158]

Under INA §240A(b)(2)(D), any credible evidence relevant to the application for VAWA cancellation is acceptable, and the respondent does not have to demonstrate the unavailability of secondary evidence. This standard applies to every element of the claim.

Marital Relationship

The Battered Immigrant Women Protection Act of 2000 expanded relief to respondents whose abuser "is or was" a citizen or lawful permanent resident, and to those battered individuals who intended to be married to their abuser but whose marriages are not legitimate because of their abuser's bigamy.[159] Therefore, VAWA cancellation does not require the applicant demonstrate that the abuser be a lawful permanent resident (LPR) at the time the abuse is inflicted for the victim or that the applicant be married currently to the abuser. As such, neither the death of the abuser nor divorce prevents the abused for-

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[155] There is no time limit for a motion to reopen to apply for VAWA suspension of deportation and there is a one-year deadline from the date of entry of the final order of removal for a VAWA cancellation motion to reopen, unless the respondent can show "extraordinary circumstances" or "extreme hardship to his or her child for not meeting the one-year deadline pursuant to INA §240(c)(6)(C)(iv).

[156] INA §240(c)(6)(C)(iv).

[157] *See* INA §101(a)(50).

[158] *Matter of A–M–*, 25 I&N Dec. 66 (BIA 2009) (holding that notwithstanding §240A(b) of the INA, which only refers to nonpermanent residents, an LPR who qualifies as a battered spouse may be eligible to apply for cancellation of removal under §240A(b)(2).

[159] *See* Victims of Trafficking and Violence Protection Act §1504, Pub. L. No. 106-386, 114 Stat. 1464, 1522–24 (2000); INA §240A(2)(b)(2)(A)(i)(III).

mer spouse from qualifying for VAWA cancellation of removal. In *Lopez-Birrueta v. Holder*, the U.S. Court of Appeals for the Ninth Circuit held that a parent who has an abused child in common with the U.S. citizen or LPR abuser is not required to have been married to the abuser.[160] In this case, the unmarried mother of two U.S. citizen children who were beaten with a stick several times a week by the LPR father of the children established eligibility for cancellation of removal under the statute notwithstanding the lack of marriage.[161] Further, although the abuse was directed at the children, the respondent was granted VAWA cancellation as the parent of an abused child.[162]

VAWA cancellation also lacks the "good faith marriage" requirement contained in VAWA self-petitioning. However, IJs may consider an allegation of marriage fraud as it relates to good moral character, so the respondent should consider preparing and submitting good faith marriage evidence in response to a marriage fraud allegation.[163] Further, factors such as the respondent's divorce from an abusive spouse, remarriage, and previous self-petitions for relief based on the abusive marriage are relevant in determining whether the respondent should be granted VAWA cancellation in the exercise of discretion.[164]

Tip: Evidence of a good faith marriage may include comingling of finances such as insurance policies, property leases, income tax forms or bank accounts and "testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences."[165] Other evidence "might include" birth certificates of children; police, medical or court documents with information about the relationship; and sworn declarations from individuals with personal knowledge of the relationship.[166] This suggested evidence derives from the VAWA self-petitioning regulation as VAWA self-petitioning does have a good faith marriage requirement.

VAWA cancellation beneficiaries are exempt from the "living in marital union" requirement for three-year naturalization, thus facilitating the path to U.S. citizenship for this protected group.[167]

Children and Sons and Daughters

A child applicant who has been abused by a U.S. citizen or LPR parent is eligible for VAWA cancellation whether he or she is under or over the age of 21.[168] The statute refers only to an individual who has been abused by a parent, without reference to the term

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[160] *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215 (9th Cir. 2011).

[161] *Id.*

[162] *Id.*

[163] INA §240A(b)(2)(C).

[164] *Matter of A–M–*, 25 I&N Dec. 66 (BIA 2009).

[165] 8 CFR §204(c)(2)(vii).

[166] *Id*.

[167] INA §319.

[168] INA §240A(b)(2)(A)(i).

"child." Therefore, the definition of "child" under the INA—an individual who is under 21 and unmarried—does not apply to VAWA cancellation cases.

However, children cannot gain status through a parent's VAWA cancellation as there is no provision in the statute for derivative beneficiaries in VAWA cancellation cases. Even when the parent is applying as the parent of the abused child, the child will not be included in the parent's cancellation application. The abused child must therefore apply separately and request that the court consolidate the cases. Alternatively, the parent may ask the IJ for a continuance to allow the time to prepare and file a FormI-360 self-petition with USCIS that would include the child, assuming the child does meet the definition per INA §101(b)(1), as self-petitioning only contemplates children and not sons or daughters. Once USCIS approves the self-petition, the IJ may dismiss the removal proceedings to shift jurisdiction over the adjustment to USCIS for the adjustment of status application process.

Despite the lack of derivative beneficiaries for VAWA cancellation, respondents can rely on parole protection for their children. Children of successful VAWA cancellation grantees, as well as parents of children granted cancellation, automatically receive parole under INA §212(d)(5) beginning on the date when the IJ approves the VAWA cancellation application.[169] A grant of parole allows for adjustment of status under the VAWA exemptions.[170] While there is no deadline for filing for adjustment, parole may be revoked if the parent or child granted VAWA cancellation does not exercise "due diligence" in filing a visa petition on behalf of the paroled relative.[171]

Sons and daughters of successful VAWA cancellation grantees do not qualify for inclusion on the parent's Form I-360 self-petition as they are not children under the INA and do not qualify for INA §212(d)(5) parole based on a parent's successful VAWA cancellation application. These sons and daughters can instead seek placement in removal proceedings per a 1996 legacy INS Central Office memo that states that "INS district offices shall promptly issue a Notice to Appear (NTA) to any alien who makes a credible request to be placed in proceedings in order to raise a claim for cancellation of removal under VAWA."[172] However, practitioners should advise clients of all the risks associated with this strategy—including a potential denial and order of removal—and ensure compliance with ethical duties. Furthermore, in practice, ICE has often declined to issue NTAs in such cases unless enforcement priority factors are present.

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[169] INA§240A(b)(4).

[170] *Id*.

[171] *Id*.

[172] Memorandum from the Office of the Gen. Counsel to Terrance O'Reilly, Dir. of Admin. Appeals Office, "Extreme Hardship" and Documentary Requirements Involving Battered Spouses and Children," (Oct. 16, 1998) (*reprinted in* 76 *Interpreter Releases* 162 (Jan. 25, 1999)).

Battery or Extreme Cruelty

To qualify for cancellation of removal, the domestic abuse must rise to the level of *battery or extreme cruelty*[173] and must be proven by *any credible evidence*.[174] Domestic abuse covers a broad area of activity, including physical, sexual, and psychological attacks, as well as economic coercion.

Although there is little case law defining battery or extreme cruelty in VAWA cancellation of removal cases,[175] the regulations defining the terms for VAWA self-petitioners serve as a guideline.[176] Under the regulations' definition of battery or extreme cruelty, the phrase includes, but is not limited to, "being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence."[177] The preamble to the regulations states that the definition of battery or extreme cruelty is flexible and sufficiently broad to encompass all types of domestic battery and extreme cruelty.[178] The regulations offer an expansive definition of battery or extreme cruelty including psychological abuse with no requirement of physical violence. Violence against another person, animal, or thing should be considered abuse if it can be established that the act was deliberately made to perpetrate extreme cruelty against the respondent applying for VAWA cancellation. Practitioners should consider the following as extremely cruelty:

- Social isolation of the victim;
- Accusation of infidelity;
- Incessantly calling, writing, or contacting;
- Interrogating friends and family members;
- Stalking;
- Making threats;
- Economic abuse (*e.g.*, not allowing the victim to get a job or controlling all money in the family);
- Using threats relating to a child to coerce or blackmail; and
- Degrading the victim.

The most important evidence for sustaining the burden of proving battery or extreme cruelty will be the respondent's detailed sworn declaration and credible in-court testimo-

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[173] INA §240A(b)(2)(A)(v).

[174] INA §240A(b)(2)(D).

[175] *See Bedoya-Melendez v. U.S. Att'y Gen.*, 680 F.3d 1321 (11th Cir. 2012); *Lopez-Birrueta v. Holder*, 633 F.3d 1211, 1215 (9th Cir. 2011); *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003).

[176] *See* 8 CFR §204.2(c)(1)(vi).

[177] *Id.*

[178] *See* 61 Fed. Reg. 13061, 13065 (Mar. 26, 1996).

ny. "Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel."[179] Aside from these, practitioners should consider police reports, civil protection orders, medical records of injuries stemming from the abuse, intake forms from domestic violence organizations or sexual assault shelters, letters from counselors, Child Protective Services reports, photos of the injuries, torn clothing or destroyed property, transcripts from "911" calls, psychological evaluations, e-mail and social media threats, and affidavits from neighbors, friends, or family who witnessed the abuse. Respondents seeking VAWA cancellation protection do not have to prove that the abuse occurred in the United States; battery or extreme cruelty outside the United States "by a spouse or parent" or against their children by "[a qualifying] parent" qualifies for VAWA cancellation.[180]

Tip: Survivors of violence often do not know that what they have endured qualifies as battery or extreme cruelty either because this treatment is seen as common in their country of origin or because it is part of a longtime, normalized pattern. Practitioners should take care to conduct deep and sensitive intakes with survivors of violence. This may include starting with broader questions and ending with leading questions. Remember that abusive acts that may not initially appear violent may actually be part of an overall pattern of violence. However, this pattern will only become apparent if practitioners take the time to learn the whole story and ask about all the interactions between the survivor client and the abuser.

Domestic violence is not confined to physical battery; it includes psychological and emotional harm. In *Hernandez v. Ashcroft*, the Ninth Circuit addressed the requirement of extreme cruelty in the context of domestic violence.[181] The court first held that it had jurisdiction to review a determination of extreme cruelty because it was a question of fact subject to legal standards and not a discretionary decision, and thus is subject to judicial review by the federal circuit courts.[182] The court then tackled the merits of the case, whether extreme cruelty had occurred. The Ninth Circuit in *Hernandez v. Ashcroft* reviewed spousal abuse consisting of egregious physical violence in Mexico and a non-

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[179] 8 CFR §§204.2(c)(2)(iv), 204.2(e)(2)(iv).

[180] INA §240A(b)(2)(A),

[181] *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003); *see also Lopez-Birrueta v. Holder*, 633 F.3d 1211 (9th Cir. 2011) (examining the definition of "battery or extreme cruelty" in 8 CFR §§204.2(c)(1)(vi), (e)(1)(vi), noting that the sections are identical but for the last sentence, depending on whether the petitioner is a spouse (§204.2(c)) or a child (§204.2(e)) and holding that the statute does not indicate that battery or extreme cruelty is defined differently depending on the marital status of the petitioner).

[182] *See also Reyes-Vasquez v. Ashcroft*, 354 F.3d 942 (8th Cir. 2004), *but see Bedoya-Melendez v. U.S. Att'y Gen.*, 680 F.3d 1321, 1328 (11th Cir. 2012); *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010); *Johnson v. U.S. Att'y Gen.*, 602 F.3d 508 (3d Cir. 2010); *Stepanovic v. Filip*, 554 F.3d 673 (7th Cir. 2009) (citing and holding along with the Fifth, Sixth, and Tenth circuits that a finding of extreme cruelty was discretionary and therefore nonreviewable); *Wilmore v. Gonzales*, 455 F.3d 524 (5th Cir. 2006); *Perales-Cumpean v. Gonzales*, 429 F.3d 977 (10th Cir. 2005).

physical cycle of domestic violence in the United States. The court concluded that extreme cruelty describes the non-physical manifestations of domestic violence. The court reasoned that, as much as battery is interpreted as the existence of physical abuse in a domestic violence case, extreme cruelty is a similarly objective inquiry into an individual's experience of psychological cruelty. "Extreme cruelty simply provides a way to evaluate whether an individual has suffered psychological abuse that constitutes domestic violence."[183] The court relied on testimony given by expert witnesses that define domestic violence as a cycle of violence perpetrated in a pattern of behavior used by the abuser to maintain control over the victim. In this context, non-physical actions constitute domestic violence when they are intertwined with the threat of harm used to maintain the abuser's control over the victim through fear and dominance. The husband's non-physical actions—calling his wife; promising to change; and begging her to come back—rose to the level of domestic violence because:

- The victim was emotionally vulnerable;
- There was a strong emotional bond necessitated by violence; and
- There was an underlying threat that failure to meet the abuser's requests would bring violence.[184]

As helpful as this decision is for understanding the realities of domestic violence battery or extreme cruelty, it remains to be seen if another U.S. court of appeals will take jurisdiction over this issue and provide a similar decision given the federal court jurisdictional hurdles set by IIRAIRA.

Three-Year Continuous Physical Presence

A respondent applying for VAWA cancellation must show three years of continuous presence in the United States immediately preceding the date of the application.[185] Amendments enacted in the Battered Immigrant Women Protection Act of 2000[186] significantly eased the provisions regarding physical presence. First, in a return to the pre-IIRAIRA suspension requirement, the amendments exempted VAWA cancellation applicants from the "stop-time rule" under INA §240A(d)(1).[187] Under the "stop-time rule", the issuance of an NTA—the charging document in a removal case— or an Order to Show Cause—the charging document in deportation proceedings—stops continuous physical presence from accruing.[188]. This means the three years continue to accrue up to the date of application for cancellation. The date of the application is when the application is formally "submitted" to the IJ and signed by the respondent at the individual hear-

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[183] *Id.*

[184] *Id.*

[185] INA §240A(b)(2)(B).

[186] Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, §§1501–13, 114 Stat. 1464, 1518–37.

[187] INA §240A(b)(2)(A)(ii),

[188] INA §240A(d)(1).

ing. Similarly, continuous physical presence accrues up until a final order of removal, meaning until the BIA adjudicates the appeal, if the respondent appeals.[189] Second, the amendments provided that a respondent is not considered to have failed to maintain continuous physical presence because of a departure from the United States if the respondent demonstrates a connection between the absence and the abuse.[190] No absence or portion of an absence connected to the abuse counts toward the 90- or 180-day limits, which allows the respondent to more easily establish the three years of continuous presence in the United States. However, like with cancellation of removal under INA §240A(b), commission of a disqualifying crime will stop accrual of physical presence..[191]

Good Moral Character

An applicant for VAWA cancellation of removal, much like a self-petition VAWA applicant,[192] must show that he or she has been a person of good moral character.[193] As such, good moral character, defined in the negative in INA §101(f), applies to VAWA cancellation of removal cases. The categories listed in INA §101(f) comprise per se bars to establishing good moral character during the three-year period. The amendments to the Battered Immigrant Women Protection Act of 2000 slightly eased the application of §101(f) for VAWA self-petitioners and applicants for cancellation. Under those amendments, an act or conviction that does not bar the AG from granting relief under INA §240A(b)(2)(A)(iv)—inadmissibility under INA §§212(a)(2) or (3); or deportability under INA §§237(a)(1)(G), (a)(2), (a)(3), or (a)(4))—does not bar a finding of good moral character if the government finds that the act or conviction was connected to the abuse and that a waiver otherwise is warranted. Therefore, even if the VAWA cancellation applicant falls into one of the bars under §101(f), if the act or conviction was connected to the applicant's abuse and a waiver is otherwise warranted, the conviction or act does not make the applicant ineligible for VAWA cancellation.[194] However, IJs have broad discretionary authority to consider acts and convictions.

A USCIS memorandum provides some insight into determining whether an act or conviction contained in §101(f) is waivable under §§212(h)(1), 212(i)(1), 237(a)(7), and 237(a)(1) of the Battered Immigrant Women Protection Act of 2000.[195] Although the memorandum discusses good moral character in the context of VAWA self-petitions, it also provides guidance to the cancellation of removal standard. Waivable offenses include:

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[189] INA §240A(b)(2)(B),

[190] INA §212(a)(9)(C)(ii).

[191] *Id*.

[192] 8 CFR §204.2(c)(l)(vii).

[193] INA §240A(b)(2)(A)(iii).

[194] INA §§240A(b)(2)(A)(iii), 240A(b)(2)(C).

[195] Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, §§1501–13, 114 Stat. 1464, 1518–37.

- Engaging in prostitution;[196]
- Knowingly encouraging, inducing, assisting, abetting, or aiding another foreign national to enter the United States in violation of the law;
- Having been removed previously from the United States;
- One drug conviction for simple possession of marijuana of 30 grams or less;
- Having been convicted for two or more offences; and
- Giving false testimony.

The offenses are waivable if the foreign national can show that she would not have committed the crime but for the batter or extreme cruelty. The evidence submitted must demonstrate:

- Circumstances surrounding the offence, including the relationship the abuser had to the offense and the abuser's role in it; and
- The causal relationship between the offence and the battery or extreme cruelty.

The offense did not have to occur during the marriage. In addition, the adjudicator must consider the full history of the case, including the need to escape.[197]

To help establish good moral character, practitioners should consider submitting:

- Notarized affidavits by friends, community members, children's teachers, clergy, employer, etc.;
- Awards or certificates of appreciation;
- Proof of volunteer work;
- Proof of donations to charity; or
- Academic record, if enrolled in school.

Aside from this evidence, practitioners should also ensure that the respondent has a clean social media presence and that any profile or account activity will not undermine the application for VAWA cancellation.

For VAWA cancellation applicants, good moral character is assessed during the three years preceding the entry of the final administrative order on the case by the IJ at the individual hearing and not the earlier date on which the application was filed with the immigration court.[198] If the respondent has conduct prior to the three-year period that may

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[196] The preamble to the VAWA regulations states that if an individual is not convicted and was subjected to abuse by being forced into prostitution or forced to engage in other excludable behavior, she would not be precluded from being found to be a person of good moral character. *See* 61 Fed. Reg. 13066 (Mar. 26, 1996).

[197] U.S. Citizenship and Immigration Services (USCIS) Memorandum, W. Yates, "Determinations of Good Moral Character in VAWA-Based Self-Petitions" (Jan. 19, 2005), AILA Doc. No. 05012561.

[198] *Matter of Garcia*, 24 I&N Dec. 179, 182–83 (BIA 2007) (explaining that an application for special rule cancellation of removal is a continuing one and that the good moral character period, which is coterminous with the period of continuous physical presence, accrues until the entry of a final administra-

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prove problematic to a finding of good moral character, the BIA has held that the conduct by a respondent more than three years prior to the VAWA cancellation application should not be considered in determining whether one is barred from establishing good moral character.[199] The case involved a respondent who 14 years prior had submitted a fraudulent asylum application and provided false testimony.[200] The BIA found that, assuming these fraud factors were relevant to whether the "catch-all" provision at INA §101(f), which relates to the good moral character bars, is triggered, these factors alone were not so significant to prevent the respondent from showing good moral character.[201]

Inadmissible or Deportable

An applicant is not eligible for VAWA cancellation if he or she is inadmissible or deportable under certain statutory sections. These include the following:

- INA §212(a)(2)—conviction of certain crimes;
- INA §212(a)(3)—security and related grounds;
- INA §237(a)(1)(G)—marriage fraud;
- INA §237(a)(2)—criminal offenses, including:
  - CMTs,
  - multiple criminal convictions,
  - aggravated felony,
  - high-speed flight,
  - controlled-substances violations,
  - firearms offenses,
  - miscellaneous crimes,
  - domestic violence,
  - stalking, and
  - crimes against children;
- INA §237(a)(3)—failure to register and document fraud; and
- INA §237(a)(4)—security and related grounds.

As mentioned above, the Battered Immigrant Women Protection Act of 2000 created new waivers found at INA §237(a)(7) for:

- Convictions of domestic violence and stalking under INA §237(a)(2)(E)(i); and

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tive order); *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 797–98 (BIA 2005) (stating that the period of good moral character is calculated backward from the date of the final administrative decision)

[199] *Matter of M–L–M–A–*, 26 I&N Dec. 360 (BIA 2014).

[200] *Id*. at 361.

[201] *Id*. at 363.

- Crimes and violations of domestic violence protection orders under INA §237(a)(2)(E)(ii).

The waiver also applies to noncitizens who have been battered or subjected to extreme cruelty, and who were not the primary perpetrators of violence in the relationship, if:

- The foreign national was acting in self-defense;
- The foreign national violated a protection order intended to protect the foreign national; or
- The crime in question did not result in serious bodily injury, and there was a connection between the crime and the abuse.

Thus, VAWA cancellation applicants with certain convictions still may be eligible to establish good moral character if they are eligible for a waiver under INA §237(a)(7). VAWA 2005,[202] signed into law on January 6, 2005, clarified that this waiver is available to abused spouses and children in VAWA cancellation cases to overcome good moral character issues.

When it comes to using the INA §212(h) waiver in conjunction with VAWA cancellation to overcome a bar of inadmissibility resulting from INA §212(a)(2), the BIA has held that an applicant for VAWA cancellation cannot benefit from it because "cancellation of removal is a self-contained form of relief."[203] Thus an applicant who does not meet the basic eligibility requirements for VAWA cancellation cannot use a §212(h) waiver to circumvent the requirements of cancellation.[204]

Extreme Hardship

Unlike VAWA self-petitioner applicants, respondents applying for VAWA cancellation of removal or VAWA suspension of deportation must show that he or she would suffer extreme hardship if deported. The hardship can be to the applicant or applicant's child, or, if a child applicant, to the parent.[205] A 1996 legacy INS memorandum states that extreme hardship "is not a definable term of fixed and inflexible content or meaning; it necessarily depends upon the facts and circumstance peculiar to each case."[206] The extreme hardship claim will therefore be evaluated on a case-by-case basis after a review of the evidence in the case.[207]

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[202] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

[203] *Matter of Y–N–P–*, 26 I&N Dec. 10 (BIA 2012).

[204] *Id.* at 18.

[205] INA §240A(b)(2)(A)(v).

[206] *See* Legacy INS Memorandum, T. Aleinikoff, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents," (Apr. 16, 1996), *reprinted in* 73 *Interpreter Releases* 737 (May 24, 1996).

[207] 8 CFR§1240.58(a); *see also* Legacy INS Memorandum, P. Virtue, Office of the General Counsel, "'Extreme Hardship' and Documentary Requirements Involving Battered Spouses and Children," *Continued*

EOIR has issued regulations on factors to be considered in assessing extreme hardship in cancellation of removal cases for battered spouses and children.[208] The regulations were part of the interim rule on NACARA,[209] issued by legacy INS and EOIR, effective June 21, 1999. These are the same hardship factors that USCIS considers when adjudicating VAWA self-petition cases, and include the following:

- Nature and extent of the physical or psychological consequences of abuse;
- Effect of loss of access to the United States courts and criminal justice system, including, but not limited to:
  - the ability to obtain and enforce orders of protection,[210]
  - criminal investigations, and
  - prosecution or court orders regarding child support, maintenance, child custody,[211] and visitations;
- Likelihood that the abuser's family, friends, or others acting on behalf of the abuser in the home country would physically or psychologically harm the applicant or the applicant's child(ren);
- Applicant's needs or needs of the applicant's child(ren) for social, medical, mental health, or other supportive services unavailable or not reasonably accessible in the home country;
- Existence of laws and social practices in the home country that would punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household; and
- Abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant or the applicant's children from future abuse.

The legacy INS memorandum[212] also indicated some additional hardship factors to be considered in VAWA applications. These are linguistic or cultural factors that make se-

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Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office, INS mem. HQ 90/15-P, HQ 70/8-P, at 7 (Oct. 16, 1998), *reprinted in* 76(4) *Interpreter Releases* 162 (Jan. 25, 1999).

[208] 8 CFR §240.58(c).

[209] NACARA, Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–201 (1997).

[210] A protection order is of little use abroad if the abuser travels back and forth to the victim's homeland. *See*, *e.g.*, *Behind Closed Doors: The Impact of Domestic Violence on Children*, UNICEF Child Protection Section (2006), *available at www.unicef.org/media/files/BehindClosedDoors.pdf.*

[211] Child custody disputes and protection orders are compelling hardship factors. A grant of custody is meaningless if the parent is deported; the abusive parent would then be free to reopen the custody decision without challenge. *See* G. Pendleton & Ann Block, "Applications for Immigration Status Under the Violence Against Women Act," *Immigration and Naturalization Law Handbook* 436, 457 (AILA 2001–02 Ed.).

curing employment in the home country difficult, additional factors relevant to conditions in the home country, and any other economic factors in the United States or abroad.

While practitioners may look to the other extreme hardship factors that the BIA has enumerated in traditional suspension of deportation cases to bolster extreme hardship arguments, practitioners should primarily rely on 8 CFR §240.58(c), the regulation regarding extreme hardship factors for VAWA cancellation cases. The other extreme hardship factors include the applicant's:

- Age;
- Length of time in the United States;
- Family ties in the United States;
- Health;
- Financial status or occupation;
- Ties to the community;
- Home country economic and political conditions;
- Likelihood of encountering disruption of educational opportunities; and
- Likelihood of suffering adverse psychological impact due to deportation.

[212] Legacy INS Memorandum, P. Virtue, "Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children," (Oct. 16, 1998), *reprinted in* 76 *Interpreter Releases* 162 (Jan. 25, 1999).

The following cases set forth these hardship factors in greater detail: *INS v. Wang*,[213] *Matter of Anderson*,[214] *Matter of Pilch*,[215] and *Matter of O–J–O–*.[216] *Matter of O–J–O–* is particularly important to VAWA cancellation cases because it illustrates other equities for extreme hardship when the applicant has weak family ties in the United States.[217]

Legacy INS memoranda provide insight into the agency's interpretation of extreme hardship. Although IJs are not required to follow these directives, they can be used to guide the practitioner in presenting evidence of extreme hardship to the immigration court. For example, an October 16, 1998, memorandum provides that the approach in determining extreme hardship should be flexible, stating that "reviewers of these cases should take an open and flexible approach to the issue of extreme hardship, keeping in mind that the fact that a particular scenario has not previously appeared in the 'extreme hardship' case law by no means suggests that it cannot now amount to 'extreme hardship'...."[218] Practitioners should not take this element of VAWA cancellation for granted, as extreme hardship is largely seen as discretionary, rendering denials on this basis difficult to challenge on appeal.

Laws of Other Countries

As discussed above, some of the types of hardship factors examined in adjudicating a VAWA cancellation case involve conditions—including laws and law enforcement practices—in the respondent's home country. It is sometimes difficult to obtain information on specific laws and conditions in other countries though it is becoming increasingly easy with more governments and nongovernmental organizations uploading information to the Internet. Aside from general Internet searches, it is helpful to review country reports from the U.S. Department of State, Human Rights Watch, Human Rights First, Amnesty International, and the U.N. High Commissioner for Refugees, to name a few. Affidavits from experts who have knowledge of the home country—including family members, women's groups, and lawyers in the home country—also can be effective. There are excellent websites for foreign law and political and social conditions. Contact the Library of Congress's Law Division, at (202) 707-5065 (fax: (202) 707-1820), and ask to have certified copies of foreign laws sent to you.

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[213] *INS v. Wang*, 450 U.S. 139 (1981).

[214] *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

[215] *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

[216] *Matter of O–J–O–*, 21 I&N Dec. 381 (BIA 1996).

[217] *Id.*

[218] *See* P. Virtue, Office of the General Counsel, "'Extreme Hardship' and Documentary Requirements Involving Battered Spouses and Children," Memorandum to Terrance O'Reilly, Director, Administrative Appeals Office, INS mem. HQ 90/15-P, HQ 70/8-P, at 7 (Oct. 16, 1998), *reprinted in* 76(4) *Interpreter Releases* 162 (Jan. 25, 1999).

Intake Interview

The intake interview lays the foundation for obtaining the above information and proving the case. It is important to consider the following when interviewing an abused respondent:

- Be aware that you are dealing with a respondent who has suffered profound violence and be sensitive to the ways that different cultures deal with such issues;
- During a general intake interview, do not overlook asking questions that may enable the respondent to qualify for relief under VAWA;
- Set aside enough time to interview the respondent. Domestic violence cases often take more time than other cases because the story usually is not immediately divulged or at one time;
- Become familiar with the country conditions and the treatment of women, the lesbian, gay, bisexual, transgender community, or the particular vulnerable group to which the respondent belongs in their country of nationality prior to the interview;
- Refer the respondent to mental health support agencies for his or her own general well-being;
- Seek to work in partnership with domestic violence agencies that can provide in-depth information and experience in this area;
- Learn about the domestic violence syndrome of power and control and the cycle of violence: tension building, explosion, and then the honeymoon phase; and
- Frame particular questions. Rather than asking, "did you suffer domestic violence?" ask, "were you hit?", "were you pushed?", "were you allowed to work?", "were you allowed to have friends?", "were you insulted or mistreated in front of friends, family, children?"

After gathering the facts and understanding the respondent's background, prepare a detailed and specific sworn declaration in the client's own words. Asylum-knowledgeable practitioners should approach VAWA cancellation sworn declaration in the same meticulous manner as asylum sworn statements.

VAWA Cancellation Cap

Under INA §240A(e)(1), Congress limited the number of cancellation applicants who may adjust status to lawful permanent residence each year to 4,000. However, Congress exempted VAWA suspension applicants—those who received an OSC charging document before April 1, 1997—from the 4,000 person cap when it passed Nicaraguan Adjustment and Central American Relief Act (NACARA).[219]

Self-Petitioning Respondents: How and Why

Respondents can seek VAWA self-petitioning as opposed to VAWA cancellation if the requirements for VAWA self-petitioning are more advantageous, given the facts of

[219] Nicaraguan and Central American Relief Act, §204(a), Pub. L. No. 105–-139, 111 Stat. 2644.

the particular case, or if they do not qualify for VAWA cancellation, to help support the burden of proof for VAWA cancellation or to seek dismissal of removal proceedings if they prefer to proceed with the self-petitioning process before USCIS.

VAWA self-petitioners, including spouses and children of U.S. citizens, must file Form I-360 with the USCIS Vermont Service Center (VSC) as opposed to filing it with the IJ. If USCIS approves the petition (or issues a prima facie notice of eligibility prior to approval), the respondent should present the approved Form I-360 to the IJ as evidence that DHS acknowledges that the respondent has demonstrated VAWA eligibility, which can count toward proving VAWA cancellation of removal. In a VAWA cancellation case, a VAWA self-petition approved by USCIS shows the respondent has endured battery or extreme cruelty. The respondent still will have to prove the remaining elements of VAWA cancellation: three years of continuous presence preceding the date of application, good moral character during those three years of continuous presence, and extreme hardship. As to the last element of extreme hardship, the Battered Immigrant Women Protection Act of 2000 eliminated the extreme hardship requirement for self-petitioners, but not for VAWA cancellation applications. This is one advantage of the VAWA self-petition process, especially for applicants who, for example, hail from developed and stable countries or who are financially independent.

If the abuser was a U.S. citizen, the respondent qualifies as an immediate relative and is not subject to the visa quotas allocation system known as the family-preference categories updated monthly on the U.S. Department of State *Visa Bulletin*. Such a respondent can seek dismissal of the removal proceedings from the IJ so that he or she can seek adjustment of status with USCIS. Alternatively, the respondent can seek adjustment of status before the IJ, but it is likely that with the current backlogs affecting the immigration courts, ICE OCC will move to dismiss or the IJ will seek a dismissal motion from ICE OCC.

Note that approved VAWA self-petitioners whose abusers were LPRs are subject to the family-preference visa categories, and must wait for their "priority date" to become "current" before they can apply for adjustment of status. A respondent with an approved Form I-360 VAWA self-petition based on an LPR abuser will therefore be unable to immediately adjust status—meaning that the IJ may not be willing to dismiss the removal proceedings. Practitioners should nonetheless move to dismiss proceedings and rely on *Matter of Avetisyan* if ICE OCC opposes dismissal.[220] If removal proceedings continue, the respondent can seek an EAD by filing Form I-765 pursuant to deferred action, as approved VAWA self-petitioners subject to the family-preference visa categories should receive deferred action as they wait for the priority date to become current.[221] Practitioners should not file the EAD based on immediate eligibility to adjust if the applicant is not an immediate relative or if the priority date is not current; the VSC will reject the application. Of course, those respondents who qualify for and have filed a VAWA cancellation

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[220] *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

[221] 8 CFR §274a.12(c)(14).

application with the immigration court can file an EAD based on this pending application.[222]

NACARA §203

NACARA Section 203 provides certain Salvadoran, Guatemalan and Eastern Europeans with the opportunity to file for suspension of deportation and cancellation of removal under relaxed rules similar to those for VAWA cancellation.[223] NACARA §203 permits all the *ABC* class members,[224] along with other Salvadoran, Guatemalan, and Eastern European asylum-seekers, to proceed under the pre-IIRAIRA suspension of deportation rules. Therefore, individuals who were in deportation proceedings before April 1, 1997, would obtain NACARA benefits through suspension of deportation claims. Individuals in removal proceedings commenced on or after April 1, 1997, would obtain NACARA benefits through special-rule cancellation of removal. NACARA also exempted NACARA beneficiaries from the annual limit now placed on the number of requests for suspension of deportation and cancellation of removal that may be granted.

The Legal Immigration and Family Equity (LIFE) Act Amendments[225] also contain a reference to NACARA. Under §1505 of the LIFE Act, the reinstatement of removal provisions at INA §241(a)(5) do not apply to NACARA applicants. Specifically, the LIFE Act and the Act Amendments of 2000[226] made the following changes to NACARA §203 suspension and cancellation for certain Central Americans:

> INA §241(a)(5) (reinstatement of prior removal orders and ineligibility for relief under the INA) does not bar Salvadorans and Guatemalans from eligibility, and notwithstanding any time and number limits imposed by law (other than those premised on conviction of aggravated felony), Salvadorans and Guatemalans eligible for NACARA 203 suspension or cancellation who have become eligible for suspension or cancellation as a result of these amendments may file one motion to reopen; the scope is limited to eligibility for cancellation or suspension.[227]

The regulatory requirements for NACARA §203 are located at 8 CFR §§240.60 through 240.70. There are two ways in which an individual may apply for relief under NACARA. Individuals not in removal or deportation proceedings who have an asylum application pending with the USCIS asylum office may submit an application for NACARA relief with USCIS and will be interviewed at the local asylum office. Individuals in removal or deportation proceedings may submit a NACARA application with

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[222] 8 CFR §274a.12(c)(10).

[223] Pub. L. No. 105-100, tit. II, §203, 111 Stat. 2160, 2196–200 (1997).

[224] *ABC v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

[225] Legal Immigration and Family Equity Act, Pub. L. No. 106-553, §1(a)(2) (appx. B, H.R. 5548, §§1101–04), 114 Stat. 2762, 2762A-142 to 2762A-149 (2000).

[226] LIFE Act Amendments of 2000, Pub. L. No. 106-554, appx. D, div. B, §§1501–06, 114 Stat. 2763, 2763A-324 to 2763A-328.

[227] *See* 8 CFR §241.8(d). On July 17, 2001, the Executive Office for Immigration Review issued an interim rule that set October 16, 2001, as the deadline for filing these motions to reopen.

EOIR. This section mainly discusses NACARA relief as a defense against deportation or removal.

There is no application deadline for NACARA applicants or their derivative family members. Because an application for special-rule cancellation of removal is a continuing one, an applicant can continue to accrue physical presence until the issuance of a final administrative decision.[228]

Beneficiaries of NACARA

Guatemalans

A Guatemalan who is in either of the two categories described below, and who has not been convicted of an aggravated felony, is eligible for NACARA relief if he or she:

Category 1:

- Entered the United States on or before October 1, 1990;
- Registered for *ABC* benefits on or before December 31, 1991; and
- Has not been apprehended at time of entry after December 19, 1990.

Category 2:

- Filed an application for asylum on or before April 1, 1990.

Salvadorans

A Salvadoran who is in either of the two categories described below, and who has not been convicted of an aggravated felony, is eligible for NACARA benefits if he or she:

Category 1:

- Entered the United States on or before September 19, 1990;
- Registered for *ABC* benefits on or before October 31, 1991 (by direct registration or by applying for temporary protected status); and
- Has not been apprehended at time of entry after December 19, 1990.

Category 2:

- Filed an application for asylum on or before April 1, 1990.

To apply for NACARA with USCIS, Salvadorans and Guatemalans described above must have a timely filed and concurrently pending adjudicated Form I-589, Application for Asylum and for Withholding of Removal, with USCIS. For Salvadorans, the deadline to file the Form I-589 was January 3, 1995. For Guatemalans, the deadline was February 16, 1996. At this time, there are very few NACARA-eligible Salvadorans and Guatemalans whose Form I-589 remains pending. However, the local asylum office may "reopen" I-589s in the system depending on the circumstances of the case so as to enable those who are NACARA-eligible to apply for this benefit before USCIS. All other Salvadorans

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[228] *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005); *see also*, *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007).

and Guatemalans who are eligible for NACARA may file for relief in deportation or removal proceedings only before the IJ.[229]

Nationals of Former Soviet-Bloc Countries

An individual from a former Soviet-bloc country who has not been convicted of an aggravated felony is eligible to apply for benefits under NACARA if he or she meets the following criteria:

- Entered the United States on or before December 31, 1990;
- Filed an application for asylum on or before December 31, 1991; and
- At the time of filing was a national of one of the following:
  - Soviet Union,
  - Russia,
  - any republic of the former Soviet Union,
  - Latvia,
  - Estonia,
  - Lithuania,
  - Poland,
  - Czechoslovakia,
  - Romania,
  - Hungary,
  - Bulgaria,
  - Albania,
  - East Germany,
  - Yugoslavia, or
  - Any state of the former Yugoslavia.

Dependent Spouses and Children

The spouse or child of a member of one of the three groups described above who has not been convicted of an aggravated felony also is eligible to apply for NACARA relief. The principal spouse or parent must first be granted suspension or special-rule cancellation of removal for the dependent to be granted NACARA. The family relationship must exist at the time the principal spouse or parent is granted the benefit. The spouse need not be a citizen of the NACARA-designated country to qualify for relief.[230]

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[229] 8 CFR §§240.62(a) and 249.62(b).

[230] *Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007).

Unmarried Sons and Daughters

The unmarried son or daughter (21 years of age or older) of a principal NACARA beneficiary who has not been convicted of an aggravated felony is eligible to apply for benefits under NACARA if the following criteria are met:

- The principal must have been granted suspension of deportation or cancellation of removal;
- If the son or daughter is 21 years of age or older at the time the parent is granted the benefit, the son or daughter must have entered the United States on or before October 1, 1990; and
- The relationship to the parent must exist at the time the parent is granted NACARA relief.

Other Requirements

In addition to meeting the eligibility requirements discussed above, applicants must demonstrate seven years of continuous presence, good moral character, and extreme hardship to the applicant or the applicant's U.S. citizen or LPR spouse, parent or child. Principal applicants, but not their family members, are entitled to the presumption that their deportation or removal will cause them extreme hardship. These requirements are discussed in more detail below.

JURISDICTION OF NACARA APPLICATIONS

USCIS Asylum Office

Although this section focuses on NACARA applications filed in immigration court, the close jurisdictional interplay between the immigration court and USCIS over NACARA cases warrants discussion. A NACARA-eligible individual with a Form I-589 pending at USCIS may file the NACARA application with USCIS for adjudication at the asylum office. In some cases, a respondent in removal proceedings may decide that it is preferable to pursue his or her NACARA application with USCIS and seek administrative closure of the removal proceedings to pursue the NACARA application with the asylum office. For example, if there are dependents who are not in proceedings, it may be a good idea to close the principal's case administratively because, otherwise, *the dependents will have to be placed in proceedings* to have their applications adjudicated.

In addition, *ABC* class members with asylum applications pending at the asylum office are entitled to a de novo asylum interview at the asylum office. Even if a NACARA applicant has a strong case, he or she may not want to forfeit the possibility of obtaining asylum. Certain benefits accrue to asylees that are not available to those granted NACARA. Asylees may bring their spouses and minor children to the United States. Asylees also have access to public benefits unavailable to certain LPRs. In practical terms, it will rarely be beneficial for an *ABC* class member to forego LPR status through NACARA and try to seek asylum given that the applications were all filed over 20 years ago.

Guatemalans

A Guatemalan who meets each of the following criteria is eligible for a de novo asylum adjudication under the *ABC* settlement agreement:

- First entered the United States on or before October 1, 1990;
- Registered for *ABC* benefits on or before December 31, 1991;
- Applied for asylum on or before January 3, 1995;
- Has not been served a final asylum officer decision on the *ABC* claim; and
- Has not been apprehended at the time of entry after December 19, 1990.

Salvadorans

A Salvadoran who meets each of the following criteria is eligible for a de novo asylum adjudication under the *ABC* settlement agreement:

- First entered the United States on or before September 19, 1990;
- Registered for *ABC* benefits on or before October 31, 1991;
- Applied for asylum on or before January 31, 1996 (with an administrative grace period to February 16, 1996);
- Has not been served a final asylum officer decision on the *ABC* claim; and
- Has not been apprehended at time of entry after December 19, 1990.

Means of Demonstrating ABC Class Membership

In *Chaly-Garcia*, the Ninth Circuit held that an *ABC* class member may manifest his intention to obtain the benefits of the *ABC* settlement agreement through several means, not solely through the submission of an *ABC* registration form.[231] On August 5, 2008, USCIS issued a memorandum implementing the rule established in *Chaly-Garcia* nationwide.[232] This memorandum provides important guidance in establishing *ABC* class membership for purposes of applying for NACARA.

Upon request, the USCIS Asylum Office in Arlington, VA can search the *ABC* database and can to provide confirmation proof of class membership.[233] However, because the database is complete, filing a Freedom of Information Act request may provide a more complete record. Class membership may also be demonstrated by secondary documents and credible testimony if there is no confirmation of membership in the database.[234]

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[231] *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007).

[232] USCIS Memorandum, J. Langlois, "Making *ABC* Registration Determinations, *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007)" (Aug. 5, 2008), AILA Doc. No. 08090264.

[233] The public e-mail address for the Arlington Asylum Office is *Arlington.Asylum@uscis.dhs.gov*. The public phone number is (703) 235-4100. The fax number is (703) 812-8455.

[234] USCIS Memorandum, J. Langlois, "Making *ABC* Registration Determinations, *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007)" (Aug. 5, 2008), AILA Doc. No. 08090264; *see also*, J. Langlois,

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Dependents

USCIS also has jurisdiction over the NACARA applications of the spouse, child, and/or unmarried son and daughter where the spouse or parent either has a NACARA application either pending or had an application approved by the local asylum office. However, since such dependents are not *ABC* class members, an IJ is not *required* to close removal proceedings administratively to permit the dependent to file his or her NACARA application with the asylum office. If the dependent provides evidence that the spouse or parent has applied for NACARA with the asylum office and the spouse or parent appears to be eligible for NACARA benefits, the IJ *may* close the case administratively. The dependent then may submit his or her NACARA application to USCIS for adjudication at the local asylum office.

Even if the IJ is willing to close the case administratively, the IJ may not do so without the consent of ICE district counsel. Thus, it is best to consult with ICE district counsel in advance of the hearing to see if ICE will join in the motion to administratively close the case.

Executive Office for Immigration Review

Except as outlined above, once an individual has been placed in removal or deportation proceedings, the immigration court has exclusive jurisdiction over his or her NACARA application. Note that USCIS can and does refer NACARA applicants to the immigration court for removal proceedings if the asylum office determines that the applicant is not eligible, does not merit relief in the exercise of discretion, or is eligible only for the 10-year heightened standard NACARA. In such a case, the asylum office usually refers the application to the immigration court unless the reason for ineligibility is an outstanding order of removal. Note that the asylum office will not refer NACARA applicants with current legal status such as Temporary Protective Status even if their NACARA applications are not approved by the asylum office, as the immigration court will not take jurisdiction over an individual with legal status who is not deportable or removable. However, an individual who loses or forgoes legal status can request issuance of an NTA.

Requirements for NACARA Suspension of Deportation or Cancellation of Removal

To qualify for NACARA suspension of deportation, the applicant has to have been placed in deportation proceedings—the OSC issued before April 1, 1997—and be deportable. To qualify for NACARA special-rule cancellation of removal, the applicant must be in removal proceedings—the NTA issued on or after April 1, 1997—and be inadmissible or deportable. All applicants must merit a favorable exercise of discretion, in addition to proving the following:

- Continuous physical presence in the United States for seven years before the application for suspension of deportation or cancellation of removal is filed;

Director, Asylum Division, Office of Refugee, Asylum and International Affairs, "Making *ABC* Registration Determinations," Memorandum to Asylum Division (Washington, D.C.: June 8, 2006).

- Good moral character during the seven-year period; and
- Removal would cause extreme hardship to the applicant or the applicant's U.S. citizen or LPR spouse, parent, or child.

Continuous Physical Presence for Seven Years

Generally, NACARA applicants must demonstrate seven years of continuous physical presence immediately prior to filing the NACARA application. The stop-time rule does not apply to NACARA applicants and continuous physical presence may be accrued.[235] However, if the applicant is inadmissible or deportable under certain grounds of inadmissibility or deportability (usually for criminal conduct), the applicant must establish 10 years of physical presence. In a September 6, 2007, memorandum, USCIS took the position that grounds of deportation only apply to individuals who were admitted, and grounds of inadmissibility only apply to those individuals who are in the United States without having been admitted.[236] For individuals applying for suspension of deportation, this includes individuals found deportable under the following sections of the INA:

- §241(a)(2)—crimes;
- §241(a)(3)—failure to register and falsification of documents; or
- §241(a)(4)—security grounds as they existed prior to IIRAIRA.

For individuals applying for special-rule cancellation of removal, this includes individuals found inadmissible or deportable under the following sections of the INA:

- §212(a)(2)—crimes,
- §237(a)(2)—crimes other than aggravated felonies; or
- §237(a)(3)—failure to register and falsification of documents.

Departures

If the applicant is applying for suspension of deportation, the applicant must establish that any absence from the United States during the seven years (or 10 years, if the higher standard applies)[237] prior to filing the application was brief, casual, and innocent and did not interrupt meaningfully the applicant's period of presence in the United States. Absences from the United States for 90 days or less, or in the aggregate of 180 days or less, are considered brief. Absences beyond the 90-day or 180-day bright-line test will be considered on a case-by-case basis.

Departures pursuant to an order of deportation or voluntary departure are not considered casual, nor are any departures that reveal a lack of commitment to living in the United States. Travel pursuant to advance parole does not necessarily interrupt continuous physical presence. However, applicants in deportation proceedings will lose the right to

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[235] 8 CFR §240.64(b).

[236] USCIS Memorandum, J. Langlois, "Revision to the NACARA Lesson Plan and Change to NACARA Quality Assurance Review Categories" (Sept. 6, 2007), AILA Doc. No. 07092562.

[237] 8 CFR §240.66(c).

pursue suspension of deportation upon being paroled into the United States. Instead, such applicants will be placed into removal proceedings, where they can apply for cancellation of removal.

If the applicant is applying for cancellation of removal, *any* absence from the United States for more than 90 continuous days, or 180 days in the aggregate, will be considered to break continuous presence. There are no exceptions.

Good Moral Character

A NACARA applicant must demonstrate that he or she has been a person of good moral character for the required period of physical presence in the United States. A child under 14 years of age is presumed to be a person of good moral character and is not required to submit documentation establishing good moral character.

An applicant cannot establish good moral character if he or she falls into one of the categories listed in INA §101(f). These categories include:

- Habitual drunkard;[238]
- Drug offenses (except for a single offense of simple possession of marijuana);
- CMTs;
- Multiple crimes with sentences totaling five years or more;
- Prostitute;
- Practicing polygamist;
- Alien smuggler;
- One whose income is derived principally from illegal gambling activities;
- One who has been convicted of two or more gambling offenses;
- One who has given false testimony for the purpose of obtaining any benefits under the INA;
- One who has been confined to a penal institution as a result of a conviction for an aggregate of 180 days or more during the good moral character period; and
- One who has been convicted of an aggravated felony on or after *November 29, 1990*.

An applicant not fitting in any of the above categories does not compel a finding that the applicant is a person of good moral character. The good moral character inquiry may extend beyond the statutory period and to other factors not listed in INA §101(f). However, any relevant negative factors must be weighed along with all positive factors. Negative factors not included in INA §101(f) include failing to file income taxes, falsifying tax returns, and neglecting family responsibilities. Positive factors include involvement in the community, volunteer work, and participation in church activities.

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[238] *But see Ledezma-Cosino v. Lynch*, No. 12-73289, slip op. (9th Cir. March 24, 2016).

Extreme Hardship

The list of factors relevant to the evaluation of extreme hardship to the applicant or the applicant's U.S. citizen or LPR spouse, parent or child is codified in 8 CFR §1240.58. However, there is no requirement that an applicant establish each of the factors, nor is the list in the regulation exclusive. Factors may be considered in the aggregate. The IJ must evaluate each application on a case-by-case basis.

The factors listed in 8 CFR §1240.58 include:

- Age of the applicant and age at time of entry;
- Applicant's children (how many, along with information on age, immigration status, and ability to speak native language);
- Health conditions of the applicant and the applicant's child, spouse, or parent;
- Employment opportunities in the native country;
- Length of presence in the United States;
- Family members legally residing in the United States;
- Financial impact of departure from the United States;
- Irreparable harm as a result of disruption of educational opportunities;
- Psychological impact of return to native country;
- Political and economic conditions in the country of return;
- Ties to the country to which the applicant would be returned;
- Ties to the United States;
- Immigration history in the United States; and
- Absence of other means to adjust status in the United States.

Presumption of Extreme Hardship for Certain NACARA Beneficiaries

The AG has concluded that sufficient evidence exists to support an evidentiary presumption of extreme hardship for *ABC* class members who are eligible to apply for relief under NACARA.[239] This conclusion is based on a determination that the *ABC* class members share certain characteristics that give rise to a strong likelihood that an *ABC* class member or qualified relative would suffer extreme hardship if deported or removed.

Nonetheless, if the evidence in the record significantly undermines the assumptions on which the presumption is based, the presumption may be overcome. For example, an individual who has great wealth and has invested it in his or her home country may be able to return to that country without experiencing hardship.

The presumption of extreme hardship applies to all Salvadoran and Guatemalan principals, whether they actually applied for *ABC* benefits or not. The presumption does not apply to their dependents who are applying for relief under NACARA, nor does it apply

[239] 8 CFR §240.64(d).

to nationals of the former Soviet bloc. However, evidence that a NACARA applicant's spouse or parent has obtained NACARA relief may assist in proving extreme hardship.

Statutory Bars to NACARA

Bars Relating to Immigration Violations

Before pursuing a NACARA application in immigration court, it is important to review all of the statutory bars to eligibility. Although both suspension of deportation and cancellation of removal under NACARA result in the same benefit—LPR status—different statutory bars apply in certain cases.

Suspension of Deportation

A person in deportation proceedings may not apply for relief under NACARA if the person:

- Was convicted of an aggravated felony under INA §101(a)(43);
- Participated in Nazi persecution or genocide;
- Entered the United States as a crewman after June 30, 1964; or
- Entered the United States as an exchange visitor.

In addition, violation of certain grounds of pre-IIRAIRA deportability will bar an individual from applying for the seven-year suspension of deportation under NACARA. Such individuals still may be able to apply for NACARA, but must prove 10 years of continuous physical presence since the commission of the disqualifying conduct, good moral character during those 10 years, and that deportation would cause exceptional and extremely unusual hardship to themselves or their qualifying U.S. citizens and LPR family members.[240] Grounds of deportation only apply to individuals who were admitted, whereas grounds of inadmissibility will apply to those individuals who are in the United States without having been admitted.[241] The grounds of deportability that will bar application for the seven-year NACARA are:

- CMT within five years of entry with a sentence of one year or longer;
- Two or more convictions for CMTs;
- Controlled-substance violation, other than a single offense of possession of 30 grams or less of marijuana;
- Drug abuser or addict;
- Firearms offense;

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[240] *Matter of Castro-Lopez*, 26 I&N Dec. 693 (BIA 2015) (holding that the 10-year continuous physical presence period is measured from the date of the most recently incurred ground of removal when that ground is among those listed in the heightened standard for establishing continuous physical presence set forth in 8 CFR §1240.66(c)(1)).

[241] USCIS Memorandum, J. Langlois, "Revision to the NACARA Lesson Plan and Change to NACARA Quality Assurance Review Categories" (Sept. 6, 2007), AILA Doc. No. 07092562.

- Conviction for attempt to commit espionage, treason, or sabotage;
- Failure to register and falsification of documents; and
- Security and related ground (except Nazi persecutors).

It is the applicant's burden to establish that he or she is not an aggravated felon under INA §101(a)(43).[242] NACARA benefits are not available to those who are subject to the material support bar.[243]

Cancellation of Removal

A person in removal proceedings may not apply for NACARA cancellation of removal if he or she:

- Participated in the persecution of another based on race, nationality, religion, political opinion, social group,[244]
- Entered the United States as a crewman after June 30, 1964,[245] or
- Entered the United States as an exchange visitor.

Just as with NACARA suspension of deportation, certain grounds of deportability and inadmissibility (post-IIRAIRA) will bar an individual from applying for seven-year cancellation of removal under NACARA. Such individuals may be able to apply for heightened standard NACARA if they can demonstrate 10 years of continuous physical presence and good moral character as well as exceptional and extremely unusual hardship to themselves and their qualifying relatives.[246] Grounds of inadmissibility only apply to those individuals who are in the United States without having been admitted, whereas the grounds of deportability apply to those who have been admitted.[247]

The grounds of inadmissibility and deportability that will bar application for the seven-year cancellation of removal under NACARA are:

- CMT within five years of entry with a sentence of one year or longer;
- Two or more convictions for CMTs;
- Two or more convictions with an aggregate sentence of five years;
- Controlled-substance violation, other than a single offense of possession of 30 grams or less of marijuana;
- Drug abuser or addict;

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[242] *Mondragón v. Holder*, 706 F.3d 535, 538 (4th Cir. 2013).

[243] *Barahona v. Holder*, 691 F.3d 349 (4th Cir. 2012).

[244] Many respondents are denied NACARA benefits because of the persecutor bar, so it is crucial to assess respondents for this potential bar. *See Quitanilla v. Holder*, 758 F.3d 570 (4th Cir. 2014); *Pastora v. Holder*, 737 F.3d 902 (4th Cir. 2013).

[245] *Gonzalez v. Holder*, 673 F.3d 35 (1st Cir. 2012).

[246] 8 CFR §240.66(c).

[247] USCIS Memorandum, J. Langlois, "Revision to the NACARA Lesson Plan and Change to NACARA Quality Assurance Review Categories" (Sept. 6, 2007), AILA Doc. No. 07092562.

- Firearms offense;
- Conviction for attempt to commit espionage, treason, or sabotage;
- Failure to register and falsification of documents;
- Conviction for high-speed flight from an immigration checkpoint;
- Crimes of domestic violence;
- Violation of protective orders;
- False representation of U.S. citizenship;
- Prostitution and commercialized vice;
- Criminals who have asserted immunity; and
- Membership in a totalitarian party.

Bars Relating to Failure to Comply with Immigration Proceedings

A practitioner should analyze the immigration history of a client before deciding whether to apply for relief under NACARA. An individual's failure to appear at a prior hearing or for deportation could bar him or her from applying for NACARA benefits. The bars to discretionary relief for individuals pursuing suspension of deportation generally are more lenient than the bars imposed for individuals pursuing cancellation of removal.

Suspension of Deportation: Five-Year Bars

Failure to appear at deportation proceedings. An individual cannot apply for NACARA relief for five years after the date of the final order of deportation if the individual failed to appear at his or her deportation proceeding. However, this bar only applies if the individual was given oral notice, in a language that the individual understands, of the time and place of the proceedings and the consequences of failing to appear at the deportation proceeding. An individual may not be subject to the five-year bar only if exceptional circumstances existed for the failure to appear.

Failure to voluntarily depart. An individual cannot apply for NACARA suspension of deportation for five years if the individual remained in the United States after the date granted to depart the United States voluntarily. The five years begins to run on the scheduled date of departure, unless the individual can prove that exceptional circumstances prevented the departure. The five-year bar will apply only if the individual was given notice of the consequences of the failure to depart in a language that the individual understood.

Failure to appear under deportation order. An individual cannot apply for NACARA suspension of deportation for five years if he or she failed to appear for his or her deportation. The five years begins to run on the date on which he or she was required to appear, unless the individual can prove that exceptional circumstances prevented his or her appearance. The five-year bar will apply only if the individual was given oral and written notice, in a language that the individual understood, of the consequences of the failure to appear.

Failure to appear for asylum hearing. An individual cannot apply for NACARA suspension of deportation for five years if he or she failed to appear for his or her asylum hearing. The five years begins to run on the date on which he or she was scheduled to appear, unless the individual can prove that exceptional circumstances prevented his or her appearance. The five-year bar will apply only if the individual was given written notice, in English and Spanish, of the hearing date, and oral notice of the same in a language the applicant understood.

Cancellation of Removal: 10-Year Bars

Failure to appear at removal hearing. An individual is barred from applying for NACARA cancellation of removal for 10 years if he or she failed to appear for his or her removal hearing. The 10 years begins to run on the date of the final order of removal if the order was issued in absentia. The 10-year bar will only apply if the individual was given oral notice, in a language that the individual understood, of the time and place of the hearing and the consequences of the failure to appear.

Failure to voluntarily depart. An individual is barred from applying for NACARA cancellation of removal for 10 years if he or she failed to leave by the voluntary departure date given. The 10 years begins to run on the final date given to depart. The 10-year bar will only apply if the voluntary departure order informed the individual of the consequences of the failure to depart.

Process for Applying in Removal Proceedings

Application

To apply for NACARA, an individual must file a completed Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100 (NACARA)), with the immigration court, along with the accompanying fee and supporting evidence. The fee for an individual is currently $165; it is $570 if all applications for a family are submitted together in a single packet.[248] In addition, each applicant over 14 years of age must pay a biometrics fee of $85. It is advisable to check the USCIS website before filing the application to ensure that the filing fee and the filing location are correct. The applicant also may apply simultaneously with USCIS for employment authorization. A sample Form I-881 is attached as Appendix 18.

Unmarried Sons and Daughters

A dependent of a NACARA principal who is 21 years of age or older when his or her parent is granted NACARA must overcome the additional eligibility hurdle of proving that he or she entered the United States on or before October 1, 1990. If an individual did not enter the United States until after that date and is nearing age 21, it is important to try to expedite adjudication of the parent's case. If the parent's case is pending with the USCIS asylum office, a request for expedited interview should be sent. If the parent's

[248] 8 CFR §103.7 (filing fees are subject to change).

case is pending with the immigration court, a motion to expedite should be filed with the court to preserve the dependent's right to pursue relief under NACARA.

Tip: Given the backlogs present at most immigration courts, practitioners should consider calling the IJ's legal assistant after filing the motion to expedite to ensure the IJ is aware of the motion. However, do exercise patience and professionalism, as not doing so may hurt rather than help you.

Motions to Reopen

In general, an individual who received a final order of deportation or removal must have filed at least a skeletal (without a completed Form I-881) motion to reopen by September 11, 1998, to be eligible to pursue a NACARA claim.[249] If a skeletal motion to reopen was filed, the completed Form I-881 must have been filed by November 18, 1999, to preserve the right to pursue a NACARA application. Upon an order by an IJ to reopen the case, the applicant must pay the required fee for the NACARA application.

The government allowed certain individuals to file motions to reopen beyond the September 11, 1998, deadline. Such individuals had to demonstrate that they were prima facie eligible for NACARA as of September 11, 1998, and that their failure to file on time was inadvertent. In such cases, DHS district counsel would join the motion to reopen. Such cases should have been filed by November 18, 1999. Some district counsels still will join in late-filed motions to reopen for NACARA-eligible individuals. The advocate should document the humanitarian equities as well as the statutory eligibility of the applicant before proposing such a joint motion to district counsel.

The U.S. Court of Appeals for the Ninth Circuit has held that the statutory time bar on the motion to reopen deportation or removal proceedings is a statute of limitations subject to equitable tolling.[250] In *Albillo-DeLeon v. Gonzales,* the court held that equitable tolling was appropriate for the respondent because he was deceived and prejudiced by an individual purporting to be his legal advocate.

The U.S. Court of Appeals for the Fifth Circuit held that it lacked jurisdiction to review a failure to reopen a NACARA case because of untimely filing.[251] The court stated that a "failure to meet the … deadline constituted a failure to exhaust his administrative remedies," which deprived the court of jurisdiction. In addition, the statute states that an IJ may reopen any case.[252] This instruction is not reviewable by courts because it does not provide a meaningful standard against which to judge the IJ's decision. Every circuit court has agreed that they lack jurisdiction to review *sua sponte* motions to reopen claims.[253]

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[249] *Mejia-Hernandez v. Holder*, 633 F.3d 818 (9th Cir. 2011).

[250] *Albillo-DeLeon v. Gonzales*, 410 F.3d 1090 (9th Cir. 2005).

[251] *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246 (5th Cir. 2004).

[252] *Id.* at 248.

[253] *See Marekegn Asfaw Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (other circuit cases cited therein).

Burden of Proof

The burden of proof is on the NACARA applicant. If a NACARA applicant is eligible for the presumption of extreme hardship, the extreme hardship element is considered established as soon as the applicant submits a completed application. The IJ then must evaluate whether other evidence overcomes the presumption.

A NACARA applicant should submit evidence to corroborate his or her testimony regarding physical presence, good moral character, and extreme hardship. Credible testimony alone may be sufficient to win a NACARA case.[254] However, for most cases, documentary evidence and witnesses will be necessary. Where such evidence is not available, the applicant should submit a reasonable explanation as to why certain documentary evidence cannot be produced.

Types of Evidence

Physical Presence

An applicant need not document every day in the United States for the prior seven years. However, the applicant should provide documentation for every three to four months in the United States for the prior seven years. If the applicant departed the United States during the prior seven years, the applicant should submit documentation to prove that such departure did not disrupt physical presence.

Evidence that should be submitted to prove presence includes:

- Bankbooks;
- Leases/deeds;
- Receipts;
- Letters;
- Birth, church, or school records;
- Employment records;
- USCIS, ICE, and CBP records;
- Tax records; and
- Witness affidavits.

Good Moral Character

Absence of an arrest or conviction record based on the FBI security check is strong evidence that the applicant has good moral character. However, documentary evidence should be submitted including affidavits from witnesses, preferably witnesses who are U.S. citizens.

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[254] USCIS Memorandum, J. Langlois, "Making *ABC* Registration Determinations, *Chaly-Garcia v. U.S.*, 508 F.3d 1201 (9th Cir. 2007) (Aug. 5, 2008)," AILA Doc. No. 08090264; *see also*, J. Langlois, Director, Asylum Division, Office of Refugee, Asylum and International Affairs, "Making *ABC* Registration Determinations," Memorandum to Asylum Division (Washington, D.C.: June 8, 2006).

Extreme Hardship

NACARA applicants eligible for the presumption of hardship are not initially required to submit documentary evidence to prove hardship. If ICE presents evidence that overcomes the presumption, then the applicant must present evidence of hardship to counter ICE's evidence. Applicants who are not eligible for the presumption of hardship should present documentary evidence. This evidence includes:

- School records of applicant or applicant's children (or both);
- Medical records;
- Records of ties to the community;
- Country conditions information; and
- Sworn declarations from witnesses familiar with the applicant's life and therefore knowledgeable about the potential hardship.

Deadline for Applications

NACARA §203 provides many important benefits to respondents from designated countries, among which is the availability of relief without regard to statutory filing application deadlines. Although the statutory deadlines for the filing of motions to reopen deportation and removal orders in order to apply for NACARA have passed, other aspects of the application process do not have deadlines. Thus, individuals in the United States who currently are not eligible for qualified for NACARA, either because they do not have seven years of physical presence in the United States or for some other reason, may be able to apply in the future once they become eligible.

CONCLUSION

Although fewer and fewer respondents are eligible for generous suspension of deportation benefits that were eliminated by IIRAIRA, cancellation of removal—whether for non–lawful permanent residents or battered spouses and children—is an important avenue toward adjustment of status for eligible respondents regardless of how they entered the United States. However, respondents who are qualifying nationals of El Salvador, Guatemala, and certain former Soviet-bloc countries may still benefit from suspension of deportation and a special-rule cancellation of removal protection under NACARA. Although suspension of deportation, cancellation of removal benefits, and NACARA protections are similar, the eligibility requirements for these differ greatly and practitioners must carefully review these before advising clients and filing the application with the immigration court.