

PRACTITIONER'S TOOLKIT ON CANCELLATION OF REMOVAL FOR LAWFUL PERMANENT RESIDENTS

2016



PennState Law



PIRC
Pennsylvania Immigration
Resource Center

TABLE OF CONTENTS

Lawful Permanent Resident Cancellation of Removal Toolkit

PART 1	7
I. PREFACE.....	8
2016 Edition.....	8
About the Center.....	9
About the Pennsylvania Immigration Resource Center	9
About the Redacted Version (<i>Available Upon Request</i>).....	9
Methodology	10
Statutory Section.....	10
Case Law.....	10
Practice Advisories	11
Advice from Practitioners.....	11
Evidence	11
Sample Legal Documents	11
Legal Disclaimer.....	11
II. INTRODUCTION.....	13
III. STATUTE- LPR Cancellation of Removal: INA § 240A(a) & 8 U.S.C. § 1229b.....	15
Burden of Proof.....	15
SECTION1- (1) Has Been an Alien Lawfully Admitted for Permanent Residence for Not Less Than 5 Years	16
SECTION 2 - (2) Has Resided in the United States Continuously for 7 Years After Having Been Admitted in Any Status.....	17
Stop Time Rule	17
SECTION3- (3) Has Not Been Convicted of Any Aggravated Felony	19
Retroactivity	19
Aggravated Felony Determination	19
Categorical Approach.....	20
Modified Categorical Approach	20
List of Aggravated Felonies Under INA § 101(a)(43):.....	22
SECTION4- Discretionary Component of LPR Cancellation of Removal	31
Positive Factors.....	31
Negative Factors.....	32
SECTION5- Individuals Ineligible for LPR Cancellation Relief.....	33
INA § 240A(c) - Aliens ineligible for relief:.....	33
Explanation of INA § 240A(c).....	34
IV. REGULATIONS	35
8 C.F.R. § 1240.20: Cancellation of removal and adjustment of status under INA § 240A.....	35
8 C.F.R. § 1240.11(a): Creation of the status of an alien lawfully admitted for permanent residence	35
V. CASE LAW	37
(a). Arranged by Court Authority.....	38
(1). <i>Supreme Court of the United States</i>	38
(2). <i>United States Court of Appeals for the Third Circuit</i>	42
(3). <i>Board of Immigration Appeals</i>	57
(b). Arranged by Statutory Element.....	67
(1). <i>Has been an alien lawfully admitted for permanent residence for not less than 5 years</i>	67
(A). <i>Conditional Lawful Permanent Residents</i>	67

TABLE OF CONTENTS

(B). Burden of Proof for Abandonment of Lawful Permanent Resident Status	69
(C). Ability to Impute a Parent’s Lawful Permanent Resident Status.....	70
(2). <i>Has resided in the U.S. continuously for 7 years after having been admitted in any status</i>	71
(A). Retroactivity	71
(B). Re-entry After a Clock Stopping Event	73
(C). An Incomplete NTA’s Application to Stop-Time Rule	77
(D). Ability to Impute Parent’s Continuous Residence Time.....	79
(E). Date to Stop Time of Continuous Residence	80
(F). Stop-Time Rule’s Application to 5 years as Lawful Permanent Resident.....	84
(G). Nonimmigrant Status and 7 Years Continuous Residence Requirement	85
(3). <i>Has not been convicted of any aggravated felony</i>	86
(A). Categorical Approach	86
(B). Modified Categorical Approach.....	88
(C). Simultaneous Applications for Relief if Applicant Committed an Aggravated Felony.....	90
(D). Availability of Alternative Discretionary Relief if Convicted of an Aggravated Felony.....	91
(4). <i>Discretionary Component of LPR Cancellation of Removal</i>	91
(A). Standard for Determining Discretionary Component	91
(B). Court of Appeals Jurisdiction to Hear Appeals Concerning the Discretionary Component.....	95
(C). Retroactivity	95

VI. PRACTICE ADVISORIES 98

(a). How to Apply for LPR Cancellation of Removal.....	98
Preparing the Application	98
Supporting Documents.....	100
Required Biometric and Biographical Information.....	101
Fees	102
Serving and Filing the Application	103
(b). Release from Detention Information	105
Bond	105
Habeas Corpus	105
(c). How to Obtain Client’s Records.....	107
Freedom of Information Act (FOIA) Requests.....	107
Processing Tracks.....	107
Processing Times.....	107
Expediting Requests.....	107
Fees.....	108
Executive Office for Immigration Review (EOIR) FOIA Request	109
How to Request the Information Sought.....	109
Tracking Requests	109
Immigration and Customs Enforcement (ICE) FOIA Request	110
How to Request the Information Sought.....	110
Tracking Requests	110
Customs and Border Patrol (CBP) FOIA Request	111
How to Request the Information Sought.....	111
Tracking Requests	112
Citizenship & Immigration Services (USCIS) Freedom of Information Act (FOIA)	113
How to Request the Information Sought.....	113
Tracking Requests	113
Federal Bureau of Investigation (FBI) Background Check	114
How to Request the Information Sought.....	114
Tracking Requests	114
State Criminal Records	115
Pennsylvania	115

New Jersey	116
Delaware	116
VII. ALTERNATIVES TO §240A(a) – Alternative Forms of Relief, Prosecutorial Discretion, Administrative and Judicial Options for Individuals Denied or Ineligible for LPR Cancellation of Removal Relief.....	118
(a). Alternative Forms of Relief.....	118
Non-LPR Cancellation of Removal.....	118
Incomplete Notice to Appear (Third Circuit Court Jurisdiction).....	119
§ 212(c) Waiver.....	119
§ 212(h) Waiver	120
Asylum.....	121
Withholding of Removal.....	121
Protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).....	121
Temporary Protected Status (TPS)	122
Voluntary Departure.....	122
(b). Prosecutorial Discretion.....	124
(c). Administrative and Judicial Options to Challenge Removal	125
Motions to Reopen or Reconsider.....	125
Stay of Removal.....	125
Judicial Review	126
Administrative Appeal.....	126
VIII. APPENDIX – Pro-se packets from the Florence Immigrant and Refugee Rights Project	127
IX. APPENDIX – Sample documents and forms from government entities; includes the application for LPR Cancellation of Removal from EOIR.....	153
Advice to Applicant.....	154
Instructions.....	156
Form EOIR 42A.....	159
Form EOIR 28.....	166
Sample Cover Page.....	168
Sample Written Pleading.....	169
Sample Proof of Service	173
Form G-325A: Biographic Information	175
X. APPENDIX – Citation Guidelines from EOIR Immigration Court Practice Manual	177
XI. APPENDIX – Table of Authorities.....	198
Federal Statutes Cited	198
Federal Regulations Cited.....	199
Public Laws	200
Federal Agency Documents Cited.....	200
Cases Cited	202
Book Citations.....	204
Other Citations	204
Practitioner/Stakeholder Citations.....	205
PART 2 (REDACTED).....	206
I. ADVICE FOR PRACTITIONERS – Suggested Litigation Strategies & Best Practices	207

TABLE OF CONTENTS

Alternative Remedy: 212(h) & Aggravated Felonies	207
At Initial Client Intake	207
Bond: Advising Clients Whether or Not to Post Bond	207
NTA has been issued	209
NTA has not been issued	209
Obtaining the Client’s A-file/Criminal Record (in California).....	209
Preparing the Application	210
Release Plan	210
At the Hearing.....	211
At the Master Calendar Hearing.....	211
Cite to Your Evidence	211
Direct and Cross Examination	211
Family Presence	213
At Conclusion of Case	213
Biometrics.....	214
Briefs and Forms.....	214
Forms.....	214
Do Brief	214
Usually Do Not Brief	215
Criminal Defense Attorney Cooperation	215
Employment Authorization Document.....	216
Evidence	216
Addendum and Index	216
Affidavit of Others.....	217
Affidavits from Respondent: Yes File	217
Affidavits from Respondent: No, Do Not File	219
Country Conditions.....	219
Psychological Evaluations.....	219
Taxes	221
Immigration Judges	221
Standard of Proof	222
Stop-Time Rule	222

II. APPENDIX – Tools & Sample Documents from Private Attorneys and Non-Governmental Organizations223

(a). Intake Form	223
Initial Client Intake	224
(b). Evidence Guide.....	230
Examples of Evidence for the Discretionary Component.....	230
Family ties within the U.S.	230
Evidence of hardship to the applicant and family if deportation occurs	231
Service in Armed Forces.....	232
History of employment	232
Existence of property or business ties	232
Existence of value and service to the community	232
Proof of genuine rehabilitation if a criminal record exists.....	233
Documentation Check List for Clients	234
(c). Sample Legal Documents.....	237
1. Respondent’s Reply to DHS’ Closing Arguments	241
2. Respondent’s Closing Arguments In Support of Applications for Cancellation of Removal and for Asylum, Withholding of Removal, and Relief Under the Convention Against Torture.	247
3. Respondent’s Response to DHS Motion to Reconsider.....	259

TABLE OF CONTENTS

4. Memorandum in Support of Respondent's Application for Cancellation of Removal	270
5. Memorandum in Support of Respondent's Application for Cancellation of Removal and Document Submission in Support Thereof	281
6. Memorandum in Support of Respondent's Application for Cancellation of Removal	290
7. Motion To Permit Hearing On Form EOIR-42A, Application For Cancellation.....	301
8. Motion to Advance Merits Hearing.....	314
9. Order of the Immigration Judge	317
10. Motion to Accept Untimely Filing.....	318
11. Witness List	322
12. Respondent's Intent to Offer Evidence in Support of Motion to Permit Hearing On Form EOIR-42a, Application For Cancellation	325

PART 1

I. PREFACE

2016 Edition

This toolkit is a compilation of information about INA § 240A(a), or Cancellation of Removal for lawful permanent residents (LPR). The toolkit is intended to serve as a resource for immigration attorneys representing LPR clients facing removal from the United States. In addition to describing the LPR Cancellation statute, the toolkit also provides information about aggravated felonies, the discretionary component of Cancellation, individuals who are ineligible for LPR Cancellation, options available to those who are ineligible for LPR Cancellation, applicable regulations, the Florence Immigrant and Refugee Rights Project Pro Se packet, sample documents from government entities, and immigration court citation guidelines.

This toolkit is an update of the 2010 edition. The 2016 edition provides the reader with updated case law and government forms, alternative remedies, information on obtaining client records, new evidence section, and additional suggested litigation strategies and briefs from practitioners. This toolkit was created by Laura Lopez Ledesma and Lauren Picciallo, second year law students of Penn State Law's Center for Immigrants' Rights Clinic (Center), under the supervision of Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar and professor of clinical law at Penn State Law-University Park. Invaluable feedback was provided by Matthew Lamberti, Esq., managing attorney at Pennsylvania Immigration Resource Center (PIRC). The Center is thankful to the following practitioner's for their advice, briefs, and other supporting documents:

- Anna M. Gallagher, Esq., Maggio-Kattar P.C. (2009).
- Christina Powers, Esq. (2009).
- George M. Baurkot, Esq., Baurkot & Baurkot (2016).
- Jack Herzig, Esq. (2009).
- Jeff Joseph, Esq., Joseph Law Firm P.C. (2009).
- Joyce Antila Phipps, Esq., Casa de Esperanza, Bound Brook, NJ (2009).
- Julie C. Ferguson, Esq. (2009).
- Lisa Brodyaga, Esq., Refugio Rio Grande Law Office (2009).
- Maria Baldini-Potermin, Esq., Maria Baldini-Potermin & Associates, P.C. (2009).
- Matthew Lamberti, Esq., Pennsylvania Immigration Resource Center, York, PA (2016).
- Raymond G. Lahoud, Esq., Baurkot & Baurkot (2016).
- Rosina Stambaugh, Esq., The Law Office of Christopher A. Ferro, LLC (2009).

- Shelley Wittevrongel, Esq. (2009).
- Siobhan Waldron, Esq., formerly at Immigration Center for Women and Children (Los Angeles, CA), currently at Centro Legal de la Raza (Oakland, California) (2016).
- Susan Compernelle, Esq. (2009).
- Toni Maschler, Esq., Bromberg, Kohler Maya & Maschler, PLLC (2009).

About the Center

Penn State Law's Center for Immigrants' Rights Clinic is directed by Professor [Shoba Sivaprasad Wadhia](#). At the Center, students produce white papers, practitioner toolkits, and primers of national impact for institutional clients. Students at the Center also engage in community outreach and education on immigration topics such as immigration enforcement and prosecutorial discretion. Finally, the Center provides legal support in individual cases of immigrants challenging deportation (removal) or seeking protection by the Department of Homeland Security and in the courts.

About the Pennsylvania Immigration Resource Center

The Pennsylvania Immigration Resource Center (PIRC) is located less than a mile from York County Prison and has become the leading source of legal services to immigrants detained by the Department of Homeland Security in Pennsylvania. PIRC offers pro bono representation to the most vulnerable immigrant detainees. In providing legal and educational resources to detained populations, PIRC seeks to empower unrepresented immigrants to evaluate and manifest their defenses against deportation from the U.S..

About the Redacted Version (Available Upon Request)

In creating the toolkit, we spoke to immigration 'stakeholders' and collected suggested litigation strategies and sample documents included the toolkit. Part 2 of the toolkit is available only upon request from the Center for Immigrants' Rights at centerforimmigrantsr@pennstatelaw.psu.edu. Part 2 contains suggested litigation strategies and best practices and other sample documents. The sample documents include motions, memoranda, briefs, exhibit lists for supporting documents, certificates of service, and direct examination questions.

Throughout this toolkit, we will use the following acronyms to refer to specific terminology:

- AEDPA – Anti-Terrorism and Effective Death Penalty Act of 1996
- BIA – Board of Immigration Appeals
- DHS – Department of Homeland Security
- EOIR – Executive Office for Immigration Review

- IIRIRA – Illegal Immigrant Reform and Immigrant Responsibility Act of 1996
- INA – Immigration and Nationality Act
- LPR – Lawful Permanent Resident
- IJ – Immigration Judge
- NTA – Notice To Appear
- USCIS – United States Citizenship and Immigration Services

Methodology

This toolkit is an update of the 2010 edition. There are several additions and changes to the 2016 version of the toolkit. Below you will find the methodology and significant changes to the sections of the toolkit.

Statutory Section

The statutory section of the toolkit, Part 1, Roman Numeral III, describes each statutory element of LPR Cancellation of Removal. Each statutory element in LPR Cancellation of Removal is a subheading and contains a brief description of critical case law developments for that element. We have included hyperlinks to helpful practice advisories throughout the statutory section and hypotheticals addressing more complex issues of that element. While most of the case law is applicable to all circuits, this toolkit is specifically geared towards the Third Circuit. For example, Section 3, which covers the element “has not been convicted of any aggravated felony,” contains the entirety of § 101(a)(43) of the Immigration and Nationality Act (INA) in plain English. In addition to the statute, we have included case law specific to the Third Circuit that addresses issues applicable to the specific statutory subsection of 101(a)(43).

Case Law

The case law section of the toolkit, Part 1, Roman Numeral V, includes the case law that addresses the most critical components of the statutory elements. All case law in the 2016 edition was Shepardized and screened for additional developments.

Additionally, the case law section is arranged in two fashions: (1) arranged by court authority and (2) arranged by statutory element. In the case law section arranged by statutory element, we have further split each statutory element into sub-topics. For example, in the case law section which addresses the statutory element “has been an alien lawfully admitted for permanent residence for not less than 5 years” the sub-topics include: (A) Conditional Lawful Permanent Residents, (B) Burden of Proof for Abandonment of Lawful Permanent Resident Status, and (C) Ability to Impute a Parent’s Lawful Permanent Resident Status. All case law we have included is precedent in the Board of Immigration Appeals or Third Circuit.

Practice Advisories

The Practice Advisory section of the toolkit, Part 1, Roman Numeral VI, includes “how to” instructions and additional helpful information on how to help get your client out of detention. This section has three subheadings. Section (a) includes information about how to prepare an LPR Cancellation of Removal application, supporting documents, required biometric and biographical information, fees, and serving and filing the application. Section (b) contains information about release from detention, which includes a brief description on bond and habeas corpus. Section (c) includes instruction on how to obtain client’s records from the federal government and the states of New Jersey, Pennsylvania, and Delaware.

Advice from Practitioners

The Advice of Practitioners section, Part 2, Roman Numeral II, Section (a), includes suggested litigation strategies, best practices, and helpful tips in preparing the application and for court hearings. This section has been split up into subtopics that address different issues ranging from alternative remedies to the use of affidavits. Additionally, this section includes interviews from 2009 and 2016. Practitioners who were added to the section responded to our request for participation, which was sent to a variety of immigration listservs. The 2009 interviews have all been vetted to make sure each points are still relevant as of 2016.

Evidence

The Evidence section, Part 2, Roman Numeral I, Section (b), includes a consolidation of evidence that was suggested by different attorneys. Attorneys who participated were those who responded to our immigration listserv inquiries in 2016 and past attorneys who participated when the 2010 LPR Cancellation of Removal edition was developed.

Sample Legal Documents

The Sample Legal Documents Part 2, Roman Numeral 1, Section (c), includes briefs and other documents submitted to the Immigration Court. At the beginning of the sample legal documents section is a brief description of each legal document contained. Briefs that were included were obtained from those who responded to the listserv inquiries. Additionally, all briefs were vetted for relevancy and accuracy.

Legal Disclaimer

This Toolkit is limited in its scope as it is primarily focused on Cancellation of Removal for Lawful Permanent Residents. Moreover, it is not a substitute for reading the primary sources of law that pertain to such remedy. This Toolkit is for informational purposes only and not for the purpose of providing legal advice. Although we have gone to great

lengths to make sure our information is accurate and useful, we recommend you conduct further research based on your client's specific circumstances and circuit law governing your client's case. Questions or corrections to this toolkit should be sent to centerforimmigrantsr@pennstatelaw.psu.edu.

II. INTRODUCTION

In 1996, Congress enacted two major pieces of legislation that modified the statutory requirements of relief from removal. The 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) merged the former § 212(c) waiver-of-deportation and suspension-of-deportation methods of relief, and consolidated them into a statutory scheme called “Cancellation of Removal.”¹ One form of relief is Cancellation of Removal for Lawful Permanent Residents (LPR) and another form of relief is Cancellation of Removal for Non-LPRs. The other major piece of legislation was the Anti-Terrorism and Effective Death Penalty Act (AEDPA).²

Both IIRIRA and AEDPA greatly expanded the enumerated crimes falling under “aggravated felony,” thereby limiting relief for many noncitizens who would otherwise be eligible. IIRIRA applied special provisions and restrictions on noncitizens charged with aggravated felonies. For instance, an LPR charged with an “aggravated felony” after April 1, 1997 is ineligible for § 240A(a) Cancellation of Removal.³ Though Congress repealed § 212(c) relief, § 212(c) relief still can be invoked in some instances by noncitizens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea.⁴

Under IIRIRA, two forms of Cancellation of Removal were devised, INA §§ 240A(a) and 240A(b). Cancellation of Removal for non-LPRs is available to “an alien who is inadmissible or deportable.”⁵ Unlike § 240A(a), which applies only to LPRs, § 240A(b) applies to all noncitizens who may qualify.⁶ However, the focus of this toolkit is limited to § 240A(a): LPR Cancellation of Removal. § 240A(a) reads as follows:

¹ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, div. C; 110 Stat. 3009, 3009-46 to 724 (1996); H.R. Rep. 104-863 (1996). 104th Cong. 2d Sess.; H.R. Conf. Rep. No. 104-828, 104th Cong. 2d Sess. (1996); S. Rep. 104-249, 104th Cong. 2d Sess. (1996); 142 Cong. Rec. S4730-01, § 150 (1996); 142 Cong. Rec. H2378-05, § 309 (1996); 8 U.S.C. §§ 1229b(a), 1229b(b) (2016); INA §§ 240A(a) and 240A(b).

² Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, title IV; 110 Stat. 1214, 1258-81, § 440(e) (1996); 8 U.S.C. § 1101(a)(43) (2016).

³ 8 U.S.C. § 1229b(a)(3) (2016); INA § 240A(a)(3).

⁴ 8 C.F.R. §§ 1003, 1212, 1240 (2016); *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

⁵ 8 U.S.C. § 1229b(b)(1) (2016); INA § 240A(b)(1).

⁶ 8 U.S.C. § 1229b(a) (2016); INA § 240A(a); 8 U.S.C. § 1229b(b)(1) (2016); INA § 240A(b)(1).

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-

- (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,*
- (2) has resided in the United States continuously for 7 years after having been admitted in any status, and*
- (3) has not been convicted of any aggravated felony.⁷*

The relief of Cancellation of Removal under INA § 240A(a) applies to eligible noncitizens placed in removal proceedings on or after April 1, 1997.⁸ As with most forms of relief, Cancellation of Removal is granted or denied at the discretion of the Immigration Judge.

⁷ 8 U.S.C. § 1229b(a) (2016); INA § 240A(a).

⁸ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, div. C; 110 Stat. 3009, 3009-46 to 724 (1996); H.R. Rep. 104-863 (1996). 104th Cong. 2d Sess.; H.R. Conf. Rep. No. 104-828, 104th Cong. 2d Sess. (1996); S. Rep. 104-249, 104th Cong. 2d Sess. (1996); 142 Cong. Rec. S4730-01, § 150 (1996); 142 Cong. Rec. H2378-05, § 309 (1996).

III. STATUTE- LPR Cancellation of Removal: INA § 240A(a) & 8 U.S.C. § 1229b

“The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

- (1) Has been an alien lawfully admitted for permanent residence for not less than 5 years,
- (2) Has resided in the United States continuously for 7 years after having been admitted in any status, and
- (3) Has not been convicted of any aggravated felony.”

Burden of Proof

While the government has the burden of proving removability by clear and convincing evidence,⁹ the applicant has the burden of proving that s/he qualifies for LPR Cancellation of Removal.¹⁰ For example, if charging that the noncitizen is removable for conviction of an aggravated felony, during the removal proceeding the government has to prove that the conviction is an aggravated felony. However, for purposes of establishing eligibility for relief, a noncitizen may have to show that the conviction is *not* an aggravated felony.

For a practice advisory about burden of proof for aggravated felonies, please see: National Immigration Project, Practice Advisory: The Burden of Proof to Overcome the Aggravated Felony Bar to Cancellation of Removal (Mar. 22, 2007), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2007_22Mar_proof-burden-agfel.pdf.

⁹ 8 U.S.C. § 1229a(c)(3)(A) (2016); INA § 240(c)(3)(A) (2016).

¹⁰ 8 U.S.C. § 1229a(c)(4)(A) (2016); INA § 240(c)(4)(A) (2016).

SECTION 1-**(1) Has Been an Alien Lawfully Admitted for Permanent Residence for Not Less Than 5 Years**

The key terms under this provision are "lawfully admitted for permanent residence." "Lawfully admitted for permanent residence" means having been lawfully accorded the entry into the "United States after inspection and authorized by an immigration officer."¹¹ A person who obtains lawful permanent residence by fraud or mistake is deemed to have not been "lawfully admitted for permanent residence" and thus is ineligible for Cancellation of Removal.¹² Attorneys should note that a child of an LPR may not impute the parent's years of lawful permanent residency in order to achieve the five year requirement.¹³

Hypothetical	<ul style="list-style-type: none"> • In January of 2000, a noncitizen was admitted into the U.S. as a Conditional Permanent Resident. • In March of 2005, the noncitizen was convicted of theft.
Assessment	For purpose of LPR Cancellation of Removal, this noncitizen has been admitted as a Permanent Resident although the admission was on a conditional basis. Thus, this noncitizen has accrued 5 years and two months as a lawfully admitted permanent resident. ¹⁴

¹¹ 8 U.S.C. § 1101(a)(20) (2016); INA § 101(a)(20) (2014).

¹² See *Gallimore v. Attorney General*, 619 F.3d 216, 223 (3rd Cir. 2010) (citing *Matter of Koloamatangi*, 23 I. & N. Dec. 548 (BIA 2003)); See also, *Ijomah-Nwosa v. Holder*, Civ. No. 14-2527 (WJM), 2015 WL 5097925 at *2 (D.N.J. 2015) ("Even though the Government mistakenly admitted and granted Petitioner lawful permanent resident status as the unmarried child of a U.S. citizen, such status is deemed void *ab initio* because it did not comply with the relevant substantive legal requirements that supported Petitioner's eligibility").

¹³ *Holder v. Martinez Gutierrez*, 132 S.Ct. 2011, 2018 (2012).

¹⁴ See generally, *Gallimore v. Attorney General*, 619 F.3d 216 (3d Cir. 2010).

SECTION 2-**(2) Has Resided in the United States Continuously for 7 Years After Having Been Admitted in Any Status**

An "admission" is the lawful entry of a noncitizen into the United States after inspection and authorization by an immigration officer.¹⁵ A noncitizen who is present in the U.S. without inspection has not made a lawful admission.¹⁶ Likewise, a noncitizen who was paroled into the U.S. has not made a lawful admission.¹⁷ Hence, a noncitizen's entry without inspection or by parole does not commence continuous residence.

Importantly, § 240A(a)(2) does not require a noncitizen to have resided in the U.S. in a *lawful* immigration status; rather it requires an admission in "any status."¹⁸ Also, the continuous residence requirement does not apply to a noncitizen who has served 24 months in active-duty status in the U.S. armed forces, was in the U.S. at the time of enlistment or induction, and was honorably discharged.¹⁹

Stop Time Rule

Additionally, § 240(A)(d)(1), also known as the Stop Time Rule, sets forth that continuous residence stops at the earlier of one of the following: (1) the date of the commission of the crime which makes the noncitizen inadmissible or deportable or (2) the date the noncitizen received the most current Notice to Appear (NTA).²⁰ An attorney should be aware that service of an NTA in a previous proceeding does not serve to bar accrual of more time of continuous residence with concern to "an application for Cancellation of Removal filed in the current proceeding."²¹ Further, an attorney should be aware that children applying for LPR Cancellation of Removal must also meet the 7 year continuous residency requirement and may not impute their parents' continuous residency to meet the requirement.²²

¹⁵ 8 U.S.C. § 1101(a)(13) (2016); INA § 101(a)(13).

¹⁶ 8 U.S.C. § 1182 (a)(6)(A) (2016); INA § 212(a)(6)(A).

¹⁷ 8 U.S.C. § 1101(a)(13)(B) (2016); INA § 101(a)(13)(B).

¹⁸ Matter of Perez, 22 I. & N. Dec. 689, 692 (BIA 1999).

¹⁹ 8 U.S.C. § 1229b(d)(3) (2016); INA § 240A(d)(3).

²⁰ Matter of Ordaz-Gonzalez, 26 I. & N. Dec. 637, 638 (BIA 2015).

²¹ Matter of Cisneros-Gonzalez, 23 I. & N. Dec. 668, 668 (BIA 2004).

²² Holder v. Martinez Guitierrez, 132 S.Ct. 2012, 2018 (2012).

- Hypothetical
- On January 15, 1999, a noncitizen was admitted into the U.S. as a tourist.
 - On January 15, 2000, the noncitizen married a U.S. citizen and adjusted to Lawful Permanent Residency.
 - On January 30, 2006, the noncitizen was arrested for possession of cocaine.
 - On January 31, 2006, the noncitizen pled guilty for possession of cocaine.
 - On January 31, 2010, the noncitizen was served with a Notice to Appear.
- Assessment
- For purposes of LPR Cancellation of Removal, this noncitizen's continued residence clock stopped on January 30, 2006, when the crime was committed.²³ The stop-time rule was triggered 7 years and 15 days after the noncitizen was admitted as a tourist into the U.S.. Thus, this noncitizen has accrued the required 7 years of continuous residency after having been admitted into the U.S. in any status.

²³ See generally, Matter of Perez, 22 I. & N. Dec. 689 (BIA 1999).

SECTION 3-**(3) Has Not Been Convicted of Any Aggravated Felony**

A lawful permanent resident is deportable if convicted of an aggravated felony at any time after admission.²⁴ Furthermore, under INA § 240A(a)(3), an LPR convicted of an aggravated felony is ineligible for Cancellation of Removal relief. The list of aggravated felonies under INA § 101(a)(43) expanded as a result of two pieces of legislation: the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). As one scholar notes, “The definition of aggravated felony encompasses a range of offenses from very serious to relatively minor offenses and imposes harsh consequences for a noncitizen convicted of qualifying crimes.”²⁵

Retroactivity

An attorney representing an applicant for LPR Cancellation of Removal should be aware of the extensive list of aggravated felonies under INA § 101(a)(43). An attorney should also be aware that the aggravated felony definition applies retroactively, which means that a crime that did not constitute an aggravated felony at the time of an applicant’s conviction may be classified as such at the time of application for LPR Cancellation. When this retroactivity occurs, the previous crime will be considered an aggravated felony and will prevent the LPR from successfully obtaining Cancellation of Removal. Further, the attorney should be aware that some sections contain a term of imprisonment. A suspended sentence counts towards the one-year requirement for immigration purposes.²⁶

Aggravated Felony Determination

The attorney should be cognizant that not all state convictions will fall within the meaning of the comparable federal definition of aggravated felony under INA § 101(a)(43). That is, some state criminal statutes will not be a close enough comparison to the INA definition of aggravated felony for the applicant to be considered an aggravated felon for immigration purposes.²⁷ To determine whether the state conviction falls within the meaning of the aggravated felony for immigration

²⁴ 8 U.S.C. § 1227(a)(2)(A)(iii) (2016); INA § 237(a)(2)(A)(iii).

²⁵ Erica Steinmiller-Perdomo, *Consequences Too Harsh For Noncitizens Convicted of Aggravated Felonies?*, 41 Fla. St. U. L. Rev. 1173, 1173 (2014).

²⁶ 8 U.S.C. § 1101(a)(48)(B) (2016); INA § 101(a)(48)(B).

²⁷ *See generally*, *Moncreiffe v. Holder*, 133 S.Ct. 1678, 1684 (2013).

purposes, the attorney should apply the categorical approach and, when necessary, should apply the modified categorical approach.

Categorical Approach

Under the **Categorical Approach**²⁸, the attorney should look to the state statute to see if the state statute's elements fit within the "generic" federal definition of the corresponding aggravated felony.²⁹ A state offense is a categorical match to a federal offense *only if* the state offense conviction "necessarily involved... facts" that would equate to the generic federal offense.³⁰ Notably, the adjudicator will *not* consider the factual circumstances of the respondent's case, and will only look to whether the statute's elements are comparable.³¹ Additionally, the respondent must show that there was a *realistic probability*, not a theoretical possibility, that the state would apply its statute to conduct that falls outside of the generic definition of the applicable federal statute.³² In order to show a realistic probability, the attorney should provide the adjudicator with case law showing that circumstances exist in which the state statute would not be applied in the same manner in which the federal statute was applied.

An example of the application of the Categorical Approach appears in *Moncreiffe v. Holder*.³³ There, the respondent pled guilty to possession with intent to distribute marijuana.³⁴ However, the Supreme Court held that the state statute did not fit within the meaning of an aggravated felony because the state statute did not reveal whether the respondent obtained remuneration nor did the state statute reveal the amount of marijuana necessary for a conviction. Therefore, no way existed to determine whether every possible scenario of conviction under the state statute would necessarily fall within the bounds of the federal statute.³⁵

Modified Categorical Approach

The **Modified Categorical Approach** is a tool of the **Categorical Approach** and must be

²⁸ For more information about the categorical approach see, Immigration Defense Project, <http://immigrantdefenseproject.org/wp-content/uploads/2013/05/Moncreiffe-PA-5-1-13-FINAL.pdf> (last visited May 12, 2016).

²⁹ *Moncreiffe v. Holder*, 133 S.Ct. 1678, 1680 (2013).

³⁰ *Id.* at 1680.

³¹ *Moncreiffe v. Holder*, 133 S.Ct. 1678, 1680 (2013).

³² *Moncreiffe v. Holder*, 133 S.Ct. at 1684.

³³ *Id.*

³⁴ *Id.* at 1683.

³⁵ *Id.* at 1680.

applied if the state statute is *divisible* into subsections, at least one of which contains elements that trigger a match with the generic definition.³⁶ A state statute is divisible if the statute can be divided into more than one section so as to see whether an alternative portion of the statute would align with the federal statute.³⁷

A case example of the when the Court has applied the Modified Categorical Approach is *Descamps v. U.S.*³⁸ There, the Supreme Court found that a California burglary statute was indivisible.³⁹ The California statute would have allowed for lawful and unlawful entries to be considered burglary, unlike the federal statute that was only applicable to unlawful entries.⁴⁰ Because the statute did not require that the jury decide which alternative, lawful or unlawful entry, satisfied a conviction, the Supreme Court found that the statute was indivisible.⁴¹ If the statute is determined to be divisible, then the court may consult a limited group of documents in the record of conviction to determine which of the multiple crimes covered by the divisible statute corresponds to the Respondent's conviction.⁴²

For more information about the **Modified Categorical Approach** see the following:

- Immigration Defense Project, Practice Advisory: *Descamps v. United States* and the Modified Categorical Approach (July 17, 2013), <http://immigrantdefenseproject.org/wp-content/uploads/2013/06/Descamps-advisory-7-17-FINAL.pdf>.
- Immigration Defense Project, Practice Advisory: *Matter of Chairez-Castrejon*: BIA Applies *Moncrieffe* and *Descamps* to Modify and Clarify its Views on Proper Application of the Categorical Approach (July 31, 2014) https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2014_13Jul_chairez-castrejon.pdf.

³⁶ *Descamps v. US*, 133 S.Ct. 2276, 2279 (2013).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

List of Aggravated Felonies Under INA § 101(a)(43)⁴³:**(A) murder, rape, or sexual abuse of a minor;⁴⁴**

- In determining whether a crime involving sexual abuse of a minor falls within INA § 101(a)(43)(A), the Board of Immigration Appeals (Board) finds it useful to look to 18 U.S.C. § 3509(a)(8), which defines sexual abuse as “the employment, use persuasion, inducement, enticement or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution or other form of sexual exploitation of children, or incest with children.”⁴⁵

(B) illicit trafficking in a controlled substance (see Controlled Substances Act, 21 U.S.C. 802), including a drug tracking crime (see 18 U.S.C. 924(c));⁴⁶**(C) illicit trafficking in firearms or illicit trafficking in destructive devices (see Crimes and Criminal Procedure, 18 U.S.C. 921) or illicit trafficking in explosive**

⁴³ See <http://uscode.house.gov/>.

⁴⁴ Restrepo v. Attorney General 617 F.3d 787, 800 (3d Cir. 2010) (holding that N.J. Stat. Ann. § 2C:14-3(a) is a categorical match to INA § 101(a)(43)(A)); Stubbs v. Attorney General, 452 F.3d 251, 256 (3d Cir. 2006) (finding that the New Jersey statute N.J. Stat. Ann. § 2C:24-4(a) is not a categorical match to INA § 101(a)(43)(A); Matter of Small, 23 I. & N. Dec. 448, 450 (BIA 2002) (finding that sexual abuse of a minor includes people charged with misdemeanor sexual abuse).

⁴⁵ Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 995 (1999); see also Stubbs v. Attorney General, 452 F.3d 251, 256 (3d Cir. 2006) (finding that in order for a crime to fall within INA § 101(a)(43)(A), the crime necessarily needs to involve a “past act with a child”).

⁴⁶ Bautista v. Attorney General 608 Fed. Appx. 83, 86 (3d Cir. 2015) (holding that N.J. Stat. Ann §§ 2C:35-5 and 2C:35-5(b)(8) are aggravated felonies under the INA) (3d Cir 2015); Oliveira v. Attorney General, 618 Fed. Appx. 126, 130 (3d Cir. 2015) (holding that N.J. Stat. Ann. § 2C: 35-10(a)(1) is an aggravated felony under INA § 101(a)(43)(B)); Mattie v. Attorney General, 585 Fed. Appx. 821, 822 (3d Cir. 2014) (holding that the noncitizen failed to show that N.J. Stat. Ann § 2C:35-5(b)(11) was not an aggravated felony); Lepianka v. Attorney General, 586 Fed. Appx. 869, 871 (3d Cir. 2014) (holding that N.J. Stat. Ann. § 2C:35-5(a)(1), and (b)(2) are aggravated felonies under the INA); Kporlor v. Attorney General, 529 Fed. Appx. 173, 176 (3d Cir. 2013) (holding that N.J. Stat. Ann. § 2C:35-5(a)(1) and (b)(2) was an aggravated felony under INA § 101(a)(43)(B)); Cadet v. Attorney General, 339 Fed. Appx. 273, 275 (3d Cir. 2009) (holding that N.J. Stat. Ann. § 2C:35-5(b)(3) is an aggravated felony within the INA); Marte v. Attorney General, 339 Fed.Appx. 265, 268 (3d Cir. 2009) (holding that N.J. Stat. Ann. § 2C:35-7 is an aggravated felony within the INA); Drakes v. Attorney General, 266 Fed. Appx. 184, 186 (3d Cir. 2008) (holding that New York State Penal Law 220.16(1) is an aggravated felony under INA 101(a)(43)(B)); In re: Francisco Rodriguez-Trinidad, A044 892640, (BIA Feb. 24, 2016) (finding that 35 Pa. Cons. Stat § 780-113(a)(30) is not a categorical match with INA § 101(a)(43)(B)).

materials (see Crimes and Criminal Procedure, 18 U.S.C. 841(c));

(D) an offense relating to **laundering of monetary instruments** (see 18 U.S.C. 1956) or relating to engaging in **monetary transactions in property derived from specific unlawful activity** (see 18 U.S.C. 1957) **if the amount of the funds exceeded \$10,000;**

(E) an offense described in the following:

a. relating to explosive materials offenses:⁴⁷

- It shall be unlawful for any person **to receive, possess, transport, ship, conceal, store, barter, sell, dispose of, pledge or accept as security for a loan, any stolen explosive materials** which are moving as, which are part of, which constitute, or which have been shipped or transported in, interstate or foreign commerce, either before or after such materials were stolen, knowing or having reasonable cause to believe that the explosive materials were stolen. (see 18 U.S.C. 842(h));

unlawful for a person who: is convicted of a crime punishable by imprisonment for a term exceeding one year; who is a fugitive from justice; who is an unlawful user of or addicted to any controlled substance; who has been adjudicated as a mental defective or who has been committed to a mental institution; an alien (unless admitted as an LPR (INA § 101(a)(20), a refugee (INA § 207), in asylum status (INA § 208)); **and** - is a foreign law enforcement officer of a friendly foreign government; **or**

is a person having the power to direct or cause the direction of the management and policies of a corporation, partnership, or association licensed, and the shipping, transporting, possession, or receipt of explosive materials is in furtherance of such power. (see 18 U.S.C. 842(i));

- Whoever **transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent** that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property will be imprisoned or fined, or both; and if personal injury results to any person will be imprisoned or fined, or both; and if death results to any person will be imprisoned or fined, or both (see 18 U.S.C. 844(d));

⁴⁷ *Bautista v. Attorney General*, 744 F.3d 54, 74 (3d 2015) (finding that New York Penal Law §§ 110 and 150.10. is not a categorical match to § 101(a)(43)(E)(i) because the New York Statute lacked the Federal Statute's jurisdictional element).

- Whoever, **through the use of the mail, telephone, telegraph, or other instrument** of interstate or foreign commerce, or in or affecting interstate or foreign commerce, **willfully makes any threat, or maliciously conveys false information** knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property **by means of fire or an explosive** shall be imprisoned or fined, or both. (see 18 U.S.C. 844(e));
- Whoever **maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property** in whole or in part owned or possessed by, or leased to, the U.S., or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned or fined or both; **or directly or proximately causes personal injury or creates a substantial risk of injury to any person; or directly or proximately causes the death of any person** (see 18 U.S.C. 844(f));
- Whoever **possesses an explosive in an airport** or building in whole or in part owned, possessed, or used by, or leased to, the U.S. or any department or agency, except with the written consent of the agency, imprisoned or fined, or both; see exceptions. (see 18 U.S.C. 844(g));
- Whoever- (1) **uses fire or an explosive to commit any felony** which may be prosecuted in a court of the U.S., or (2) **carries an explosive during the commission of any felony** which may be prosecuted in a court of the U.S.. (see 18 U.S.C. 844(h));
- Whoever **maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce** shall be imprisoned or fined or both; and if personal injury or death results to any person, shall be imprisoned or fined or both (see 18 U.S.C. 844(i));

b. relating to **firearms offenses**:

It shall be unlawful for any person-

- who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. (see 18 U.S.C. 922(g)(1));
- who is a **fugitive from justice** (see 18 U.S.C. 922(g)(2));
- who is an **unlawful user of or addicted to any controlled substance** (as defined in (21 U.S.C. 802 § 102)) (see 18 U.S.C. 922(g)(3));
- who has been **adjudicated as a mental defective** or who has been **committed to a mental institution** (see 18 U.S.C. 922(g)(4));

- who, being an alien- is **illegally or unlawfully in the U.S.**; or except as provided in subsection (y)(2), has been **admitted to the U.S. under a nonimmigrant visa.** (see 18 U.S.C. 922(g)(5));
- It shall be unlawful for any person **to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition,** which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen (see 18 U.S.C. 922(j));
- It shall be unlawful for any person **who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport** in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce (see 18 U.S.C. 922(n));
- This subsection does not apply with respect to- **a transfer to or by, or possession by or under the authority of, the U.S.** or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; **or any lawful transfer or lawful possession of a machinegun** that was lawfully possessed before the date this subsection takes effect. (see 18 U.S.C. 922(o))
- It shall be unlawful for any person **to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm-**(1)(A) **that, after removal of grips, stocks, and magazines, is not as detectable** as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; **or (B) any major component** of which, when subjected to inspection by the types of x-ray machines commonly used at airports, **does not generate an image that accurately depicts the shape of the component;** (2) See for term definitions and exception. (see 18 U.S.C. 922(p));
- It shall be unlawful for any person **to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation** under 18 U.S.C. 925(d)(3) (see 18 U.S.C. 922(r));
- Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, **ships, transports, or receives a firearm or any ammunition** in interstate or foreign commerce shall be imprisoned or fined or both (see 18 U.S.C. 924(b));
- Whoever **knowingly transfers a firearm, knowing that such firearm will be**

- used to commit a crime of violence** (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned or fined or both (see 18 U.S.C. 924(h)).
- c. relating to **firearms offenses** (Prohibited Acts, Internal Revenue Code of 1986, 26 U.S.C. 5861)
- (F) a **crime of violence** (as defined in 18 U.S.C. 16 of Title 18, but not including a purely political offense) for which the term of imprisonment is at least one year.
- Under 18 U.S.C. § 16(a), “The term ‘crime of violence’ means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”⁴⁸
 - Under 18 U.S.C. § 16(b), “The term ‘crime of violence’ means any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”⁴⁹
 - Under 18 U.S.C. § 16(a), a crime of violence is a crime which require a mens rea that “suggests a higher degree of intent than negligent or merely accidental conduct.”⁵⁰ In this regard, a crime of violence necessarily involves “*violent force* - that is, force capable of causing physical pain or injury to another person.”⁵¹
 - Although 18 U.S.C. § 16(b) sweeps more broadly than § 16(a), whether a reckless mens rea can amount to a crime of violence under § 16(b), depends on whether the statute encompasses “a person acting in disregard of the risk

⁴⁸ 18 U.S.C. § 16(a) (2016).

⁴⁹ 18 U.S.C. § 16(b) (2016).

⁵⁰ *Leocal v. Ashcroft*, 543 U.S. 1, 1 (2004)(finding that Florida’s Driving while Under the Influence statute did not require a mens rea requirement other than negligence; therefore, the Florida Statute did not necessarily involve facts that would be a conviction under 18 U.S.C. § 16); *See also*, *Aguilar v. AG*, 663 F.3d 692, 700 (3rd Cir. 2011)(finding that a reckless crime could be a crime of violence under § 16(b) as both statute and case law focus on the risk of the intentional use of force, not merely on mens rea); *But see*, *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008) (finding that criminal recklessness was not a crime of violence under U.S.C. § 16(b)).

⁵¹ *Johnson v. US*, 559 U.S. 133, 140 (2010) (emphasis added); *see also*, *Matter of Guzman-Polanco*, 26 I. & N. Dec 713, 716-718 (BIA 2016) (Here, the Board affirmed the “violent force” language of *Johnson v. US* to hold that a statute which states that infliction of bodily injury by “any means or form” does not necessarily require the use of violent force and so is not a categorical match to § 16(a). However, the Board did not resolve the question of whether such a statute may be encompassed by § 16(b).).

- that the physical force might be used against another in committing an offense.”⁵²
- However, a recent development concerning the constitutionality of 18 U.S.C. § 16, and particularly § 16(b) has arisen in the Federal Circuit Courts of Appeal.⁵³
- (G) a **theft** offense (including receipt of stolen property) or **burglary offense** for which the term of imprisonment is at least one year.
- A **misdemeanor of theft under the state law, may** be deemed an aggravated felony for immigration purposes, **so long as the term of imprisonment is at least one year.**⁵⁴
- (H) an offense relating to the demand for or receipt of ransom as described in the following sections: **Interstate Communications** (see 18 U.S.C. 875); **Mailing threatening communications** (see 18 U.S.C. 876); **Mailing threatening communications from foreign country** (see 18 U.S.C. 877); **Ransom Money** (see 18 U.S.C. 1202).
- (I) an offense relating to child pornography: **Sexual exploitation of children** (see 18 U.S.C. 2251), **Selling or buying of children** (see 18 U.S.C. 2251A), or **Certain activities relating to material involving the sexual exploitation of minors** (see 18 U.S.C. 2252).
- (J) an offense relating to **racketeer influenced corrupt organizations** (see 18 U.S.C. 1962), or if it is a **second or subsequent offense** (see 18 U.S.C. 1084); relating to **gambling offenses** (see 18 U.S.C. 1955), for which a sentence of one-year

⁵² *Leocal v. Ashcroft*, 543 U.S. at 10.

⁵³ *See*, *United States v. Gonzalez-Longoria*, No. 15–40041, 2016 WL 537612 at *235 (5th Cir. 2016) (holding that 18 U.S.C. § 16 definition of “crime of violence” was unconstitutionally vague for sentencing enhancement purposes); *United States v. Vivas-Cejas*, 808 F.3d 719, 721 (7th Cir. 2015) (finding that 18 U.S.C. § 16(b) is unconstitutionally vague as the phrases “by its nature” and “substantial risk” provided no guidance to the courts); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015) (finding that 18 U.S.C. § 16(b) is unconstitutionally vague, therefore INA § 101(a)(43)(F), which cites to 18 U.S.C. § 16 is unconstitutionally vague). For the standard for determining whether a residual clause is unconstitutionally vague, *see Johnson v. U.S.*, 135 S.Ct. 2251 (2015).

⁵⁴ *See, e.g., Brooks v. Attorney General*, 297 Fed. Appx. 205, 216 (3rd Cir. 2006) (holding that the noncitizen’s conviction under New York’s law for possession of stolen property in the fifth degree, a *misdemeanor*, was an aggravated felony for immigration purposes).

imprisonment or more may be imposed;

(K) an offense that –

- (i) relates to the **owning, controlling, managing, or supervising of a prostitution business**;
- (ii) is relating to transportation for the purpose of prostitution if committed for commercial advantage: **Transportation generally** (see 18 U.S.C. 2421); **Coercion and enticement** (see 18 U.S.C. 2422), or **Transportation of minors** (see 18 U.S.C. 2423); or
- (iii) relating to peonage, slavery, involuntary servitude, and trafficking in persons: **Peonage; obstructing enforcement** (see 18 U.S.C. 1581), **Vessels for slave trade** (see 18 U.S.C. 1582), **Enticement into slavery** (see 18 U.S.C. 1583), **Sale into involuntary servitude** (see 18 U.S.C. 1584), **Seizure, detention, transportation or sale of slaves** (see 18 U.S.C. 1585), **Transportation of slaves from U.S.** (see 18 U.S.C. 1588), **Forced labor** (see 18 U.S.C. 1589), **Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor** (see 18 U.S.C. 1590), **Sex trafficking of children or by force, fraud, or coercion** (see 18 U.S.C. 1591).

(L) an offense from the following:

- (i) **Gathering, transmitting or losing defense information** (see 18 U.S.C. 793), **Disclosure of classified information** (see 18 U.S.C. 798), **Destruction of war material, war premises, or war utilities** (see 18 U.S.C. 2153), **Treason** (see 18 U.S.C. 2381), or **Misprision of treason** (see 18 U.S.C. 2382);
- (ii) **Protection of identities of certain U.S. undercover intelligence officers, agents, informants, and sources** (National Security Act, see 50 U.S.C. 3121, *formerly 50 U.S.C. 421*); or
- (iii) Currently 50 U.S.C. 3121, *formerly at 50 U.S.C. 421*

(M) an offense that –

- (i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000;⁵⁵ or
- (ii) is **relating to tax evasion** (see section 7201 of Title 26) in which the revenue loss to the Government exceeds \$10,000.

⁵⁵ *Nijhawan v. Holder*, 557 U.S. 29, 42-43 (2009) (Finding that the IJ was able to consider the applicant's sentencing-related material to determine if the fraud amounted to \$10,000 to fall within INA § 101(a)(43)(M)).

- (N) an offense **relating to bringing in and harboring certain aliens** [see paragraph (1)(A) or (2) of section 8 U.S.C. 1324(a)], except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;
- (O) an offense of **Improper Entry by Alien: Improper time or place; avoidance of examination or inspection, misrepresentation and concealment of acts** (INA § 275(a); 8 U.S.C. 1325(a)) or of **Reentry of Removed Aliens** (INA § 276; 8 U.S.C. 1326) committed by an alien who was **previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph**;
- (P) an offense (i) which either is **falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument** in violation of Forgery of false use of passport (see 18 U.S.C. 1543), or Fraud and misuse of visas, permits, and other documents (see 18 U.S.C. 1546(a)) and (ii) for which the term of imprisonment is at least 12 months, **except in the case of a first offense** for which the alien has affirmatively shown that the alien **committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)** to violate a provision of this Act;
- (Q) an offense relating to a **failure to appear by a defendant for service of sentence** if the underlying offense is punishable by imprisonment for a term of 5 years or more;
- (R) an offense relating to **commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers** of which have been altered for which the term of imprisonment is at least one year;
- (S) an offense relating to **obstruction of justice, perjury or subornation of perjury, or bribery of a witness**, for which the term of imprisonment is at least one year;
- (T) an offense relating to a **failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony** for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an **attempt or conspiracy**⁵⁶ to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

⁵⁶ In Matter of Richardson, 25 I. & N. Dec. 226, 226 (BIA 2010), the Board found that “conspiracy” is “not limited to conspiracies that require the commission of an overt act in furtherance of the conspiracy by one of the conspirators.” Further, the Board found that “[a]n alien who was only convicted of conspiracy to commit an aggravated felony is removable on the basis of the conviction section 101(a)(43)(U) of the Act may not also be found removable for the underlying substantive offense, even though the record of conviction shows that the conspirators actually committed the substantive offense.”

SECTION 4-**Discretionary Component of LPR Cancellation of Removal**

In addition to satisfying the three statutory eligibility requirements under INA § 240A(a) which are that the applicant (1) has been an alien admitted for permanent residence for not less than 5 years, (2) has resided in the U.S. continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony), **an applicant for LPR Cancellation of Removal must establish that s/he warrants relief as a matter of discretion.** An Immigration Judge (IJ) has discretion to determine whether a particular applicant should be granted Cancellation of Removal relief. An IJ must balance the adverse factors evidencing the individual's undesirability as a lawful permanent resident with the social and humane considerations presented on his or her behalf to determine whether the granting of relief appears to be in the best interest of the United States.⁵⁷

Positive Factors

When exercising discretion in an LPR Cancellation of Removal case, an IJ may consider positive factors. The Board described the following positive factors in Matter of C-V-T, 22 I. & N. Dec. 7 (BIA 1998):

- Family ties within the U.S.;
- Residency of long duration in the U.S.;
- Evidence of hardship to the respondent and family if deportation occurs;
- Service in Armed Forces;
- History of employment;
- Existence of property or business ties;
- Existence of value and service to the community;
- Proof of genuine rehabilitation if a criminal record exists;
- Evidence attesting to a respondent's good character.

The existence of minor U.S. citizen children is a positive factor that an IJ may consider.⁵⁸ It is important to note that equities that accrue after a final order or after knowledge of potential deportation are diminished.⁵⁹ In addition, the Board may give less weight to a

⁵⁷ Matter of Marin, 16 I. & N. Dec. 581, 584 (BIA 1978).

⁵⁸ Matter of Arreguin, 21 I. & N. Dec. 38 (BIA 1995).

⁵⁹ Matter of Correa, 19 I. & N. Dec. 130, 130 (BIA 1984).

record of employment, where employment was unauthorized, and long residence in the U.S., where status was undocumented.⁶⁰

Negative Factors

When exercising discretion in an LPR Cancellation of Removal case, an IJ may also consider **negative factors** such as:⁶¹

- Nature and underlying circumstances of grounds of removal;
- Additional significant immigration violations;
- Existence of criminal record;
- Other evidence of bad character or undesirability

If an attorney has prepared documents in support of the positive factors relating to discretion, s/he may be able to refute any negative factors that an IJ considers. In addition to submitting supporting documents, an attorney should prepare his or her client to discuss negative factors in a hearing before the IJ, in case these factors are brought up. An applicant should be prepared to speak honestly about negative factors, to take responsibility for past actions, and to emphasize rehabilitation.⁶²

It is important to note that an IJ may consider all crimes that an applicant has committed, including crimes that are not aggravated felonies, for the purpose of determining whether a favorable exercise of discretion is warranted. While considering such crimes, an IJ may inquire into circumstances surrounding the commission of the crimes. However, an IJ may not look to an applicant's criminal record in order to reassess his or her ultimate guilt or innocence.⁶³

For examples of evidence which support the discretionary component please request the redacted version of the LPR Cancellation of Removal Toolkit.

⁶⁰ Varela-Blanco v. INS, 18 F.3d 584, 587-588 (8th Cir. 1994).

⁶¹ Matter of Edwards, 10 I. & N. Dec. 506, 195 (BIA 1964); Matter of Marin, 16 I. & N. Dec. 581, 585 (BIA 1978).

⁶² The Florence Immigrant and Refugee Rights Project, *available at* <http://www.firrp.org> (choose "Resources" and follow "How to Defend Your Case" hyperlink, scroll to "Cancellation of Removal for Legal Permanent Residents (green card holders) and select "English" hyperlink) (last visited May 12, 2016).

⁶³ Matter of Roberts, 20 I. & N. Dec. 294, 294 (BIA 1991).

SECTION 5-**Individuals Ineligible for LPR Cancellation Relief****INA § 240A(c) - Aliens ineligible for relief⁶⁴:**

The provisions of subsection (a) and (b)(l) shall not apply to any of the following aliens:

- (1) An alien who entered the United States as a crewman subsequent to June 30, 1964.
- (2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J) [8 U.S.C. § 1182(c)] of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 212(e) of this title.
- (3) An alien who--
 - (A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 101(a)(15)(J) [8 U.S.C. § 1101(a)(15)(J)], or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,
 - (B) is subject to the two-year foreign residence requirement of section 212(e) [8 U.S.C. § 1182(e)], and
 - (C) has not fulfilled that requirement or received a waiver thereof.
- (4) An alien who is inadmissible under section 212(a)(3) [1 U.S.C. § 1182(a)(3)], or deportable under section 237(a)(4) [8 U.S.C. § 1227(a)(4)].
- (5) An alien who is described in section 241(b)(3)(B)(i) [8 U.S.C. A. § 1231(b)(3)(B)(i)].
- (6) An alien whose removal has previously been canceled under this section or whose deportation was suspended under section 244(a) [8 U.S.C. § 1254(a)] or who has been granted relief under section 212(c) [8 U.S.C. § 1182(c)], as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [September 30, 1996].

⁶⁴ 8 U.S.C. § 1229b(c) (2016); INA § 240A(c).

Explanation of INA § 240A(c)

Noncitizens who are per se ineligible for LPR Cancellation of Removal include:

1. Crewmen who entered subsequent to June 30, 1964;
2. Persons admitted on J visas to receive graduate medical training regardless of whether they are subject to or have fulfilled the 2-year home residency requirement;
3. Persons admitted on a J visa or who acquired such status after admission with 2-year foreign residency requirement who never fulfilled the requirement or received a waiver;
4. Persons inadmissible or deportable for security or related reasons;
5. Persons determined to have persecuted others;
6. Persons previously granted suspension of deportation or Cancellation of Removal.

IV. REGULATIONS

8 C.F.R. § 1240.20: Cancellation of removal and adjustment of status under INA § 240A

(a) Jurisdiction. An application for the exercise of discretion under section 240A of the Act shall be submitted on Form EOIR-42, Application for Cancellation of Removal, to the Immigration Court having administrative control over the Record of Proceeding of the underlying removal proceeding under section 240 of the Act. The application must be accompanied by payment of the filing fee as set forth in § 103.7(b) of 8 C.F.R. Chapter I or a request for a fee waiver.

(b) Filing the application. The application may be filed only with the Immigration Court after jurisdiction has vested pursuant to § 1003.14 of this chapter.

8 C.F.R. § 1240.11(a): Creation of the status of an alien lawfully admitted for permanent residence

(1) In a removal proceeding, an alien may apply to the immigration judge for cancellation of removal under section 240A of the Act, adjustment of status under section 1 of the Act of November 2, 1966 (as modified by section 606 of Pub.L. 104-208), section 101 or 104 of the Act of October 28, 1977, section 202 of Pub.L. 105-100, or section 902 of Pub.L. 105-277, or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of § 1240.20, and 8 C.F.R. parts 1245 and 1249. The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by entrepreneur (as defined in section 216A(f)(1) of the Act) shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act, or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with 8 C.F.R. part 1216.

(2) In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the alien is inadmissible under any provision of section 212(a) of the Act, and believes that s/he meets the eligibility requirements for a waiver of the ground of inadmissibility, s/he may

apply to the immigration judge for such waiver. The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of § 1240.8(d). In a relevant case, the immigration judge may adjudicate the sufficiency of an Affidavit of Support Under Section 213A (Form I-864), executed on behalf of an applicant for admission or for adjustment of status, in accordance with the provisions of section 213A of the Act and 8 C.F.R. part 213a.

(3) In exercising discretionary power when considering an application for status as a permanent resident under this chapter, the immigration judge may consider and base the decision on information not contained in the record and not made available for inspection by the alien, provided the Commissioner has determined that such information is relevant and is classified under the applicable Executive Order as requiring protection from unauthorized disclosure in the interest of national security. Whenever the immigration judge believes that s/he can do so while safeguarding both the information and its source, the immigration judge should inform the alien of the general nature of the information in order that the alien may have an opportunity to offer opposing evidence. A decision based in whole or in part on such classified information shall state that the information is material to the decision.

V. CASE LAW

Arranged by Court Authority

- Page 38 Supreme Court of the United States
- Page 42 United States Court of Appeals for the Third Circuit
- Page 57 Board of Immigration Appeals

Arranged by Statutory Element

- Page 67 (1) Has been an alien lawfully admitted for permanent residence for not less than 5 years
- Page 71 (2) Has resided in the U.S. continuously for 7 years after having been admitted in any status
- Page 86 (3) Has not been convicted of any aggravated felony
- Page 91 (4) Discretionary Component of LPR Cancellation of Removal

(a). Arranged by Court Authority**(1). Supreme Court of the United States**

MELLOULI V. LYNCH, 135 S. Ct. 1980 (2015) [Precedent]:

ISSUE Whether a state drug-paraphernalia misdemeanor meets the categorical definition of controlled substance under the Controlled Substance Act when the state misdemeanor is silent as to the controlled substance?

HOLDING To be a categorical federal drug offense for immigration purposes, a state law violation for controlled substances must be an offense for a controlled substance as defined in the Controlled Substance Act.

- Respondent Moones Mellouli, a citizen of Tunisia, entered the U.S. on a student visa in 2004. In 2009, he became a conditional permanent resident and, in 2011, an LPR. In 2010, he pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia to “store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” Kan. Stat. Ann. §21-5709(b)(2). Under the Kansas law, it was immaterial whether the substance was scheduled in the Controlled Substance Act, 21 U. S. C. §802. The State did not charge, or seek to prove, that Mellouli possessed a substance on the §802 schedules. The sole “paraphernalia” Mellouli was charged with possessing was a sock in which he had placed four orange tablets. The criminal charge and plea agreement did not identify the controlled substance involved, although Mellouli had acknowledged the tablets were Adderall. Mellouli was sentenced to a suspended term of 359 days and 12 months’ probation, after which DHS placed him in removal proceedings. The Board affirmed the immigration judge's decision and he was removed. The Eighth Circuit denied Mellouli’s petition for review. The Supreme Court then granted certiorari and applied the categorical approach. The Court held that since the record did not prove that Mellouli’s conviction was based on possession of a drug on the §802 schedule, the conviction could not be a categorical controlled substance conviction.
- This case is important because an offense for drug-paraphernalia possession must specify whether the controlled substance is scheduled in the Controlled Substance Act to meet the criteria for a controlled substance offense. Please note Mellouli was *not* found deportable of an aggravated felony, but rather deportable because Mellouli was found guilty of a crime involving controlled substance under INA §237(a)(2)(B). This case is included as an example of the application of the categorical

approach.

MONCRIEFFE V. HOLDER, 133 S. Ct. 1678 (2013) [Precedent]:

ISSUE Whether a conviction under a statute that criminalizes conduct described by the Controlled Substance Act's (CSA) 21 U.S.C. §841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense punishable as a felony under the CSA?

HOLDING To be a categorical federal drug offense for immigration purposes, a state drug offense must necessarily correspond to an offense punishable as a felony under the Controlled Substance Act.

- Respondent Adrian Moncrieffe legally entered the U.S. in 1984. In 2007 he was stopped for a traffic violation and was found in possession of 1.3 grams of marijuana. He pleaded guilty under Georgia law to possession of marijuana with intent to distribute. He was placed in removal proceedings on the grounds that his conviction was an aggravated felony because possession of marijuana with intent to distribute is a Controlled Substance Act offense, 21 U.S.C. §841(a), punishable by up to five years' imprisonment, §841(b)(1)(D). An IJ ordered his removal, and the Board affirmed. The Fifth Circuit denied Moncrieffe's petition to review his argument that his conviction met CSA's §841(b)(4), which makes marijuana distribution punishable as a misdemeanor if the offense involves a small amount for no remuneration. The U.S. Supreme Court granted certiorari to resolve whether the state conviction qualified as an aggravated felony when applying the categorical approach. A state drug offense must meet two conditions: 1) the offense must "necessarily" proscribe conduct that is an offense under the CSA, and 2) the CSA must "necessarily" prescribe felony punishment for that conduct. Unlike the federal statute, the Georgia statute is ambiguous as to whether the conduct proscribed involved remuneration or the amount of controlled substances needed to be a violation. Thus, because the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA, the Court held the offense was not a categorical aggravated felony. The Court reversed and remanded the case.
- This case is important because when there is ambiguity in the state conviction the facts may not "necessarily" correspond to an offense punishable as a felony under the CSA. A noncitizen's conviction for a marijuana distribution offense can fail to qualify as an aggravated felony

if there is no remuneration or no more than a small amount of marijuana.

DESCAMPS V. U.S., 133 S.Ct. 2276 (2013) [Precedent]:

ISSUE Whether the modified categorical approach applies to statutes that contain a single, indivisible set of elements?

HOLDING The modified categorical approach does not apply to statutes that contain a single, indivisible set of elements.

- Respondent Michael Descamps was convicted of being “a felon in possession of a firearm” and the government sought an enhanced sentence “based on Descamps’ prior state convictions for burglary, robbery, and felony harassment.” To be subject to the enhanced sentencing, the statute requires that the person had been previously convicted of a 3 violent felonies or a serious drug offense. A “violent felony” is one which “has as an element the use, attempted use, or threatened use of physical force against the person of another,” or that is a “burglary, arson or extortion, involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.” Descamps argued that his past conviction was not within the meaning of the “violent felony” and therefore he could not be subject to the enhanced sentencing. The prior California felony that Descamps had been convicted found guilty a “person who enters” certain locations “with intent to commit grand or petit larceny or any felony.” Unlike the federal statute, Descamps argues, the California statute did not require that a person enter into the location unlawfully; therefore, the California statute was not a categorical match. Both the District Court and the Ninth Circuit disagreed with Descamps, and applied the modified categorical approach to look to “certain documents, including the record of the plea colloquy, to discover whether Descamps had “admitted the elements of a generic burglary” when entering his plea.” The District Court and the Ninth Circuit concluded that Descamps’ crime was within the meaning of the federal statute of burglary but Descamps appealed. The Supreme Court concluded that the California statute was indivisible, and therefore, the lower courts erred in applying the modified categorical approach. The Court found that the purpose of the modified categorical approach was to help “effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant’s conviction.” The Court illustrated that a statute may be indivisible, for example, when a statute of burglary includes both “entry into an automobile as well as a building.” In such a situation, entering an automobile would not be within

the generic federal definition; however, the alternative, “entry into... a building” would be within the generic federal definition. Because, in this hypothetical situation, the statute would not reveal which alternative the defendant was convicted, courts could look to the plea agreement, the colloquy between the judge and the defendant, or indictment so as to determine which alternative was used. On the other hand, where a statute is indivisible, courts should apply the categorical approach and may “only look to the statutory definitions,” of the defendant’s prior offenses, and not “to the particular facts underlying those convictions.” Here, the statute of Descamps prior conviction was not divisible, as the statute does not have a list of alternatives.

- This case is important because it shows an example of the application of the modified categorical approach and sets forth that the “sentencing courts may not consult additional documents when a defendant was convicted under an “indivisible” statutes.”

HOLDER V. MARTINEZ GUTIERREZ, 132 S. Ct. 2011 (2012) [Precedent]:

ISSUE Whether a parent’s lawful permanent resident status can be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish eligibility for Cancellation of Removal under § 240A(a)(1)?

HOLDING A child of an LPR may not impute the parent’s length of time as an LPR for purposes of 5 years of LPR and 7-year continuous residence requirement.

- This case decided two consolidated cases about imputation, one with regard to the 5-year LPR requirement and the other with regard to 7-year continuous residence requirement. Only Respondent Martinez Gutierrez involved imputation with regard to the five years of LPR requirement. Martinez Gutierrez illegally entered the U.S. with his family in 1989, when he was five years old. Respondent’s father obtained a LPR status two years later; however, respondent never adjusted his status until 2003. Two years later respondent was apprehended and admitted to smuggling undocumented people across the border. He then applied for Cancellation of Removal. The IJ determined he could qualify for LPR § 240A(a)(1) and (a)(2) on his own because of his father’s status, but the Board reversed. Respondent appealed to the Court of Appeals, which reversed and remanded the decision to the Board. On appeal from the Ninth Circuit, the Supreme Court concluded that the Board’s interpretation of §240A(a)(1) is “based on a permissible construction of the statute,” and reversed the Ninth Circuit’s decision.
- This case is important because the Supreme Court reaffirmed the Board’s

holding that a parent's LPR status may not be imputed to their children to give the child the necessary 5 years of LPR status to qualify for cancellation or 7 years' continuous residence.

INS v. ENRICO ST. CYR, 533 U.S. 289 (2001) [Precedent]:

ISSUE Whether the post-IIRAIRA statutory restrictions on discretionary relief apply to noncitizens who plead guilty to a deportable crime prior to the enactment of IIRAIRA?

HOLDING Post-IIRAIRA statutory restrictions on discretionary relief do not apply to noncitizens who pled guilty to a deportable crime prior to the enactment of IIRAIRA.

- Respondent Enrico St. Cyr was admitted as an LPR in 1986. A decade later in Connecticut, he pled guilty in a Connecticut state court to selling a controlled substance, \$100 worth of cocaine, and thus became deportable. If the INS had taken custody of St. Cyr at the completion of his sentence, he would have been eligible for a waiver of deportation under INA § 212(c). Because the INS did not begin proceedings against St. Cyr until 1997, St. Cyr would be subject to the new laws passed in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), if the court found that the statutes were retroactive. Therefore, St. Cyr could no longer file a motion for § 212(c), even though he pled to the crime when the waiver was still being granted. Represented by the ACLU, St. Cyr sued the federal government on the grounds that he was lawfully eligible for the waiver. The case reached the U.S. Supreme Court in 2001. The Court ruled that Congress never intended for INS to apply its new rule retroactively in cases involving plea bargains made prior to the enactment of IIRIRA. That meant that St. Cyr, and other immigrants whose convictions were obtained through plea agreements, remain eligible for § 212(c) waiver if they would have been eligible for § 212(c) relief at the time of their plea.
- This case is important because it held that the effective date of the changes from INA § 212(c) to Cancellation of Removal for LPRs, April 1, 1997, does not bar § 212(c) relief for certain pre-IIRIRA convictions.

(2). United States Court of Appeals for the Third Circuit

SINGH V. ATTORNEY GENERAL, 807 F.3d 547 (3d Cir. 2015) [Precedent]:

ISSUE Whether a noncitizen convicted of a crime involving moral turpitude (CIMT) can use a re-entry to restart the clock to satisfy the seven-year continuous residency requirement?

HOLDING An LPR convicted of a CIMT cannot reenter as a method to restart the clock to accrue the requisite 7-year continuous residence.

- Respondent, Narinder Singh, was a native and citizen of India. He was granted asylum on July 1, 1993, and adjusted to LPR status on June 1, 1994. On September 14, 2000, he was convicted in the U.S. District Court for the Northern District of Florida of conspiracy to counterfeit passports, counterfeiting and using visas, and mail fraud in violation of 18 U.S.C. § 371. He was also convicted of unlawful possession of forged, counterfeited, altered, and falsely made nonimmigrant U.S. visas in violation of 18 U.S.C. § 1546. Singh departed the U.S and re-entered on January 20, 2003. In October 2009, he applied for admission to the U.S. as an LPR. On January 10, 2010, Immigration and Customs Enforcement detained him. On January 19, 2010, he was served with a Notice to Appear charging him as inadmissible because he had a counterfeiting conviction, a crime involving moral turpitude. Singh applied for Cancellation of Removal but the IJ denied the petition and the Board dismissed his appeal based on a finding that he had not accrued seven years of continuous residence in the U.S. to be eligible for Cancellation of Removal pursuant to 8 U.S.C. § 1229b(a) [240A(a)]. Singh then filed a petition for review arguing that his 2003 re-entry restarted the clock for purposes of the seven-year residence requirement. However, the Court held that when Singh committed the CIMT, the clock both stopped and permanently prevented the clock from restarting. The Third Circuit cited to its Okeke decision that where there is a re-entry, the clock starts “anew.” However, the Third Circuit court distinguishes Okeke from the present case because in the former, the basis for removal was that the noncitizen was a visa-overstay. Thus, the court relied instead on the Nelson case in which the noncitizen’s removal was based on a crime that terminated his continuous residence and his continuous presence. Because Singh’s conviction involved a CIMT, the CIMT terminated his continuous residence and continuous presence so his re-entry could not restart the clock.
- This case is important because it reaffirms that re-entry can re-start the clock after a “clock stopping event” (i.e., receipt of a NTA), except when the NTA states the “clock stopping event” as the cause for removal. Here, the Third Circuit distinguished in part and applied in part the holding in Okeke and thereby Cisneros-Gonzalez, to the context of *LPR* Cancellation of Removal.

MATTER OF PAEK, 26 I. & N. 403 (BIA 2014), *aff’d*, 793 F.3d 330 (3d Cir. 2015)

[Precedent]:

ISSUE Whether a noncitizen who was admitted to the U.S. as a conditional

permanent resident is considered a lawful permanent resident?

HOLDING A noncitizen spouse lawfully admitted as a permanent resident on a conditional basis, is considered an LPR.

- Respondent Ka A. Paek was admitted into the U.S. in 1991. Respondent was convicted of theft in 2005 and robbery in 2006, and removal proceedings were initiated in July 2013. Respondent then applied for adjustment of status pursuant to his marriage to a U.S. citizen and applied for Section 212(h) waiver. However, the waiver states that “No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if... since the date of his admission the alien has been convicted of an aggravated felony.” Therefore, if the Respondent was considered a “lawful” permanent resident at the time of his convictions, he would not be eligible for the waiver. The Board found that “notwithstanding any other provision of this Act, an alien spouse... shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence to have obtained such status on a conditional basis to the provisions of this section.”
- While this case deals with § 212(h) waivers, this case further indicates that a conditional permanent resident will be considered to have “lawfully” entered.

GUZMAN V. ATTORNEY GENERAL, 770 F.3d 1077 (3d Cir. 2014) [Precedent]:

ISSUE Whether the stop-time rule can be applied retroactively to terminate the accrual of continuous residence for LPR Cancellation of Removal?

HOLDING The stop-time rule can be applied retroactively to terminate accrual of time required to satisfy the requisite 7-year continuous physical presence.

- Respondent, Cristian Guzman is a 38-year-old citizen of the Dominican Republic. He was admitted to the U.S. as an LPR on October 8, 1994 and had continually resided in the U.S. since that time. In 1995, Guzman was arrested in NY and charged with Criminal Possession of a Controlled Substance. On December 19, 1995, Guzman pled guilty to a lesser possession charge and was sentenced to 3 years’ probation. In 2005, he was again arrested and charged with Criminal Possession of a Controlled Substance and pled guilty. On December 1, 2005 he was sentenced to time served. On March 6, 2012, DHS served Guzman with an NTA and took him into custody based on the 2005 conviction pursuant to a controlled substance abuse (INA §237(a)(2)(B)(i)). He conceded removability, but applied for LPR Cancellation of Removal. The Government argued that Guzman was ineligible for the relief because the stop-time rule terminated

his continuous residence when he committed the 1995 drug offense. Guzman argued that he could have accrued 7 years of continuous residence. Specifically, Guzman argued that (1) the application of the stop-time rule was impermissibly retroactive because the rule became effective on April 1, 1997 through IIRIRA, after he committed his 1995 drug offense; (2) he should be able to apply for the 212(c) deportation waiver, which was available prior to IIRIRA, and he should be able to delay his deportation, which was a strategy available prior to IIRIRA to allow him to accrue the 7 years of continuous presence for the 212(c) waiver; and, (3) the retroactive application of the stop-time rule was arbitrary and capricious because only LPRs who committed crimes within 7 years of admission were punished by being subject to the rule. Therefore, Guzman moved to terminate his deportation to apply for naturalization. The IJ held the stop-time rule was not arbitrary; therefore, Guzman was ineligible for Cancellation of Removal and for 212(c) because he had only accrued 1 year of continuous residence by the time he committed the 1995 crime. Further, Guzman had not made affirmative communication with DHS regarding his prima facie eligibility for naturalization, which is required to terminate the deportation so that the Petitioner can seek naturalization (*In re Acosta Hidalgo*). The Board affirmed the IJ's holding and found that Guzman could not apply simultaneously for 212(c) relief and LPR Cancellation of Removal because 8 U.S.C. § 1229b(c)(6) explicitly precludes applying for both. Additionally, even if he could obtain a 212(c) waiver notwithstanding his 1995 conviction, the conviction would still have ended his continuous residence for purposes of Cancellation of Removal because the 212(c) waiver does not serve to pardon, expunge, or eliminate all negative immigration consequences stemming from a noncitizen's criminal conviction. The 3rd Circuit Court affirmed the Board's decision that Guzman was ineligible to apply for the 212(c). The Court cited *St. Cyr*, wherein the noncitizen has accrued the required 7 years of continuous residence before IIRIRA became effective and removal proceedings commenced after IIRIRA became effective, thus, retroactive application of IIRIRA was held a "new disability" because the LPR already had a vested right to use 212(c) when he plead guilty. The 3rd Circuit Court also cited to *Sinotes-Cruz*, where the noncitizen committed a crime pre-IIRIRA that was later reclassified by IIRIRA as a deportable crime. Retroactive application was impermissible in that case because the LPR relied on the pre-IIRIRA law when he plead guilty. In the present case, the 3rd Circuit held that Guzman has no vested right in 212(c) because he did not have the requisite 7 years of continuous residence at the time he committed the

1995 crime, and the 1995 crime made him deportable. Thus, the stop-time rule was triggered and made him ineligible for LPR Cancellation of Removal.

- This case is important because the 3rd Circuit reinforced that an LPR may use 212(c) as relief only when the vested right to qualify under 212(c) existed at the time in which the crime was committed and that the stop-time rule does apply retroactively to terminate the accrual of continuous presence for purposes of LPR Cancellation of Removal⁶⁵. Additionally, the 3rd Circuit did not rule on whether the Board's interpretation is correct when the Board held that an LPR cannot apply concurrently for 212(c) relief and LPR Cancellation of Removal.

VARGAS V. ATTORNEY GENERAL, 543 Fed. Appx. 162 (3d Cir. 2013)⁶⁶ [Precedent]:

ISSUE Whether the Court of Appeals lacked jurisdiction to review a petitioner's claim that the Board gave insufficient consideration to discretionary factors?

HOLDING The Court of Appeals lacks jurisdiction to review a petitioner's claim, unless the Board engaged in "impermissible fact finding."

- Respondent Emmanuel De La Cruz Vargas was found to be statutorily eligible for Cancellation of Removal; however, he was denied application on account of discretionary factors. Respondent argued that the IJ erred because the Judge did not meaningfully consider all discretionary factors. The government argues that the Courts of Appeal generally lack jurisdiction to review discretionary matters. The Third Circuit agreed with the government finding that the court lacked authority to review claims based on the IJ's discretion; however, the Third Circuit found that the court can review for "impermissible fact finding."
- This case is important because it holds that the Third Circuit will not look to whether the Board or IJ insufficiently weighed the equities, but will look at only those scenarios, which the Board engaged in "impermissible fact finding."

⁶⁵ See, *Sinotes-Cruz v Gonzales*, 468 F.3d 1190 (9th Cir. 2006) (holding that the stop-time rule may not be applied retroactively to prevent noncitizens from fulfilling the seven-year continuous residence requirement when the noncitizen pleads guilty under the expectation that his plea will not affect his immigration status based on the law in effect at the time the noncitizen pleads guilty).

⁶⁶ See *e.g.*, *Padmore v. Holder*, 609 F.3d 62, 70 (2d Cir. 2010) (finding the BIA "improperly found facts which it held to be "significant" and "important" to its decision denying him relief").

LEE V. ATTORNEY GENERAL, 431 Fed. Appx. 184 (3d Cir. 2011) [Precedent]:

ISSUE Whether the IJ abused his discretion in denying Cancellation of Removal for a respondent who was statutorily eligible for relief?

HOLDING The IJ did not abuse his discretion.

- Respondent Mun Seok Lee conceded removability on account of his conviction of possession of a handgun without a permit and applied for Cancellation of Removal. Although Respondent was statutorily eligible, the IJ denied Cancellation of Removal on a discretionary basis. The IJ stated: “[Respondent] has not demonstrated that he is worthy of the Court’s favorable exercise of discretion based on [his] pattern of engaging in unlawful conduct relating to his alcohol intoxication as reported in conviction and/or arrest records occurring from 1993 to 2008.” The Board affirmed, finding that Respondent had not displayed that his “positive equities do not outweigh the adverse factors in this case.” The Board stated that Respondent’s positive equities included his lengthy stay in the U.S., the fact that he owns “several successful businesses that employ about 40 people, his history of paying taxes, and his active participation in his church and community.” The adverse factors included his criminal history, the “recency, the quantity of the [] alcohol-related arrests and convictions[,] and the serious nature of them poses a public risk,” the fact that his rehabilitation is not supported by the record, the fact that he only attended Alcoholics Anonymous that were mandated because of his criminal convictions, and the fact that “he was not forthcoming in his testimony about his use of alcohol in connection with his arrests, and that, by his own admission, he continued to drink alcohol.” The Third Circuit concluded that the Board correctly “weigh[ed] the favorable and adverse factors.”
- This case is important because the case provides an example of how the positive and adverse factors will be applied.

GALLIMORE V. ATTORNEY GENERAL, 619 F.3d 216 (3d Cir. 2010) [Precedent]:

ISSUE 1 Whether a noncitizen who had mistakenly responded falsely on an application for adjustment of status is considered to have been “lawfully admitted for permanent residence?”

ISSUE 2 Whether a noncitizen is considered to have been “lawfully” admitted for permanent residence when admitted on a conditional basis or when the conditions were removed?

HOLDING A noncitizen who had mistakenly responded falsely on an application for adjustment of status is *not* considered to have been lawfully admitted for permanent residence.

HOLDING A noncitizen is considered to have been admitted as a lawful permanent

- 2 resident when s/he is admitted on a conditional basis.
- The Respondent, Earl Gallimore, entered the U.S. on August 7, 1993 pursuant to a nonimmigrant visa. On September 25, 1993, police found five pounds of marijuana in Respondent's car on a car stop. On January 12, 1994, Respondent married a US citizen and applied for adjustment of status. On the application for adjustment of status, Respondent answered no to the following question: "Have you ever, in or outside the U.S. been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance...?" On September 13, 1994, Respondent was arrested for the pending indictment for possession of marijuana and eventually pled guilty to the charge. On April 1, 1996, Respondent applied to have the conditions on his status removed. When Respondent applied for the removal of the conditions, his wife answered on a supporting document that Respondent had never been convicted of violating any law. On December 17, 2001, Gallimore applied for naturalization and was denied. Due to Respondent's previous failure to disclose the indictment, he was found to have poor moral character. On April 3, 2006 he was served a Notice to Appear. Respondent explained to the IJ that he had not understood that he had been arrested during the car stop. The IJ found that Respondent had "willfully failed to disclose" his arrest on his application for adjustment, and that he had not been eligible for Cancellation of Removal because he had never been "lawfully admitted for permanent residence." The Board agreed with the IJ's conclusion, and the Third Circuit affirmed. The Third Circuit concluded that his 1995 conviction rendered the Respondent inadmissible. As such, the Respondent was inadmissible at the time adjustment, and he had not been "lawfully" admitted for permanent residence. However, the Third Circuit found that this was not the end of the inquiry as the date that Respondent could be considered to have obtained "lawful" permanent residence is January 12, 1994, the date in which Respondent had applied for conditional permanent residence. The Third Circuit found that the Board did not speak to this issue. While finding that the word "permanent" may connote a meaning that did not encompass noncitizens given a conditional status, the Third Circuit found this interpretation to be inconsistent with Section 1186(a), which concerns "conditional permanent residents' eligibility for citizenship." The statute states: "For purposes of [naturalization] in the case of an alien who is in the United States as an LPR on a conditional basis under this section, the alien shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence." Further, Section 1186(a) is further corroborated by 8 C.F.R. §

216.1, which states that conditional residents are to be considered LPRs, as well. Therefore, the Third Circuit indicates that the court is not aware of any reason to conclude that a conditional permanent resident is not a “lawful” permanent resident. However, the Third Circuit leaves this decision to the Board to make an affirmative holding that a conditional permanent resident is considered a “lawful” permanent resident.

- This case is important for three reasons. The case affirms the Board’s holding that a noncitizen who fraudulently or mistakenly completed an application for lawful permanent residence will not be considered to have “lawfully” entered. The noncitizen will not be considered to have “lawfully” entered even if it is the agency that had erroneously conferred lawful permanent resident status. Further, this case indicates that a noncitizen who is a conditional permanent resident, is an LPR.

JURADO-DELGADO v. ATTORNEY GENERAL, 498 Fed. App. 101 (3d Cir. 2009)

[Precedent]:

ISSUE Whether INA § 240A(a) can be applied retroactively to crimes committed by an LPR in 1991, before INA §240 was enacted?

HOLDING A noncitizen who committed crimes for which s/he was deportable under pre-Illegal Immigration Reform and Immigrant Responsibility Act may be deportable under post-IIRIRA proceedings; the court left open the question as to whether Lawful Permanent Resident Cancellation of Removal can be applied retroactively to crimes committed before IIRIRA was enacted.

- Respondent, Jimmy Jurado-Delgado, a native and citizen of Ecuador, was admitted to the U.S. as an LPR in 1985. Jurado-Delgado conceded before an IJ that he was removable either under INA §237(a)(2)(A)(ii) for having been convicted of two crimes involving moral turpitude in 1997, or under INA § 237(a)(3)(D), for having falsely represented himself to be a U.S. citizen, but he requested Cancellation of Removal under INA §240A(a). The court held that Jurado-Delgado's 1991 crimes stopped his accrual of time toward a period of seven years of continuous residence because they were crimes involving moral turpitude, which rendered him inadmissible under § 212(a)(2)(A)(i). Jurado-Delgado petitioned for review of a final order of the Board. He argued, among other things, that the Board's determination that he was ineligible for Cancellation of Removal is the result of an impermissible, retroactive application of that statute. In his view, the Board, when determining whether he was statutorily eligible for Cancellation Of removal, was not entitled to take into account crimes that he committed prior to Congress's creation of that remedy. Because the Board applied the law in effect at the time Jurado-Delgado committed the deportable offense,

no question of retroactivity was implicated. Here, the Third Circuit Court denied Jurado-Delgado's petition for review.

- This case is important because it suggests that INA § 240A(a) can be applied retroactively to crimes committed by an LPR before INA § 240A was enacted, such that the crimes can stop accrual of time toward a period of seven years of continuous residence.

AUGUSTIN v. ATTORNEY GENERAL, 520 F.3d 264 (3d Cir. 2008) [Precedent]:

ISSUE Whether a noncitizen who entered the U.S. as a minor can impute his parent's years of continuous residence in order to meet the seven-year requirement for Cancellation of Removal?

HOLDING A parent's LPR residence may not be imputed to his or her child for purpose of the 7-year continuous residence requirement.

- Respondent, Luckson Augustin, was admitted to the U.S. as an LPR at the age of 13 to join his parents who had previously come to the U.S.. Approximately five years after coming to the U.S., the noncitizen committed a crime involving moral turpitude. He was later charged with being removable based in part on that crime. The noncitizen admitted the allegations but argued that he was eligible for Cancellation of Removal based on his father's seven years of continuous residence in the U.S. prior to any of the crimes being committed. The Board rejected that argument, interpreting the statute as requiring that the noncitizen himself actually dwell in the U.S. for seven years before committing the crime. On review, the court held that the Board's denial of Cancellation of Removal and its refusal to impute the father's years of residence was permissible because it was a straightforward application of the statute's requirements.
- This case is important because it affirms, under Chevron deference, the view that a parent's residence may not be imputed to his or her minor child for purposes of the seven-year residence provision of Cancellation of Removal. This case affirms the Board's reasoning in Matter of Ramirez Vargas, 24 I.&N. Dec. 599 (BIA 2008).

ATKINSON v. ATTORNEY GENERAL, 479 F.3d. 222 (3d Cir. 2007) [Precedent]

ISSUE Whether the post-IIRAIRA statutory restrictions on discretionary relief apply to noncitizens who were convicted of a deportable crime prior to the enactment of IIRAIRA?

HOLDING Post-IIRAIRA statutory restrictions on discretionary relief do not apply to noncitizens who were convicted of a deportable crime prior to the enactment of IIRAIRA.

- Respondent Claudius Atkinson was convicted of state criminal offenses in

1991. He received a notice to appear in 1997, notifying him that he was removable based upon his convictions. The IJ denied the noncitizen's request for a waiver of deportation under former § 212(c) (repealed 1996), finding that he was ineligible for that relief. A month after the Board denied the noncitizen's appeal, the U.S. Supreme Court issued its decision in St. Cyr. The noncitizen filed his habeas petition after his reconsideration motion, based on St. Cyr, was denied. The District Court held that he was not entitled to relief because he failed to show that he had relied on § 212(c) when he was convicted in 1991. In conformity with the REAL ID Act, the court treated the habeas petition as a petition for review. The court held that the noncitizen was not precluded from applying for § 212(c) relief. IIRIRA did not apply retroactively to noncitizens who were convicted of aggravated felonies prior to IIRIRA's effective date, regardless of whether they pleaded guilty or were convicted by a jury.

- This case is important because the Third Circuit held that § 212(c) is available to individuals who elected to go to trial and were convicted (as opposed to entering a plea agreement).

JOSEPH v. ATTORNEY GENERAL, 236 Fed. Appx. 787 (3d Cir. 2007) [Precedent]:

ISSUE Whether an LPR is eligible for Cancellation of Removal when he commits a controlled substance violation, triggering the statute's "stop-time" provision under § 240A(d)(1)?

HOLDING The stop-time rule only terminates the accrual of time for purposes of satisfying the requisite 7-year continuous residence; the stop-time rule does not apply to the 5-years of permanent residency requirement.

- Respondent George Russel Joseph entered the U.S. in 1992 as a conditional resident and became an LPR in 1994. A NTA that was dated June 15, 2005 placed him in removal proceedings. He was charged with being removable because in August of 1997 he committed a controlled substance violation and an aggravated felony. He was convicted in January of 1998. The IJ found him removable for committing the controlled substance violation, but found that the Government had not met its burden of showing that any of his convictions were also aggravated felonies. Nevertheless, the IJ found Joseph ineligible for Cancellation of removal under INA § 240A(a). Joseph appealed to the Board, but the Board affirmed that Joseph was ineligible for LPR Cancellation of Removal because he did not have the required 5 years of permanent residence. The Board applied the stop-time rule to Joseph's permanent residence status, and calculated that his status as a permanent resident began in 1994 and terminated in 1998 when he was convicted. Joseph then appealed to the

Court of Appeals for the Third Circuit, which held that the Board impermissibly applied the stop-time rule to the requirement of 5 years of permanent residence, and the stop-time rule only applies to the 7 years of continuous residence. Joseph had met the permanent residency requirement. However, the Board still found him ineligible for LPR Cancellation of Removal because his conviction did trigger the stop-time rule for purposes of the 7 years of continuous residence requirement. To calculate Joseph's continuous residence, the Board counted the time from when Joseph was admitted in 1992 to the date he committed the crime in 1997 and determined he did not have the 7 years of continuous residence. Thus, the court denied Joseph's petition for review.

- This case is important because it reaffirms that the stop-time rule applies only to the requirement of 7 years of continuous residence.

OKEKE v. ATTORNEY GENERAL, 407 F.3d 585 (3d Cir. 2005) [Precedent]:

ISSUE Whether a noncitizen is entitled to a new period of continuous physical presence, commencing upon his lawful reentry into the U.S., so as to allow him to accrue the time required to establish eligibility for Non-LPR Cancellation of Removal?

HOLDING A noncitizen who lawfully reenters the U.S. after overstaying a visa may start a new accrual of time for purposes of satisfying the requisite 10-year continuous physical presence when the noncitizen's Notice to Appear exclusively charges the noncitizen with being a visa overstay.

- Respondent, Anderson Jude Okeke, a native and citizen of Nigeria, petitioned for review of two orders from the Board. Those orders affirmed the Immigration Judge's decision that Okeke could not demonstrate the requisite continuous physical presence in the U.S. in order to qualify for Non-LPR Cancellation of Removal. Essentially, the Board found that the 'stop-time' provision (INA § 240A(d)(1)), once triggered, precluded the accrual of a new period of continuous presence, which in this case commenced with Okeke's lawful reentry into the U.S. The lawful reentry, which was the critical fact on appeal, occurred after Okeke committed a controlled substance offense, which, pursuant to INA § 240A(d)(1), clearly ended any prior period of continuous physical residence. This court concluded that the clock restarted upon Okeke's reentry. Pursuant to the express terms of the NTA, it was the last reentry into the U.S. that should have been considered in calculating continuous physical presence.
- This case is important because a noncitizen is entitled to a new period of continuous physical presence under INA § 240A(d)(1), commencing upon his lawful reentry into the U.S., so as to allow him to accrue the time required to

establish eligibility for *Non-LPR* Cancellation of Removal. Here, the Third Circuit is applying the holding in *Cisneros*. Though this holding applies to Non-LPR Cancellation of Removal, the holding could also apply to LPR Cancellation of Removal as INA § 240A(d)(1) refers to both continuous physical presence under Non-LPR Cancellation of Removal and continuous residence under LPR Cancellation of Removal.

DUDNEY v. ATTORNEY GENERAL, 129 Fed. Appx. 747 (3d Cir. 2005) [Precedent]:

ISSUE Whether an LPR's 1998 conviction stopped the clock for purposes of the continuous residence requirement of INA §240A(a)(2)?

HOLDING The stop-time rule may be triggered by a noncitizen when s/he commits a crime for which a noncitizen is deportable.

- Respondent Barrington Dudney was admitted to the U.S. as an immigrant in August 1992. In October 1998, he was convicted of possession and possession with the intent to deliver a controlled substance (92 packets of marijuana). On August 3, 1999, he was convicted of possession of a controlled substance, simple assault and for resisting arrest during an August 20, 1998 incident. Dudney also was convicted on August 31, 1999 of charges of simple assault, possession of an instrument of crime and recklessly endangering another person in an incident on February 19, 1999. In June 1999, the INS issued a NTA charging Dudney with removability based upon his October 1998 conviction. A removal order was entered after Dudney failed to appear for his hearing, but the IJ later terminated the proceedings due to insufficient evidence. In October 2001, the INS issued another NTA charging Dudney with removability for having committed an aggravated felony (drug trafficking), two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, and a violation of law relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana. These charges were based on the October 1998 and August 31, 1999 convictions. The NTA was then amended, and the August 3, 1999 convictions for drug possession and simple assault, and another aggravated felony charge were added. Through counsel, Dudney sought Cancellation of Removal as a permanent resident pursuant to INA § 240A(a). The IJ found Dudney removable for a violation of law relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, based on his August 3, 1999 drug conviction. The Board also agreed with the IJ that Dudney was not eligible for Cancellation of Removal because he did not meet the requirement that he have continuous residence here for seven years. The Board explained that

even if Dudney could not be removed based upon his October 1998 conviction because the proceedings related to this conviction were terminated, the October 1998 conviction stopped the clock for purposes of the seven-year residence requirement. Alternatively, Dudney's continuous residence stopped as early as August 20, 1998 when the crime was committed.

- This case is important because it affirms that an LPR must satisfy INA § 240A(a)(2), the seven-year continuous residence requirement, in order to be eligible for LPR Cancellation of Removal, and furthermore that commission of the deportable crime or conviction for the deportable crime may stop the accrual of time.

RODRIGUEZ-MUNOZ v. ATTORNEY GENERAL, 419 F.3d 245 (3d Cir. 2005) [Precedent]:

ISSUE Whether a noncitizen who has been convicted of an aggravated felony can seek simultaneous INA §212(c) and Cancellation of Removal relief?

HOLDING A crime involving moral turpitude that may be waivable under §212(c) may nevertheless be an aggravated felony that renders a noncitizen ineligible for LPR Cancellation of Removal.

- Respondent Richard Jose Rodriguez-Munoz was admitted to the U.S. as an LPR in 1976. In 1992, he pled guilty to four drug offenses in New York state court, including third degree criminal sale of a controlled substance (crack cocaine). In 1994, the INS charged Rodriguez-Munoz with deportability as a noncitizen convicted of an aggravated felony and as being convicted of a violation relating to a controlled substance. While the immigration proceedings were pending, Rodriguez-Munoz pled guilty in New York to two additional offenses: fifth degree criminal possession of marijuana and seventh degree criminal possession of a controlled substance. The government acknowledged that there was no question that Rodriguez-Munoz was eligible to apply for an INA § 212(c), waiver of deportation concerning his 1992 conviction. Indeed, § 212(c) relief remained available for noncitizens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect. Rodriguez-Munoz apparently did not argue before the Board that his 1992 conviction was not an aggravated felony, nor did he raise such an argument on appeal. Although a waiver of deportation gave him a chance to stay in the U.S. despite his misdeed, it did not expunge his conviction. Thus, even if Rodriguez-Munoz's deportation based on his 1992 conviction were waived under § 212(c), that conviction would nonetheless remain an aggravated felony for purposes of precluding his application for

Cancellation of Removal under INA§ 240A. Thus, he was deportable.

- This case is important because a noncitizen who has an aggravated felony conviction along with other crimes of moral turpitude cannot seek simultaneous INA § 212(c) and Cancellation of Removal relief, because the aggravated felony makes him or her ineligible for Cancellation of Removal.

MURALI KRISHNA PONNAPULA v. ASHCROFT, 373 F.3d 480 (3d Cir. 2004) [Precedent]:

ISSUE Whether the post-IIRAIRA statutory restrictions on discretionary relief apply to noncitizens who were convicted of a deportable crime prior to the enactment of IIRAIRA, but who turned down a misdemeanor plea deal?

HOLDING A noncitizen who turned down a misdemeanor plea deal, and was later convicted of an aggravated felony is not subject to the statutory restrictions of IIRAIRA.

- Respondent Murali Krishna Ponnepula was indicted for grand larceny and falsifying business records in violation of New York law after his brother submitted a loan application with the noncitizen's forged signature and without the noncitizen's knowledge. In reliance on counsel's advice, the noncitizen turned down a misdemeanor plea agreement, went to trial when former INA § 212(c) was still in effect, and was convicted. The court rejected the Government's contention that St. Cyr precluded the noncitizen from claiming an impermissible retroactive effect of the repeal of § 212(c). With respect to the noncitizen, who reasonably could have relied on the potential availability of § 212(c) relief, the court found the repeal of § 212(c) had an impermissible retroactive effect. Although the court concluded that actual reliance was not necessary, the court found that the noncitizen demonstrated clear and reasonable actual reliance on the former statutory scheme in making the decision to go to trial.
- This case is important because the noncitizen reasonably believed that even if he was convicted of a felony after trial he would still likely be eligible for hardship relief from deportation pursuant to former § 212(c). In reliance of this, the noncitizen decided to turn down the misdemeanor offer and proceeded to trial. The Third Circuit court utilized St. Cyr and allowed the noncitizen to avail himself of § 212(c) relief.

SCHEIDEMANN v. INS, 83 F.3d 1517 (3d Cir. 1996) [Precedent]:

ISSUE Whether an LPR who has served at least five years of imprisonment for a crime defined as an aggravated felony (under the original 1988 definition) is eligible to apply for a discretionary waiver of deportation under § 212(c).

HOLDING A noncitizen who has been convicted of an aggravated felony with a 5-year sentence is ineligible for relief under INA 212(c).

- Respondent James Scheidemann was an LPR since 1959. Scheidemann sought review of an order of the Board, which dismissed his appeal to overturn a deportation order. Scheidemann faced deportation on account of a 1987 drug trafficking conviction for which he had served over five years in prison. Scheidemann did not contest his deportability. Rather, he argued that he was eligible to apply for a discretionary waiver of deportation under INA § 212(c). The court held that Congress intended § 212(c) to restrict the Attorney General's power to exercise discretionary relief, immediately after the amendment to the aggravated felony statute, with respect to noncitizens who had served at least five years imprisonment for crimes defined as aggravated felonies under the original 1988 definition, regardless of the conviction date. Accordingly, Scheidemann's petition for review was denied.
- This case is important because an LPR who has served at least five years of imprisonment for a crime defined as an aggravated felony (under the original 1988 definition) will not be eligible to apply for a discretionary waiver of deportation under the former § 212(c).

MATTER OF HUANG, 19 I. & N. Dec. 749 (BIA 1988) [Precedent]:

ISSUE Who has the burden of establishing abandonment of lawful permanent resident status?

HOLDING The DHS has the burden of establishing abandonment of lawful permanent residence status.

- The noncitizen family members were natives and citizens of Taiwan and included an adult female and her two minor children. They were initially admitted to the US as LPRs on June 5, 1982. The noncitizen's husband was admitted as an LPR one week earlier. The noncitizen's husband, after receiving his Alien Registration Receipt Card, returned to Japan to continue studying and working at a university's medical school as a medical doctor. Soon after, the noncitizen wife and the children returned to Japan. The noncitizen and her two children last sought to reenter the U.S. on May 10, 1986, at which time they were placed in exclusion proceedings and ordered removed. She appealed. The INS contended on appeal that the noncitizens had abandoned their LPR statuses. The Board noted that the INS has the burden of proving that a noncitizen is ineligible for admission as a returning permanent resident. In determining whether the DHS has met its burden of proof, the IJ should look to whether the LPR has an unrelinquished residence after a temporary visit abroad. A temporary visit abroad may be an extended period of absence, "if the end of the period of absence can be fixed by some early event." The noncitizen's professed

intent to return is not sufficient to support a finding that the visit was “temporary.” The Board found that the INS had met the burden and the Board ordered the noncitizen and her children removed from the U.S.

- This case is important because the Board held that the DHS bears the ultimate burden of showing abandonment of LPR status.

(3). Board of Immigration Appeals

MATTER OF NELSON, 25 I. & N. Dec. 410 (BIA 2011) [Precedent]:

ISSUE Whether a noncitizen is entitled to a new period of continuous residence, commencing upon his reentry into the U.S., so as to allow him to accrue the time required to establish eligibility for LPR Cancellation of Removal?

HOLDING “Once an alien has been convicted of an offense that stops the accrual of the 7-year period of continuous residence required for cancellation of removal...section 240A(d)(1) of the Act does not permit such residence to restart simply because the alien has departed from, and returned to the United States.”

- Respondent, Michael Alexander Nelson, a native and citizen of Jamaica, was admitted as a LPR on November 3, 1994. On February 20, 1999, Respondent was convicted of a New York offense for possession of marijuana. In August 2000, Respondent visited Canada and thereafter returned to the U.S.. On November 26, 2008, Nelson was served with an NTA because of his criminal offense of possession of marijuana. The IJ found that Nelson was removable based on his 1999 convictions and that Nelson failed to show eligibility for Cancellation of Removal because he had not accrued continuous residence for 7 years. Specifically, the IJ found that Nelson could not re-start the clock when he re-entered after his trip to Canada. Thus, according to the IJ, the clock stopped for purposes of accruing continuous residence time on February 20, 1999, at which point Nelson had not resided in the U.S. for 7-years. On appeal, Nelson argued that he was eligible for Cancellation of Removal because his reentry into the U.S. after his trip to Canada, restarted the clock. Thus, the date that the stopped the time for accrual of residence was November 2008, rather than February 1999. The Board affirmed the IJ’s decision. In so holding, the Board found that the facts in Okeke v. Attorney General differ. In Okeke, the respondent had been removed for possession of marijuana, and thereafter returned to the U.S. lawfully on a student visa. The respondent in Okeke, was then placed into removal proceedings for failing to maintain a student status. Here, the Board found that the fact that the new removal proceedings were related to the clock stopping event distinguished the Nelson’s case from that of Okeke. Unlike the respondent in

Okeke, here Nelson's removal proceedings are on account of his conviction. Therefore, the Board concluded that Okeke, was not "binding" in this case. However, the Board did suggest that it may have come to a different result should Nelson have received a waiver prior to his reentry into the U.S..

- This case is important because the holding provides that lawful reentry into the U.S. after a clock-stopping event will not re-start the clock for purposes of 7-years continuous residence when the clock-stopping event was the basis for removal. Further, this distinguishes the holding in Okeke v. Attorney General, providing a further wrinkle in that the clock *cannot* restart after lawful re-entry, if the basis for removal is the prior clock stopping event.

MATTER OF CAMARILLO, 25 I. & N. Dec. 644 (BIA 2011) [Precedent]:

ISSUE Whether an NTA that does not include the date and time of the initial hearing can stop the clock for purposes of Cancellation of Removal?

HOLDING In-person service of an NTA that does not indicate a date or time of hearing is nevertheless sufficient to terminate the continuous residence of an LPR.

- Respondent, Judith Camarillo, was a native and citizen of Guatemala who became a LPR in 2000. On August 29, 2005, she was served in person with a Notice to Appear, which included the phrase "To be set" in the space provided for the date and time of the hearing. The NTA was later filed with the Harlingen Immigration Court, which issued a notice of hearing on November 9, 2007. She was charged with alien smuggling and the IJ found her removable. But the IJ granted her petition for Cancellation of Removal on the grounds that Camarillo had accrued the required seven-years of continuous residence by the time the Court issued the notice that contained the hearing date. The IJ interpreted the terms in 239(a)(1) of 8 U.S.C. §1229(a)(1)(G), "[t]he time and place at which the proceedings will be held," as requirements for an NTA so that the stop-time rule takes effect. DHS appealed, arguing that section § 1229(a)(1) specifies that an NTA must be served, and the terms in §1229(a)(1)(G) help identify what an NTA is. The Board agreed with the DHS that the key phrase was "served a notice to appear" and the Congress intended the phrase "under section 239(a)" after "notice to appear" to specify the document the DHS must serve to trigger the "stop-time" rule. Additionally, the court highlighted that removal proceedings commence when the NTA is **filed** with the Immigration Court. 8 C.F.R. § 1239.1(a) (2011). Since the commencement of proceedings is a separate issue from the **service** of the NTA, what mattered was the NTA that Camarillo was served in person. Thus,

Camarillo was not eligible for Cancellation of Removal because she had not accrued seven-years at the time she was served in 2005. The court sustained the appeal by DHS.

- This case is important because the holding found that the NTA will suffice to end continuous residence, regardless if there is a date or time for the hearing on the NTA at the time the noncitizen is served. The court also distinguished that the date that mattered for purposes of terminating continuous residence is the date that the NTA was served and not the date on which removal proceedings commence nor the date that the NTA is filed. Peculiarly, the Board never makes any conclusions regarding Camarillo's criminal conviction for smuggling aliens into the U.S., which could have been a reason to stop time for purposes of the 7 years of continuous residence.

MATTER OF RAMIREZ-VARGAS, 24 I. & N. Dec. 599 (BIA 2008) [Precedent]:

ISSUE Whether a parent's lawful permanent resident status can be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish for Cancellation of Removal under § 240A(a)(1)?

HOLDING A parent's LPR residence may not be imputed to his or her child for purpose of the 7-year continuous residence requirement.

- Respondent, Ramirez-Vargas, a native and citizen of Mexico and an LPR of the U.S., was found removable as a noncitizen convicted of a controlled substance violation but granted his application for Cancellation of Removal. The DHS appealed, arguing that the IJ erred in finding the respondent statutorily eligible for that relief because the lawful permanent residence of the noncitizen's father could not be imputed to the noncitizen. The Board sustained the appeal by DHS. The Board held that a parent's period of residence in the U.S. cannot be imputed to a child for purposes of calculating the 7 years of continuous residence required to establish eligibility for Cancellation of Removal under INA § 240A(a)(2).
- This case is important because it rejected the 9th Circuit Court's holding that imputation of a parent's LPR status to a child was permissible. Matter Of Escobar, 24 I. & N. Dec. 231 (BIA 2007). Matter of Escobar was vacated in 2009 and currently all Circuit Courts hold that imputation of a parent's continuance residence is impermissible.

MATTER OF JURADO, 24 I. & N. Dec. 29 (BIA 2006) [Precedent]:

ISSUE Whether a noncitizen needs to be charged with a crime and found inadmissible or removable in order for the criminal conduct in question to

terminate continuous residence?

HOLDING A noncitizen who committed crimes for which s/he was deportable under pre-IIRIRA may be deportable under post-IIRIRA proceedings; the Board left open the question as to whether LPR Cancellation of Removal can be applied retroactively to crimes committed before IIRIRA was enacted.

- Respondent Jimmy Roberto Jurado, was admitted to the U.S. as an LPR on September 15, 1985. He was convicted in 1991 of retail theft in violation of Pennsylvania law. In 1992 he was also convicted of unsworn falsification to authorities. In addition, the noncitizen was convicted in 1997 of two crimes involving moral turpitude that were the basis of the charge of removability in his NTA. In proceedings before the IJ, the noncitizen conceded that he was removable, both on the initial charge and on a lodged charge that he falsely represented himself to be a U.S. citizen. He applied for Cancellation of Removal under section 240A(a) of the Act, which the IJ granted. On appeal, the DHS contended that the noncitizen failed to demonstrate the requisite period of continuous residence to establish his eligibility for Cancellation of Removal. The Board agreed and found that the IJ erred in concluding that the noncitizen was eligible for Cancellation of Removal.
- This case is important because the Board concluded that the time period of a crime is measured from the commission of the crime, not the conviction.

MATTER OF CISNEROS-GONZALEZ, 23 I. & N. Dec. 668 (BIA 2004) [Precedent]:

ISSUE Whether a noncitizen who departed the U.S. after being served with a valid charging document can seek relief in a subsequent removal proceeding, based on a new period of continuous physical presence measured from the date of his return?

HOLDING For purposes of applying for Cancellation of Removal, a noncitizen's period of continuous physical presence ends when s/he is served with the charging document on which the current removal proceeding is based (8 U.S.C. § 1229b(d)(1)); the stop-time rule does not refer to charging documents served in prior proceedings.

- Respondent Ignacio Cisneros-Gonzalez's first removal proceeding was in December 28, 1990. He was served with an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien (Form I-221S), charging him with deportability for having entered without inspection (former 8 U.S.C. §1251(a)(2)). On January 10, 1991 he was deported. On January 11, 1991 he returned to the U.S. without being admitted or paroled. On January 5, 2001, he applied for Non-LPR Cancellation of Removal, which requires continuous

physical presence for 10 years. The IJ cited to Matter of Mendoza-Sandino as authority to apply the stop-time rule to Cisneros-Gonzalez's first deportation proceeding from 1990, which would have made him ineligible for the relief. However, the Board's legislative history analysis determined that Congress did not intend for the stop-time rule under INA §240A(d)(1) to ban noncitizens from seeking Cancellation of Removal relief. The "stop-time" rule was not intended to extend to charging documents issued in earlier proceedings. Thus, the Board sustained Cisneros-Gonzalez's appeal and remanded the case.

- This case is important because the Board distinguishes this case from Matter of Mendoza-Sandino, 22 I. & N. Dec. 1236 (BIA 2000). There, the noncitizen applied for suspension of deportation based on a single order to show cause. Here, however, multiple charging documents existed. When the DHS does not or cannot reinstate a prior order of removal against a previously deported noncitizen and instead issues a new order of removal, the noncitizen may be eligible to apply for Cancellation of Removal based on the accrual of the new continuous presence (§ 240A(b)) or new continuous residence (§ 240A(a)). Importantly, note that Cisneros-Gonzalez was applied to § 240A(b) [Non-LPR Cancellation of Removal], rather than § 240A(a) [LPR Cancellation of Removal]. Under 240A(d)(1), however, the stop-time rule applies to both LPR Cancellation of Removal's continuous residence requirement (§ 240A(a)(2)) and Non-LPR Cancellation of Removal's continuous physical presence requirement (§ 240A(b)(2)).

MATTER OF DEANDA-ROMO, 23 I. & N. Dec. 597 (BIA 2003) [Precedent]:

ISSUE Whether a noncitizen who has committed two crimes involving moral turpitude is precluded from establishing the requisite 7 years of continuous residence for cancellation of removal under INA §240A(a)(2), where his first crime was a petty offense that was committed within the 7-year period and the second crime was committed more than 7 years after his admission to the U.S.?

HOLDING The stop-time rule is triggered by crimes for which a noncitizen is inadmissible; however, the stop-time rule is not triggered by petty offenses.

- Respondent Jose Abraham Deanda-Romo, was admitted to the U.S. as an LPR on January 8, 1992. On September 21, 1999, he was convicted in Texas of two misdemeanor offenses of assault with bodily injury to his spouse, one occurring on October 30, 1998, and the other on June 20, 1999. He was sentenced to imprisonment for both offenses. He conceded removability and applied for LPR Cancellation of Removal. The IJ terminated the application after finding that the noncitizen was ineligible for relief

under the "stop-time" rule. The Board held that the noncitizen was not precluded by the stop-time rule from establishing the requisite seven years of continuous residence because his first crime qualified as a petty offense, under INA 212(a)(2)(A)(ii)(II), and therefore did not render him inadmissible. Thus, according to the Board, the noncitizen had accrued the requisite seven years of continuous residence before the second offense was committed.

- This case is important because the court held that the stop-time rule does not apply until the second conviction where the first conviction was a petty offense.

IN RE BLANCAS-LARA, 23 I. & N. Dec. 458 (BIA 2002) [Precedent]:

ISSUE Whether the period of a noncitizen's residence in the U.S. after admission as a nonimmigrant may be considered in calculating the 7 years of continuous residence required to establish eligibility for cancellation of removal.

HOLDING A noncitizen's admission as a nonimmigrant may be used to calculate the start of 7-year continuous residence requirement.

- Respondent Eduardo Blancas-Lara was first admitted to the U.S. in August 1986 with a border-crossing card. He adjusted his status to that of an LPR on August 5, 1991. The noncitizen's period of continuous residence under section 240A(a)(2) of the Act ended on April 1, 1998, when he was served with a Notice to Appear. At that point, the noncitizen had resided in the U.S. as an LPR for about 6 years and 8 months. The IJ concluded that the noncitizen could count time he spent in the U.S. as a child before his admission as an LPR toward the accrual of 7 years of continuous residence under section 240A(a)(2), because the lawful residence of his father, a citizen and resident of the U.S., could be imputed to him. On appeal the Board found that the noncitizen established that, at the time of his application for relief, he had resided in the U.S. continuously for 7 years after having been admitted as a nonimmigrant. Thus, an applicant who is admitted with a nonimmigrant visa, and accrues the 7 years of continuous residence to meet the second element of the statute, does not need an imputation argument. Accordingly, the Board concurred with the IJ's decision and dismissed the appeal.
- This case is important because the Board stated that the period of a noncitizen's residence in the U.S. after admission as a nonimmigrant may be considered in calculating the seven years of continuous residence required to establish eligibility for cancellation of removal.

MATTER OF SOTELO-SOTELO, 23 I.&N. Dec. 201 (BIA 2001) [Precedent]:

ISSUE Whether a noncitizen is required to satisfy a threshold test of showing "unusual or outstanding equities" for the consideration of whether a favorable exercise of discretion is warranted?

HOLDING The noncitizen does not have to show "unusual or outstanding equities." Rather, favorable and adverse factors should be weighed to determine whether the person warrants discretionary relief.

- Respondent Javier Sotelo-Sotelo adjusted his status to that of an LPR on December 1, 1990. On July 24, 2000, he was convicted of the following offenses: possession and passing fraudulent resident alien cards, failure to provide migrant workers with terms and conditions of employment, and illegal entry or aiding and abetting illegal entry. The noncitizen was sentenced to 8 months of imprisonment for each of the first two offenses, and to 6 months of imprisonment for the third offense. In proceedings before the IJ, the noncitizen conceded removability as charged and applied for Cancellation of Removal under INA §240A(a). The IJ denied the noncitizen's application for relief, and the noncitizen appealed. The Board found that the favorable factors presented in support of the noncitizen's application for cancellation of removal did not outweigh the adverse factors. In doing so, the Board rejected the use of an 'outstanding and unusual equities' requirement as a threshold for relief and instead found that the IJ should weigh the favorable and adverse factors to determine whether the 'totality of the evidence' on balance indicates that a favorable discretion is warranted.
- This case is important because the Board rejected the use of an 'outstanding and unusual equities' requirement as a threshold for relief and instead found that the IJ should weigh the favorable and adverse factors to determine whether the 'totality of the evidence' on balance indicates that a favorable discretion is warranted.

MATTER OF CAMPOS-TORRES, 22 I. & N. Dec. 1289 (BIA 2000) [Precedent]:

ISSUE Whether the noncitizen's commission of a firearms offense, which is not referred to in INA § 212(a)(2), precluded him from satisfying the requirement in INA § 240A(a)(2) that he have resided in the U.S. continuously for 7 years after having been admitted in any status?

HOLDING A noncitizen triggers the stop-time rule when s/he violates a provision that is actually found in 212(a)(2).

- Respondent Ignacio Campos-Torres, was admitted to the U.S. as a temporary resident on May 4, 1988, and adjusted his status to that of a LPR on December 13, 1990. On September 23, 1993 the noncitizen was

convicted of a single offense of unlawful use of a weapon. The noncitizen was sentenced to 18 months of probation. On June 25, 1997, the INS issued and served a NTA, commencing removal proceedings and charging the noncitizen with removability. The issue that was raised before the IJ and argued in the initial briefs submitted on appeal concerned the appropriate date to apply in determining when accrual of continuous residence ends. The noncitizen argued that under the plain language of the statute, firearms offenses do not cut off continuous residence because they are not "referred to" in § 212(a)(2) of the Act. The government argued that the plain language of INA § 240A(d)(1) does not clearly support either its position or that of the noncitizen because the statute is ambiguous. The Board found that because the noncitizen's firearms offense, which rendered him deportable under INA § 237(a)(2)(C), is not referred to in INA § 212(a)(2), it did not stop time under INA § 240A(d)(1).

- This case is important because the Board held that "an offense must be one 'referred to in section 212(a)(2)' of the Act, 8 U.S.C. § 1182(a)(2) (1994 & Supp. II 1996), to terminate the period of continuous residence or continuous physical presence required for cancellation of removal."

MATTER OF PEREZ, 22 I. & N. Dec. 689 (BIA 1999) [Precedent]:

ISSUE Whether the "stop-time" rule operates to terminate the period of continuous residence required for Cancellation of Removal as of the date the noncitizen commits the offense that renders him/her deportable?

HOLDING The stop-time rule is triggered by a noncitizen who violates a provision in INA § 212(a)(2), § 237(a)(2) or 237(a)(4).

- Respondent Cristobal Perez, admitted each of the factual allegations in the Notice to Appear. Specifically, he admitted that was first admitted as a temporary resident on September 21, 1989, and that his status was subsequently adjusted to that of an LPR on December 7, 1990. The noncitizen further admitted that he was convicted on July 11, 1997, in Texas, of possession of cocaine, and that this offense was committed on or about August 4, 1992. The noncitizen conceded that he was removable as charged under section 237(a)(2)(B)(i) of the Act on the basis of this conviction and the IJ ordered him removed. The noncitizen appealed to the Board on the basis of the retroactive effect of § 240A, arguing that the section's rules limiting eligibility for relief from removal should not apply to him. The Board, after finding that applying Section 240A would not have an impermissible "retroactive effect," concluded that the respondent's period of continuous residence is deemed to have ended on the date he committed his controlled substance violation. The commission of that offense was

prior to his attainment of the required 7 years of continuous residence. Therefore, he was statutorily ineligible for section 240A(a) Cancellation of Removal. Accordingly, the Board found that the IJ's pretermission of his application for Cancellation of Removal was proper.

- This case is important because the Board concluded that "admission in any status" includes admission as a temporary resident. Also, "Under INA 240A(d)(1)(B), continuous residence is deemed to end upon the commission of an offense under INA § 212(a)(2), or INA § 237(a)(2) or § 237(a)(4). The time period is measured from the commission of the crime, not the conviction."

MATTER OF EDWARDS, 20 I. & N. Dec. 191 (BIA 1990) [Precedent]:

ISSUE Whether Section 212(c) provides an indiscriminate waiver for individuals who demonstrate statutory eligibility?

HOLDING Section 212(c) does not provide an indiscriminate waiver for individuals who demonstrate statutory eligibility.

- Respondent Edwards, who was admitted as an LPR in 1968. He married a US citizen with whom he had four US citizen children. He incurred criminal convictions while in the US that entailed him serving some 2 and 1/2 years of imprisonment. The noncitizen implored that he be allowed to remain in the US because of his family. He insisted that he would work hard to change his ways. He stated that his wife and children, as well as his mother and siblings, resided here and that he knew no one in Barbados. The IJ determined that the noncitizen was statutorily eligible for a section 212(c) waiver. However, he denied that relief in the exercise of discretion. On appeal, Edwards argued that the IJ erred by failing to consider all of the favorable factors presented in his case. The Board balanced the various factors in the noncitizen's case and took note of his favorable equities, which the board found to be unusual or outstanding. However, when the Board weighed these equities against the adverse factors of the noncitizen's extensive criminal record, the Board determined that a favorable exercise of discretion was not warranted.
- This case is important because the Board states that under former INA § 212(c), courts should consider the record as a whole. Additionally, this case clarified confusion that was found from the rehabilitation factor in Matter of Marin. Some courts found that "a clear showing of reformation is an absolute prerequisite to a favorable exercise of discretion;" however, the Board clarified the rehabilitation is not an absolute prerequisite. Rather, each instance should be evaluated on a case-by-case basis.

MATTER OF MARIN, 16 I. & N. Dec. 581 (BIA 1978) [Precedent]:

ISSUE Whether a waiver of deportation/cancellation of removal provides an indiscriminate waiver for all who demonstrate statutory eligibility for such relief?

HOLDING Waivers of deportation/cancellation do not provide indiscriminate relief for all who demonstrate statutory eligibility for such relief. Rather, the adjudicator will consider positive and adverse factors, as set forth below.

- Respondent Marin was admitted as a LPR on February 3, 1965. In March 1976, he pled guilty to the felony charge of criminal sale of cocaine. He served 30 months in New York State penal institutions. In May 1977 he was served with an order to show cause and was charged with being deportable. The IJ found him deportable and he appealed. The noncitizen argued that he was eligible for 212(c) relief. The Board stated that Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General is required to determine as a matter of discretion whether an applicant warrants the relief sought. The Board concluded that the noncitizen bears the burden of demonstrating that his application merits favorable consideration. The noncitizen was unable to advance any substantial equities and the Board dismissed his appeal.
- This case is important because the Board courts should consider a noncitizen's record as a whole. Courts should balance the adverse factors evidencing the noncitizen's undesirability as a permanent resident with the social and humane considerations presented in his or her behalf to determine whether relief should be granted. Adverse factors include: (1) "the nature and underlying circumstances of the exclusion ground at issue," (2) "the presence of additional significant violations of this country's immigration laws," (3) "the existence of a criminal record and, if so, its nature, recency, and seriousness," and (4) "the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country." Positive equities include: (1) family ties within the US, (2) residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), (3) evidence of hardship to the respondent and family if deportation occurs, (4) service in this country's Armed Forces, (5) a history of employment, (6) the existence of property or business ties, (7) evidence of value and service to the community, (8) proof of a genuine rehabilitation if a criminal record exists, and (9) other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives)."

(b). Arranged by Statutory Element**(1). Has been an alien lawfully admitted for permanent residence for not less than 5 years****(A). Conditional Lawful Permanent Residents**

GALLIMORE V. ATTORNEY GENERAL, 619 F.3d 216 (3d Cir. 2010) [Precedent]:

ISSUE 1 Whether a noncitizen who had mistakenly responded falsely on an application for adjustment of status is considered to have been “lawfully admitted for permanent residence?”

ISSUE 2 Whether a noncitizen is considered to have been “lawfully” admitted for permanent residence when admitted on a conditional basis or when the conditions were removed?

HOLDING 1 A noncitizen who had mistakenly responded falsely on an application for adjustment of status is *not* considered to have been lawfully admitted for permanent residence.

HOLDING 2 A noncitizen is considered to have been admitted as a lawful permanent resident when s/he is admitted on a conditional basis.

- The Respondent, Earl Gallimore, entered the U.S. on August 7, 1993 pursuant to a nonimmigrant visa. On September 25, 1993, police found five pounds of marijuana in Respondent’s car on a car stop. On January 12, 1994, Respondent married a US citizen and applied for adjustment of status. On the application for adjustment of status, Respondent answered no to the following question: “Have you ever, in or outside the U.S. been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance...?” On September 13, 1994, Respondent was arrested for the pending indictment for possession of marijuana and eventually pled guilty to the charge. On April 1, 1996, Respondent applied to have the conditions on his status removed. When Respondent applied for the removal of the conditions, his wife answered on a supporting document that Respondent had never been convicted of violating any law. On December 17, 2001, Gallimore applied for naturalization and was denied. Due to Respondent’s previous failure to disclose the indictment, he was found to have poor moral character. On April 3, 2006 he was served a Notice to Appear. Respondent explained to the IJ that he had not understood that he had been arrested during the car stop. The IJ found that Respondent had “willfully failed to disclose” his arrest on his application for adjustment, and that he had not been eligible for Cancellation of Removal because he had never been “lawfully admitted for permanent residence.” The Board agreed

with the IJ's conclusion, and the Third Circuit affirmed. The Third Circuit concluded that his 1995 conviction rendered the Respondent inadmissible. As such, the Respondent was inadmissible at the time adjustment, and he had not been "lawfully" admitted for permanent residence. However, the Third Circuit found that this was not the end of the inquiry as the date that Respondent could be considered to have obtained "lawful" permanent residence is January 12, 1994, the date in which Respondent had applied for conditional permanent residence. The Third Circuit found that the Board did not speak to this issue. While finding that the word "permanent" may connote a meaning that did not encompass noncitizens given a conditional status, the Third Circuit found this interpretation to be inconsistent with Section 1186(a), which concerns "conditional permanent residents' eligibility for citizenship." The statute states: "For purposes of [naturalization] in the case of an alien who is in the United States as an LPR resident on a conditional basis under this section, the alien shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence." Further, Section 1186(a) is further corroborated by 8 C.F.R. § 216.1, which states that conditional residents are to be considered LPRs, as well. Therefore, the Third Circuit indicates that the court is not aware of any reason to conclude that a conditional permanent resident is not a "lawful" permanent resident. However, the Third Circuit leaves this decision to the Board to make an affirmative holding that a conditional permanent resident is considered a "lawful" permanent resident.

- This case is important for three reasons. The case affirms the Board's holding that a noncitizen who fraudulently or mistakenly completed an application for lawful permanent residence will not be considered to have "lawfully" entered. The noncitizen will not be considered to have "lawfully" entered even if it is the agency that had erroneously conferred LPR status. Further, this case indicates that a noncitizen who is a conditional permanent resident, is an LPR.

MATTER OF PAEK, 26 I. & N. 403 (BIA 2014), *aff'd*, 793 F.3d 330 (3d Cir. 2015)
[Precedent]:

ISSUE Whether a noncitizen who was admitted to the U.S. as a conditional permanent resident is considered a lawful permanent resident?

HOLDING A noncitizen spouse lawfully admitted as a permanent resident on a conditional basis, is considered an LPR.

- Respondent Ka A. Paek, was admitted into the U.S. in 1991. Respondent was convicted of theft in 2005 and robbery in 2006, and removal

proceedings were initiated in July 2013. Respondent then applied for adjustment of status pursuant to his marriage to a U.S. citizen and applied for Section 212(h) waiver. However, the waiver states that “No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if... since the date of his admission the alien has been convicted of an aggravated felony.” Therefore, if the Respondent was considered a “lawful” permanent resident at the time of his convictions, he would not be eligible for the waiver. The Board found that “notwithstanding any other provision of this Act, an alien spouse... shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence to have obtained such status on a conditional basis to the provisions of this section.”

- While this case deals with § 212(h) waivers, this case further indicates that a conditional permanent resident will be considered to have “lawfully” entered.

(B). Burden of Proof for Abandonment of Lawful Permanent Resident Status

MATTER OF HUANG, 19 I. & N. Dec. 749 (BIA 1988) [Precedent]:

ISSUE Who has the burden of establishing abandonment of lawful permanent resident status?

HOLDING The DHS has the burden of establishing abandonment of lawful permanent residence status.

- The noncitizen family members were natives and citizens of Taiwan and included an adult female and her two minor children. They were initially admitted to the US as LPRs on June 5, 1982. The noncitizen's husband was admitted as a lawful permanent resident one week earlier. The noncitizen's husband, after receiving his Alien Registration Receipt Card, returned to Japan to continue studying and working at a university's medical school as a medical doctor. Soon after, the noncitizen wife and the children returned to Japan. The noncitizen and her two children last sought to reenter the U.S. on May 10, 1986, at which time they were placed in exclusion proceedings and ordered removed. She appealed. The INS contended on appeal that the noncitizens had abandoned their LPR statuses. The Board noted that the INS has the burden of proving that a noncitizen is ineligible for admission as a returning permanent resident. In determining whether the DHS has met its burden of proof, the IJ should look to whether the LPR has an unrelinquished residence after a temporary visit abroad. A temporary visit abroad may be an extended period of absence, “if

the end of the period of absence can be fixed by some early event.” The noncitizen’s professed intent to return is not sufficient to support a finding that the visit was “temporary.” The Board found that the INS had met the burden and the Board ordered the noncitizen and her children removed from the U.S.

- This case is important because the Board held that the DHS bears the ultimate burden of showing abandonment of LPR status.

(C). Ability to Impute a Parent’s Lawful Permanent Resident Status

HOLDER V. MARTINEZ GUTIERREZ, 132 S. Ct. 2011 (2012) [Precedent]:

ISSUE Whether a parent’s lawful permanent resident status can be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under § 240A(a)(1)?

HOLDING A child of an LPR may not impute the parent’s length of time as an LPR for purposes of 5 years of lawful permanent residence and 7-year continuous residence requirement.

- This case decided two consolidated cases about imputation, one with regard to the 5-year LPR requirement and the other with regard to 7-year continuous residence requirement. Only Respondent Martinez Gutierrez involved imputation with regard to the five years of lawful permanent residence requirement. Martinez Gutierrez, illegally entered the U.S. with his family in 1989, when he was five years old. Respondent’s father obtained a LPR status two years later; however, respondent never adjusted his status until 2003. Two years later respondent was apprehended and admitted to smuggling undocumented people across the border. He then applied for cancellation of removal. The IJ determined he could qualify for LPR § 240A(a)(1) and (a)(2) on his own because of his father’s status, but the Board reversed. Respondent appealed to the Court of Appeals, which reversed and remanded the decision to the Board. On appeal from the Ninth Circuit, the Supreme Court concluded that the Board’s interpretation of §240A(a)(1) is “based on a permissible construction of the statute,” and reversed the Ninth Circuit’s decision.
- This case is important because the Supreme Court reaffirmed the Board’s holding that a parent’s LPR status may not be imputed to their children to give the child the necessary 5 years of LPR status to qualify for cancellation or 7 years’ continuous residence.

(2). Has resided in the U.S. continuously for 7 years after having been admitted in any status

(A). Retroactivity

JURADO-DELGADO v. ATTORNEY GENERAL, 498 Fed. App. 101 (3d Cir. 2009)

[Precedent]:

ISSUE Whether INA § 240A(a) can be applied retroactively to crimes committed by an LPR in 1991, before INA §240 was enacted?

HOLDING A noncitizen who committed crimes for which s/he was deportable under pre-Illegal Immigration Reform and Immigrant Responsibility Act may be deportable under post-IIRIRA proceedings; the court left open the question as to whether Lawful Permanent Resident Cancellation of Removal can be applied retroactively to crimes committed before IIRIRA was enacted.

- Respondent, Jimmy Jurado-Delgado, a native and citizen of Ecuador, was admitted to the U.S. as an LPR in 1985. Jurado-Delgado conceded before an IJ that he was removable either under INA §237(a)(2)(A)(ii) for having been convicted of two crimes involving moral turpitude in 1997, or under INA § 237(a)(3)(D), for having falsely represented himself to be a U.S. citizen, but he requested Cancellation of Removal under INA §240A(a). The court held that Jurado-Delgado's 1991 crimes stopped his accrual of time toward a period of seven years of continuous residence because they were crimes involving moral turpitude, which rendered him inadmissible under § 212(a)(2)(A)(i). Jurado-Delgado petitioned for review of a final order of the Board. He argued, among other things, that the Board's determination that he was ineligible for Cancellation of Removal is the result of an impermissible, retroactive application of that statute. In his view, the Board, when determining whether he was statutorily eligible for Cancellation Of removal, was not entitled to take into account crimes that he committed prior to Congress's creation of that remedy. Because the Board applied the law in effect at the time Jurado-Delgado committed the deportable offense, no question of retroactivity was implicated. Here, the Third Circuit Court denied Jurado-Delgado's petition for review.
- This case is important because it suggests that INA § 240A(a) can be applied retroactively to crimes committed by an LPR before INA § 240A was enacted, such that the crimes can stop accrual of time toward a period of seven years of continuous residence.

GUZMAN V. ATTORNEY GENERAL, 770 F.3d 1077 (3d Cir. 2014) [Precedent]:

ISSUE Whether the stop-time rule can be applied retroactively to terminate the accrual of continuous residence for LPR Cancellation of Removal?

HOLDING The stop-time rule can be applied retroactively to terminate accrual of time required to satisfy the requisite 7-year continuous physical presence.

- Respondent, Cristian Guzman is a 38-year-old citizen of the Dominican Republic. He was admitted to the U.S. as an LPR on October 8, 1994 and had continually resided in the U.S. since that time. In 1995, Guzman was arrested in NY and charged with Criminal Possession of a Controlled Substance. On December 19, 1995, Guzman pled guilty to a lesser possession charge and was sentenced to 3 years' probation. In 2005, he was again arrested and charged with Criminal Possession of a Controlled Substance and pled guilty. On December 1, 2005 he was sentenced to time served. On March 6, 2012, DHS served Guzman with an NTA and took him into custody based on the 2005 conviction pursuant to a controlled substance abuse (INA §237(a)(2)(B)(i)). He conceded removability, but applied for LPR Cancellation of Removal. The Government argued that Guzman was ineligible for the relief because the stop-time rule terminated his continuous residence when he committed the 1995 drug offense. Guzman argued that he could have accrued 7 years of continuous residence. Specifically, Guzman argued that (1) the application of the stop-time rule was impermissibly retroactive because the rule became effective on April 1, 1997 through IIRIRA, after he committed his 1995 drug offense; (2) he should be able to apply for the 212(c) deportation waiver, which was available prior to IIRIRA, and he should be able to delay his deportation, which was a strategy available prior to IIRIRA to allow him to accrue the 7 years of continuous presence for the 212(c) waiver; and, (3) the retroactive application of the stop-time rule was arbitrary and capricious because only LPRs who committed crimes within 7 years of admission were punished by being subject to the rule. Therefore, Guzman moved to terminate his deportation to apply for naturalization. The IJ held the stop-time rule was not arbitrary; therefore, Guzman was ineligible for Cancellation of Removal and for 212(c) because he had only accrued 1 year of continuous residence by the time he committed the 1995 crime. Further, Guzman had not made affirmative communication with DHS regarding his prima facie eligibility for naturalization, which is required to terminate the deportation so that the Petitioner can seek naturalization (*In re Acosta Hidalgo*). The Board affirmed the IJ's holding and found that Guzman could not apply simultaneously for 212(c) relief and LPR Cancellation of Removal because 8 U.S.C. § 1229b(c)(6) explicitly precludes applying for both. Additionally, even if he could obtain a 212(c) waiver

notwithstanding his 1995 conviction, the conviction would still have ended his continuous residence for purposes of Cancellation of Removal because the 212(c) waiver does not serve to pardon, expunge, or eliminate all negative immigration consequences stemming from a noncitizen's criminal conviction. The 3rd Circuit Court affirmed the Board's decision that Guzman was ineligible to apply for the 212(c). The Court cited St. Cyr, wherein the noncitizen has accrued the required 7 years of continuous residence before IIRIRA became effective and removal proceedings commenced after IIRIRA became effective, thus, retroactive application of IIRIRA was held a "new disability" because the LPR already had a vested right to use 212(c) when he plead guilty. The 3rd Circuit Court also cited to Sinotes-Cruz, where the noncitizen committed a crime pre-IIRIRA that was later reclassified by IIRIRA as a deportable crime. Retroactive application was impermissible in that case because the LPR relied on the pre-IIRIRA law when he pled guilty. In the present case, the 3rd Circuit held that Guzman has no vested right in 212(c) because he did not have the requisite 7 years of continuous residence at the time he committed the 1995 crime, and the 1995 crime made him deportable. Thus, the stop-time rule was triggered and made him ineligible for LPR Cancellation of Removal.

- This case is important because the 3rd Circuit reinforced that an LPR may use 212(c) as relief only when the vested right to qualify under 212(c) existed at the time in which the crime was committed and that the stop-time rule does apply retroactively to terminate the accrual of continuous presence for purposes of LPR Cancellation of Removal⁶⁷. Additionally, the 3rd Circuit did not rule on whether the Board's interpretation is correct when the Board held that an LPR cannot apply concurrently for 212(c) relief and LPR Cancellation of Removal.

(B). Re-entry After a Clock Stopping Event

MATTER OF CISNEROS-GONZALEZ, 23 I. & N. Dec. 668 (BIA 2004) [Precedent]:

ISSUE Whether a noncitizen who departed the U.S. after being served with a valid charging document can seek relief in a subsequent removal proceeding,

⁶⁷ See, Sinotes-Cruz v Gonzales, 468 F.3d 1190 (9th Cir. 2006) (holding that the stop-time rule may not be applied retroactively to prevent noncitizens from fulfilling the seven-year continuous residence requirement when the noncitizen pleads guilty under the expectation that his plea will not affect his immigration status based on the law in effect at the time the noncitizen pleads guilty).

based on a new period of continuous physical presence measured from the date of his return?

HOLDING For purposes of applying for Cancellation of Removal, a noncitizen's period of continuous physical presence ends when s/he is served with the charging document on which the current removal proceeding is based (8 U.S.C. § 1229b(d)(1)); the stop-time rule does not refer to charging documents served in prior proceedings.

- Respondent Ignacio Cisneros-Gonzalez's first removal proceeding was in December 28, 1990. He was served with an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien (Form I-221S), charging him with deportability for having entered without inspection (former 8 U.S.C. §1251(a)(2)). On January 10, 1991 he was deported. On January 11, 1991 he returned to the U.S. without being admitted or paroled. On January 5, 2001, he applied for Non-LPR Cancellation of Removal, which requires continuous physical presence for 10 years. The IJ cited to Matter of Mendoza-Sandino as authority to apply the stop-time rule to Cisneros-Gonzalez's first deportation proceeding from 1990, which would have made him ineligible for the relief. However, the Board's legislative history analysis determined that Congress did not intend for the stop-time rule under INA §240A(d)(1) to ban noncitizens from seeking Cancellation of Removal relief. The "stop-time" rule was not intended to extend to charging documents issued in earlier proceedings. Thus, the Board sustained Cisneros-Gonzalez's appeal and remanded the case.
- This case is important because the Board distinguishes this case from Matter of Mendoza-Sandino, 22 I. & N. Dec. 1236 (BIA 2000). There, the noncitizen applied for suspension of deportation based on a single order to show cause. Here, however, multiple charging documents existed. When the DHS does not or cannot reinstate a prior order of removal against a previously deported noncitizen and instead issues a new order of removal, the noncitizen may be eligible to apply for Cancellation of Removal based on the accrual of the new continuous presence (§ 240A(b)) or new continuous residence (§ 240A(a)). Importantly, note that Cisneros-Gonzalez was applied to § 240A(b) [Non-LPR Cancellation of Removal], rather than § 240A(a) [LPR Cancellation of Removal]. Under § 240A(d)(1), however, the stop-time rule applies to both LPR Cancellation of Removal's continuous residence requirement (§ 240A(a)(2)) and Non-LPR Cancellation of Removal's continuous physical presence requirement (§ 240A(b)(2)).

OKEKE v. ATTORNEY GENERAL, 407 F.3d 585 (3d Cir. 2005) [Precedent]:

ISSUE Whether a noncitizen is entitled to a new period of continuous physical

presence, commencing upon his lawful reentry into the U.S., so as to allow him to accrue the time required to establish eligibility for Non-LPR Cancellation of Removal?

HOLDING A noncitizen who lawfully reenters the U.S. after overstaying a visa may start a new accrual of time for purposes of satisfying the requisite 10-year continuous physical presence when the noncitizen's Notice to Appear exclusively charges the noncitizen with being a visa overstay.

- Respondent, Anderson Jude Okeke, a native and citizen of Nigeria, petitioned for review of two orders from the Board. Those orders affirmed the Immigration Judge's decision that Okeke could not demonstrate the requisite continuous physical presence in the U.S. in order to qualify for Non-LPR Cancellation of Removal. Essentially, the Board found that the 'stop-time' provision (INA § 240A(d)(1)), once triggered, precluded the accrual of a new period of continuous presence, which in this case commenced with Okeke's lawful reentry into the U.S. The lawful reentry, which was the critical fact on appeal, occurred after Okeke committed a controlled substance offense, which, pursuant to INA § 240A(d)(1), clearly ended any prior period of continuous physical residence. This court concluded that the clock restarted upon Okeke's reentry. Pursuant to the express terms of the NTA, it was the last reentry into the U.S. that should have been considered in calculating continuous physical presence.
- This case is important because a noncitizen is entitled to a new period of continuous physical presence under INA § 240A(d)(1), commencing upon his lawful reentry into the U.S., so as to allow him to accrue the time required to establish eligibility for *Non-LPR* Cancellation of Removal. Here, the Third Circuit is applying the holding in *Cisneros*. Though this holding applies to Non-LPR Cancellation of Removal, the holding could also apply to LPR Cancellation of Removal as INA § 240A(d)(1) refers to both continuous physical presence under Non-LPR Cancellation of Removal and continuous residence under LPR Cancellation of Removal.

MATTER OF NELSON, 25 I. & N. Dec. 410 (BIA 2011) [Precedent]:

ISSUE Whether a noncitizen is entitled to a new period of continuous residence, commencing upon his reentry into the U.S., so as to allow him to accrue the time required to establish eligibility for LPR Cancellation of Removal?

HOLDING "Once an alien has been convicted of an offense that stops the accrual of the 7-year period of continuous residence required for cancellation of removal...section 240A(d)(1) of the Act does not permit such residence to restart simply because the alien has departed from, and returned to the United States."

- Respondent, Michael Alexander Nelson, a native and citizen of Jamaica, was admitted as a LPR on November 3, 1994. On February 20, 1999, Respondent was convicted of a New York offense for possession of marijuana. In August 2000, Respondent visited Canada and thereafter returned to the U.S.. On November 26, 2008, Nelson was served with an NTA because of his criminal offense of possession of marijuana. The IJ found that Nelson was removable based on his 1999 convictions and that Nelson failed to show eligibility for Cancellation of Removal because he had not accrued continuous residence for 7 years. Specifically, the IJ found that Nelson could not re-start the clock when he re-entered after his trip to Canada. Thus, according to the IJ, the clock stopped for purposes of accruing continuous residence time on February 20, 1999, at which point Nelson had not resided in the U.S. for 7-years. On appeal, Nelson argued that he was eligible for Cancellation of Removal because his reentry into the U.S. after his trip to Canada, restarted the clock. Thus, the date that the stopped the time for accrual of residence was November 2008, rather than February 1999. The Board affirmed the IJ's decision. In so holding, the Board found that the facts in Okeke v. Attorney General differ. In Okeke, the respondent had been removed for possession of marijuana, and thereafter returned to the U.S. lawfully on a student visa. The respondent in Okeke, was then placed into removal proceedings for failing to maintain a student status. Here, the Board found that the fact that the new removal proceedings were related to the clock stopping event distinguished the Nelson's case from that of Okeke. Unlike the respondent in Okeke, here Nelson's removal proceedings are on account of his conviction. Therefore, the Board concluded that Okeke, was not "binding" in this case. However, the Board did suggest that it may have come to a different result should Nelson have received a waiver prior to his reentry into the U.S..
- This case is important because the holding provides that lawful reentry into the U.S. after a clock-stopping event will not re-start the clock for purposes of 7-years continuous residence when the clock-stopping event was the basis for removal. Further, this distinguishes the holding in Okeke v. Attorney General, providing a further wrinkle in that the clock *cannot* restart after lawful re-entry, if the basis for removal is the prior clock stopping event.

SINGH V. ATTORNEY GENERAL, 807 F.3d 547 (3d Cir. 2015) [Precedent]:

ISSUE Whether a noncitizen convicted of a crime involving moral turpitude (CIMT) can use a re-entry to restart the clock to satisfy the seven-year continuous residency requirement?

HOLDING An LPR convicted of a CIMT cannot reenter as a method to restart the clock

to accrue the requisite 7-year continuous residence.

- Respondent, Narinder Singh, was a native and citizen of India. He was granted asylum on July 1, 1993, and adjusted to LPR status on June 1, 1994. On September 14, 2000, he was convicted in the U.S. District Court for the Northern District of Florida of conspiracy to counterfeit passports, counterfeiting and using visas, and mail fraud in violation of 18 U.S.C. § 371. He was also convicted of unlawful possession of forged, counterfeited, altered, and falsely made nonimmigrant U.S. visas in violation of 18 U.S.C. § 1546. Singh departed the U.S and re-entered on January 20, 2003. In October 2009, he applied for admission to the U.S. as an LPR. On January 10, 2010, Immigration and Customs Enforcement detained him. On January 19, 2010, he was served with a Notice to Appear charging him as inadmissible because he had a counterfeiting conviction, a crime involving moral turpitude. Singh applied for Cancellation of Removal but the IJ denied the petition and the Board dismissed his appeal based on a finding that he had not accrued seven years of continuous residence in the U.S. to be eligible for Cancellation of Removal pursuant to 8 U.S.C. § 1229b(a) [240A(a)]. Singh then filed a petition for review arguing that his 2003 re-entry restarted the clock for purposes of the seven-year residence requirement. However, the Court held that when Singh committed the CIMT, the clock both stopped and permanently prevented the clock from restarting. The Third Circuit cited to its Okeke decision that where there is a re-entry, the clock starts “anew.” However, the Third Circuit court distinguishes Okeke from the present case because in the former, the basis for removal was that the noncitizen was a visa-overstay. Thus, the court relied instead on the Nelson case in which the noncitizen’s removal was based on a crime that terminated his continuous residence and his continuous presence. Because Singh’s conviction involved a CIMT, the CIMT terminated his continuous residence and continuous presence so his re-entry could not restart the clock.
- This case is important because it reaffirms that re-entry can re-start the clock after a “clock stopping event” (i.e., receipt of a NTA), except when the NTA states the “clock stopping event” as the cause for removal. Here, the Third Circuit distinguished in part and applied in part the holding in Okeke and thereby Cisneros-Gonzalez, to the context of *LPR* Cancellation of Removal.

(C). An Incomplete NTA’s Application to Stop-Time Rule

MATTER OF CAMARILLO, 25 I. & N. Dec. 644 (BIA 2011) [Precedent]:

ISSUE Whether an NTA that does not include the date and time of the initial

hearing can stop the clock for purposes of Cancellation of Removal?

HOLDING In-person service of an NTA that does not indicate a date or time of hearing is nevertheless sufficient to terminate the continuous residence of an LPR.

- Respondent, Judith Camarillo, was a native and citizen of Guatemala who became a LPR in 2000. On August 29, 2005, she was served in person with a Notice to Appear, which included the phrase “To be set” in the space provided for the date and time of the hearing. The NTA was later filed with the Harlingen Immigration Court, which issued a notice of hearing on November 9, 2007. She was charged with alien smuggling and the IJ found her removable. But the IJ granted her petition for Cancellation of Removal on the grounds that Camarillo had accrued the required seven-years of continuous residence by the time the Court issued the notice that contained the hearing date. The IJ interpreted the terms in 239(a)(1) of 8 U.S.C. §1229(a)(1)(G), “[t]he time and place at which the proceedings will be held,” as requirements for an NTA so that the stop-time rule takes effect. DHS appealed, arguing that section § 1229(a)(1) specifies that an NTA must be served, and the terms in §1229(a)(1)(G) help identify what an NTA is. The Board agreed with the DHS that the key phrase was “served a notice to appear” and the Congress intended the phrase “under section 239(a)” after “notice to appear” to specify the document the DHS must serve to trigger the “stop-time” rule. Additionally, the court highlighted that removal proceedings commence when the NTA is **filed** with the Immigration Court. 8 C.F.R. § 1239.1(a) (2011). Since the commencement of proceedings is a separate issue from the **service** of the NTA, what mattered was the NTA that Camarillo was served in person. Thus, Camarillo was not eligible for Cancellation of Removal because she had not accrued seven-years at the time she was served in 2005. The court sustained the appeal by DHS.
- This case is important because the holding found that the NTA will suffice to end continuous residence, regardless if there is a date or time for the hearing on the NTA at the time the noncitizen is served. The court also distinguished that the date that mattered for purposes of terminating continuous residence is the date that the NTA was served and not the date on which removal proceedings commence nor the date that the NTA is filed. Peculiarly, the Board never makes any conclusions regarding Camarillo’s criminal conviction for smuggling aliens into the U.S., which could have been a reason to stop time for purposes of the 7 years of continuous residence.

(D). Ability to Impute Parent's Continuous Residence Time

MATTER OF RAMIREZ-VARGAS, 24 I.& N. Dec. 599 (BIA 2008) [Precedent]:

ISSUE Whether a parent's lawful permanent resident status can be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish for cancellation of removal under § 240A(a)(1)?

HOLDING A parent's LPR residence may not be imputed to his or her child for purpose of the 7-year continuous residence requirement.

- Respondent, Ramirez-Vargas, a native and citizen of Mexico and an LPR of the U.S., was found removable as a noncitizen convicted of a controlled substance violation but granted his application for Cancellation of Removal. The DHS appealed, arguing that the IJ erred in finding the respondent statutorily eligible for that relief because the lawful permanent residence of the noncitizen's father could not be imputed to the noncitizen. The Board sustained the appeal by DHS. The Board held that a parent's period of residence in the U.S. cannot be imputed to a child for purposes of calculating the 7 years of continuous residence required to establish eligibility for Cancellation of Removal under INA § 240A(a)(2).
- This case is important because it rejected the 9th Circuit Court's holding that imputation of a parent's LPR status to a child was permissible. Matter Of Escobar, 24 I. & N. Dec. 231 (BIA 2007). Matter of Escobar was vacated in 2009 and currently all Circuit Courts hold that imputation of a parent's continuance residence is impermissible.

AUGUSTIN v. ATTORNEY GENERAL, 520 F.3d 264 (3d Cir. 2008) [Precedent]:

ISSUE Whether a noncitizen who entered the U.S. as a minor can impute his parent's years of continuous residence in order to meet the seven-year requirement for Cancellation of Removal?

HOLDING A parent's LPR residence may not be imputed to his or her child for purpose of the 7-year continuous residence requirement.

- Respondent, Luckson Augustin, was admitted to the U.S. as an LPR at the age of 13 to join his parents who had previously come to the U.S.. Approximately five years after coming to the U.S., the noncitizen committed a crime involving moral turpitude. He was later charged with being removable based in part on that crime. The noncitizen admitted the allegations but argued that he was eligible for Cancellation of Removal based on his father's seven years of continuous residence in the U.S. prior to any of the crimes being committed. The Board rejected that argument, interpreting the statute as requiring that the noncitizen himself actually

dwell in the U.S. for seven years before committing the crime. On review, the court held that the Board's denial of Cancellation of Removal and its refusal to impute the father's years of residence was permissible because it was a straightforward application of the statute's requirements.

- This case is important because it affirms, under Chevron deference, the view that a parent's residence may not be imputed to his or her minor child for purposes of the seven-year residence provision of cancellation. This case affirms the Board's reasoning in Matter of Ramirez Vargas, 24 I.&N. Dec. 599 (BIA 2008).

(E). Date to Stop Time of Continuous Residence

MATTER OF PEREZ, 22 I. & N. Dec. 689 (BIA 1999) [Precedent]:

ISSUE Whether the "stop-time" rule operates to terminate the period of continuous residence required for Cancellation of Removal as of the date the noncitizen commits the offense that renders him/her deportable?

HOLDING The stop-time rule is triggered by a noncitizen who violates a provision in INA § 212(a)(2), § 237(a)(2) or 237(a)(4).

- Respondent Cristobal Perez, admitted each of the factual allegations in the Notice to Appear. Specifically, he admitted that he was first admitted as a temporary resident on September 21, 1989, and that his status was subsequently adjusted to that of an LPR on December 7, 1990. The noncitizen further admitted that he was convicted on July 11, 1997, in Texas, of possession of cocaine, and that this offense was committed on or about August 4, 1992. The noncitizen conceded that he was removable as charged under section 237(a)(2)(B)(i) of the Act on the basis of this conviction and the IJ ordered him removed. The noncitizen appealed to the Board on the basis of the retroactive effect of § 240A, arguing that the section's rules limiting eligibility for relief from removal should not apply to him. The Board, after finding that applying Section 240A would not have an impermissible "retroactive effect," concluded that the respondent's period of continuous residence is deemed to have ended on the date he committed his controlled substance violation. The commission of that offense was prior to his attainment of the required 7 years of continuous residence. Therefore, he was statutorily ineligible for section 240A(a) Cancellation of Removal. Accordingly, the Board found that the IJ's pretermission of his application for Cancellation of Removal was proper.
- This case is important because the Board concluded that "admission in any status" includes admission as a temporary resident. Also, "Under INA

240A(d)(1)(B), continuous residence is deemed to end upon the commission of an offense under INA § 212(a)(2), or INA § 237(a)(2) or § 237(a)(4). The time period is measured from the commission of the crime, not the conviction."

MATTER OF CAMPOS-TORRES, 22 I. & N. Dec. 1289 (BIA 2000) [Precedent]:

ISSUE Whether the noncitizen's commission of a firearms offense, which is not referred to in INA § 212(a)(2), precluded him from satisfying the requirement in INA § 240A(a)(2) that he have resided in the U.S. continuously for 7 years after having been admitted in any status?

HOLDING A noncitizen triggers the stop-time rule when s/he violates a provision that is actually found in 212(a)(2).

- Respondent Ignacio Campos-Torres, was admitted to the U.S. as a temporary resident on May 4, 1988, and adjusted his status to that of an LPR on December 13, 1990. On September 23, 1993 the noncitizen was convicted of a single offense of unlawful use of a weapon. The noncitizen was sentenced to 18 months of probation. On June 25, 1997, the INS issued and served a NTA, commencing removal proceedings and charging the noncitizen with removability. The issue that was raised before the IJ and argued in the initial briefs submitted on appeal concerned the appropriate date to apply in determining when accrual of continuous residence ends. The noncitizen argued that under the plain language of the statute, firearms offenses do not cut off continuous residence because they are not "referred to" in § 212(a)(2) of the Act. The government argued that the plain language of INA § 240A(d)(1) does not clearly support either its position or that of the noncitizen because the statute is ambiguous. The Board found that because the noncitizen's firearms offense, which rendered him deportable under INA § 237(a)(2)(C), is not referred to in INA § 212(a)(2), it did not stop time under INA § 240A(d)(1).
- This case is important because the Board held that "an offense must be one 'referred to in section 212(a)(2)' of the Act, 8 U.S.C. § 1182(a)(2) (1994 & Supp. II 1996), to terminate the period of continuous residence or continuous physical presence required for cancellation of removal."

MATTER OF DEANDA-ROMO, 23 I. & N. Dec. 597 (BIA 2003) [Precedent]:

ISSUE Whether a noncitizen who has committed two crimes involving moral turpitude is precluded from establishing the requisite 7 years of continuous residence for cancellation of removal under INA §240A(a)(2), where his first crime was a petty offense that was committed within the 7-year period and the second crime was committed more than 7 years after his admission to the U.S.?

HOLDING The stop-time rule is triggered by crimes for which a noncitizen is inadmissible; however, the stop-time rule is not triggered by petty offenses.

- Respondent Jose Abraham Deanda-Romo, was admitted to the U.S. as an LPR on January 8, 1992. On September 21, 1999, he was convicted in Texas of two misdemeanor offenses of assault with bodily injury to his spouse, one occurring on October 30, 1998, and the other on June 20, 1999. He was sentenced to imprisonment for both offenses. He conceded removability and applied for LPR Cancellation of Removal. The IJ terminated the application after finding that the noncitizen was ineligible for relief under the "stop-time" rule. The Board held that the noncitizen was not precluded by the stop-time rule from establishing the requisite seven years of continuous residence because his first crime qualified as a petty offense, under INA 212(a)(2)(A)(ii)(II), and therefore did not render him inadmissible. Thus, according to the Board, the noncitizen had accrued the requisite seven years of continuous residence before the second offense was committed.
- This case is important because the court held that the stop-time rule does not apply until the second conviction where the first conviction was a petty offense.

DUDNEY v. ATTORNEY GENERAL, 129 Fed. Appx. 747 (3d Cir. 2005) [Precedent]:

ISSUE Whether an LPR's 1998 conviction stopped the clock for purposes of the continuous residence requirement of INA §240A(a)(2)?

HOLDING The stop-time rule may be triggered by a noncitizen when s/he commits a crime for which a noncitizen is deportable.

- Respondent Barrington Dudney, was admitted to the U.S. as an immigrant in August 1992. In October 1998, he was convicted of possession and possession with the intent to deliver a controlled substance (92 packets of marijuana). On August 3, 1999, he was convicted of possession of a controlled substance, simple assault and for resisting arrest during an August 20, 1998 incident. Dudney also was convicted on August 31, 1999 of charges of simple assault, possession of an instrument of crime and recklessly endangering another person in an incident on February 19, 1999. In June 1999, the INS issued a NTA charging Dudney with removability based upon his October 1998 conviction. A removal order was entered after Dudney failed to appear for his hearing, but the IJ later terminated the proceedings due to insufficient evidence. In October 2001, the INS issued another NTA charging Dudney with removability for having committed an aggravated felony (drug trafficking), two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, and a violation of

law relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana. These charges were based on the October 1998 and August 31, 1999 convictions. The NTA was then amended, and the August 3, 1999 convictions for drug possession and simple assault, and another aggravated felony charge were added. Through counsel, Dudney sought cancellation of removal as a permanent resident pursuant to INA § 240A(a). The IJ found Dudney removable for a violation of law relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana, based on his August 3, 1999 drug conviction. The Board also agreed with the IJ that Dudney was not eligible for cancellation of removal because he did not meet the requirement that he have continuous residence here for seven years. The Board explained that even if Dudney could not be removed based upon his October 1998 conviction because the proceedings related to this conviction were terminated, the October 1998 conviction stopped the clock for purposes of the seven-year residence requirement. Alternatively, Dudney's continuous residence stopped as early as August 20, 1998 when the crime was committed.

- This case is important because it affirms that an LPR must satisfy INA § 240A(a)(2), the seven-year continuous residence requirement, in order to be eligible for LPR Cancellation of Removal, and furthermore that commission of the deportable crime or conviction for the deportable crime may stop the accrual of time.

MATTER OF JURADO, 24 I. & N. Dec. 29 (BIA 2006) [Precedent]:

ISSUE Whether a noncitizen needs to be charged with a crime and found inadmissible or removable in order for the criminal conduct in question to terminate continuous residence?

HOLDING A noncitizen who committed crimes for which s/he was deportable under pre-IIRIRA may be deportable under post-IIRIRA proceedings; the Board left open the question as to whether LPR cancellation of removal can be applied retroactively to crimes committed before IIRIRA was enacted.

- Respondent Jimmy Roberto Jurado, was admitted to the U.S. as an LPR on September 15, 1985. He was convicted in 1991 of retail theft in violation of Pennsylvania law. In 1992 he was also convicted of unsworn falsification to authorities. In addition, the noncitizen was convicted in 1997 of two crimes involving moral turpitude that were the basis of the charge of removability in his NTA. In proceedings before the IJ, the noncitizen conceded that he was removable, both on the initial charge

and on a lodged charge that he falsely represented himself to be a U.S. citizen. He applied for Cancellation of Removal under section 240A(a) of the Act, which the IJ granted. On appeal, the DHS contended that the noncitizen failed to demonstrate the requisite period of continuous residence to establish his eligibility for Cancellation of Removal. The Board agreed and found that the IJ erred in concluding that the noncitizen was eligible for cancellation of removal.

- This case is important because the Board concluded that the time period of a crime is measured from the commission of the crime, not the conviction.

(F). Stop-Time Rule's Application to 5 years as Lawful Permanent Resident

JOSEPH v. ATTORNEY GENERAL, 236 Fed. Appx. 787 (3d Cir. 2007) [Precedent]:

ISSUE Whether an LPR is eligible for Cancellation of Removal when he commits a controlled substance violation, triggering the statute's "stop-time" provision under § 240A(d)(1)?

HOLDING The stop-time rule only terminates the accrual of time for purposes of satisfying the requisite 7-year continuous residence; the stop-time rule does not apply to the 5-years of permanent residency requirement.

- Respondent George Russel Joseph entered the U.S. in 1992 as a conditional resident and became an LPR in 1994. A NTA that was dated June 15, 2005 placed him in removal proceedings. He was charged with being removable because in August of 1997 he committed a controlled substance violation and an aggravated felony. He was convicted in January of 1998. The IJ found him removable for committing the controlled substance violation, but found that the Government had not met its burden of showing that any of his convictions were also aggravated felonies. Nevertheless, the IJ found Joseph ineligible for Cancellation of removal under INA § 240A(a). Joseph appealed to the Board, but the Board affirmed that Joseph was ineligible for LPR Cancellation of Removal because he did not have the required 5 years of permanent residence. The Board applied the stop-time rule to Joseph's permanent residence status, and calculated that his status as a permanent resident began in 1994 and terminated in 1998 when he was convicted. Joseph then appealed to the Court of Appeals for the Third Circuit, which held that the Board impermissibly applied the stop-time rule to the requirement of 5 years of permanent residence, and the stop-time rule only applies to the 7 years of continuous residence. Joseph had met the permanent residency requirement. However, the Board still found him ineligible for LPR Cancellation of Removal because his conviction did trigger

the stop-time rule for purposes of the 7 years of continuous residence requirement. To calculate Joseph's continuous residence, the Board counted the time from when Joseph was admitted in 1992 to the date he committed the crime in 1997 and determined he did not have the 7 years of continuous residence. Thus, the court denied Joseph's petition for review.

- This case is important because it reaffirms that the stop-time rule applies only to the requirement of 7 years of continuous residence.

(G). Nonimmigrant Status and 7 Years Continuous Residence Requirement

IN RE BLANCAS-LARA, 23 I. & N. Dec. 458 (BIA 2002) [Precedent]:

ISSUE Whether the period of a noncitizen's residence in the U.S. after admission as a nonimmigrant may be considered in calculating the 7 years of continuous residence required to establish eligibility for cancellation of removal.

HOLDING A noncitizen's admission as a nonimmigrant may be used to calculate the start of 7-year continuous residence requirement.

- Respondent Eduardo Blancas-Lara was first admitted to the U.S. in August 1986 with a border-crossing card. He adjusted his status to that of an LPR on August 5, 1991. The noncitizen's period of continuous residence under section 240A(a)(2) of the Act ended on April 1, 1998, when he was served with a Notice to Appear. At that point, the noncitizen had resided in the U.S. as an LPR for about 6 years and 8 months. The IJ concluded that the noncitizen could count time he spent in the U.S. as a child before his admission as an LPR toward the accrual of 7 years of continuous residence under section 240A(a)(2), because the lawful residence of his father, a citizen and resident of the U.S., could be imputed to him. On appeal the Board found that the noncitizen established that, at the time of his application for relief, he had resided in the U.S. continuously for 7 years after having been admitted as a nonimmigrant. Thus, an applicant who is admitted with a nonimmigrant visa, and accrues the 7 years of continuous residence to meet the second element of the statute, does not need an imputation argument. Accordingly, the Board concurred with the IJ's decision and dismissed the appeal.
- This case is important because the Board stated that the period of a noncitizen's residence in the U.S. after admission as a nonimmigrant may be considered in calculating the seven years of continuous residence required to establish eligibility for cancellation of removal.

(3). Has not been convicted of any aggravated felony**(A). Categorical Approach**

PARK v. ATTORNEY GENERAL, 472 F.3d 66 (3d Cir. 2006) [Precedent]:

ISSUE Whether a conviction for trafficking in counterfeit goods or services in violation of the Trademark Counterfeiting Act of 1984, 18 U.S.C. §2320, is a conviction for "an offense relating to ... counterfeiting," pursuant to INA §101(a)(43)(R) (and an aggravated felony)?

HOLDING A noncitizen who commits an aggravated felony as defined in INA §101(a)(43) is ineligible for LPR Cancellation of Removal and 18 U.S.C. 2320 is an aggravated felony.

- Respondent Yong Wong Park was admitted to the U.S. as an immigrant on or around February 12, 1998. On February 18, 2000, Park pleaded guilty in the U.S. District Court for the Southern District of New York to one count of trafficking in counterfeit goods or services from at least February 1997 through October 1997, in violation of 18 U.S.C. § 2320. After his conviction, the DHS initiated removal proceedings. The court found that Park's conviction under 18 U.S.C. §2320 was an offense relating to counterfeiting for purposes of the definition of "aggravated felony" under INA § 101(a)(43)(R). Park applied for LPR Cancellation under INA §240A(a) but because he had been convicted of an aggravated felony, he was ineligible for Cancellation of Removal. Park's petition for review was dismissed.
- This case is important because a conviction for trafficking in counterfeit goods or services in violation of the Trademark Counterfeiting Act of 1984, 18 U.S.C. §2320, is an aggravated felony because it is a conviction for "an offense relating to ... counterfeiting," pursuant to INA § 101(a)(43)(R). Therefore, a noncitizen with this type of conviction will be unsuccessful applying for LPR Cancellation of Removal.

MONCRIEFFE V. HOLDER, 133 S. Ct. 1678 (2013) [Precedent]:

ISSUE Whether a conviction under a statute that criminalizes conduct described by the Controlled Substance Act's (CSA) 21 U.S.C. §841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense punishable as a felony under the CSA?

HOLDING To be a categorical federal drug offense for immigration purposes, a state drug offense must necessarily correspond to an offense punishable as a felony under the Controlled Substance Act.

- Respondent Adrian Moncrieffe legally entered the U.S. in 1984. In 2007 he was stopped for a traffic violation and was found in possession of 1.3 grams of marijuana. He pleaded guilty under Georgia law to possession of marijuana with intent to distribute. He was placed in removal proceedings on the grounds that his conviction was an aggravated felony because possession of marijuana with intent to distribute is a Controlled Substance Act offense, 21 U.S.C. §841(a), punishable by up to five years' imprisonment, §841(b)(1)(D). An IJ ordered his removal, and the Board affirmed. The Fifth Circuit denied Moncrieffe's petition to review his argument that his conviction met CSA's §841(b)(4), which makes marijuana distribution punishable as a misdemeanor if the offense involves a small amount for no remuneration. The U.S. Supreme Court granted certiorari to resolve whether the state conviction qualified as an aggravated felony when applying the categorical approach. A state drug offense must meet two conditions: 1) the offense must "necessarily" proscribe conduct that is an offense under the CSA, and 2) the CSA must "necessarily" prescribe felony punishment for that conduct. Unlike the federal statute, the Georgia statute is ambiguous as to whether the conduct proscribed involved remuneration or the amount of controlled substances needed to be a violation. Thus, because the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA, the Court held the offense was not a categorical aggravated felony. The Court reversed and remanded the case.
- This case is important because when there is ambiguity in the state conviction, then the facts may not "necessarily" correspond to an offense punishable as a felony under the CSA. A noncitizen's conviction for a marijuana distribution offense can fail to qualify as an aggravated felony if there is no remuneration or no more than a small amount of marijuana.

MELLOULI V. LYNCH, 135 S. Ct. 1980 (2015) [Precedent]:

ISSUE Whether a state drug-paraphernalia misdemeanor meets the categorical definition of controlled substance under the Controlled Substance Act when the state misdemeanor is silent as to the controlled substance?

HOLDING To be a categorical federal drug offense for immigration purposes, a state law violation for controlled substances must be an offense for a controlled substance as defined in the Controlled Substance Act.

- Respondent Moones Mellouli, a citizen of Tunisia, entered the U.S. on a student visa in 2004. In 2009, he became a conditional permanent resident and, in 2011, an LPR. In 2010, he pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia to "store, contain,

conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.” Kan. Stat. Ann. §21-5709(b)(2). Under the Kansas law, it was immaterial whether the substance was scheduled in the Controlled Substance Act, 21 U. S. C. §802. The State did not charge, or seek to prove, that Mellouli possessed a substance on the §802 schedules. The sole “paraphernalia” Mellouli was charged with possessing was a sock in which he had placed four orange tablets. The criminal charge and plea agreement did not identify the controlled substance involved, although Mellouli had acknowledged the tablets were Adderall. Mellouli was sentenced to a suspended term of 359 days and 12 months’ probation, after which DHS placed him in removal proceedings. The Board affirmed the immigration judge’s decision and he was removed. The Eighth Circuit denied Mellouli’s petition for review. The Supreme Court then granted certiorari and applied the categorical approach. The Court held that since the record did not prove that Mellouli’s conviction was based on possession of a drug on the §802 schedule, the conviction could not be a categorical controlled substance conviction.

- This case is important because an offense for drug-paraphernalia possession must specify whether the controlled substance is scheduled in the Controlled Substance Act to meet the criteria for a controlled substance offense. Please note Mellouli was *not* found deportable of an aggravated felony, but rather deportable because Mellouli was found guilty of a crime involving controlled substance under INA §237(a)(2)(B). This case is included as an example of the application of the categorical approach.

(B). Modified Categorical Approach

DESCAMPS V. U.S., 133 S.Ct. 2276 (2013) [Precedent]:

ISSUE Whether the modified categorical approach applies to statutes that “contain a single, “indivisible” set of elements?”

HOLDING The modified categorical approach does not apply to statutes that contain a single, indivisible set of elements.

- Respondent Michael Descamps was convicted of being “a felon in possession of a firearm” and the government sought an enhanced sentence “based on Descamps’ prior state convictions for burglary, robbery, and felony harassment.” To be subject to the enhanced sentencing, the statute requires that the person had been previously convicted of a 3 violent felonies or a serious drug offense. A “violent felony” is one which “has as an element the use, attempted use, or threatened use of physical force against the person of another,” or that is a “burglary, arson or extortion, involves

use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.” Descamps argued that his past conviction was not within the meaning of the “violent felony” and therefore he could not be subject to the enhanced sentencing. The prior California felony that Descamps had been convicted found guilty a “person who enters” certain locations “with intent to commit grand or petit larceny or any felony.” Unlike the federal statute, Descamps argues, the California statute did not require that a person enter into the location unlawfully; therefore, the California statute was not a categorical match. Both the District Court and the Ninth Circuit disagreed with Descamps, and applied the modified categorical approach to look to “certain documents, including the record of the plea colloquy, to discover whether Descamps had “admitted the elements of a generic burglary” when entering his plea.” The District Court and the Ninth Circuit concluded that Descamps’ crime was within the meaning of the federal statute of burglary but Descamps appealed. The Supreme Court concluded that the California statute was indivisible, and therefore, the lower courts erred in applying the modified categorical approach. The Court found that the purpose of the modified categorical approach was to help “effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant’s conviction.” The Court illustrated that a statute may be indivisible, for example, when a statute of burglary includes both “entry into an automobile as well as a building.” In such a situation, entering an automobile, would not be within the generic federal definition; however, the alternative, “entry into... a building” would be within the generic federal definition. Because, in this hypothetical situations, the statute would not reveal which alternative the defendant was convicted, courts could look to the plea agreement, the colloquy between the judge and the defendant, or indictment so as to determine which alternative was used. On the other hand, where a statute is indivisible, courts should apply the categorical approach and may “only look to the statutory definitions,” of the defendant’s prior offenses, and not “to the particular facts underlying those convictions.” Here, the statute of Descamps prior conviction was not divisible, as the statute does not have a list of alternatives.

- This case is important because it shows an example of the application of the modified categorical approach and sets forth that the “sentencing courts may not consult additional documents when a defendant was convicted under an “indivisible” statutes.”

(C). Simultaneous Applications for Relief if Applicant Committed an Aggravated Felony

RODRIGUEZ-MUNOZ v. ATTORNEY GENERAL, 419 F.3d 245 (3d Cir. 2005) [Precedent]:

ISSUE Whether a noncitizen who has been convicted of an aggravated felony can seek simultaneous INA §212(c) and cancellation of removal relief.

HOLDING A crime involving moral turpitude that may be waivable under §212(c) may nevertheless be an aggravated felony that renders a noncitizen ineligible for LPR Cancellation of Removal?

- Respondent Richard Jose Rodriguez-Munoz was admitted to the U.S. as an LPR in 1976. In 1992, he pled guilty to four drug offenses in New York state court, including third degree criminal sale of a controlled substance (crack cocaine). In 1994, the INS charged Rodriguez-Munoz with deportability as a noncitizen convicted of an aggravated felony and as being convicted of a violation relating to a controlled substance. While the immigration proceedings were pending, Rodriguez-Munoz pled guilty in New York to two additional offenses: fifth degree criminal possession of marijuana and seventh degree criminal possession of a controlled substance. The government acknowledged that there was no question that Rodriguez-Munoz was eligible to apply for a INA § 212(c), waiver of deportation concerning his 1992 conviction. Indeed, § 212(c) relief remained available for noncitizens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect. Rodriguez-Munoz apparently did not argue before the Board that his 1992 conviction was not an aggravated felony, nor did he raise such an argument on appeal. Although a waiver of deportation gave him a chance to stay in the U.S. despite his misdeed, it did not expunge his conviction. Thus, even if Rodriguez-Munoz's deportation based on his 1992 conviction were waived under § 212(c), that conviction would nonetheless remain an aggravated felony for purposes of precluding his application for cancellation of removal under INA§ 240A. Thus, he was deportable.
- This case is important because a noncitizen who has an aggravated felony conviction along with other crimes of moral turpitude cannot seek simultaneous INA § 212(c) and Cancellation of Removal relief, because the aggravated felony makes him or her ineligible for Cancellation of Removal.

**(D). Availability of Alternative Discretionary Relief
if Convicted of an Aggravated Felony**

SCHEIDEMANN v. INS, 83 F.3d 1517 (3d Cir. 1996) [Precedent]:

ISSUE Whether an LPR who has served at least five years of imprisonment for a crime defined as an aggravated felony (under the original 1988 definition) is eligible to apply for a discretionary waiver of deportation under § 212(c).

HOLDING A noncitizen who has been convicted of an aggravated felony with a 5-year sentence is ineligible for relief under INA 212(c).

- Respondent James Scheidemann was an LPR since 1959. Scheidemann sought review of an order of the Board, which dismissed his appeal to overturn a deportation order. Scheidemann faced deportation on account of a 1987 drug trafficking conviction for which he had served over five years in prison. Scheidemann did not contest his deportability. Rather, he argued that he was eligible to apply for a discretionary waiver of deportation under INA § 212(c). The court held that Congress intended § 212(c) to restrict the Attorney General's power to exercise discretionary relief, immediately after the amendment to the aggravated felony statute, with respect to noncitizens who had served at least five years imprisonment for crimes defined as aggravated felonies under the original 1988 definition, regardless of the conviction date. Accordingly, Scheidemann's petition for review was denied.
- This case is important because an LPR who has served at least five years of imprisonment for a crime defined as an aggravated felony (under the original 1988 definition) will not be eligible to apply for a discretionary waiver of deportation under the former § 212(c).

(4). Discretionary Component of LPR Cancellation of Removal

(A). Standard for Determining Discretionary Component

MATTER OF MARIN, 16 I. & N. Dec. 581 (BIA 1978) [Precedent]:

ISSUE Whether a waiver of deportation/cancellation of removal provides an indiscriminate waiver for all who demonstrate statutory eligibility for such relief?

HOLDING Waivers of deportation/cancellation do not provide indiscriminate relief for all who demonstrate statutory eligibility for such relief. Rather, the adjudicator will consider positive and adverse factors, as set forth below.

- Respondent Marin was admitted as a LPR on February 3, 1965. In March

1976, he pled guilty to the felony charge of criminal sale of cocaine. He served 30 months in New York State penal institutions. In May 1977 he was served with an order to show cause and was charged with being deportable. The IJ found him deportable and he appealed. The noncitizen argued that he was eligible for 212(c) relief. The Board stated that Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General is required to determine as a matter of discretion whether an applicant warrants the relief sought. The Board concluded that the noncitizen bears the burden of demonstrating that his application merits favorable consideration. The noncitizen was unable to advance any substantial equities and the Board dismissed his appeal.

- This case is important because the Board courts should consider a noncitizen's record as a whole. Courts should balance the adverse factors evidencing the noncitizen's undesirability as a permanent resident with the social and humane considerations presented in his or her behalf to determine whether relief should be granted. Adverse factors include: (1) "the nature and underlying circumstances of the exclusion ground at issue," (2) "the presence of additional significant violations of this country's immigration laws," (3) "the existence of a criminal record and, if so, its nature, recency, and seriousness," and (4) "the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country." Positive equities include: (1) family ties within the US, (2) residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), (3) evidence of hardship to the respondent and family if deportation occurs, (4) service in this country's Armed Forces, (5) a history of employment, (6) the existence of property or business ties, (7) evidence of value and service to the community, (8) proof of a genuine rehabilitation if a criminal record exists, and (9) other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives)."

MATTER OF EDWARDS, 20 I.&N. Dec. 191 (BIA 1990) [Precedent]:

ISSUE Whether Section 212(c) provides an indiscriminate waiver for individuals who demonstrate statutory eligibility?

HOLDING Section 212(c) does not provide an indiscriminate waiver for individuals who demonstrate statutory eligibility.

- Respondent Edwards, who was admitted as an LPR in 1968. He married a US citizen with whom he had four US citizen children. He incurred

criminal convictions while in the US that entailed him serving some 2 and 1/2 years of imprisonment. The noncitizen implored that he be allowed to remain in the US because of his family. He insisted that he would work hard to change his ways. He stated that his wife and children, as well as his mother and siblings, resided here and that he knew no one in Barbados. The IJ determined that the noncitizen was statutorily eligible for a section 212(c) waiver. However, he denied that relief in the exercise of discretion. On appeal, Edwards argued that the IJ erred by failing to consider all of the favorable factors presented in his case. The Board balanced the various factors in the noncitizen's case and took note of his favorable equities, which the board found to be unusual or outstanding. However, when the Board weighed these equities against the adverse factors of the noncitizen's extensive criminal record, the Board determined that a favorable exercise of discretion was not warranted.

- This case is important because the Board states that under former INA § 212(c), courts should consider the record as a whole. Additionally, this case clarified confusion that was found from the rehabilitation factor in Matter of Marin. Some courts found that “a clear showing of reformation is an absolute prerequisite to a favorable exercise of discretion;” however, the Board clarified the rehabilitation is not an absolute prerequisite. Rather, each instance should be evaluated on a case-by-case basis.

MATTER OF SOTELO-SOTELO, 23 I.&N. Dec. 201 (BIA 2001) [Precedent]:

ISSUE Whether a noncitizen is required to satisfy a threshold test of showing "unusual or outstanding equities" for the consideration of whether a favorable exercise of discretion is warranted?

HOLDING The noncitizen does not have to show “unusual or outstanding equities.” Rather, favorable and adverse factors should be weighed to determine whether the person warrants discretionary relief.

- Respondent Javier Sotelo-Sotelo adjusted his status to that of an LPR on December 1, 1990. On July 24, 2000, he was convicted of the following offenses: possession and passing fraudulent resident alien cards, failure to provide migrant workers with terms and conditions of employment, and illegal entry or aiding and abetting illegal entry. The noncitizen was sentenced to 8 months of imprisonment for each of the first two offenses, and to 6 months of imprisonment for the third offense. In proceedings before the IJ, the noncitizen conceded removability as charged and applied for Cancellation of Removal under INA §240A(a). The IJ denied the noncitizen's application for relief, and the noncitizen appealed. The Board found that the favorable factors presented in support of the

noncitizen's application for cancellation of removal did not outweigh the adverse factors. In doing so, the Board rejected the use of an 'outstanding and unusual equities' requirement as a threshold for relief and instead found that the IJ should weigh the favorable and adverse factors to determine whether the 'totality of the evidence' on balance indicates that a favorable discretion is warranted.

- This case is important because the Board rejected the use of an 'outstanding and unusual equities' requirement as a threshold for relief and instead found that the IJ should weigh the favorable and adverse factors to determine whether the 'totality of the evidence' on balance indicates that a favorable discretion is warranted.

LEE V. ATTORNEY GENERAL, 431 Fed. Appx. 184 (3d Cir. 2011) [Precedent]:

ISSUE Whether the IJ abused his discretion in denying Cancellation of Removal for a respondent who was statutorily eligible for relief?

HOLDING The IJ did not abuse his discretion.

- Respondent Mun Seok Lee conceded removability on account of his conviction of possession of a handgun without a permit and applied for Cancellation of Removal. Although Respondent was statutorily eligible, the IJ denied Cancellation of Removal on a discretionary basis. The IJ stated: “[Respondent] has not demonstrated that he is worthy of the Court’s favorable exercise of discretion based on [his] pattern of engaging in unlawful conduct relating to his alcohol intoxication as reported in conviction and/or arrest records occurring from 1993 to 2008.” The Board affirmed, finding that Respondent had not displayed that his “positive equities do not outweigh the adverse factors in this case.” The Board stated that Respondent’s positive equities included his lengthy stay in the U.S., the fact that he owns “several successful businesses that employ about 40 people, his history of paying taxes, and his active participation in his church and community.” The adverse factors included his criminal history, the “recency, the quantity of the[] alcohol-related arrests and convictions[,] and the serious nature of them poses a public risk...,” the fact that his rehabilitation is not supported by the record, the fact that he only attended Alcoholics Anonymous that were mandated because of his criminal convictions, and the fact that “he was not forthcoming in his testimony about his use of alcohol in connection with his arrests, and that, by his own admission, he continued to drink alcohol.” The Third Circuit concluded that the Board correctly “weigh[ed] the favorable and adverse factors.”
- This case is important because the case provides an example of how the positive and adverse factors will be applied.

**(B). Court of Appeals Jurisdiction to Hear Appeals Concerning
the Discretionary Component**

VARGAS V. ATTORNEY GENERAL, 543 Fed. Appx. 162 (3d Cir. 2013)⁶⁸ [Precedent]:

ISSUE Whether the Court of Appeals lacked jurisdiction to review a petitioner’s claim that the Board gave insufficient consideration to discretionary factors?

HOLDING The Court of Appeals lacks jurisdiction to review a petitioner’s claim, unless the Board engaged in “impermissible fact finding.”

- Respondent Emmanuel De La Cruz Vargas was found to be statutorily eligible for Cancellation of Removal; however, he was denied application on account of discretionary factors. Respondent argued that the IJ erred because the Judge did not meaningfully consider all discretionary factors. The government argues that the Courts of Appeal generally lack jurisdiction to review discretionary matters. The Third Circuit agreed with the government finding that the court lacked authority to review claims based on the Immigration Judge’s discretion; however, the Third Circuit found that the court can review for “impermissible fact finding.”
- This case is important because it holds that the Third Circuit will not look to whether the Board or IJ insufficiently weighed the equities, but will look at only those scenarios which the Board engaged in “impermissible fact finding.”

(C). Retroactivity

INS v. ENRICO ST. CYR, 533 U.S. 289 (2001) [Precedent]:

ISSUE Whether the post-IIRAIRA statutory restrictions on discretionary relief apply to noncitizens who plead guilty to a deportable crime prior to the enactment of IIRAIRA?

HOLDING Post-IIRAIRA statutory restrictions on discretionary relief do not apply to noncitizens who pled guilty to a deportable crime prior to the enactment of IIRAIRA.

- Respondent Enrico St. Cyr was admitted as an LPR in 1986. A decade later in Connecticut, he pled guilty in a Connecticut state court to selling a

⁶⁸ See e.g., Padmore v. Holder, 609 F.3d 62, 70 (2d Cir. 2010) (finding the BIA “improperly found facts which it held to be “significant” and “important” to its decision denying him relief”).

controlled substance, \$100 worth of cocaine, and thus became deportable. If the INS had taken custody of St. Cyr at the completion of his sentence, he would have been eligible for a waiver of deportation under INA § 212(c). Because the INS did not begin proceedings against St. Cyr until 1997, St. Cyr would be subject to the new laws passed in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), if the court found that the statutes were retroactive. Therefore, St. Cyr could no longer file a motion for § 212(c), even though he pled to the crime when the waiver was still being granted. Represented by the ACLU, St. Cyr sued the federal government on the grounds that he was lawfully eligible for the waiver. The case reached the U.S. Supreme Court in 2001. The Court ruled that Congress never intended for INS to apply its new rule retroactively in cases involving plea bargains made prior to the enactment of IIRIRA. That meant that St. Cyr, and other immigrants whose convictions were obtained through plea agreements, remain eligible for § 212(c) waiver if they would have been eligible for § 212(c) relief at the time of their plea.

- This case is important because it held that the effective date of the changes from INA § 212(c) to Cancellation of Removal for LPRs, April 1, 1997, does not bar § 212(c) relief for certain pre-IIRIRA convictions.

ATKINSON v. ATTORNEY GENERAL, 479 F.3d. 222 (3d Cir. 2007) [Precedent]

ISSUE Whether the post-IIRIRA statutory restrictions on discretionary relief apply to noncitizens who were convicted of a deportable crime prior to the enactment of IIRIRA?

HOLDING Post-IIRIRA statutory restrictions on discretionary relief do not apply to noncitizens who were convicted of a deportable crime prior to the enactment of IIRIRA.

- Respondent Claudius Atkinson was convicted of state criminal offenses in 1991. He received a notice to appear in 1997, notifying him that he was removable based upon his convictions. The IJ denied the noncitizen's request for a waiver of deportation under former § 212(c) (repealed 1996), finding that he was ineligible for that relief. A month after the BOARD denied the noncitizen's appeal, the U.S. Supreme Court issued its decision in St. Cyr. The noncitizen filed his habeas petition after his reconsideration motion, based on St. Cyr, was denied. The District Court held that he was not entitled to relief because he failed to show that he had relied on § 212(c) when he was convicted in 1991. In conformity with the REAL ID Act, the court treated the habeas petition as a petition for review. The court held that the noncitizen was not precluded from applying for § 212(c) relief. IIRIRA

did not apply retroactively to noncitizens who were convicted of aggravated felonies prior to IIRIRA's effective date, regardless of whether they pleaded guilty or were convicted by a jury.

- This case is important because the Third Circuit held that § 212(c) is available to individuals who elected to go to trial and were convicted (as opposed to entering a plea agreement).

MURALI KRISHNA PONNAPULA v. ASHCROFT, 373 F.3d 480 (3d Cir. 2004) [Precedent]:

ISSUE Whether the post-IIRIRA statutory restrictions on discretionary relief apply to noncitizens who were convicted of a deportable crime prior to the enactment of IIRIRA, but who turned down a misdemeanor plea deal?

HOLDING A noncitizen who turned down a misdemeanor plea deal, and was later convicted of an aggravated felony is not subject to the statutory restrictions of IIRIRA.

- Respondent Murali Krishna Ponnappula was indicted for grand larceny and falsifying business records in violation of New York law after his brother submitted a loan application with the noncitizen's forged signature and without the noncitizen's knowledge. In reliance on counsel's advice, the noncitizen turned down a misdemeanor plea agreement, went to trial when former INA § 212(c) was still in effect, and was convicted. The court rejected the Government's contention that St. Cyr precluded the noncitizen from claiming an impermissible retroactive effect of the repeal of § 212(c). With respect to the noncitizen, who reasonably could have relied on the potential availability of § 212(c) relief, the court found the repeal of § 212(c) had an impermissible retroactive effect. Although the court concluded that actual reliance was not necessary, the court found that the noncitizen demonstrated clear and reasonable actual reliance on the former statutory scheme in making the decision to go to trial.
- This case is important because the noncitizen reasonably believed that even if he was convicted of a felony after trial he would still likely be eligible for hardship relief from deportation pursuant to former § 212(c). In reliance of this, the noncitizen decided to turn down the misdemeanor offer and proceeded to trial. The Third Circuit court utilized St. Cyr and allowed the noncitizen to avail himself of § 212(c) relief.

VI. PRACTICE ADVISORIES

Of the following guidance from stakeholders, some are direct quotes and some have been paraphrased. Some practitioner comments, as labeled in the footnotes, are from 2009 and some are from 2016. Please note that the practitioner comments are provided for general litigation strategies, and specific facts about the application process may have changed since 2009.

(a). How to Apply for LPR Cancellation of Removal

The following is an explanation of how an attorney should file an application for LPR Cancellation of Removal on behalf of a client.⁶⁹

Preparing the Application

An LPR that has been placed in removal proceedings before an Immigration Court and who is prima facie eligible for relief may apply for LPR Cancellation. An attorney should first determine whether the LPR is eligible for LPR Cancellation under INA §240A(a) by interviewing the LPR and obtaining his or her criminal and immigration records. If the attorney determines that the LPR is eligible, the attorney should obtain relevant and necessary information from the LPR and complete an LPR Cancellation application. In order to prepare the application, the attorney should do the following:⁷⁰

- (1) Complete Form **EOIR-42A**, Application for Cancellation of Removal for Certain Permanent Residents.⁷¹ This Form requires the applicant to supply basic information about his or her self, information about his or her presence in the U.S., marital status and spouse, employment and financial status, and family.
- (2) Include a birth certificate of the applicant or other identification with a translation if it is not in English, a copy of the **LPR card** (Green Card), passport

⁶⁹ An applicant proceeding pro se should follow the same steps as an attorney when applying for LPR Cancellation, but should not include Form EOIR-28 in his or her application.

⁷⁰ An attorney should note the importance of making sure that he or she uses the most current version of all forms (Form EOIR-42A, Form G-325A, and Form EOIR-28). These forms are updated frequently and it is easy to locate and use an outdated form by mistake. E-mail from Ms. Powers, Esq., (Nov. 30, 2009).

⁷¹ See Revised as of January 1, 2016 § 1240.20(a) (2016). United States Department of Justice, Executive Office for Immigration Review (follow "Form EOIR-42A" hyperlink) *available at* www.justice.gov/eoir/formlist.htm (last visited May 12, 2016).

How to Apply for LPR Cancellation of Removal

stamp, DHS Form [I-94](#), proof of fee payment and biometrics, a full copy of the applicant's criminal record, affidavits from the applicant and others⁷², a brief in support of the application, and other supporting documentation.

- (3) Complete Form [G-325A](#), Biographic Information.⁷³ This Form requires the applicant to supply information pertaining to his or her residence in the last five years, last address outside the U.S. of more than one year, employment during the last five years, and last occupation abroad.
- (4) Complete Form [EOIR-28](#), Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court.⁷⁴ This Form requires the applicant's attorney to supply information pertaining to his or her bar membership and good standing, and authority to represent the applicant.
- (5) Note that every block of each form should be filled in completely and clearly.⁷⁵ If a particular section does not apply to an applicant, the attorney should write "not applicable" rather than leaving it blank.⁷⁶ In addition, an attorney should note that all documents filed with the Immigration Court must be in English or accompanied by a certified English translation.⁷⁷ An affidavit or declaration in

⁷² See, PART 2: I. ADVICE FOR PRACTITIONERS BY PRACTITIONERS, available only upon request of Center for Immigrants' Rights at centerforimmigrantsr@pennstatelaw.psu.edu.

⁷³ United States Citizenship and Immigration Services, available at www.uscis.gov/portal/site/uscis (follow "Forms" hyperlink; then follow "follow "Form G-325A" hyperlink), (last visited May 12, 2016)

⁷⁴ United States Department of Justice, Executive Office for Immigration Review (follow "Form EOIR-28" hyperlink) available at www.justice.gov/eoir/formslist.htm (last visited May 12, 2016).

⁷⁵ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 56, available at https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

⁷⁶ Refer to the Form EOIR-42A application instructions found in 'PART I: Appendix IX: Sample Documents and Forms From Government Entities and Select Non-Profit Organizations' of this toolkit and to the United States Department of Justice, Executive Office for Immigration Review (follow "Form EOIR-42A" hyperlink) available at www.justice.gov/eoir/formslist.htm. In addition, an attorney should look to pro se packets available from the Florence Immigrant and Refugee Rights Project found in 'PART I: Appendix VIII: Pro Se Packets' of this toolkit and at the Florence Immigrant and Refugee Rights Project available at www.firrp.org (choose "Resources" and follow "How to Defend Your Case" hyperlink, scroll to "Cancellation of Removal for Legal Permanent Residents (green card holders) and select "English" hyperlink), (last visited May 12, 2016).

⁷⁷ 8 C.F.R. §§ 1003.33, 1003.23(b)(1)(i) (2016).

How to Apply for LPR Cancellation of Removal

English by a person who does not understand English must include a certificate of interpretation stating that the affidavit or declaration has been read to the person in a language that the person understands and that s/he understood it before signing.⁷⁸

- (6) Include a witness list with the application. The witness list should include the following information for each witness, except the applicant:⁷⁹ the name of the witness, if applicable, the alien registration number ("A number"), a written summary of the testimony, the estimated length of the testimony, the language in which the witness will testify, and a curriculum vitae or resume, if called as an expert.

Supporting Documents

In addition to filing Form [EOIR-42A](#) and Form [G-325A](#), an attorney should attach supporting documents on behalf of an LPR. These documents should correspond with each statutory element of INA §240A(a). For example an attorney should submit documentary evidence to show that an LPR has been an LPR for at least five years, has resided continuously in the U.S. after having been lawfully admitted in any status, and has not been convicted of an aggravated felony.

An attorney should attach the supporting documents to the application for LPR cancellation and include a table of contents with the documents.⁸⁰ Also, an attorney should include copies of original documents rather than the originals. The IJ has discretion to retain original documents in the Record of Proceedings.⁸¹ The IJ notes on the record when original documents are turned over to DHS or the Immigration Court.⁸²

⁷⁸ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 54, *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

⁷⁹ *See Id.* at 64.

⁸⁰ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 59, *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

⁸¹ *See Id.* at 62.

⁸² *See Id.*

How to Apply for LPR Cancellation of Removal

Required Biometric and Biographical Information

An attorney must complete Form [G-325A](#) for Biographic Information to submit with an LPR Cancellation application for applicants 14 years of age or older.⁸³ Form G-325A is available for download from the Internet through USCIS⁸⁴ and requires an applicant to supply information pertaining to his or her residence in the last five years, last address outside the U.S. of more than one year, employment during the last five years, and last occupation abroad.⁸⁵

When an individual who is detained applies for LPR Cancellation, his or her biometrics and fingerprinting will be handled by the facility in which s/he is detained.⁸⁶ DHS is responsible for obtaining biometrics and any other biographical information with respect to any individual in detention.⁸⁷

When an individual who is not detained has submitted an LPR Cancellation application to the Department of Homeland Security, s/he will be given instructions on how to complete the biometrics requirement and pay the application fees. The instructions are called "Instructions for Submitting Certain Applications in Immigration Court and for Providing Biometric and Biographic Information to U.S. Citizenship and Immigration Services."⁸⁸ The applicant will be notified in writing of the location of the Applicant Support Center (ASC) or the designated Law Enforcement Agency where s/he must go to provide biometric and biographic information.⁸⁹ The applicant will also be given a date

⁸³ United States Department of Justice, Executive Office for Immigration Review, Executive Office for Immigration Review, Application for Cancellation of Removal for Certain Permanent Residents, Instructions, 1, available at www.justice.gov/eoir/formslist.htm (last visited May 12, 2016).

⁸⁴ United States Citizenship and Immigration Services, available at www.uscis.gov/portal/site/uscis (follow "Forms" hyperlink; then follow "follow "Form G-325A" hyperlink), (last visited May 12, 2016)

⁸⁵ See *Id.*

⁸⁶ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 85, available at https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

⁸⁷ 8 C.F.R. §1003.47(d) (2016)

⁸⁸ United States Department of Homeland Security, United States Citizenship and Immigration Services, Immigration Benefits in EOIR Removal Proceedings, 2, available at <https://www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf> (last visited May 12, 2016).

⁸⁹ United States Department of Justice, Executive Office for Immigration Review, Executive Office for Immigration Review, Application for Cancellation of Removal for Certain Permanent Residents, Instructions, 1, available at www.justice.gov/eoir/formslist.htm (last visited May 12, 2016).

How to Apply for LPR Cancellation of Removal and time for his or her appointment.⁹⁰ When s/he goes to the interview noted on the receipt issued by the DHS, the applicant's fingerprints will be taken and s/he will be given a biometrics confirmation document.⁹¹ It is important that an applicant comply with the instructions during this process in order to avoid delays.

Fees

An attorney must pay a required \$100 filing fee and \$85 biometrics fee to the Department of Homeland Security before filing Form [EOIR-42A](#) with the Immigration Court.⁹² The Immigration Court does not collect fees.⁹³ Evidence of payment of these fees in the form of a copy of a DHS notice of fee receipt and biometrics appointment instructions must accompany the Form [EOIR-42A](#) when it is filed with the Immigration Court.⁹⁴ The attorney should submit the fees in the exact amount to the DHS. The DHS will not accept a payment of cash; it will only accept payments made by personal check, cashier's check, certified bank check, bank international money order, or foreign draft drawn on a financial institution in the U.S. and payable to the "Department of Homeland Security" in U.S. currency.⁹⁵ If a check is drawn on an account of a person other than the LPR applicant, the name and alien registration number of the applicant must be entered on the face of the check.⁹⁶ In addition, all checks must be drawn on a bank located in the U.S.⁹⁷ Furthermore, an attorney should note that the required fees will not be reimbursed if the application is granted.⁹⁸

⁹⁰ See *Id.*

⁹¹ See *Id.*

⁹² 8 C.F.R. § 1240.20(a) (2016).

⁹³ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 64, available at https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

⁹⁴ United States Department of Justice, Executive Office for Immigration Review, Executive Office for Immigration Review, Application for Cancellation of Removal for Certain Permanent Residents, Instructions, 2, available at www.justice.gov/eoir/formslist.htm (last visited May 12, 2016).

⁹⁵ See *Id.*

⁹⁶ See *Id.*

⁹⁷ See *Id.*

⁹⁸ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 66, available at https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

How to Apply for LPR Cancellation of Removal

If an LPR is unable to pay the filing fee, his or her attorney may ask the IJ for permission to file the application without fee (fee waiver). The IJ has the discretion to waive the fee if the applicant shows that s/he is unable to pay the fee.⁹⁹ If an applicant wants to request a fee waiver, his or her attorney should notify the IJ and submit an affidavit, or unsworn declaration made pursuant to 28 U.S.C. §1746, substantiating the applicant's inability to pay the fee.¹⁰⁰ An attorney should note that if s/he submits an application without a required fee and the LPR's request for a fee waiver is denied, the filing will be deemed defectively filed and may be rejected or excluded from evidence.¹⁰¹

Serving and Filing the Application

After preparing an application for LPR Cancellation, an attorney should make a minimum of three copies of the application so that s/he can retain at least one copy for his or her records. The attorney should then file the application and serve it on opposing counsel. The attorney should do the following¹⁰²:

- (1) File a copy of the application (Form [EOIR-42A](#)), Form [G-325A](#), Form [EOIR-28](#), and the required \$100 filing fee and \$85 biometrics fee with the DHS at the appropriate USCIS Service Center before filing the application with the Immigration Court. The DHS will send a copy of a notice of fee receipt and biometrics appointment instructions to the applicant.
- (2) If the applicant is detained, DHS is responsible for obtaining biometrics. If the applicant is not detained, instruct him or her to go to his or her biometrics interview noted on the receipt from the DHS with the required documents designated on the receipt. The applicant will have fingerprints taken and receive a written confirmation once biometrics are complete.
- (3) File the original application and copies of all supporting documents with the Immigration Court with evidence of payment of the fees and biometrics.¹⁰³ This evidence should be in the form of a copy of the DHS notice of fee receipt and biometrics appointment instructions.

⁹⁹ See *Id.*

¹⁰⁰ *Id.*; 8 C.F.R. § 103.7 (2016).

¹⁰¹ See *Id.*

¹⁰² United States Department of Justice, Executive Office for Immigration Review, Executive Office for Immigration Review, Application for Cancellation of Removal for Certain Permanent Residents, Instructions, 2, available at www.justice.gov/eoir/formlist.htm (last visited May 12, 2016).

¹⁰³ 8 C.F.R. § 1240.20 (2016).

How to Apply for LPR Cancellation of Removal

- (4) Mail or deliver a copy of the packet to the Assistant Chief Counsel for the DHS at the time the Immigration Court is served. Call the Assistant Chief Counsel prior to the hearing to make certain that s/he received the packet.
- (5) In addition to filing a copy of the application and all supporting documents with the Immigration Court, the attorney should include a completed certificate showing service of the documents on the Assistant Chief Counsel.

The application package should contain, in the following order¹⁰⁴:

- Form [EOIR-28](#) (if required)
- Cover page
- If applicable, fee receipt (stapled to the application) or motion for a fee waiver
- Application
- Proposed exhibits (if any) with table of contents; and
- Proof of Service

¹⁰⁴ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 56, *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

(b). Release from Detention Information**Bond**

A noncitizen who is detained is eligible for bond or conditional parole,¹⁰⁵ unless s/he is subject to mandatory detention¹⁰⁶ or is considered an “arriving alien.”¹⁰⁷ Immigration and Customs Enforcement (ICE) will make an initial determination about bond eligibility. However, if the noncitizen does not agree with ICE, s/he is able to motion for a bond redetermination in front of an Immigration Judge (IJ).¹⁰⁸ Bond redetermination is discretionary, and the IJ will consider whether the noncitizen poses a flight risk, danger to the community, and the severity of the offense committed by the alien.¹⁰⁹ Additionally, for a noncitizen who is detained for a prolonged amount of time, s/he may be eligible for habeas relief.

Habeas Corpus

In the case of a noncitizen who is ordered removed, the Attorney General is supposed to remove the person from the United States within a period of 90 days.¹¹⁰ Noncitizens in prolonged detention may be eligible to petition for a writ of habeas corpus so that the habeas court can measure the “reasonableness” of detention that is beyond the 90 day period.¹¹¹ The Supreme Court held that after a “6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing.”¹¹² “[A]n alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”¹¹³

In the Diop case, the Third Circuit held that a respondent who had been granted withholding of removal and was released from custody could still have standing for a

¹⁰⁵ INA § 236(a).

¹⁰⁶ INA § 236(c); INA § 236(A).

¹⁰⁷ 8 C.F.R. § 1236.1(c)(2) (2016).

¹⁰⁸ Matter of Joseph, 22 I. & N. Dec. 799, 799 (BIA 1999).

¹⁰⁹ INA § 236(c)(2).

¹¹⁰ INA § 241(a)(1)(A); 8 U.S.C. § 1231(a)(1)(A) (2016).

¹¹¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

¹¹² *Id.*

¹¹³ *Id.*

habeas corpus appeal.¹¹⁴ The court concluded that the respondent's 35 months of detention "without any post-Joseph hearing inquiry into whether it was necessary to accomplish the purposes of § 1226(c) was unreasonable."¹¹⁵ The Government had argued that the respondent's habeas case was moot because he had been released from custody after the crime for which he was mandatorily detained was vacated.¹¹⁶ However the Third Circuit Court found that the respondent could again be taken into custody if the decision that vacated his crime were overturned and because a second conviction could be grounds for being detained again.¹¹⁷

Noncitizens who are still in removal proceedings and have not received a final order of deportation may also seek to file a writ of habeas corpus.¹¹⁸ The Third Circuit Court of Appeals applied the reasonableness test to cases where the noncitizen has been detained for over the "6-month" period.¹¹⁹

For more information about bond, bond redetermination, and habeas corpus see the following sources:

- American Immigration Law Foundation, Practice Advisory: Arrest, Detention and Bond Procedures for Non-Citizens *Without* Criminal Convictions (July 2008), http://www.asistahelp.org/documents/resources/AIC_on_detention_etc_DDCBE_EBCFCBD0.pdf.
- American Civil Liberties Union, Practice Advisory: Prolonged Mandatory Detention and Bond Eligibility in the Third Circuit (May 12, 2015), <https://www.aclu.org/files/assets/DiopAdvisory.pdf>.
- Florence Immigrant & Refugee Rights Project, "Pro Se Guide To Challenging Your Detention Through Habeas Corpus" (May 2013), <http://firrp.org/media/Habeas-Guide-2013.pdf>

¹¹⁴ Diop v ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011), citing United States v. Frumento, 552 F.2d 534.

¹¹⁵ Diop v ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011).

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469 (3d Cir. 2015)

¹¹⁹ Id.

(c). How to Obtain Client's Records

Freedom of Information Act (FOIA) Requests

The following is applicable to FOIA requests processed by the following agencies: Executive Office for Immigration Review (EOIR), U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Patrol (CBP), and U.S. Citizenship and Immigration Services (USCIS).

Processing Tracks¹²⁰

FOIA requests are placed on one of three (3) tracks. Requests are entered into tracks based upon the complexity of the request:

- Track 1: Track one is for those requests that seek and receive expedited processing pursuant to subsection (a)(6)(E) of the FOIA.
- Track 2: Track two is for those requests that do not involve a significant volume of records or lengthy consultations with other entities.
- Track 3: Track three is for those requests that do involve a significant volume of records and for which lengthy or numerous consultations are required, or those requests which may involve sensitive records.

Processing Times

¹²¹

The goal is to respond **within 20 business days** of receipt of the request; however, the FOIA does permit a **10-day extension** of this time period. If the request involves a significant volume of records, requires that the agency collect records from separate offices, or requires that the agency consult with another agency, the agency where the request was sent will invoke the 10-day extension for the completion of the request.

Expediting Requests

¹²²

To have a FOIA request expedited, the request must demonstrate a compelling need such as: (1) imminent threat to the life or physical safety of an individual; (2) an urgency

¹²⁰U.S. Immigration and Customs Enforcement, FOIA Overview: Submitting FOIA Requests (select the tab titled "FOIA Legal Information", scroll down to "Multi-Track Processing"), *available at*, <https://www.ice.gov/foia/overview> (last visited May 12, 2016).

¹²¹ Executive Office for Immigration Review, Freedom of Immigration Act: How to Submit a FOIA/PA Request, *available at*, <https://www.justice.gov/eoir/foia-facts> (last visited May 12, 2016).

¹²² U.S. Immigration and Customs Enforcement, Submitting FOIA Request, *available at*, <https://www.ice.gov/foia/request#wcm-survey-target-id> (last visited May 12, 2016).

to inform the public concerning actual or alleged Federal Government activity if the request is made by a person primarily engaged in disseminating information; (3) loss of substantial due process rights; or (4) a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which

Fees

¹²³There is no fee to file a FOIA request. However, FOIA established three fee categories that agencies use to determine if fees will be charged. As pertaining to attorneys (non-commercial requesters), applicants are charged for photocopying after 100 pages and for time spent searching for records in excess of two hours. Indicate a specific amount that you are willing to pay, should there be a fee incurred beyond the free allotment. If no amount is indicated, a fee of up to \$25 may be assessed.

¹²³ Id.

Executive Office for Immigration Review (EOIR) FOIA Request¹²⁴

Requests for information about a person other than the requester require proper authorization allowing release of the information. Requests regarding applications filed with DHS should not be made with EOIR and DHS forms should not be used to request records from EOIR. To obtain nonpublic information, such as the record of proceedings before an immigration court regarding a person you represent, the FOIA Service Center recommends the following:

How to Request the Information Sought

- (1) Include in the request an authorization to release information from the person who is the subject of the request (or include an explanation about how the public interest outweighs the privacy interest of the subject of the record).
- (2) The person who is the subject of the FOIA request must certify as to his or her identity by completing Form [DOJ-361](#) or reasonably describing the records sought and including identifying information. For example, if a FOIA request seeks a record of proceedings, the request, if possible, should include the following:
 - The noncitizen's full name; aliases
 - Immigration hearing location
 - Alien registration (A) number (if known). If the A number is not known or the case occurred before 1988, provide the date of the Order to Show Cause, the country of origin, and the location of the immigration hearing.
- (3) An attorney of record may provide evidence of that fact such as a valid entry of appearance, Form [EOIR-27](#) or Form [EOIR-28](#).
- (4) FOIA requests may be submitted to the following:
 - Office of the General Counsel
Attn: FOIA Service Center
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1903
Falls Church, VA 22041
 - EOIR.FOIARequests@usdoj.gov

Tracking Requests

To follow up on the status of a FOIA request, call (703) 605-1297 and ask to speak to (1) the FOIA Specialist assigned to your request or (2) Crystal Souza, the FOIA Public Liaison. Additional information on FOIA procedures can be found [here](#).

¹²⁴ Executive Office for Immigration Review, Freedom of Immigration Act: How to Submit a FOIA/PA Request, available at, <https://www.justice.gov/eoir/foia-facts> (last visited May 12, 2016).

Immigration and Customs Enforcement (ICE) FOIA Request¹²⁵

ICE FOIA requests must be submitted in writing. The request can be made using Form [G-639](#) or by using the online [FOIA Request Form](#). Requests must be for access to existing records only. The ICE FOIA Office will not "create" records for the purpose of responding to a FOIA.

How to Request the Information Sought

- (1) The request must be in writing, including a daytime phone number.
- (2) Provide as much information as possible on the subject matter to help expedite the search process.
 - Date of Birth
 - Alien number (A number)
 - Any Alias(es) (possibly used at the time of entry or apprehension)
 - Dates (Note: Travel Records only go back to 1982).
 - Times
 - Type of document
 - Entry numbers
 - Officer names (if available)
 - Certificate numbers
- (3) Requests may be submitted by any of the following:
 - Faxed to: (202) 732-4265
 - Mailed to:
FOIA Office
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20536
 - E-mailed to: ICE-FOIA@dhs.gov
Questions may also be submitted my email.

Tracking Requests

The requestor should receive an acknowledgement letter within 3-5 business days after ICE receives the request. This letter will contain a tracking number that ICE that should be on hand when checking the status of the request.

¹²⁵ U.S. Immigration and Customs Enforcement, Submitting FOIA Request, *available at*, <https://www.ice.gov/foia/request#wcm-survey-target-id> (last visited May 12, 2016).

Customs and Border Patrol (CBP) FOIA Request

CBP FOIA responses may provide the following information:¹²⁶

- Apprehension by Border Patrol between Official Ports of Entry
 - CBP does not have complete records of apprehensions made by Border Patrol before 2000. Pre-2000 records of apprehensions may be available in the A-File maintained by USCIS.
 - Requests for Alien Files should be submitted to USCIS.
- Detention by Border Patrol or at Ports of Entry
- Expedited Removal by Border Patrol or at Ports of Entry
- I-94 Records
- Information Regarding Entry and Exit
 - CBP does not have records on the entry and exit of persons arriving or departing the U.S. before 1982.
- Records Regarding Inspection or Examination upon Arrival at a U.S. Port of Entry
- Voluntary Return

CBP FOIA requests may be submitted online. Register to create a FOIA account. From the Agency Selection drop-down, choose U.S. Customs and Border Protection. Reports are delivered to the registered account. Should the agency need to contact the attorney, the agency will use the contact information provided during the account registration.

How to Request the Information Sought

The following information will be needed to provide accurate reports.

- (1) Provide a clear and detailed description of the records being requested. Include as much of the following as is available:
 - Date of Birth
 - Alien number (A number)
 - Any Alias(es) (possibly used at the time of entry or apprehension)
 - Dates (Note: Travel Records only go back to 1982).
 - Times
 - Type of document

¹²⁶ U.S. Citizenship and Immigration Services, Submitting FOIA Requests (table contains information as to which agency the FOIA request should be submitted), *available at*, <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/submitting-foia-requests> (last visited May 12, 2016).

- Entry numbers
- Officer names (if available)
- Certificate numbers

(2) Attorneys must attach a written consent from the subject of record.

- Submit Form [G-28](#), Form [G-639](#) or a written notarized consent.

Tracking Requests

From the account, a view of the request will be provided. Click on the desired request number for additional details. Alternatively, call the CBP FOIA Office at 202-325-0150, Mon-Fri 8am-5pm EST. However, they can only provide you with the same information that you can obtain online.

Citizenship & Immigration Services (USCIS) Freedom of Information Act (FOIA)¹²⁷

Visit the USCIS website to request the Freedom of Information Act record. USCIS FOIA requests must be submitted in writing by mail¹²⁸ to the National Records Center.

USCIS FOIA responses may provide the following information:¹²⁹

- Deportation Records; Detention and Removal Records
- A-file
- Petitions (I-130, I-485, I-589, N-400, etc.)
- USCIS Background Investigations
- Certification of non-existence of a record

How to Request the Information Sought

(1) Form **G-639** may be used to submit the written request.

(2) Send form to the following physical address:

- U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P. O. Box 648010
Lee's Summit, MO 64064-8010

Tracking Requests

¹³⁰To check the status of the FOIA request, visit, <https://egov.uscis.gov/foiawebstatus/> and enter the "Control Number" that was provided after receipt of the FOIA request. The "Control Number" will begin with the letters NRC, COW, etc..

- If your request is pending, the status will indicate the position of your request relative to all pending USCIS requests in the same processing track.
- If your request has been processed and responded to within the past six months, you will be given the date your request was processed.

¹²⁷ How to File a FOIA/PA Request, available at <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request> (last visited May 12, 2016).

¹²⁸ For assistance contact USCIS by Telephone 800-375-5283; Fax 802-288-1793 or 816-350-5785; Email uscis.foia@uscis.dhs.gov; or visit the USCIS FOIA Request Guide, available at, https://www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/How%20to%20File%20a%20FOIA%20Privact%20Act%20Request/USCIS_FOIA_Request_Guide.pdf (last visited May 12, 2016).

¹²⁹ Submitting FOIA Requests (table contains information as to which agency the FOIA request should be submitted), available at, <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/submitting-foia-requests> (last visited May 12, 2016).

¹³⁰ U.S. Citizenship and Immigration Services, Check Status of Request, available at, <https://egov.uscis.gov/foiawebstatus/> (last visited May 12, 2016).

Federal Bureau of Investigation (FBI) Background Check

FBI Background check reports can be processed within 13 to 15 weeks and additional time should be allocated for delivery.¹³¹

How to Request the Information Sought¹³²

- (1) Complete the Application Information Form¹³³ with the Noncitizen's Information
 - The mailing address may be the attorney's business mailing address.
 - The telephone number and e-mail address may be the attorney's business contact information.
- (2) Obtain a set of fingerprints on the [Standard Fingerprint Form FD-258](#)¹³⁴
 - The card must be of original fingerprints. Copies will not be accepted.
 - The noncitizen's name and date of birth *must be* provided on the card.
 - The fingerprinting must include rolled impressions of all 10 fingerprints (these are sometimes referred to as plain or flat impressions).
 - Fingerprints taken with ink or via live scan are acceptable. If fingerprints are not legible, the fingerprint card will be rejected.
 - If possible, have the fingerprints taken by a fingerprinting technician.
 - e.g. UPS in Pennsylvania does fingerprinting. However, UPS requires the noncitizen to register with the CogentID.com agency to process the fingerprinting fee that UPS charges.
- (3) Obtain a \$18 Money Order made out to ***Treasury of the United States***. Be sure to have the noncitizen sign where required
- (4) Mail to the FBI Criminal Justice Information Services Division.
 - FBI CJIS Division – Summary Request
1000 Custer Hollow Road
Clarksburg, WV 26306

Tracking Requests

To check the status of the FOIA request, visit, <https://vault.fbi.gov/fdps-1/@@search-fdps> or email, foipaquestions@ic.fbi.gov.¹³⁵

¹³¹ See, <https://www.fbi.gov/about-us/cjis/identity-history-summary-checks>.

¹³² Identity History Summary Request Checklist, available at, <https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/identity-history-summary-request-checklist-1> (I last visited May 12, 2016).

¹³³ Application Information Form, available at, <https://forms.fbi.gov/identity-history-summary-checks-review/q384893984839334.pdf> (last visited May 12, 2016).

¹³⁴ Form FD- 258, see, <https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/fd-258-1> (last visited May 12, 2016).

State Criminal Records

The manner to request records differs from jurisdiction to jurisdiction. The information provided below will detail the steps to obtain records in the states under the jurisdiction of the Third Circuit (Pennsylvania, New Jersey, and Delaware).

Pennsylvania¹³⁶

In Pennsylvania, there are two methods of requesting a Criminal Record, including 1) an online request or 2) submitting a request form. Response time for record requests vary depending on the volume of requests, but can be expected to take between four to six weeks.

Online Request Steps

- (1) Go to the Pennsylvania Access to Criminal History (PATCH) Website at <https://epatch.state.pa.us/Home.jsp>.
- (2) Select "Submit a New Record Check."¹³⁷
- (3) Select "Individual Request."
- (4) Read Terms and Conditions and select "Accept"
- (5) Complete questions as prompted. Prompts will include background information about the requestor and the background information about the subject of the background check.
 - (a) Required information about the requestor will include: 1) Full name, 2) Phone number, and 3) Address.
 - (b) Information about the subject of the background check will include: 1) Full name, 2) Social Security number, 3) Date of birth 4) Sex, 5) Race, and 6) Aliases and/or maiden name.
- (6) Complete payment information. For each request, there is a \$8.00 non-refundable fee.
- (7) If the person has no criminal record, this information will be provided immediately. Otherwise, record the control number to check status of request,

¹³⁵ Federal Bureau of Investigation, The Vault, available at <https://vault.fbi.gov/fdps-1/@@search-fdps> (last visited May 12, 2016).

¹³⁶ See Pennsylvania State Police, Request a Criminal Record, <http://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx#.VzPAi4-cF6U> (last visited May 12, 2016).

¹³⁷ Please note that different fees apply to different requests. If the person requesting the criminal record is a "volunteer" the person may not be subject to a fee. A volunteer may press "New Record Check" to request criminal records.

which can be found in the original PATCH webpage. If the request continues to state *pending* after 24 hours, call 1-888-783-7972.

Paper Request Steps

- (1) Download and complete the [Individual Access and Review Request Form – SP4-164A](#).¹³⁸ Information requested by the form includes:
 - (a) Requester information (Name, Address, Phone Number).
 - (b) Information Involving the Subject of the Record Check (Name, Social Security Number, Date of Birth, Sex, Race)
- (2) Make check payable to **Commonwealth of Pennsylvania**. Fee is \$10.00.
- (3) Send completed application to:
 - Pennsylvania State Police Central Repository – RCPU
1800 Elmerton Avenue
Harrisburg, PA 17110-9758

New Jersey¹³⁹

In New Jersey, criminal history background checks are obtained through live scan fingerprinting. Follow the steps below to be fingerprinted:

- (1) Download and complete the Universal Form which can be found at http://www.njsp.org/info/pdf/20150129_universforma.pdf.
- (2) Visit www.bioapplicant.com/nj or call 1-877-503-5981 to schedule a live scan fingerprinting appointment.
- (3) Bring the Universal Form and photo identification to the scheduled live scan fingerprinting appointment.
- (4) At the appointment, pay the \$40.70 fee with Visa, MasterCard or e-check.
- (5) If no response is received within 10 days, contact 609 882-2000 ext. 2918.

Delaware¹⁴⁰

In Delaware, criminal history background checks are obtained through fingerprints.

Steps for In-State Requestors

- (1) Go to 1 of 3 fingerprinting sites.

¹³⁸ See Individual Access and Review Request Form – SP4-170, <http://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx#.VvRWDI-cG6M> (last visited May 12, 2016).

¹³⁹ See New Jersey State Police, NJ Criminal History Records Information, <http://www.njsp.org/criminal-history-records/> (last visited May 12, 2016).

¹⁴⁰ See State of Delaware, State Bureau of Identification, http://dsp.delaware.gov/state_bureau_of_identification.shtml (last visited May 12, 2016).

- (a) Blue Hen Corporate Center, 655 South Bay Road, Suite 1B, Dover, Delaware, DE 19901. Hours of operation are Mondays, 8:30am to 6:30pm and Tuesday through Friday, 8:30am to 3:30pm. No appointment is necessary.
 - (b) Thurman Adams State Service Center, 546 S. Bedford Street, Room 202, Georgetown, DE 19947. Hours of operation are Monday through Thursday 8:30am to 3:30pm. To schedule an appointment, call 302-739-2528. Cash is not accepted. Results of the completed certified criminal history are not returned the same day. The results are forwarded as soon as possible.
 - (c) Delaware State Police Troop 2, 100 Langrange Ave, Newark, DE 19702. Hours of operation are Monday, Wednesday, Thursday, and Friday from 8:30am to 3:15pm. To schedule an appointment, call 302-739-2528. Results of the completed certified criminal history are not returned to same day. Results are forwarded as soon as possible.
- (2) Provide photo identification at the fingerprinting site.
 - (3) Pay at fingerprinting site. Payment options include cash, credit, debit, certified checks, money orders or company checks made out to Delaware State Police. American Express or personal checks are not accepted. The fee is \$52.50.

Steps for Out-of-State Requestors

- (1) Get fingerprints taken at local police agency or any fingerprinting agency
- (2) Obtain fingerprint cards. If the fingerprint agency does not provide fingerprint cards, print a FD-258 fingerprint card on the Federal Bureau of Investigation website at <https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/fd-258-1> and present card to the agency for fingerprinting.
- (3) Mail an authorization letter, fingerprint card, and certified check or money order, made payable to **Delaware State Police**. The fee is \$52.50.
- (4) Mail to:
 - Delaware State Police
State Bureaus of Identification
P.O. Box 430
Dover, DE 199903

VII. ALTERNATIVES TO §240A(a) – Alternative Forms of Relief, Prosecutorial Discretion, Administrative and Judicial Options for Individuals Denied or Ineligible for LPR Cancellation of Removal Relief

Noncitizens who do not meet the statutory requirements of INA § 240A(a) LPR Cancellation of Removal may be eligible to apply for the alternative forms of relief discussed below. In addition to meeting the statutory requirements for some of these alternative forms of relief, the REAL ID Act of 2005 allows the Immigration Judge (IJ) greater independence in determining credibility and requiring corroboration evidence from the noncitizen.¹⁴¹ The IJ has greater discretion in determining whether or not the testimony of the noncitizen or other witness in support of the noncitizen is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the noncitizen has satisfied his/her burden of proof.¹⁴²

(a). Alternative Forms of Relief

Non-LPR Cancellation of Removal

Cancellation of Removal for non-lawful permanent resident is available to noncitizens who have been physically present in the United States for at least 10 years, are of good moral character, have not been convicted of any crimes that would make the individual inadmissible or deportable, and can show that upon removal a qualifying relative would suffer “exceptional and extremely unusual hardship.”¹⁴³ Lawful permanent residents who are ineligible LPR Cancellation under INA § 240A(a), may apply to Non-LPR Cancellation of Removal under part INA § 240A(a).¹⁴⁴

¹⁴¹ 8 U.S.C. §§ 1158(b)(1)(B)(i), 1229a(c)(4)(A) (2016); INA §§ 208(b)(1)(B)(i), 240(c)(4)(A).

¹⁴² 8 U.S.C. §§ 1158(b)(1)(B)(ii), 1229a(c)(4)(A) (2016); INA §§ 208(b)(1)(B)(ii), 240(c)(4)(A).

¹⁴³ 8 U.S.C. §§ 1229b(b)(1)(A)-(C) (2016); INA §§ 240A(b)(1)(A)-(C).

¹⁴⁴ Stephen H. Legomsky and Cristina M. Rodriguez, *Immigration and Refugee Law and Policy*, 626 (6th ed.) (2015).

Incomplete Notice to Appear (Third Circuit Court Jurisdiction)

In Orozco-Velasquez v. Attorney General, the Third Circuit overturned the Board precedent, Matter of Camarillo, 25 I. & N. Dec. 644 (BIA 2011) by holding that that the NTA needs to include all statutory stipulations in order to stop the time for purposes of continuous physical presence, stipulations which include the date and time of the removal hearing.¹⁴⁵ The court held that 8 U.S.C. § 1229(a)(1), necessarily requires specification of the “time and place at which the proceedings shall be held.”¹⁴⁶ The Court found that the word “shall” in the statute is a requirement, and in the absence of another conflicting canon of statutory construction such a requirement is mandatory. Because the statute requires that an “alien [be] served a notice to appear under 8 U.S.C. § 1229(a)” the statute also “compels” the government to follow all the statutory stipulations set forth for an NTA, which includes stating the time and place of the hearing.¹⁴⁷ Until the government has set forth all such stipulations, the NTA “will not stop the...clock” for purposes of Cancellation of Removal eligibility.¹⁴⁸ Thus, the incomplete NTA will not preclude the noncitizen from continuing to accrue continuous physical presence for the purpose of fulfilling the required 10 years of continuous physical presence requirement of INA § 240A(a) eligibility.

§ 212(c) Waiver

A section 212(c) discretionary waiver, now repealed under the INA, provides that noncitizens lawfully admitted for permanent residence, who committed a crime or other act rendering him or her inadmissible or deportable from the U.S.; who has not had an order of deportation, and who has had a lawful unrelinquished domicile of seven consecutive years, may be eligible for a waiver of deportation.¹⁴⁹ However, this relief is only available to those who pleaded guilty prior to April 1, 1997 with the intention to apply for § 212(c) relief.¹⁵⁰ The IJ weighs the negative factors, such as the severity of the crime, against positive factors, such as the noncitizen's rehabilitation and connections with the community, in making his or her determination on whether the noncitizen merits a favorable exercise of discretion.¹⁵¹

¹⁴⁵ Orozco-Velasquez v. Attorney General, No. 13-1685, 2016 WL 930241 (3d Cir. 2016).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 8 U.S.C. § 1182(c) (2016); INA § 212(c).

¹⁵⁰ 8 C.F.R. §§ 1003, 1212, 1240 (2016); INS v. St. Cyr, 533 U.S. 289, 289 (2001).

¹⁵¹ Matter of Marin, 16 I. & N. Dec. 581, 584 (BIA 1978).

§ 212(h) Waiver

Noncitizens who have committed crimes of moral turpitude, have a single controlled substance violation involving possession of thirty grams or less of marijuana, have engaged in prostitution, or have received immunity from prosecution, may obtain a § 212(h) waiver. Such individuals may qualify for a § 212(h) waiver if (1) the crime was committed more than fifteen years before the application or admission or if it was a prostitution offense, the noncitizen has been rehabilitated and, (2) the individual is the spouse, parent, son, or daughter of a U.S. citizen or permanent legal resident and denying the waiver would cause extreme hardship to the citizen or permanent resident; or (3) the individual is seeking permanent residence after being battered by a U.S. citizen or permanent resident spouse or parent.¹⁵² When the waiver is sought based on the passage of 15 years since the commission of the offense, the noncitizen also must show that admission would not be contrary to the national welfare, safety, or security and that the noncitizen has been rehabilitated.¹⁵³ One bar from relief under § 212(h) states that “[n]o waiver shall be granted...in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if... since the date of such admission the alien has been convicted of an aggravated felony...” Until recently, there was a Circuit split on the issue of whether a noncitizen need not only be considered an LPR at the time of the application, but also have had the LPR status when the noncitizen entered to be eligible for § 212(h) relief.¹⁵⁴ However, recently the Board has held that a noncitizen who had not been admitted to the U.S. as an LPR, but who adjusted to lawful permanent residence status while residing in the U.S., is not barred from establishing eligibility for a waiver of

¹⁵² 8 U.S.C. § 1182(h) (2016); INA §§ 212(h).

¹⁵³ 8 U.S.C. § 1182(h)(1)(A)(ii), (iii) (2016); INA §§ 212(h)(1)(A)(ii), (iii).

¹⁵⁴ *Medina-Rosales v. Holder*, 778 F.3d 1140, 1146 (10th Cir. 2015) (holding that the § 212(h) bar to eligibility for relief did not include those who adjusted their status to a lawful permanent resident while present in the U.S.); *Negrete-Ramirez v. Holder*, 741 F.3d 1047 (9th Cir. 2014) (holding that the § 212(h) bar to eligibility for relief did not include those who adjusted their status to a lawful permanent resident while present in the U.S.); *Hanif v. United States*, 694 F.3d 479, 48 (3d Cir. 2012) (holding that the § 212(h) bar to eligibility for relief did not include those who adjusted their status to a lawful permanent resident in the U.S.); *Bracamontes v. Holder*, 675 F.3d 380, 387-388 (4th Cir. 2012) (holding that § 212(h) bar to eligibility for relief did not include those who adjusted their status to lawful permanent resident in the U.S.); *Martinez v. Mukasey*, 519 F.3d 532, 545 (5th Cir. 2008) (holding that the § 212(h) bar to eligibility for relief did not include those who adjusted their status to a lawful permanent resident in the U.S.); *But see*, *Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014) (holding that § 212(h) bar to eligibility for relief included those who adjusted their status to a lawful permanent resident in the U.S.).

inadmissibility under section INA §212(h) as a result of an aggravated felony conviction.¹⁵⁵

Asylum

A person may apply for asylum as a defense to removal if the noncitizen meets the definition of "refugee" under the Act and is not subject to one of the statutory bars.¹⁵⁶ A "refugee" is defined as "any person who is outside any country in which such person's nationality or...any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁵⁷

Withholding of Removal

A noncitizen in removal proceedings may apply for withholding of removal if s/he can show that s/he may not be returned to a place where s/he will face persecution because of his or her race, religion, nationality, membership in a particular group, or political opinion.¹⁵⁸ Withholding is similar to asylum in that it provides protection for persons fleeing persecution on account of one of the aforementioned five grounds, but withholding, in fact, requires a higher standard of proof. Thus, in order to obtain withholding of removal, the noncitizen must show by a clear probability that s/he faces the requisite harm of a threat to life or freedom in the proposed country of removal.¹⁵⁹

Protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Congress codified into U.S. law, prohibits the removal of a noncitizen to a country where there are substantial grounds for believing that the noncitizen would be in danger of torture or subject to inhuman or degrading

¹⁵⁵ Matter of J-H-J, 26 I. & N. Dec. 563, 564 (BIA 2015).

¹⁵⁶ 8 U.S.C. § 1158 (2016); INA § 208.

¹⁵⁷ 8 U.S.C. § 1101(a)(42)(A) (2016); INA §101(a)(42)(A).

¹⁵⁸ 8 U.S.C. § 1231(b)(3)(A) (2016); INA § 241(b)(3)(A).

¹⁵⁹ 8 C.F.R. § 208.16(c) (2016).

torture.¹⁶⁰ A noncitizen in removal proceedings may apply for this form of relief if s/he can establish that it is more likely than not that s/he would be tortured if removed to the proposed country of removal.”¹⁶¹

Temporary Protected Status (TPS)

Noncitizens from certain countries may request this form of relief.¹⁶² The Secretary of Homeland Security, after consulting with “appropriate” government agencies, may designate a foreign state or part of a foreign state under and of the three circumstances: (A) There is an ongoing armed conflict that would pose a serious threat to the personal safety of the state’s nationals if they were returned there; (B) An environmental disaster has substantially but temporarily disrupted living conditions, and the state has requested designation because it cannot adequately handle the return of its nationals; (C) “[E]xtraordinary and temporary conditions” prevent safe return, and permitting the state’s nationals to remain temporarily in the U.S. would not be contrary to the national interests.¹⁶³ Countries that are currently designated for TPS are: El Salvador, Honduras, Nicaragua, Somalia, and Sudan.¹⁶⁴

Voluntary Departure

Noncitizens in removal proceedings who meet the statutory requirements of INA § 240B may request voluntary departure instead of receiving a formal removal order.¹⁶⁵ There are three different forms of voluntary departure, depending on the stage of the proceeding when granted. Voluntary departure can be granted: (1) before the removal hearing; (2) during the removal hearing; and (3) after the removal hearing.¹⁶⁶ Under § 240B(a), the Secretary of Homeland Security may permit certain noncitizens to depart voluntarily, either in lieu of removal proceedings or before

¹⁶⁰ Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. The CAT was incorporated into United States law by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277 (1987); 8 C.F.R. §§ (1)208.16, (1)208.17, (1)208.18 (2016).

¹⁶¹ 8 C.F.R. §§ (1)208.16, (1)208.17, (1)208.18 (2016).

¹⁶² 8 U.S.C. §§ 1254a(b)(1)(A), (B), (C) (2016); INA § 244(b)(1).

¹⁶³ Stephen Legomsky and Cristina Rodriguez, *Immigration and Refugee Law and Policy*, 1140, (6th ed.) (2015)

¹⁶⁴ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov> (locate “Other Services”; select “Humanitarian” hyperlink; choose “Temporary Protected Status” hyperlink), (last visited May 12, 2016).

¹⁶⁵ 8 U.S.C. § 1229c (2016); INA § 240B.

¹⁶⁶ *Id.*

removal proceedings have been completed, at the noncitizen's own expense.¹⁶⁷ If granted pre or post-hearing departure, the noncitizen has to depart within 120 days and s/he may be required to post bond.¹⁶⁸ Under § 240B(b) noncitizens may get voluntary departure at the conclusion of the removal proceedings, at the noncitizen's expense.¹⁶⁹ Bond for subsection (b) applicants is mandatory.¹⁷⁰ If voluntary departure is granted under subsection (b), the maximum period the noncitizen has to depart is 60 days.¹⁷¹ Persons who have been convicted of an aggravated felony or who are deportable as terrorists are ineligible for this form of relief.¹⁷²

One who is granted voluntary departure but fails to depart within the designated time becomes ineligible for several other immigration options.¹⁷³ Additionally, civil penalties for failure to depart within the time period specified include: (A) a civil penalty of not less than \$1,000 and not more than \$5,000; (B) ineligibility for a period of 10 years, to receive any further relief under § 240B, § 240A, § 245, § 248, and § 249.¹⁷⁴

¹⁶⁷ 8 U.S.C. § 1229c(a)(2) (2016); INA § 240B(a).

¹⁶⁸ 8 C.F.R. § 1240.26 (2016); 8 U.S.C. § 1229c(a)(3) (2016); INA § 240B(a)(3).

¹⁶⁹ 8 U.S.C. § 1229c(b) (2016); INA § 240B(b).

¹⁷⁰ 8 U.S.C. § 1229c(b)(3) (2016); INA § 240B(b)(3).

¹⁷¹ 8 U.S.C. § 1229c(b)(2) (2016); INA § 240B(b)(2).

¹⁷² 8 U.S.C. § 1229c(a)(1) (2016); INA § 240B(a)(1).

¹⁷³ Stephen H. Legomsky and Cristina M. Rodriguez, Immigration and Refugee Law and Policy, 664 (6th ed.) (2015).

¹⁷⁴ 8 U.S.C. § 1229c(d)(1) (2016); INA § 240B(d)(1).

(b). Prosecutorial Discretion

Prosecutorial discretion refers to decision the DHS makes about whether to enforce immigration laws against a person.¹⁷⁵ According to the 2014 Jeh Johnson Memorandum, the “DHS must exercise prosecutorial discretion in the enforcement of law,” meaning, the DHS officer can make a decision not to enforce the law.¹⁷⁶ The use of Prosecutorial Discretion applies to a variety of enforcement actions including: (1) “whether to parole an alien into the United States;” (2) “whether to commence removal proceedings and what charges to lodge against the respondent;” (3) “whether to pursue formal removal proceedings;” (4) “whether to cancel a Notice to Appear or other charging document before jurisdiction vests with an immigration judge;” (4) “whether to grant deferred action or extended voluntary departure;” (5) “whether to appeal an immigration judge’s decision or order, and whether to file a motion to reopen;” (6) “whether to invoke an automatic stay during the pendency of an appeal; and, (7) “whether to impose a fine for particular offenses.”¹⁷⁷

In addition to the types of prosecutorial discretion listed above, the government agent may also exercise prosecutorial discretion in issuing a Notice to Appear. Specifically, the DHS can choose not to initiate removal proceedings against someone who has positive equities.¹⁷⁸ Some positive equities that the Department of Homeland Security (DHS) may consider in determining whether to exercise Prosecutorial Discretion include: “extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the U.S.; military service; family or community ties in the U.S.; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative.”¹⁷⁹ This list of factors is not exhaustive. Attorneys

¹⁷⁵ Wadhia, Shoba Sivaprasad, The History of Prosecutorial Discretion In Immigration Law http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605164 (last visited May 12, 2016).

¹⁷⁶ See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Protection, Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec’y for Policy 2 (Nov. 20, 2014) https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (last visited May 12, 2016).

¹⁷⁷ Manuel, Kate M. & Garvey, Todd. Prosecutorial Discretion in Immigration Enforcement: Legal Issues <https://www.fas.org/sgp/crs/misc/R42924.pdf> (last visited May 12, 2016).

¹⁷⁸ Center for Immigrants’ Rights and the American Bar Association, To File or Not to File a Notice to Appear: Improving the Government’s Use of Prosecutorial Discretion (last visited May 12, 2016).

¹⁷⁹ Id.

should inform DHS officers of the positive equities the client possesses, in order to request any form of Prosecutorial Discretion.

(c). Administrative and Judicial Options to Challenge Removal¹⁸⁰

The following are a non-exhaustive list of forms of adjudicatory review and are meant to provide a general understanding of the procedures.

Motions to Reopen or Reconsider

A noncitizen may move to reopen or to reconsider a previous decision by filing a timely motion with an IJ or the Board. The central purpose of a **motion to reopen**¹⁸¹ is to introduce new and additional evidence that is material and that was unavailable at the original hearing. A **motion to reconsider**¹⁸² seeks a reexamination of the decision based on alleged errors of law and facts. Unless an exception applies, a party may file only one motion to reopen and one motion to reconsider. With a few exceptions, a motion to reopen proceedings must be filed within 90 days of the final removal order, while a motion to reconsider must be filed within 30 days of the date of the final order. The filing of such motions does not suspend the execution of the removal decision unless a stay is ordered by the IJ, the Board, DHS, or the alien seeks to reopen an *in absentia* order (a decision made when the alien was absent at the proceeding).

Stay of Removal

A Stay of Removal prevents DHS from executing an order of removal, deportation, or exclusion. Depending on the situation, a stay of removal may be automatic or discretionary. A noncitizen is entitled to an automatic stay of removal during the time allowed to file an appeal (unless a waiver of the right to appeal is filed), while an appeal is pending before the Board, or while a case is before the Board by way of certification.¹⁸³

¹⁸⁰ United States Department of Justice, Executive Office for Immigration Review, *available at* <http://www.justice.gov/eoir/press/04/ReliefFromRemoval.pdf> (last visited May 12, 2016).

¹⁸¹ Before the Immigration Judge 8 C.F.R. § 1003.23(b)(3) (2016); INA § 240(c)(7)). Before the Board of Immigration Appeals 8 C.F.R. § 1003.2 (2016).

¹⁸² 8 C.F.R. § 1003.23(b)(2) (2016).

¹⁸³ 8 C.F.R. § 1003.6(c)(3) (2016); U.S.C. § 1252(b)(3)(B) (2016); INA § 242(b)(3)(B).

Except in cases involving *in absentia* orders,¹⁸⁴ filing a motion to reopen or reconsider will not stay the execution of any decision made in a case¹⁸⁵. Similarly, filing a petition for review in federal court also does not result in an automatic stay of a removal order. Thus, a removal order can proceed unless the alien applies for and is granted a stay of execution as a discretionary form of relief by the Board, IJ, DHS, or a federal court. Such a stay is temporary and is often coupled with a written motion to reopen or reconsider filed with the Immigration Court, the Board, or an appeal to a federal Circuit Court.

Judicial Review¹⁸⁶

The Immigration and Nationality Act confers federal courts jurisdiction over certain decisions appealed from the Board. However, subsequent laws have substantially restricted judicial review of removal orders. A noncitizen has 30 days from the date of a final removal decision to file a judicial appeal, which is generally filed with the Court of Appeals.¹⁸⁷

Administrative Appeal¹⁸⁸

The Board is the highest administrative body with the authority to interpret federal immigration laws. The Board has jurisdiction to hear appeals from decisions of IJs and certain decisions of DHS. Either a noncitizen or DHS may appeal a decision from the IJ. In deciding cases, the Board can dismiss or sustain the appeal, remand the case to the deciding IJ, or, in rare cases, refer the case to the Attorney General for a decision. A precedent decision by the Board is binding on DHS and IJs throughout the country unless the Attorney General modifies or overrules the decision. With respect to the filing deadline, the appeal of an Immigration Judge's decision must be received by 30 calendar days from the date it was issued by the court.

¹⁸⁴ 8 C.F.R. § 1003.23(b)(v) (2016).

¹⁸⁵ 8 U.S.C. § 1252 (b)(3)(B) (2016); INA § 242(b)(3)(B).

¹⁸⁶ 8 U.S.C. § 1252 (c),(d) (2016); INA § 242(c), (d).

¹⁸⁷ 8 U.S.C. § 1252 (b) (2016); INA § 242(b).

¹⁸⁸ 8 C.F.R. § 1003.38 (2016).

VIII. APPENDIX – Pro-se packets from the Florence Immigrant and Refugee Rights Project

The Florence Immigrant and Refugee Rights Project, *available at* <http://www.firrp.org> (choose "Resources" and follow "How to Defend Your Case" hyperlink, scroll to "Cancellation of Removal for Legal Permanent Residents (green card holders) and select "English" hyperlink), (last visited May. 12, 2016).

A Roadmap to Winning Your Case for “LPR Cancellation of Removal”



This guide was prepared and updated by the staff of the Florence Immigrant & Refugee Rights Project and was written for immigrant detainees in Arizona who are representing themselves pro se in their removal proceedings. This guide is not intended to provide legal advice or serve as a substitute for legal counsel. The Florence Project is a nonprofit legal services organization and does not charge for its services to immigrant detainees in Arizona. This guide is copyright protected but can be shared and distributed widely to assist indigent immigrants around the country. All of our guides are available to download on our website: www.firrp.org. We kindly ask that you give credit to the Florence Project if you are adapting the information in this guide into your own publication.

Table of Contents

- 1. Introduction**
- 2. What Does “LPR Cancellation of Removal Mean?”**
- 3. Hitting the Road to Cancellation of Removal: Your First Court Hearings**
 - a. Eligibility for “ LPR Cancellation of Removal”**
 - b. Filling out and turning in the application**
- 4. Steering Toward Success: Gathering Evidence for Your Case**
- 5. The Final Stretch: Preparing Your Testimony**
- 6. Weighing the Evidence: The Judge’s Decision**
- 7. Appendices**

Important Words to Know

Immigration Law has a lot of technical words. Here's a list of some of the words you'll see a lot in this guide and an short explanation of what they mean.

- **Immigration Judge (“Judge”):** this is the person who will make a decision about your case. He or she holds hearings in the courtroom and wears a black robe. This person doesn't work for ICE. It's her job to look at the facts of your case and apply the law fairly.
- **Immigration and Customs Enforcement (“ICE”):** this is the agency that has put you in deportation proceedings and is in charge of detaining you. ICE is part of the Department of Homeland Security, or “DHS.”
- **Government Attorney:** this is the lawyer who represents ICE when you go to your court hearings. He or she sits at the table next to you and also talks to the Judge. It's usually this attorney's job to ask the Judge to order you deported.
- **Deportation:** ICE has put you in deportation proceedings, which are also called “removal proceedings.” If the Judge orders you deported or “removed” from the United States, you will be sent back to the country where you are a citizen and will not be able to return legally to the U.S. for at least ten years.
- **The Florence Project:** this is a group of lawyers and legal assistants who provide free legal help to people without lawyers. The Florence Project wrote this guide to help you understand your case.

1. Introduction

If you are legal permanent resident (LPR) of the United States (also called a “green card” holder) and you’ve been convicted of certain crimes or broken other immigration laws, ICE may put you into deportation proceedings.

However, you may be able to apply for a one-time-only pardon that allows you to cancel your deportation.



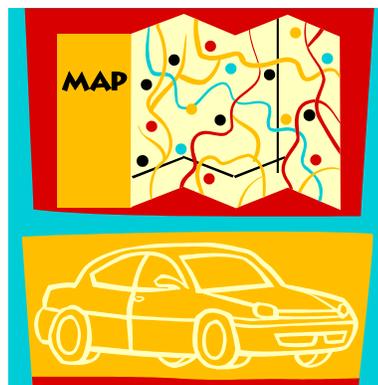
In order to get the pardon, you’ll have to show the Judge that the good things about you—like your family ties here, your work history, and your contributions to the community—outweigh the bad things in your life, like your criminal history or your addiction to drugs or alcohol.

If you are eligible to apply for “LPR Cancellation of Removal”, there’s a pretty good chance that you’ll win your case—if you do your homework and prepare well, that is. Remember, you’ll have to apply while you’re in deportation proceedings—you can’t apply if you’ve been deported already. If you decide to take the deportation and not fight for “LPR Cancellation of Removal,” you’ll face some big consequences:

- You will not be able to apply for another chance to live in the United States for at least 10 years.
- Depending on your convictions, you may never be able to apply for another chance to live here.
- If you come back to the US without permission and get caught, you may be sentenced to years in federal prison.



We know it's not easy to be detained. But, taking the time to put together an "LPR Cancellation of Removal" case could let you go on living in the United States. This guide will give you a road map to winning your case. It can be a long road to release with a few detours along the way, but we hope to give you the tools you need for a safe and smooth trip. Best of luck with your case!



2. What Does "LPR Cancellation of Removal Mean?"

It means that you may be able to stop your deportation and keep your green card if you meet ALL of the requirements below.

- You've been a Legal Permanent Resident (green card holder) for at least the last five years
- You've been in the United States with some form of legal status for at least seven years, without committing certain offenses or being put into deportation proceedings
- You haven't been convicted of an "aggravated felony." An aggravated felony usually means any conviction with a sentence over one year. But, there are many exceptions.



Remember, the requirements for "LPR Cancellation of Removal" can be a little technical and depend a lot on the details of your life.

If you are eligible for "LPR Cancellation of Removal," that doesn't mean that you'll automatically win your case. You'll need to convince the Judge that you deserve a second chance here in the United States. You can do that by showing that your deportation would cause you and the people family a lot of suffering. You'll also need to show that you understand that you've made mistakes in the past and that you won't repeat them in the future.

3. Hitting the Road to Cancellation of Removal: Your First Court Hearings

First, let's talk about the basics of immigration court. If you feel confused about court, you're not alone! Immigration law is complicated, even for lawyers. Let's figure out who is going to in court and what's going to happen in your first hearings.



The Judge will be at the front of the room and will ask you questions. He will be dressed like the man on the left. The Judge will be making the decision about your case so it's important to be respectful, polite, and prepared.

- A government attorney. When you go to court, a lawyer representing ICE will be there. He's called the government attorney. His job is to represent ICE and try to get an order of deportation against you.

- An interpreter. Don't worry if you don't speak English—an interpreter will be there in person or over the phone. Just make sure you speak up and tell the IJ that you don't speak or understand English well and need an interpreter.

The first few hearings that you'll go to will be "master calendar" hearings. At those hearings, you'll be in court with a group of other detainees. At "master calendar" hearings, the Judge will check in with you about your case and see what you want to do. It isn't time yet to show her all your evidence of the reasons why you should stay in the country. If you want more time to talk to an attorney, the judge will give you a few weeks to do so. You'll then come back for another master calendar hearing.



When you come back to court, the Judge will ask you if you want to admit or deny the changes against you. That means that the Judge wants

to know if you want to force the government attorney to prove the charges against you. If the government attorney says that you should be deported because of your criminal convictions, making him prove the charges against you can be an important step. To learn more about how to do that, read the Florence Project's guide on denying the charges against you.

Certain types of criminal convictions, even for pretty minor crimes, can affect your deportation case, so it's good to get some legal advice before admitting any criminal charges against you. If you can't speak to an attorney first, you might want to consider denying your criminal charges just to be safe.

a. Eligibility for “LPR Cancellation of Removal”

If the Judge decides that at least some of the charges against you are correct, she'll then ask you questions to figure out if you are eligible for “LPR Cancellation of Removal.” She'll ask questions to make sure you meet the requirements to apply. Take a look at the requirements on page 6 if you can't remember. If the Judge agrees that you are eligible to present your case for “LPR Cancellation” to her, she'll give you a copy of the application.

Remember, just because the Judge says you're eligible for “LPR Cancellation” does not mean that you've won your case! It means that the Judge thinks that you've met the basic requirements and is giving you a chance to show her that you deserve to have your deportation cancelled.

b. Filling out and turning in the application

Before your final hearing, you'll come back to court for one more “master calendar” hearing to turn in your application for “LPR Cancellation of Removal.” It's important that you fill out the application completely so that the Judge will accept it and schedule a final hearing for you to present all your evidence. A short guide on how to fill out your application is at the end of this packet.



When you've completed the application, make two extra copies and bring them to court with you. The original will go to the Judge. Another copy will go to the government attorney and you'll keep a copy for yourself. This is important, so don't forget!

Once you turn in your application, the Judge will give you a date for a final hearing. At this hearing, you'll appear without a group of detainees. The hearing will last a few hours.

This hearing will be your chance to present your case to the judge.

4. Steering Toward Success: Gathering Evidence for Your Case

As we talked about earlier, winning your case for "LPR Cancellation" is like following a roadmap for a long trip. You got started on your trip by going to your master calendar hearing and filling out your application. Now it's time to hit the road and begin gathering evidence to support your case. Every piece of evidence you gather means that you're a little further toward the finish line!



Start gathering evidence as soon as you decide that you want to apply for "LPR Cancellation of Removal." **Take a look at the list of evidence in Appendix 3. This will give you ideas of what documents to gather.** Many of these documents take time for your family to find and to mail to you. We know it's not easy to gather all of these documents while you're detained. Ask a trusted family member or friend to help you get these documents together. Make sure that he mails you **copies, not originals**, of these documents.

The type of evidence that you'll gather depends on the facts of your case. Try and think of evidence that shows that you or your family would suffer a lot if you were deported. For example, if you have health problems and would have a hard time getting treatment in your home country, that evidence would be very helpful to your case.

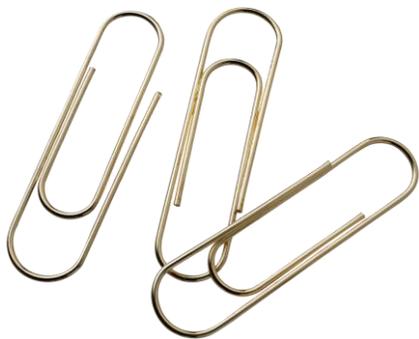


Or, if you're a single mom whose kids have never been to your country, you'll want to get letters from their teachers about how they're doing in school and whether they have any special needs. You'll need copies of their birth certificates to show that they're U.S. citizens. You'll want to document all the opportunities that they have here—scholarships, job trainings, camps—that they won't have in your country.

Every person applying for "LPR Cancellation of Removal" should get as many letters of reference as possible. These should be from friends, family, and employers and should talk about all the good contributions that you've made to the United States. Again, there is a long list of examples of good types of evidence in Appendix 3.



Remember, all the documents you submit need to be in English. If you receive documents in another language, you can translate them. Just put your translation in with the original letter and attach a signed copy of the "Certificate of Translation" that's at the end of this packet.



Once you have all your documents together, you'll want to organize them. Make a list of everything you have and then put it on top. You can divide your documents into categories like these:

1. Family Ties in the US (birth certificates, marriage certificates)
2. Evidence of Hardship to Me if I Am Deported
3. Evidence of Hardship to My Family
4. Evidence of Employment History and Property in the US
5. Evidence of Rehabilitation (if you have criminal history)

Attach a signed and dated copy of "Certificate of Service" at the end of this packet to the last page of all your evidence. Then make two copies of all your evidence. Just like the application, the original will go to the Judge, a copy will go to the government attorney and you'll keep a copy for yourself.



If you want to send the documents to the Judge before your final date, put a cover sheet with your name and A-number on top. Then put the packets in envelopes. One should say "To the Immigration Judge" and the other should say "To ICE Litigation." Ask detention staff to make sure they are delivered or put them in the detention center's mailboxes that are delivered to the Judge and to ICE.

5. The Final Stretch: Preparing Your Testimony

You're almost done with your journey toward "LPR Cancellation of Removal" and are about to see the finish line! Spending time preparing your testimony for the final hearing will help you with this final stretch of your case.



At your final hearing, you'll have an opportunity to tell the judge why you think you should stay in the United States. Keep these tips in mind when practicing your testimony:

- **Be prepared.** Write a list of the specific reasons why you and your family would suffer if you were deported. Don't just say things like "they'll miss me" or "they need me to pay the bills." That won't be much help—all families go through that. **Think about the reasons why your family will suffer much more than normal if you're deported and explain those reasons to the Judge.** Write them down on a piece of paper.



For example, you'll need to explain how much your child's cancer treatment costs, how you take care of her when she's sick, how this treatment isn't available in your home country, and how you pay all the family's medical bills. Practice explaining this to a friend or a family member over the phone.

- **Be honest.** Your job is to tell the Judge about the circumstances of your life. If you have criminal convictions and the Judge asks you about them, tell her what happened. Lying will just make things worse, and the Judge and government attorney often have ways to figure out if you are lying.

- **Turn negatives into positives.** If you had a problem with drugs and alcohol in the past, explain how you've overcome those problems—did you go to AA meetings or complete a rehabilitation program? Tell the Judge about those things, too.
- **Don't be defensive.** Admitting that you made mistakes can show the Judge that you are sorry. It can also show the Judge that you won't repeat those mistakes in the future.



- **Speak from the heart.** Judges see a lot of people every day. You can make your testimony stand out by speaking sincerely. Think of a funny story about your family to share. Think about a story that will show the Judge how much your family needs you. Explain to the Judge why your deportation would hurt you and your family very much. Don't worry if you

become nervous or emotional in court—it happens to almost everyone.

- **Ask your family members to testify in court.** Your family can come and tell the judge about the reasons why you should stay in the United States. Help your family member prepare by asking her to list all the reasons why she would suffer if you were in another country. Make sure she practices and writes the reasons down to have with her in court. Your family members can also come and watch your final hearing to show the Judge that they support you. Remember, some of the detention centers won't let small children come to court, so have your family members call the detention center and ask about the rules before they come.
- **Answer the judge's questions.** The judge may want to ask you some specific questions. A list of what she may ask is at the end of this guide. In addition to practicing your testimony, you should practice responses to those questions so you'll be prepared. Remember, be respectful when the judge speaks. Refer to the judge as "Your Honor," "Ma'am," or "Sir."

6. Weighing the Evidence: The Judge's Decision



In most cases, the Judge will give you her decision at the end of your final hearing. She'll tell you whether or not she'll approve your application for "LPR Cancellation of Removal." Other times, the Judge will tell you that she wants time to think about your case. She will write a decision and send it to you through the detention center's mail within a few weeks.

There are a few possibilities for the Judge's decision:

- If the Judge approves your application and the government attorney does not want to appeal that decision, you'll likely be released the same day.
- If the Judge approves your application and the government attorney appeals that decision, you'll likely have to wait until the Board of Immigration Appeals gives you a final decision. It usually takes at least three months.
- If the Judge denies your application, you have the choice of appealing that decision and saying that the Judge was wrong. You'll need to tell the Judge at your final hearing that you want to appeal. She'll give you some paperwork that needs to be mailed within 30 days of her decision. Take a look at the Florence Project's guide to appealing your case or schedule an appointment to talk with an attorney about your appeal.

Final Thoughts

As you've seen, winning a case for "LPR Cancellation of Removal" is not easy. You need to show that you and your family would suffer if you were deported. It takes planning, lots of work gathering evidence, and really practicing your testimony. We wish you the best of luck with your case!

Appendix 1. Filling Out Your Application

This section addresses some common questions and mistakes that can happen when you're filling out your application for Cancellation of Removal application. If you need an extra copy, it's available at <http://www.justice.gov/eoir/formslist.htm>.

You must use a *pen or typewriter* to fill out the form. Do not use a pencil. ***Most importantly, if you are unsure or do not know the answer to a question, write that on the form.*** For example, if you can't remember something about your criminal record, write down as much as you know and put "I can't remember" or "this is to the best of my memory." or indicate that you might have missing or incorrect information. If a question does not apply to you simply put "N/A" in the box, for example if you are not married and the question asks for information about your wife.

If there is not enough room on the form for you to answer a question completely, continue your answer on another piece of paper. Just make sure to write your name and A-number at the top of each piece of paper.

These are questions to watch out for:

42A Application for Cancellation of Removal

Part 1

- If you are detained, use the address for the detention center.

Part 2

- If you first entered the U.S. as a legal permanent resident, write down the date you entered and where. If you first entered the U.S. illegally and later applied for and received your legal permanent residency, put down the date you received your LPR status.

Part 3

- If you used a different name when you entered the U.S. include that information here.
- Mark here what your immigration status was when you entered the U.S. If you entered without papers, mark “entered without inspection”.
- Watch out for the question that asks you to list all of your entries and departures from the U.S. You should list every trip you’ve made out of the U.S., even if it was for less than one day. If you left and came back many times for the same reason (for example, if you went to Mexico several times just for the day to go shopping or to visit family) then you can write something like “day trip once a month to Mexico for shopping”. You may need another piece of paper to answer this question.

Part 4

- If you have *never* married, please mark “I am not married” and skip to question #36. If you have only been married ONE time, please answer questions 25-34 in full and on #35 mark “I have not been previously married”.

Part 5

- When listing your work history, begin with the job you had just before coming to detention and work backwards. If you cannot remember all of the details of your work history include as much information as you can remember.

Part 6

- Please include ALL children and listed relatives (parents, brothers, sisters, aunts, uncles, and grandparents), whether they are in the U.S. or another country. If they live outside the U.S., then only put the country where they live. If necessary, continue information on additional pieces of paper.

Part 7

- ***THE MOST IMPORTANT QUESTION*** on the application is the one that asks about your criminal history. It is VERY important to include any and all arrests, court appearances, convictions, even if you think that ICE does not know about it or the charges were dismissed. This also includes any fines or traffic violations. ICE will obtain your “rap sheet” and other conviction documents before your hearing. If you do not list the charges on your application and they later come out at the hearing, the judge may think you trying to hide something and it *will* hurt your case. If you think that you may not remember your criminal history perfectly, then you can note that the answers provided are “to the best of your recollection” and that you “might be missing or forgetting an incident.”

G-325A

- If you’ve never been married before, just list N/A
- List your addresses from the most recent to the least recent. If you’re currently detained, use the detention center’s address
- If you can’t remember exactly when you lived someplace, use the abbreviation “apprx” or “+/-” to show that you’re making an estimation
- List your previous jobs from most recent to least recent
- Check the box to indicate that the form is filed along with an application to be a Permanent Resident

Fee Waiver

- If you are currently detained and not paying any bills, you can put 0’s when asked about your monthly expenses and income.

Appendix 2: Questions to Expect from the Judge and Government Attorney

Immigration History:

1. Have you used any aliases in the United States?
2. When did you first enter the United States?
3. How did you enter?
4. How did you get your green card?
5. Have you left the U.S. since you got your green card? How many times? What is the longest amount of time you have spent outside of the U.S. after you got your green card?

Family Life:

1. Are you married? When did you get married (make sure you know the date!!!)? Where does s/he live? What is your husband or wife's immigration status? Have you ever filed a petition for him or her? Why not?
2. If not married but living with someone, why haven't you gotten married? Have you ever made plans to marry this person that you live with? How long have you lived together?
3. Do you have children? When were they born (know dates!!!)? How old are your kids? Who do they live with? What immigration status do they have?
4. Are your parents still living? Where do they live? What is their immigration status?
5. Do you have any other relatives or family in the United States? What is their immigration status?

6. Do you have any relatives or family living in your country of origin? Could you go live with them if you are removed? Why not?
7. The Judge will also want to know about your involvement and the quality of your relationship with all of the people mentioned above:
 - How often do you speak to each other?
 - How often do you see each other?
 - How is your relationship with this person?
 - How involved are you with your kids?

Hardship

1. Will your wife or kids go with you if you are deported? Why not?
2. Do you have any medical conditions? Do you take any medication?
3. Do any of your relatives have medical conditions? What? Do you take care of them? How?
4. What will you do if you are deported? Where will you go? Who will you live with? How will you get your medicine? How will you work?

Employment, Education, Community Involvement

1. How far did you get with your schooling?
2. What was the last job you had? How much were you making per week? How long were you working there?
3. The judge will want to get a sense of your employment history for at least the last 5 to 10 years, if not the entire time that you have lived in the United States.
4. If you have had long periods of unemployment, be prepared to discuss what you were doing during that time and why.

5. Where will you work or how will you support yourself if you win your case?
6. Have you done volunteer work or community service? Was it court ordered or of your own choice?
7. Do you go to church or participate in any other types of community organizations? Which ones? How often?
8. Have you always filed taxes? If not, why not?
9. Have you ever received public assistance or benefits? For how long? Why?
10. If you are a man who lived in the United States between ages 18 and 25, did you register for the Selective Service? (Note: if you did not know that you were required to register, make sure to tell the judge that rather than try to make up a reason).

Property

1. Do you own a house? A car? Other property?

Criminal Record and Other Negatives

1. Have you had any incident reports while in detention? What for?
2. What has been your most recent offense (the conviction that brought you to immigration's attention and custody)? What happened?
3. Do you have any other convictions? (List them all! Let the judge know if you can't remember all of them and *why* you have trouble remembering!)
4. What happened in each of those incidents?

5. Do you have any other arrests? What were those for? What happened in each of those incidents?
6. Make sure to explain your criminal record in a way that is honest and reflective:
 - a. First, explain exactly what happened and focus on the facts.
 - b. Second, explain what you did wrong in the situation.
 - c. Third, explain what you would do differently if you were in that situation again.
 - d. Fourth, explain you plan to do to make sure that you are never in that kind of situation again.
 - e. Fifth, explain to the judge what you have learned from this process.
 - f. Sixth, explain to the judge if you have changed, how you have changed, and why you have changed.

Drug or Alcohol use:

1. Do or did you have a drug or alcohol problem?
2. What drugs have you tried? How often do you use?
3. When did you first begin to use or consume drugs or alcohol?
4. Did you consume or use in front of your kids? While pregnant?
5. Do you drive while under the influence?
6. When did you stop using? Why did you stop?
7. What do you plan to do if you are out and feel the urge to consume drugs or alcohol again?
8. What is your plan to stay away from drugs or alcohol in the future?

9. Have you ever participated in a drug or alcohol program before? How far did you get in the program? Name some steps in AA or NA.
10. What's different this time? Why didn't it work before?

Assault, Battery, Domestic Violence, Restraining orders:

1. What do you plan to do next time you get in an argument with your spouse or someone else?
2. Who was the victim of your acts? Did you hit him or her?
3. Have you hit or beat this victim or others before? How many times?
4. Please describe in detail how you hit the victim (punched? pulled? slapped? open fist? any scars left? who was there? who called the police?)
5. Do you believe you have problems with your spouse or with managing your anger?
6. How have you solved these problems? How?
7. Is your victim here to testify on your behalf? Has he or she written a letter of support? Why not? Is he or she afraid of you?
8. Is there a restraining order? Have you violated it?
9. If the victim is a relative, what is his or her immigration status?

Future

1. What do you plan to do if you win your case and get out?
2. How will you stay out of trouble?
3. Where will you live?

4. Where do you plan to work? What will you study?

Appendix 3. Checklist of Documents

We recommend that you try to obtain as many of the following types of documents as possible, BUT please do not become discouraged or feel that you have no chance if you do not have a lot of documents to submit or if you don't have many family or friends. There are many ways to explain why these people are missing, to supplement your application in other ways, and to win your case even with a packet of evidence that is small.

Received

Letters of support from as many family members as possible (including drawings from children)	
Letters of support from friends	
Letters from people who know me (neighbors, landlord, etc.)	
Letters showing community involvement (church, volunteering)	
Proof of financial support my family (rent receipt, child support)	
Letters from past employers	
Letters from religious organizations I belong to	
Photos of family (birthday parties, holidays, pets, babies, etc.)	

Certificates from Rehabilitation Programs	
Informational Pamphlets on rehabilitation programs in my area (domestic violence, alcohol or drug abuse, anger management)	
Letter to my probation/parole officer explaining that I am in ICE custody	

Tax Records	
Pay Stubs	
Social Security Records	
Letter showing that I have a job when I get out of detention	
Proof of English Language Training, GED, college, etc.	

Certificates and diplomas	
Copies of children's school records, including letters from teachers about my children's classroom performance.	
Copies of my medical records and my close relatives	
Copies of my children's birth certificates	
A copy of my green card	
Copy of my marriage certificate	
Proof of any debt that I have (mortgage, car loans, medical, etc.)	
Proof of insurance (car, medical, etc.)	
Proof of Property that I own in the U.S.	
Articles about the situation in my country of origin (eg. poor medical care, war and violence, unemployment, poverty)	

Appendix 4. Certificate of Service

Use the following certificate if you will give the documents to the government attorney and the judge in court.

I, _____(your name here), hereby certify that I hand-delivered a copy of this document to a representative of ICE Litigation on the date below.

Signed:

Date:

Use the following certificate if you will mail the documents to the ICE attorney and judge before the hearing.

I, _____(your name here), hereby certify that I placed a copy of this document in the mail to ICE Litigation at

(list address for the ICE office at the detention center where you are staying) on the date below.

Signed:

Date:

Appendix 5. Sample Certificate of Translation

I, _____(name of translator), certify that I am competent to translate this document from its original language into English and that the translation is true and accurate to the best of my abilities.

Signature of translator

Date

IX. APPENDIX – Sample documents and forms from government entities; includes the application for LPR Cancellation of Removal from EOIR

Below you will find the applicable government forms. Please note that these forms can be revised; thus, the practitioner should check the government website for the latest edition of the following materials.

From the Executive Office for Immigration Review (EOIR), Forms¹⁸⁹

- Page 154 Advice to Applicant: Application for Cancellation of Removal for Certain Permanent Residents
- Page 156 Instructions: Application for Cancellation of Removal for Certain Permanent Residents
- Page 159 Form [EOIR 42A](#): Application for Cancellation of Removal for Certain Permanent Residents
- Page 166 Form [EOIR 28](#): Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court

From the EOIR, Immigration Court Practice Manual¹⁹⁰

- Page 168 Sample Cover Page
- Page 169 Sample Written Pleading
- Page 173 Sample Proof of Service

From the United States Citizenship and Immigration Services (USCIS)¹⁹¹

- Page 175 Form [G-325A](#): Biographic Information

¹⁸⁹ United States Department of Justice, Executive Office for Immigration Review (follow "Form EOIR-42A" hyperlink and "Form EOIR-28 hyperlink) available at www.justice.gov/eoir/formslst.htm (last visited May 12, 2016).

¹⁹⁰ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, available at <https://www.justice.gov/eoir/office-chief-immigration-judge-0> (follow "Appendices" hyperlink), (last visited May 12, 2016).

¹⁹¹ United States Citizenship and Immigration Services, available at www.uscis.gov/portal/site/uscis (follow "Forms" hyperlink; then follow "Form G-325A" hyperlink), (last visited May 12, 2016).

**Application for Cancellation of Removal for
Certain Permanent Residents**

ADVICE TO APPLICANT

PLEASE READ CAREFULLY. FEES WILL NOT BE RETURNED.

- I. Permanent Resident Aliens Eligible for Cancellation of Removal:** You may be eligible to have your removal cancelled under section 240A(a) of the Immigration and Nationality Act (INA). To qualify for this benefit, you must establish in a hearing before an Immigration Judge that:
- A. You have been a permanent resident for at least five (5) years;
 - B. Prior to service of the Notice to Appear, or prior to committing a criminal or related offense referred to in sections 212(a)(2) and 237(a)(2) of the INA, or prior to committing a security or related offense referred to in section 237(a)(4) of the INA;
 - you have at least seven (7) years continuous residence in the United States after having been lawfully admitted in any status; and
 - C. You have not been convicted of an aggravated felony.

NOTE: If you have served on active duty in the Armed Forces of the United States for at least 24 months, you do not have to meet the requirements of continuous residence in the United States. You must, however, have been in the United States when you entered the Armed Forces. If you are no longer in the Armed Forces, you must have been separated under honorable conditions.

- II. Permanent Resident Aliens NOT Eligible for Cancellation of Removal:** You are not eligible to have your removal cancelled under section 240A(a) of the INA if you:
- A. Entered the United States as a crewman after June 30, 1964;
 - B. Were admitted to the United States as, or later became, a nonimmigrant exchange alien as defined in section 101(a)(15)(J) of the INA in order to receive a graduate medical education or training, regardless of whether you are subject to or have fulfilled the 2-year foreign residence requirement of section 212(e) of the INA;
 - C. Were admitted to the United States as, or later became, a nonimmigrant exchange alien as defined in section 101(a)(15)(J) of the INA, other than to receive graduate medical education or training, and are subject to the 2-year foreign residence requirement of section 212(e) of the INA but have neither fulfilled nor obtained a waiver of that requirement;
 - D. Are an alien who is either inadmissible under section 212(a)(3) of the INA or deportable under section 237(a)(4) of the INA;
 - E. Are an alien who ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion; or
 - F. Are an alien who was previously granted relief under section 212(c) of the INA, or section 244(a) of the INA as such sections were in effect prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, or whose removal has previously been cancelled under section 240A of the INA.

**Application for Cancellation of Removal for
Certain Permanent Residents**

III. How Permanent Resident Aliens Can Apply for Cancellation of Removal

If you believe that you have met all the requirements for cancellation of removal, you must answer all the questions on the attached Form EOIR-42A fully and accurately. You must pay the filing and biometrics fees and comply with the Department of Homeland Security (DHS) instructions for providing biometric and biographic information to USCIS [available at <http://uscis.gov>]. You must also serve a copy of your application on the Assistant Chief Counsel for the DHS, U.S. Immigration and Customs Enforcement (ICE) as required in the proof of service on page 7 of this application, and you must file your application with the appropriate Immigration Court. Please read the following instructions carefully before completing your application.

INSTRUCTIONS

1. PREPARATION OF APPLICATION.

To apply for cancellation of removal as a permanent resident alien under section 240A(a) of the Immigration and Nationality Act (INA), you must fully and accurately answer all questions on the attached Form EOIR-42A. You must also comply with all of the instructions on this form. These instructions have the force of law. A separate application must be prepared and executed for each person applying for cancellation of removal. An application on behalf of an alien who is mentally incompetent or is a child under 14 years of age shall be executed by a parent or guardian.

Your responses must be typed or printed legibly in ink. Do not leave any questions unanswered or blank. If any questions do not apply to you, write "none" or "not applicable" in the appropriate space.

To the extent possible, answer all questions directly on the form. If there is insufficient room to respond fully to a question, please continue your response on an additional sheet of paper. Please indicate the number of the question being answered next to your response on the additional sheet, write your alien registration number, print your name, and sign, date, and securely attach each additional sheet to the Form EOIR-42A.

2. BURDEN OF PROOF.

The burden of proof is on you to prove that you meet all of the statutory requirements for cancellation of removal for certain permanent resident aliens under section 240A(a) of the INA and that you are entitled to such relief as a matter of discretion. To meet this burden, your responses to the questions on the application should be as detailed and complete as possible. You should also attach to your application any documents that demonstrate your eligibility for relief (see "SUPPORTING DOCUMENTS" below).

3. SUPPORTING DOCUMENTS.

You should submit with your application copies of any documents which the Department of Homeland Security (DHS), formerly the Immigration and Naturalization Service, issued to you. You should also submit all documents related to your criminal history, including all conviction records. The Immigration Judge may require you to submit additional records relating to your request for cancellation of removal.

The original of all supporting documents must be available for inspection at the hearing. If you wish to have the original documents returned to you, you should also present reproductions.

4. REQUIRED BIOMETRIC AND BIOGRAPHIC INFORMATION.

Each applicant 14 years of age or older must also comply with the requirement to supply biometric and biographic information. You will be given instructions on how to complete this requirement. You will be notified in writing of the location of the Application Support Center (ASC) or the designated Law Enforcement Agency where you must go to provide biometric and biographic information. You will also be given a date and time for the appointment. It is important to furnish all the required information. Failure to comply with this requirement may result in a delay in your appointment or in your application being deemed abandoned and dismissed by the Immigration Court.

5. TRANSLATIONS.

Any document in a foreign language must be accompanied by an English language translation and a certificate signed by the translator stating that he/she is competent to translate the document and that the translation is true and accurate to the best of the translator's abilities. Such certification must be printed legibly or typed.

Application for Cancellation of Removal for Certain Permanent Residents

6. FEES.

Before you file your Form EOIR-42A with the Immigration Court, you must pay the required \$100 filing fee and the biometrics fee to the Department of Homeland Security (DHS). Evidence of payment of these fees in the form of a copy of the DHS, U.S. Citizenship and Immigration Services (USCIS) ASC notice of fee receipt and biometrics appointment instructions must accompany your Form EOIR-42A. These fees will not be refunded, regardless of the action taken on your application. Therefore, it is important that you read the advice, instructions, and application carefully before responding. **If you are unable to pay the filing fee, you may ask the Immigration Judge to permit you to file your Form EOIR-42A without fee (fee waiver).**

DO NOT SEND CASH. All fees must be submitted in the exact amount. Remittance may be made by personal check, cashier's check, certified bank check, bank international money order, or foreign draft drawn on a financial institution in the United States and payable to the "Department of Homeland Security" in United States currency. If the applicant resides in the Virgin Islands, the check or money order must be payable to the "Commissioner of Finance of the Virgin Islands." If the applicant resides in Guam, the check or money order must be made payable to the "Treasurer, Guam." Personal checks are accepted subject to collectibility. An uncollectible check will render the application and any documents issued pursuant thereto invalid. A charge of \$30.00 will be imposed if a check in payment of a fee is not honored by the bank on which it is drawn. When the check is drawn on an account of a person other than the applicant, the name and alien registration number of the applicant must be entered on the face of the check. All checks must be drawn on a bank located in the United States.

7. SERVING & FILING YOUR APPLICATION.

- A. You must first comply with the DHS instructions for providing biometric and biographic information to USCIS, which involves sending a copy of the application to the appropriate USCIS Service Center. The DHS instructions also address payment of the application fees.
- B. You must then serve the following documents on the Assistant Chief Counsel for DHS, U.S. Immigration and Customs Enforcement (ICE):
 - a copy of your Form EOIR-42A, Application for Cancellation of Removal, with all supporting documents and additional sheets;
 - a copy of the USCIS ASC notice of fee receipt and biometrics appointment instructions; and
 - the original Biographical Information Form G-325A.

You must file the following documents with the appropriate Immigration Court:

- the original Form EOIR-42A with all supporting documents and additional sheets;
- a copy of the USCIS ASC notice of fee receipt and biometrics appointment instructions;
- a copy of the Biographical Information Form G-325A; and
- a completed certificate showing service of these documents (See Part 10 of the Application on page 7) on the ICE Assistant Chief Counsel, unless service is made on the record at the hearing.

Retain your USCIS ASC biometrics confirmation document or a copy of your Fingerprint Card, FD-258, if applicable, as proof that your biometrics were taken, and bring it to your future Immigration Court hearings.

8. PENALTIES.

You must answer all questions on Form EOIR-42A truthfully and submit only genuine documents in support of your application. **You will be required to swear or affirm that the contents of your application and the supporting documents are true to the best of your knowledge.** Your answer to the questions on this form and the supporting documents you present will be used to determine whether your removal should be cancelled and whether you should be permitted to retain your permanent resident status. Any answer you give and any supporting document you present may also be used as evidence in any proceeding to determine your right to be admitted or readmitted, re-enter, pass through, or reside in the United States. Your application may be denied if any of your answers or supporting documents are found to be false.

**Application for Cancellation of Removal for
Certain Permanent Residents**

Presenting false answers or false documents may also subject you to criminal prosecution under 18 U.S.C. section 1546 and/or subject you to civil penalties under 8 U.S.C. section 1324c if you submit your application knowing that the application, or any supporting document, contains any false statement with respect to a material fact, or if you swear or affirm that the contents of your application and the supporting documents are true, knowing that the application or any supporting documents contain any false statement with respect to a material fact. If convicted, you could be fined up to \$250,000, imprisoned for up to ten (10) years, or both. 18 U.S.C. sections 1546(a), 3559(a)(4), 3571(b)(3). If it is determined you have violated the prohibition against document fraud and a final order is entered against you, you could be subject to a civil penalty up to \$2,000 for each document used or created for the first offense, and up to \$5,000 for any second, or subsequent offense. In addition, if you are the subject of a final order for violating 8 U.S.C. section 1324c, relating to civil penalties for document fraud, you will be removable from the United States.

9. PAPERWORK REDUCTION ACT NOTICE.

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. We try to create forms and instructions that are accurate, can easily be understood, and which impose the least possible burden on you to provide us with information. Often, this process is difficult because some immigration laws are very complex. The reporting burden for this collection of information is computed as follows: (1) learning about the form, 50 minutes, (2) completing the form, 2 hours, and (3) assembling and filing the form, 3 hours, for an average of 5 hours, 50 minutes per application. If you have comments regarding the accuracy of this burden estimate, or any other aspect of this collection of information, including suggestions for reducing this burden, you may write to the U.S. Department of Justice, Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

PART 3 - INFORMATION ABOUT YOUR PRESENCE IN THE UNITED STATES

18) My first arrival into the United States was under the name of: *(Last, First, Middle)* _____ 19) My first arrival to the United States was on: *(Month, Day, Year)* _____

20) Place or port of first arrival: *(Place or Port, City, and State)* _____

21) I: was inspected and admitted.
 I entered using my Lawful Permanent Resident card which is valid until _____ *(Month, Day, Year)*.
 I entered using a _____ *(Specify Type of Visa)* visa which is valid until _____ *(Month, Day, Year)*.
 was not inspected and admitted.
 I entered without documents. Explain: _____
 I entered without inspection. Explain: _____
 Other. Explain: _____

22) I applied on _____ *(Month, Day, Year)* for additional time to stay and it was granted on _____ *(Month, Day, Year)* and valid until _____ *(Month, Day, Year)*, or denied on _____ *(Month, Day, Year)*.

23) Since the date of my first entry, I departed from and returned to the United States at the following places and on the following dates:
(Please list all departures regardless of how briefly you were absent from the United States.)

If you have never departed from the United States since your original date of entry, please mark an X in this box:

	Port of Departure <i>(Place or Port, City and State)</i>	Departure Date <i>(Month, Day, Year)</i>	Purpose of Travel	Destination
1	_____	_____	_____	_____
	Port of Return <i>(Place or Port, City and State)</i>	Return Date <i>(Month, Day, Year)</i>	Manner of Return	Inspected and Admitted? <input type="checkbox"/> Yes <input type="checkbox"/> No
2	_____	_____	_____	_____
	Port of Return <i>(Place or Port, City and State)</i>	Return Date <i>(Month, Day, Year)</i>	Manner of Return	Inspected and Admitted? <input type="checkbox"/> Yes <input type="checkbox"/> No

24) Have you ever departed the United States: a) under an order of deportation, exclusion, or removal?..... Yes No
b) pursuant to a grant of voluntary departure?..... Yes No

PART 4 - INFORMATION ABOUT YOUR MARITAL STATUS AND SPOUSE *(Continued on page 3)*

25) I am not married: I am married: 26) If married, the name of my spouse is: *(Last, First, Middle)* _____ 27) My spouse's name before marriage was: _____

28) The marriage took place in: *(City and Country)* _____ 29) Date of marriage: *(Month, Day, Year)* _____

30) My spouse currently resides at:

Apt. number and/or in care of

Number and Street

City or Town State/Country Zip Code

31) Place and date of birth of my spouse: *(City & Country; Month, Day, Year)* _____

32) My spouse is a citizen of: *(Country)* _____

33) If your spouse is other than a native born United States citizen, answer the following:
He/she arrived in the United States at: *(Place or Port, City and State)* _____
He/she arrived in the United States on: *(Month, Day, Year)* _____
His/her alien registration number(s) is: A# _____
He/she was naturalized on: *(Month, Day, Year)* _____ at _____ *(City and State)*

34) My spouse - is - is not employed. If employed, please give salary and the name and address of the place(s) of employment.

Full Name and Address of Employer	Earnings Per Week <i>(Approximate)</i>
_____	\$ _____
_____	\$ _____
_____	\$ _____

PART 4 - INFORMATION ABOUT YOUR MARITAL STATUS AND SPOUSE (Continued)

35) I - have - have not been previously married: (If previously married, list the name of each prior spouse, the dates on which each marriage began and ended, the place where the marriage terminated, and describe how each marriage ended.)

Name of prior spouse: (Last, First, Middle)	Date marriage began: Date marriage ended:	Place marriage ended: (City and Country)	Description or manner of how marriage was terminated or ended:

Name of prior spouse: (Last, First, Middle)	Date marriage began: Date marriage ended:	Place marriage ended: (City and Country)	Description or manner of how marriage was terminated or ended:

36) Have you been ordered by any court, or are otherwise under any legal obligation, to provide child support and/or spousal maintenance as a result of a separation and/or divorce? - Yes - No

PART 5 - INFORMATION ABOUT YOUR EMPLOYMENT AND FINANCIAL STATUS

37) Since my arrival into the United States, I have been employed by the following named persons or firms: (Please begin with present employment and work back in time. Any periods of unemployment or school attendance should be specified. Attach a separate sheet for additional entries if necessary.)

Full Name and Address of Employer	Earnings Per Week (Approximate)	Type of Work Performed	Employed From: (Month, Day, Year)	Employed To: (Month, Day, Year)
_____	\$ _____			PRESENT
_____	\$ _____			
_____	\$ _____			

38) If self-employed, describe the nature of the business, the name of the business, its address, and net income derived therefrom:

39) My assets (and if married, my spouse's assets) in the United States and other countries, not including clothing and household necessities, are:

Self		Jointly Owned With Spouse	
Cash, Stocks, and Bonds..... \$ _____		Cash, Stocks, and Bonds..... \$ _____	
Real Estate..... \$ _____		Real Estate..... \$ _____	
Auto (dollar value minus amount owed)..... \$ _____		Auto (dollar value minus amount owed)..... \$ _____	
Other (describe on line below)..... \$ _____		Other (describe on line below)..... \$ _____	
_____ TOTAL \$ _____		_____ TOTAL \$ _____	

40) I - have - have not received public or private relief or assistance (e.g. Welfare, Unemployment Benefits, Medicaid, TANF, AFDC, etc.). If you have, please give full details including the type of relief or assistance received, date for which relief or assistance was received, place, and total amount received during this time: _____

41) Please list each of the years in which you have filed an income tax return with the Internal Revenue Service: _____

PART 6 - INFORMATION ABOUT YOUR FAMILY *(Continued on page 5)*

42) I have _____ *(Number of)* children. Please list information for each child below, include assets and earnings information for children over the age of 16 who have separate incomes:

Name of Child: <i>(Last, First, Middle)</i> Child's Alien Registration Number:	Citizen of What Country: Birth Date: <i>(Month, Day, Year)</i>	Now Residing At: <i>(City and Country)</i> Birth Date: <i>(City and Country)</i>	Immigration Status of Child
A#: Estimated Total of Assets: \$ _____ Estimated Average Weekly Earnings: \$ _____			
A#: Estimated Total of Assets: \$ _____ Estimated Average Weekly Earnings: \$ _____			
A#: Estimated Total of Assets: \$ _____ Estimated Average Weekly Earnings: \$ _____			

43) If your application is denied, would your spouse and all of your children accompany you to your:

Country of Birth - <input type="checkbox"/> Yes <input type="checkbox"/> No	If you answered "No" to any of the responses, please explain: _____ _____ _____
Country of Nationality - <input type="checkbox"/> Yes <input type="checkbox"/> No	
Country of Last Residence - <input type="checkbox"/> Yes <input type="checkbox"/> No	

44) Members of my family, including my spouse and/or child(ren) - have - have not received public or private relief or assistance (e.g., Welfare, Unemployment Benefits, Medicaid, TANF, AFDC, etc.). If any member of your immediate family has received such relief or assistance, please give full details including identity of person(s) receiving relief or assistance, dates for which relief or assistance was received, place, and total amount received during this time: _____

45) Please give the requested information about your parents, brothers, sisters, aunts, uncles, and grandparents, living or deceased. As to residence, show street address, city, and state, if in the United States; otherwise show only country:

Name: <i>(Last, First, Middle)</i> Alien Registration Number:	Citizen of What Country: Birth Date: <i>(Month, Day, Year)</i>	Relationship to Me: Birth Date: <i>(City and Country)</i>	Immigration Status of Listed Relative
A#: Complete Address of Current Residence, if Living: _____ _____			
A#: Complete Address of Current Residence, if Living: _____ _____			

PART 7 - MISCELLANEOUS INFORMATION *(Continued on page 6)*

46) I - have - have not entered the United States as a crewman after June 30, 1964.

47) I - have - have not been admitted as, or after arrival in the United States acquired the status of, an exchange alien.

48) I - have - have not submitted address reports as required by section 265 of the Immigration and Nationality Act.

49) I - have - have never (either in the United States or in any foreign country) been arrested, summoned into court as a defendant, convicted, fined, imprisoned, placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public law or ordinance (including, but not limited to, traffic violations or driving incidents involving alcohol). *(If answer is in the affirmative, please give a brief description of each offense including the name and location of the offense, date of conviction, any penalty imposed, any sentence imposed, and the time actually served. You are required to submit documentation of any such occurrences.)*

50) Have you ever served in the Armed Forces of the United States? - Yes - No. If "Yes" please state branch (*Army, Navy, etc.*) and service number: _____

Place of entry on duty: (*City and State*) _____

Date of entry on duty: (*Month, Day, Year*) _____ Date of discharge: (*Month, Day, Year*) _____

Type of discharge: (*Honorable, Dishonorable, etc.*) _____

I served in active duty status from: (*Month, Day, Year*) _____ to (*Month, Day, Year*) _____

51) Have you ever left the United States or the jurisdiction of the district where you registered for the draft to avoid being drafted into the military or naval forces of the United States? Yes No

52) Have you ever deserted from the military or naval forces of the United States while the United States was at war? Yes No

53) If male, did you register under the Military Selective Service Act or any applicable previous Selective Service (Draft) Laws? Yes No
If "Yes," please give date, Selective Service number, local draft board number, and your last draft classification: _____

54) Were you ever exempted from service because of conscientious objection, alienage, or any other reason? Yes No

55) Please list your present or past membership in or affiliation with every political organization, association, fund, foundation, party, club, society, or similar group in the United States or any other place since your 16th birthday. Include any foreign military service in this part. If none, write "None." Include the name of the organization, location, nature of the organization, and the dates of membership.

Name of Organization	Location of Organization	Nature of Organization	Member From: <i>(Month, Day, Year)</i>	Member To: <i>(Month, Day, Year)</i>

PART 8 - SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT

(Read the following information and sign below)

I declare that I have prepared this application at the request of the person named in Part 1, that the responses provided are based on all information of which I have knowledge, or which was provided to me by the applicant, and that the completed application was read to the applicant in a language the applicant speaks fluently for verification before he or she signed the application in my presence. I am aware that the knowing placement of false information on the Form EOIR-42A may subject me to civil penalties under 8 U.S.C. 1324c.

Signature of Preparer:		Print Name:	Date:
Daytime Telephone #: ()	Address of Preparer: <i>(Number and Street, City, State, Zip Code)</i>		

PART 9 - SIGNATURE

APPLICATION NOT TO BE SIGNED BELOW UNTIL APPLICANT APPEARS BEFORE AN IMMIGRATION JUDGE

I swear or affirm that I know the contents of this application that I am signing, including the attached documents and supplements, and that they are all true to the best of my knowledge, taking into account the correction(s) numbered _____ to _____, if any, that were made by me or at my request.

(Signature of Applicant or Parent or Guardian)

Subscribed and sworn to before me by the above-named applicant at _____

Immigration Judge

Date: (Month, Day, Year)

PART 10 - PROOF OF SERVICE

I hereby certify that a copy of the foregoing Form EOIR-42A was: - delivered in person - mailed first class, postage prepaid

on _____ to the Assistant Chief Counsel for the DHS (U.S. Immigration and Customs Enforcement-ICE)
(Month, Day, Year)

at _____
(Number and Street, City, State, Zip Code)

Signature of Applicant (or Attorney or Representative)

Indicate Type of Appearance:

Primary Attorney/Representative

Non-Primary Attorney/Representative

On behalf of _____ (Attorney’s Name) for the following hearing: _____ (Date)

I am providing pro bono representation. Check one: yes no

Proof of Service

I (Name) _____ mailed or delivered a copy of this Form EOIR-28 on (Date) _____
to the DHS (U.S. Immigration and Customs Enforcement – ICE) at _____

X _____

Signature of Person Serving

APPEARANCES - An attorney or Accredited Representative (with full accreditation) must register with the EOIR eRegistry in order to practice before the Immigration Court (see 8 C.F.R. § 1292.1(f)). Registration must be completed online on the EOIR website at www.justice.gov/eoir. An appearance shall be filed on a Form EOIR-28 by the attorney or representative appearing in each case before an Immigration Judge (see 8 C.F.R. § 1003.17). A Form EOIR-28 shall be filed either as an electronic form, or as a paper form, as appropriate (for further information, please see the Immigration Court Practice Manual, which is available on the EOIR website at www.justice.gov/eoir). The attorney or representative must check the box indicating whether the entry of appearance is for custody and bond proceedings only, for all proceedings other than custody and bond, or for all proceedings including custody and bond. When an appearance is made by a person acting in a representative capacity, his/her personal appearance or signature constitutes a representation that, under the provisions of 8 C.F.R. part 1003, he/she is authorized and qualified to represent individuals and will comply with the EOIR Rules of Professional Conduct in 8 C.F.R. § 1003.102. Thereafter, substitution or withdrawal may be permitted upon the approval of the Immigration Judge of a request by the attorney or representative of record in accordance with 8 C.F.R. § 1003.17(b). Please note that although separate appearances in custody and non-custody proceedings are permitted, appearances for limited purposes within those proceedings are not permitted. *See Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986). A separate appearance form (Form EOIR-27) must be filed with an appeal to the Board of Immigration Appeals (see 8 C.F.R. § 1003.38(g)). Attorneys and Accredited Representatives (with full accreditation) must first update their address in eRegistry before filing a Form EOIR-28 that reflects a new address.

FREEDOM OF INFORMATION ACT - This form may not be used to request records under the Freedom of Information Act or the Privacy Act. The manner of requesting such records is in 28 C.F.R. §§ 16.1-16.11 and appendices. For further information about requesting records from EOIR under the Freedom of Information Act, see *How to File a Freedom of Information Act (FOIA) Request With the Executive Office for Immigration Review*, available on EOIR's website at <http://www.justice.gov/eoir>.

PRIVACY ACT NOTICE - The information requested on this form is authorized by 8 U.S.C. §§ 1229(a), 1362 and 8 C.F.R. § 1003.17 in order to enter an appearance to represent a party before the Immigration Court. The information you provide is mandatory and required to enter an appearance. Failure to provide the requested information will result in an inability to represent a party or receive notice of actions in a proceeding. EOIR may share this information with others in accordance with approved routine uses described in EOIR's system of records notice, EOIR-001, Records and Management Information System, 69 Fed. Reg. 26,179 (May 11, 2004), or its successors and EOIR-003, Practitioner Complaint-Disciplinary Files, 64 Fed. Reg. 49237 (September 1999). Furthermore, the submission of this form acknowledges that an attorney or representative will be subject to the disciplinary rules and procedures at 8 C.F.R. 1003.101 *et seq.*, including, pursuant to 8 C.F.R. §§ 292.3(h)(3), 1003.108(c), publication of the name of the attorney or representative and findings of misconduct should the attorney or representative be subject to any public discipline by EOIR.

CASES BEFORE EOIR - Automated information about cases before EOIR is available by calling (800) 898-7180 or (240) 314-1500.

FURTHER INFORMATION - For further information, please see the *Immigration Court Practice Manual*, which is available on the EOIR website at www.justice.gov/eoir.

ADDITIONAL INFORMATION:

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is six (6) minutes. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

APPENDIX F Sample Cover Page

A. Tourney, Esquire
1234 Center Street
Anytown, ST 99999

Filing party. If pro se, the alien should provide his or her own name and address in this location. If a representative, the representative should provide his or her name and complete business address.

DETAINED

Detention status. If the alien is detained, the word "DETAINED" should appear prominently in the top right corner, preferably highlighted.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ANYTOWN, STATE

Court. The Immigration Court location (city or town) and state should be provided.

In the Matters of:

Jane Smith
John Smith
Jill Smith

File Nos.: A 012 345 678
A 012 345 679
A 012 345 680

In removal proceedings

A numbers. The alien registration number of every person included in the submission should be listed.

Name and type of proceeding. The full name of every person included in the submission should be listed.

Immigration Judge Susan Jones **Next Hearing: September 22, 2008 at 1:00 p.m.**

Name of the Immigration Judge and the date and time of the next hearing. This information should always be listed.

RESPONDENT'S PRE-HEARING BRIEF

Filing title. The title of the submission should be placed in the middle and bottom of the page.

APPENDIX L

Sample Written Pleading

Prior to entering a pleading, parties are expected to have reviewed the pertinent regulations, as well as Chapter 4 of the Immigration Court Practice Manual (Hearings before Immigration Judges).

[name and address of attorney or representative]

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
[the court's location (city or town) and state]

_____)
In the Matter of:)
) **File No.:** [the respondent's A number]
[the respondent's name])
)
In removal proceedings)
_____)

RESPONDENT'S WRITTEN PLEADING

On behalf of my client, I make the following representations:

1. The respondent concedes proper service of the Notice to Appear, dated _____.
2. I have explained to the respondent (through an interpreter, if necessary):
 - a. the rights set forth in 8 C.F.R. § 1240.10(a);
 - b. the consequences of failing to appear in court as set forth in INA § 240(b)(5);
 - c. the limitation on discretionary relief for failure to appear set forth in INA § 240(b)(7);
 - d. the consequences of knowingly filing or making a frivolous application as set forth in INA § 208(d)(6);
 - e. the requirement to notify the court within five days of any change of address or telephone number, using Form EOIR-33/IC pursuant to 8 C.F.R. § 1003.15(d).

3. The respondent concedes the following allegation(s) _____, and denies the following allegation(s) _____.

4. The respondent concedes the following charge(s) of removability _____, and denies the following charge(s) of removability _____.

5. In the event of removal, the respondent;

names _____ as the country to which removal should be directed;

OR

declines to designate a country of removal.

6. The respondent will be applying for the following forms of relief from removal:

- Termination of Proceedings
- Asylum
- Withholding of Removal (Restriction on Removal)
- Adjustment of Status
- Cancellation of Removal pursuant to INA § _____
- Waiver of Inadmissibility pursuant to INA § _____
- Voluntary Departure
- Other (specify) _____
- None

7. If the relief from removal requires an application, the respondent will file the application (other than asylum), no later than fifteen (15) days before the date of the individual calendar hearing, unless otherwise directed by the court. The respondent acknowledges that, if the application(s) are not timely filed, the application(s) will be deemed waived and abandoned under 8 C.F.R. § 1003.31(c).

If the respondent is filing a defensive asylum application, the asylum application will be filed in open court at the next master calendar hearing.

8. If background and security investigations are required, the respondent has received the DHS biometrics instructions and will timely comply with the instructions. I have explained the instructions to the respondent (through an interpreter, if necessary). In addition, I have explained to the respondent (through an interpreter, if necessary), that, under 8 C.F.R. § 1003.47(d), failure to provide biometrics or other biographical information within the time allowed will constitute abandonment of the application unless the respondent demonstrates that such failure was the result of good cause.

9. The respondent estimates that _____ hours will be required for the respondent to present the case.

10. It is requested that the Immigration Court order an interpreter proficient in the _____ language, _____ dialect;

OR

The respondent speaks English and does not require the services of an interpreter.

Date

Attorney or Representative for the Respondent

RESPONDENT'S PLEADING DECLARATION

I, _____, have been advised of my rights in these proceedings by my attorney or representative. I understand those rights. I waive a further explanation of those rights by this court.

I have been advised by my attorney or representative of the consequences of failing to appear for a hearing. I have also been advised by my attorney of the consequences of failing to appear for a scheduled date of departure or deportation. I understand those consequences.

I have been advised by my attorney or representative of the consequences of knowingly filing a frivolous asylum application. I understand those consequences.

I have been advised by my attorney or representative of the consequences of failing to follow the DHS biometrics instructions within the time allowed. I understand those consequences.

I understand that if my mailing address changes I must notify the court within 5 days of such change by completing an Alien's Change of Address Form (Form EOIR-33/IC) and filing it with this court.

Finally, my attorney or representative has explained to me what this Written Pleading says. I understand it, I agree with it, and I request that the court accept it as my pleading.

Date

Respondent

CERTIFICATE OF INTERPRETATION

I, _____, am competent to translate and interpret from
(name of interpreter)

_____ into English, and I certify that I have read this entire document to the
(name of language)

respondent in _____, and that the respondent stated that he or she understood
(name of language)

the document before he or she signed the Pleading Declaration above.

(signature of interpreter)

(typed/printed name of interpreter)

OR

I, _____, certify that _____, a telephonic
(name of attorney or representative) (name of interpreter)

interpreter who is competent to translate and interpret from _____ into English, read
(name of language)

this entire document to the respondent in _____ and that the respondent stated
(name of language)

that he or she understood the document before he or she signed the Pleading Declaration above.

(signature of attorney or representative)

(typed/printed name of attorney or representative)

APPENDIX G

Sample Proof of Service

Instructions:

By law, all submissions to the Immigration Court *must* be filed with a “Proof of Service” (or “Certificate of Service”). See Chapter 3.2 (Service on the Opposing Party). This Appendix provides guidelines on how to satisfy this requirement.

What is required. To satisfy the law, you must do *both* of the following:

1. *Serve the opposing party.* Every time you file a submission with the Immigration Court, you must give, or “serve,” a copy on the opposing party. If you are an alien in proceedings, the opposing party is the Department of Homeland Security.
2. *Give the Immigration Court a completed Proof of Service.* You must submit a signed “Proof of Service” to the Immigration Court along with your document(s). The Proof of Service tells the Immigration Court that you have given a copy of the document(s) to the opposing party.

Sample Proof of Service. You do not have to use the sample contained in this Appendix. You may write up your own Proof of Service if you like. However, if you use this sample, you will satisfy the Proof of Service requirement.

Sending the Proof of Service. When you have to supply a Proof of Service, be sure to staple or otherwise attach it to the document(s) that you are serving.

Forms that contain a Proof of Service. Some forms, such as the Application for Cancellation of Removal for Certain Permanent Residents (Form EOIR-42A), contain a Certificate of Service, which functions as a Proof of Service for the form. You must complete the Certificate of Service to satisfy the Proof of Service requirement *for that form*. Such a Certificate of Service only functions as a Proof of Service for the form on which it appears, not for any supporting documents that you file with the form. If you are filing supporting documents with a form that contains a Certificate of Service, you must file a separate Proof of Service for those documents.

Forms that do not contain a Proof of Service. Forms that do not contain a Certificate of Service are treated like any other document. Therefore, you must supply the Proof of Service for those forms.

Sample Proof of Service

(Name of alien or aliens)

("A number" of alien or aliens)

PROOF OF SERVICE

On _____, I, _____,
(date) (printed name of person signing below)

served a copy of this _____
(name of document)

and any attached pages to _____
(name of party served)

at the following address: _____
(address of party served)

(address of party served)

by _____
(method of service, for example overnight courier, hand-delivery, first class mail)

(signature)

(date)

G-325, Biographic Information

Family Name	First Name	Middle Name	<input type="checkbox"/> Male <input type="checkbox"/> Female	Date of Birth (mm/dd/yyyy)	Citizenship/Nationality	File Number A
All Other Names Used (include names by previous marriages)			City and Country of Birth		U.S. Social Security No. (if any)	
Family Name	First Name	Date of Birth (mm/dd/yyyy)	City, and Country of Birth (if known)		City and Country of Residence	
Father Mother (Maiden Name)						
Current Husband or Wife (If none, so state) Family Name (For wife, give maiden name)		First Name	Date of Birth (mm/dd/yyyy)	City and Country of Birth	Date of Marriage (mm/dd/yyyy)	Place of Marriage
Former Husbands or Wives (If none, so state) Family Name (For wife, give maiden name)		First Name	Date of Birth (mm/dd/yyyy)	City and Country of Birth	Date of Termination of Marriage (mm/dd/yyyy)	Place of Termination of Marriage

Applicant's residence last five years. List present address first.

Street Name and Number	City	Province or State	Country	From		To	
				Month	Year	Month	Year
						Present Time	

Applicant's last address outside the United States of more than one year.

Street Name and Number	City	Province or State	Country	From		To	
				Month	Year	Month	Year

Applicant's employment last five years. (If none, so state.) List present employment first.

Full Name and Address of Employer	Occupation (Specify)	From		To	
		Month	Year	Month	Year
				Present Time	

Last occupation abroad if not shown above. (Include all information requested above.)

This form is submitted in connection with an application for:		Signature of Applicant ➔	Date
<input type="checkbox"/> Naturalization	<input type="checkbox"/> Other (Specify):		
<input type="checkbox"/> Status as Permanent Resident			

If your native alphabet is in other than Roman letters, write your name in your native alphabet below:

--

Penalties: Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact.

Applicant: Print your name and Alien Registration Number in the box outlined by heavy border below.

Complete This Box (Family Name)	(Given Name)	(Middle Name)	(Alien Registration Number)
			A

Instructions

What Is the Purpose of This Form?

USCIS will use the information you provide on this form to process your application or petition.

Complete this biographical information form and include it with the application or petition you are submitting to U.S. Citizenship and Immigration Services (USCIS).

If you have any questions on how to complete the form, call our National Customer Service Center at **1-800-375-5283**. For TDD (hearing impaired) call: **1-800-767-1833**.

Privacy Act Notice

We ask for the information on this form, and associated evidence, to determine if you have established eligibility for the immigration benefit for which you are filing. Our legal right to ask for this information can be found in the Immigration and Nationality Act, as amended. We may provide this information to other government agencies. Failure to provide this information, and any requested evidence, may delay a final decision or result in denial of your immigration benefit.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 15 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Coordination Division, Office of Policy and Strategy, 20 Massachusetts Avenue, NW, Washington, DC 20529-2140, OMB No. 1615-0008. **Do not mail your completed Form G-325 to this address.**

X. APPENDIX – Citation Guidelines from EOIR Immigration Court Practice Manual

The following manual provides guidelines for writing citations in compliance with the Board of Immigration Appeals within the Executive Office for Immigration Review (EOIR). An attorney should note that the Board generally follows A Uniform System of Citation, also known as the Blue Book, but digresses from that convention in certain ways¹⁹². The Board appreciates but does not require citations that follow the examples used in the following manual. An attorney should adhere to the manual when writing citations but will not be penalized for doing otherwise.

¹⁹² United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Appendix J: Citation Guidelines, 188-207, *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited May 12, 2016).

APPENDIX J

Citation Guidelines*

When filing papers with the Immigration Court, parties should keep in mind that accurate and complete legal citations strengthen the argument made in the submission. This Appendix provides guidelines for frequently cited sources of law.

The Immigration Court generally follows *A Uniform System of Citation* (also known as the “Blue Book”), but diverges from that convention in certain instances. The Immigration Court appreciates but does not require citations that follow the examples used in this Appendix. The citation categories are:

- I. Cases
- II. Regulations
- III. Statutes/laws
- IV. Legislative history
- V. Treaties and international materials
- VI. Publications and communications by governmental agencies,
and
- VII. Commonly cited commercial publications

Note that, for the convenience of filing parties, some of the citation formats in this Appendix are less formal than those used in the published cases of the Board of Immigration Appeals. Once a source has been cited in full, the objective is brevity without compromising clarity.

This Appendix concerns the citation of legal authority. For guidance on citing to the record and other sources, see Chapter 3.3(e) (Source materials) and Chapter 4.18(d) (Citation).

As a practice, the Immigration Court prefers italics in case names and publication titles, but underlining is an acceptable alternative.

□ □ □ □ □

* This appendix is substantially based on Appendix J (Citation Guidelines) in the Board of Immigration Appeals Practice Manual. The Office of the Chief Immigration Judge wishes to acknowledge the efforts of all those involved in the preparation of that appendix.

I. Decisions, Briefs, and Exhibits

General guidance: *Abbreviations in case names.* As a general rule, well-known agency abbreviations (e.g., DHS, INS, FBI, Dep't of Justice) may be used in a case name, but without periods. If an agency name includes reference to the "United States," it is acceptable to abbreviate it to "U.S." However, when the "United States" is named as a party in the case, do not abbreviate "United States." For example:

<i>DHS v. Smith</i>	not <i>D.H.S. v. Smith</i>
<i>U.S. Dep't of Justice v. Smith</i>	not <i>United States Department of Justice v. Smith</i>
<i>United States v. Smith</i>	not <i>U.S. v. Smith</i>

Short form of case names. After a case has been cited in full, a shortened form of the name may be used thereafter. For example:

full:	<i>INS v. Phinpathya</i> , 464 U.S. 183 (1984)
short:	<i>Phinpathya</i> , 464 U.S. at 185
full:	<i>Matter of Nolasco</i> , 22 I&N Dec. 632 (BIA 1999)
short:	<i>Nolasco</i> , 22 I&N Dec. at 635

Citations to a specific point. Citations to a specific point should include the precise page number(s) on which the point appears. For example:

Matter of Artigas, 23 I&N Dec. 99, 100 (BIA 2001)

Citations to a dissent or concurrence. If citing to a dissent or concurrence, this should be indicated in a parenthetical notation. For example:

Matter of Artigas, 23 I&N Dec. 99, 109-110 (BIA 2001) (dissent)

Board decisions: *Published decisions.* Precedent decisions by the Board of Immigration Appeals ("Board") are binding on the Immigration Court, unless modified or overruled by the Attorney General or a federal court. All precedent Board decisions are available on the Executive Office for Immigration Review website at www.justice.gov/eoir. Precedent decisions should be cited in the "I&N Dec." form illustrated below. The citation must identify the adjudicator (BIA, A.G., etc.) and the year of the decision. Note that there are no spaces in "I&N" and that only "Dec." has a period.

For example:

Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992)

Unpublished decisions. Citation to unpublished decisions is discouraged because these decisions are not binding on the Immigration Court in other cases. When reference to an unpublished case is necessary, a copy of the decision should be provided, and the citation should include the alien's full name, the alien registration number, the adjudicator, and the precise date of the decision. Italics, underlining, and "*Matter of*" should not be used. For example:

Jane Smith, A 012 345 678 (BIA July 1, 1999)

"Interim Decision." In the past, the Board issued precedent decisions in slip opinion or "Interim Decision" form. Because all published cases are now available in final form (as "I&N Decisions"), citations to "Interim Decisions" are no longer appropriate and are disfavored.

"Matter of," not *"In re."* All precedent decisions should be cited as "*Matter of*." The use of *"In re"* is disfavored. For example: *Matter of Yanez*, not *In re Yanez*.

For a detailed description of the Board's publication process, see Board Practice Manual, which is available on the Executive Office for Immigration Review website at www.justice.gov/eoir.

IJ decisions:

If referring to an earlier decision in the case by the Immigration Judge, the decision should be cited. This applies whether the decision was issued orally or in writing. Citations to decisions of Immigration Judges should state the nature of the proceedings, the page number, and the date. For example:

IJ Bond Proceedings Decision at 5 (Dec. 12, 2008)

AG decisions:

Precedent decisions by the Attorney General are binding on the Immigration Court, and should be cited in accordance with the rules for precedent decisions by the Board of Immigration Appeals. All precedent decisions by the Attorney General are available on the Executive Office for Immigration Review website at www.justice.gov/eoir.

Matter of Y-L-, 23 I&N Dec. 270 (AG 2002)

DHS decisions: Precedent decisions by the Department of Homeland Security and the former Immigration and Naturalization Service should be cited in accordance with the rules for precedent decisions by the Board of Immigration Appeals.

Federal & state courts: *Generally.* Federal and state court decisions should generally be cited according to the standard legal convention, as set out in the latest edition of *A Uniform System of Citation* (also known as the “Blue Book”). For example:

INS v. Phinpathya, 464 U.S. 183 (1984)

Saakian v. INS, 252 F.3d 21 (1st Cir. 2001)

McDaniel v. United States, 142 F. Supp. 2d 219 (D. Conn. 2001)

U.S. Supreme Court. The Supreme Court Reporter citation (“S.Ct.”) should be used only when the case has not yet been published in the United States Reports (“U.S.”).

Unpublished cases. Citation to unpublished state and federal court cases is discouraged. When citation to an unpublished decision is necessary, a copy of the decision should be provided, and the citation should include the docket number, court, and precise date. Parties are also encouraged to provide the LexisNexis or Westlaw number. For example:

Bratco v. Mukasey, No. 04-726367, 2007 WL 4201263 (9th Cir. Nov. 29, 2007) (unpublished)

Precedent cases not yet published. When citing to recent precedent cases that have not yet been published in the Federal Reporter or other print format, parties should provide the docket number, court, and year. Parties are also encouraged to provide the LexisNexis or Westlaw number. For example:

Grullon v. Mukasey, ___ F.3d ___, No. 05-4622, 2007 U.S. App. LEXIS 27325 (2d Cir. 2007)

Briefs & exhibits: *Text from briefs.* If referring to text from a brief, the brief should be cited. The citation should state the filing party’s identity, the nature of proceedings, the page number, and the date. For example:

Respondent’s Bond Appeal Brief at 5 (Dec. 12, 2008)

Exhibits. Exhibits designated during a hearing should be cited as they were designated by the Immigration Judge. For example:

Exh. 3

Exhibits accompanying a brief should be cited by alphabetic tab or page number. For example:

Respondent's Pre-Hearing Brief, Tab A

□ □ □ □ □

II. Regulations

General guidance: *Regulations generally.* There are two kinds of postings in the Federal Register: those that are simply informative in nature (such as “notices” of public meetings) and those that are regulatory in nature (referred to as “rules”). There are different types of “rules,” including “proposed,” “interim,” and “final.” The type of rule will determine whether or not (and for how long) the regulatory language contained in that rule will be in effect. Generally speaking, proposed rules are not law and do not have any effect on any case, while interim and final rules do have the force of law and, depending on timing, may affect a given case.

Federal Register and Code of Federal Regulations. Regulations appear first in the Federal Register (Fed. Reg.) and then in the Code of Federal Regulations (C.F.R.). Once regulations appear in a volume of the C.F.R., do not cite to the Federal Register *unless* there is a specific reason to do so (discussed below).

C.F.R.: For the Code of Federal Regulations, always identify the volume, the section number, and the year. The year need not be given after the first citation, unless a subsequent citation refers to a regulation published in a different year. Always use periods in the abbreviation “C.F.R.” For example:

full: 8 C.F.R. § 1003.1 (2002)

short: 8 C.F.R. § 1003.1

Fed. Reg.: Citations to regulatory material in the Federal Register should be used only when:

- the citation is to information that will never appear in the C.F.R., such as a public notice or announcement
- the rule contains regulatory language that will be, but is not yet, in the C.F.R.
- the citation is to information associated with the rule, but which will not appear in the C.F.R. (e.g., a preamble or introduction to a rule)
- the rule contains proposed or past language of a regulation that is pertinent in some way to the filing or argument

The first citation to the Federal Register should always include (i) the volume, (ii) the abbreviated form "Fed. Reg.", (iii) the page number, (iv) the date, and (v) important identifying information such as "proposed rule," "interim rule," "supplementary information," or the citation where the rule will appear. For example:

full: 67 Fed. Reg. 52627 (Aug. 13, 2002) (proposed rule)

full: 67 Fed. Reg. 38341 (June 4, 2002) (to be codified at 8 C.F.R. §§ 100, 103, 236, 245a, 274a, and 299)

short: 67 Fed. Reg. at 52627-28; 67 Fed. Reg. at 38343

Since the Federal Register does not use commas in its page numbers, do not use a comma in page numbers. Use abbreviations for the month.

When citing the preamble to a rule, identify it exactly as it is titled in the Federal Register, e.g., 67 Fed. Reg. 54878 (Aug. 26, 2002) (supplementary information).

□ □ □ □ □

III. Statutes / Laws

General guidance: *Full citations.* Whenever citing a statute for the first time, be certain to include all the pertinent information, including the name of the statute, its public law number, statutory cite, and a parenthetical identifying where the statute was codified (if applicable). The only exception is the Immigration and Nationality Act, which is illustrated below.

Short citations. The use of short citations is encouraged, but only after the full citation has been used.

Special rule for U.S.C. and C.F.R. There are two abbreviations that never need to be spelled out: “U.S.C.” for the U.S. Code and the “C.F.R.” for the Code of Federal Regulations. Always use periods with these abbreviations.

Special rule for the INA. Given the regularity with which the Immigration and Nationality Act is cited before the Immigration Court, there is generally no need to provide the Public Law Number, the Stat. citation, or U.S.C. citation. The Immigration Court will presume INA citations refer to the current language of the Act unless the year is provided.

State statutes. State statutes should be cited as provided in *A Uniform System of Citation* (also known as the “Blue Book”).

Sections of law. Full citations are often lengthy, and filing parties are sometimes uncertain where to put the section number in the citation. For the sake of simplicity, use the word “section” and give the section number in front of the full citation to the statute. Once a full citation has been given, use the short citation form with a section symbol “§.” This practice applies whether the citation is used in a sentence or after it. For example:

The definition of the term “alien” in section 101(a)(3) of the Immigration and Nationality Act applies to persons who are not citizens or nationals of the United States. The term “national of the United States” is expressly defined in INA § 101(a)(22), but the term “citizen” is more complex. See INA §§ 301-309, 316, 320.

- USC:** Citations to the United States Code, always identify the volume, the section number, and the year. The year need not be given after the first citation, unless a subsequent citation refers to a section published in a different year. Always use periods in the abbreviation “U.S.C.” For example:
- full: 18 U.S.C. § 16 (2006)
- short: 18 U.S.C. § 16
- INA:**
- full: section xxx of Immigration and Nationality Act
- short: INA § xxx
- USA PATRIOT:**
- full: section xxx of Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272
- short: USA PATRIOT Act § xxx
- LIFE:**
- full: section xxx of Legal Immigration and Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762 (2000), *amended by* Pub. L. No. 106-554, 114 Stat. 2763 (2000)
- short: LIFE Act § xxx
- CCA:**
- full: section xxx of Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631
- short: CCA § xxx
- NACARA:**
- full: section xxx of Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2193 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997)
- short: NACARA § xxx

-
- IIRIRA:** full: section xxx of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546
short: IIRIRA § xxx
- AEDPA:** full: section xxx of Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214
short: AEDPA § xxx
- INTCA:** full: section xxx of Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, *amended by* Pub. L. No. 105-38, 11 Stat. 1115 (1997)
short: INTCA § xxx
- MTINA:** full: section xxx of Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733
short: MTINA § xxx
- IMMACT90:** full: section xxx of Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978
short: IMMACT90 § xxx
- ADAA:** full: section xxx of Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181
short: ADAA § xxx
- IMFA:** full: section xxx of Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537
short: IMFA § xxx

IRCA: full: section xxx of Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359

short: IRCA § xxx

IRFA: full: section xxx of International Religious Freedom Act of 1988, Pub. L. No. 105-292, 112 Stat. 2787

short: IRFA § xxx

□ □ □ □ □

IV. Legislative History

General guidance: *Difficult to locate.* Because sources of legislative history are often difficult to locate, err on the side of providing more information, rather than less. If a source is difficult to locate, include a copy of the source with your filing (or an Internet address for it) and make clear reference to that source in your filing.

Sources. To locate legislative history, try the Library of Congress website (www.thomas.loc.gov) or commercial services. Citation to common electronic sources is encouraged.

Bills: Provide the following information the first time a bill is cited: (i) the bill number, (ii) the number of the Congress, (iii) the session of that Congress, (iv) the section number of the bill, if you are referring to a specific section, (v) the Congressional Record volume, (vi) the Congressional Record page or pages, (vii) the date of that Congressional Record, and (viii) the edition of the Congressional Record, if known. For example:

full: S. 2104, 100th Cong., 2d Sess. § 102, 134 Cong. Rec. 2216 (daily ed. Mar. 15, 1988)

short: 134 Cong. Rec. at 2218

Reports: Provide the following information the first time a report is cited: (i) whether it is a Senate or House report, (ii) the report number, (iii) the year, and (iv) where it is reprinted (a reference to where the document is available electronically is acceptable). The short form may refer either to the page numbers of the report or the page numbers where the report is reprinted. For example:

full: H.R. Conf. Rep. No. 104-828 (1996), *available in* 1996 WL 563320

short: H.R. Conf. Rep. No. 104-828, at 5

full: S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182

short: 1984 U.S.C.C.A.N. at 3183

Many committee reports are available on-line through the Library of Congress web site (www.thomas.loc.gov) or commercial services. Copies of the U.S. Code Congressional & Administrative News (U.S.C.C.A.N.), which compiles many legislative documents, are available in some public libraries.

Hearings: Provide the following information the first time a hearing is cited: (i) name of the hearing, (ii) the committee or subcommittee that held it, (iii) the number of the Congress, (iv) the session of that Congress, (v) the page or pages of the hearing, (vi) the date or year of the hearing, and (vii) information about what is being cited (such as the identity of the person testifying and context for the testimony). For example:

Operations of the Executive Office for Immigration Review (EOIR):
Hearing before the Subcomm. on Immigration and Claims of the House
Comm. on the Judiciary, 107th Cong., 2d Sess. 19 (2002) (testimony of EOIR
Director)

□ □ □ □ □

V. *Treaties and International Materials*

- CAT:**
- full: Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988)
- short: Convention Against Torture, art. 3
- UNHCR Handbook:**
- full: Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva 1992)
- short: UNHCR Handbook ¶ xxx
[use paragraph symbol “¶” or abbreviation “para.”]
- U.N. Protocol on Refugees:**
- full: Article xxx of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223
- short: U.N. Refugee Protocol, art. xxx

□ □ □ □ □

VI. *Publications and Communications by Governmental Agencies*

General guidance: *No universal citation form.* In immigration proceedings, parties cite to a wide variety of administrative agency publications and communications, and there is no one format that fits all such documents. For that reason, use common sense when citing agency documents, and err on the side of more information, rather than less.

Difficult to locate material. If the document may be difficult for the Immigration Court to locate, include a copy of the document with your filing.

Internet material. If a document is posted on the Internet, identify the website where the document can be found or include a copy of the document with a legible Internet address.

Practice Manual: The Immigration Court Practice Manual is not legal authority. However, if there is reason to cite it, the preferred form is to identify the specific provision by chapter and section along with the date at the bottom of the page on which the cited section appears. For example:

full: Immigration Court Practice Manual, Chapter 8.5(a)(iii) (January xx, xxxx)

short: Practice Manual, Chap. 8.5(a)(iii)

Forms: Forms should first be cited according to their full name and number. A short citation form may be used thereafter. See Appendix E (Forms) for a list of common immigration forms. For example:

full: Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26)

short: Notice of Appeal *or* Form EOIR-26

If a form does not have a name, use the form number as the citation.

Country reports: State Department country reports appear both as compilations in Congressional committee prints and as separate reports and profiles. Citations to country reports should always contain the publication date and the specific page numbers (if available). Provide an Internet address when available. The first citation to any country report should contain all identifying

information, and a short citation form may be used thereafter. For example:

full: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Nigeria Country Reports on Human Rights Practices – 2001* (Mar. 2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8397.htm>

short: *2001 Nigeria Country Reports*

full: Committees on Foreign Relations and International Relations, 104th Cong., 1st Sess., *Country Reports on Human Rights Practices for 1994* xxx (Joint Comm Print 1995)

short: *1994 Country Reports* at page xxx

full: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *The Philippines – Profile of Asylum Claims and Country Conditions* xxx (June 1995)

short: *1995 Philippines Profile* at page xxx

Visa Bulletin:

Citations to the State Department's Visa Bulletin should include the volume, number, month, and year of the specific issue being cited. For example:

full: U.S. Dep't of State Visa Bulletin, Vol. VIII, No. 55 (March 2003)

short: Visa Bulletin (March 2003)

Internal documents:

A citation to an internal government document, such as a memo or cable, should contain as much identifying information as possible. Be sure to include any identifying heading (e.g., the "re" line in a memo) and the precise date of the document being cited. Include a copy of the document with the filing or indicate where it has been reprinted publicly. For example:

Dep't of State cable (no. 97-State-174342) (Sept. 17, 1997) (copy attached)

Office of the General Counsel, INS, U.S. Dep't of Justice, Compliance with Article 3 of the Convention Against Torture in cases of removable aliens (May 14, 1997), reprinted in 75 *Interpreter Releases* 375 (Mar. 16, 1998)

Religious Freedom Reports: The International Religious Freedom Act of 1998 (IRFA) mandates that the Department of State issue an Annual Report on International Religious Freedom (State Department Report). IRFA further authorizes Immigration Judges to use the State Department Report as a resource in asylum adjudications. The State Department Report should be cited as follows:

full: Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *Annual Report on International Religious Freedom* (Sept. 2007)

short: 2007 *Religious Freedom Report* at page xxx

IRFA also mandates the issuance of an Annual Report by the United States Commission on International Religious Freedom (USCIRF Report). The USCIRF is a government body that is independent of the executive branch. Citations to the USCIRF Report should be distinguishable from citations to the Department of State report:

full: United States Commission on International Religious Freedom, *Annual Report of the United States Commission on International Religious Freedom*, xxx (May 2007)

short: 2007 USCIRF Annual Report at page xxx

□ □ □ □ □

VII. Commonly Cited Commercial Publications

General guidance: *No universal citation form.* In immigration proceedings, parties cite to a wide variety of commercial texts and publications. Use common sense when citing these documents. If a document is difficult to locate, include a copy of the document with your filing (or an Internet address for it) and make clear reference to that document in your filing.

No endorsements or disparagements. The following list contains citations to specific publications that are frequently cited in filings before the Immigration Court. Their inclusion in the list is not an endorsement of the publication, nor is omission from this list a disparagement of any other publication.

Use of quotation marks, italics or underlining, and first initials. For all filings, parties should use a single format for all publications – quotation marks around any article title (whether in a book, law review, or periodical), italics or underlining for the name of any publication (whether a book, treatise, or periodical), and reference to authors' last names only (although use of first initials is appropriate where there are multiple authors with the same last name).

Shortened names. Many publications have long titles. It is acceptable to use a shortened form of the title *after* the full title has been used. Be certain to use a short form that clearly refers back to the full citation. Page and/or section numbers should always be used, whether the publication is cited in full or in shortened form.

Articles in Books: Articles in books should identify the author (by last name only), title of the article, and the publication that contains that article (including the editor and year). For example:

full: Massimino, "Relief from Deportation Under Article 3 of the United Nations Convention Against Torture," in *2 1997-98 Immigration & Nationality Law Handbook* 467 (American Immigration Lawyers Association, ed., 1997)

short: Massimino at 469

- Bender's:** Bender's Immigration Bulletin should be cited by author (last name only), article, volume, publication, month, and year. For example:
- full: Sullivan, "When Representations Cross the Line," 1 *Bender's Immigration Bulletin* (Oct. 1996)
- short: Sullivan at 3
- Immigration Briefings:** This publication should be cited by author (last name only), article, volume, publication, month, and year. For example:
- full: Elliot, "Relief From Deportation: Part I," 88-8 *Immigration Briefings* (Aug. 1988)
- short: Elliot at 18
- Immigration Law and Procedure:** Citations to treatises require particular attention because their pagination is often complex. The first citation to this treatise must be in full and contain the volume number, the section number, the page number, the edition, and year. For example:
- full: 2 Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* § 51.01(1)(a), at 51-3 (rev. ed. 1997)
- short: 2 *Immigration Law and Procedure* § 51.01(1)(a), at 51-3
- Interpreter Releases:** Citations should state the volume, title, page number(s), and precise date. Provide a parenthetical explanation for the citation when appropriate. For example:
- full: 75 *Interpreter Releases* 275-76 (Feb. 23, 1998) (regarding INS guidelines on when to consent to reopening of proceedings)
- short: 75 *Interpreter Releases* at 276

If an article has a title and named author, provide that information. For example:

full: Wettstein, "Lawful Domicile for Purposes of INA § 212(c): Can It Begin with Temporary Residence," in 71 *Interpreter Releases* 1273 (Sept. 26, 1994)

short: Wettstein at 1274

Law Reviews:

Law review articles should identify the author (by last name) and the title of the article, followed by the volume, name, page number(s), and year of the publication. For example:

full: Hurwitz, "Motions Practice Before the Board of Immigration Appeals," 20 *San Diego L. Rev.* 79 (1982)

short: Hurwitz, 20 *San Diego L. Rev.* at 80

Sutherland:

Citations to this treatise should include the volume number, author, name of the publication, section number, page number(s), and edition. For example:

full: 2A Singer, *Sutherland Statutory Construction* § 47.11, at 144 (4th ed. 1984)

short: 2A *Sutherland* § 47.11, at 144

□ □ □ □

XI. APPENDIX – Table of Authorities**Federal Statutes Cited**

8 U.S.C. § 1101(a)(13) (2016)	INA § 101(a)(13)
8 U.S.C. § 1101(a)(20) (2016)	INA § 101(a)(20)
8 U.S.C. § 1101(a)(42)(A) (2016)	INA § 101(a)(42)(A)
8 U.S.C. § 1101(a)(43) (2016)	INA § 101(a)(43)
8 U.S.C. § 1101(a)(48)(B) (2016)	INA § 101(a)(48)(B)
8 U.S.C. § 1158 (2016)	INA § 208
8 U.S.C. § 1182(a)(6)(A) (2016)	INA § 212(a)(6)(A)
8 U.S.C. § 1182(c) (2016)	INA § 212(c)
8 U.S.C. § 1182(h) (2016)	INA § 212(h)
8 U.S.C. § 1226 (2016)	INA § 236
8 U.S.C. § 1226(a) (2016)	INA § 236(a)
8 U.S.C. § 1226(c) (2016)	INA § 236(c)
8 U.S.C. § 1226(c)(2) (2016)	INA § 236(c)(2)
8 U.S.C. § 1226a (2016)	INA § 236A
8 U.S.C. § 1227(a)(2)(A)(iii) (2016)	INA § 237(a)(2)(A)(iii)
8 U.S.C. § 1229a(c) (2016)	INA § 240(c)
8 U.S.C. § 1229a(c)(3)(A) (2016)	INA § 240(c)(3)(A)
8 U.S.C. § 1229b(a) (2016)	INA § 240A(a)
8 U.S.C. § 1229b(a)(3) (2016)	INA § 240A(a)(3)
8 U.S.C. § 1229b(b)(1) (2016)	INA § 240A(b)(1)
8 U.S.C. § 1229b(c) (2016)	INA § 240A(c)
8 U.S.C. § 1229b(d) (2016)	INA § 240A(d)
8 U.S.C. § 1229b(d)(1)(B) (2016)	INA § 240A(d)(1)(B)
8 U.S.C. § 1229c (2016)	INA § 240B
8 U.S.C. § 1231(a)(1)(A) (2016)	INA § 241(a)(1)(A);
8 U.S.C. § 1231(b)(3)(A) (2016)	INA § 241(b)(3)(A)
8 U.S.C. § 1252(b)(3)(B) (2016)	INA § 242(b)(3)(B)
8 U.S.C. § 1252(c) (2016)	INA § 242(c)
8 U.S.C. § 1252(d) (2016)	INA § 242(d)
8 U.S.C. § 1254a(b)(1) (2016)	INA § 244(b)(1)
18 U.S.C. § 16(a) (2016)	
18 U.S.C. § 16(b) (2016)	

Federal Regulations Cited

[8 C.F.R. § 103.7](#) (2016)
[8 C.F.R. § 208.13\(b\)](#) (2016)
[8 C.F.R. § 208.13\(c\)\(1\)](#) (2016)
[8 C.F.R. §§ \(1\)208.16](#) (2016)
[8 C.F.R. § 208.16\(c\)](#) (2016)
[8 C.F.R. §§ \(1\)208.17](#) (2016)
[8 C.F.R. §§ \(1\)208.18](#) (2016)
[8 C.F.R. § 208.18\(a\)](#) (2016)
[8 C.F.R. § 274a.12\(c\)\(10\)](#) (2016)
[8 C.F.R. § 1003](#) (2016)
[8 C.F.R. § 1003.2](#) (2016)
[8 C.F.R. § 1003.6\(c\)\(3\)](#) (2016)
[8 C.F.R. § 1003.6\(b\)](#) (2016)
[8 C.F.R. § 1003.23\(b\)\(1\)\(I\)](#) (2016)
[8 C.F.R. § 1003.23\(b\)\(2\)](#) (2016)
[8 C.F.R. § 1003.23\(b\)\(3\)](#) (2016)
[8 C.F.R. § 1003.33](#) (2016)
[8 C.F.R. § 1003.38](#) (2016)
[8 C.F.R. § 1003.47\(d\)](#) (2016)
[8 C.F.R. § 1212](#) (2016)
[8 C.F.R. § 1236.1\(c\)\(2\)](#) (2016)
[8 C.F.R. § 1240](#) (2016)
[8 C.F.R. § 1240.11](#) (2016)
[8 C.F.R. § 1240.20\(a\)](#) (2016)
[8 C.F.R. § 1240.26\(a\)](#) (2016)

Public Laws

- Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, title IV; 110 Stat. 1214, 1258-81, §440(e) (1996).
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. The CAT was incorporated into United States law by the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277 (1987).
- Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, div. C; 110 Stat. 3009, 3009-46 to 724 (1996); H.R. Rep. 104-863 (1996). 104th Cong. 2d Sess.,; H.R. Conf. Rep. No. 104-828, 104th Cong. 2d Sess. (1996); S. Rep. 104- 249, 104th Cong. 2d Sess. (1996); 142 Cong. Rec. S4730-01, §150 (1996); 142 Cong. Rec. H2378-05, § 309 (1996).
- REAL ID Act of 2005- Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005, PL 109-13, div. B, 119 Stat. 231, 302-23 (May 11, 2005); H.R. Cong. Rep. 109-72 at 173-75, 151 Cong. Rec. H.R. 2813, 2386-77 (2005).

Federal Agency Documents Cited

- Executive Office for Immigration Review, Freedom of Immigration Act: How to Submit a FOIA/PA Request, *available at*, <https://www.justice.gov/eoir/foia-facts> (last visited, May 12, 2016).
- Federal Bureau of Investigation, Application Information Form, *available at*, <https://forms.fbi.gov/identity-history-summary-checks-review/q384893984839334.pdf> (last visited, May 12, 2016).
- Federal Bureau of Investigation, Form FD-258, see, <https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/fd-258-1> (last visited, May 12, 2016).
- Federal Bureau of Investigation, The Vault, *available at* <https://vault.fbi.gov/fdps-1/@@search-fdps> (last visited May 12, 2016).
- Form FD-258, see, <https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/fd-258-1> (last visited May 12, 2016).
- Identity History Summary Request Checklist, *available at*, <https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/identity-history-summary-request-checklist-1> (last visited, May 12, 2016).
- Manuel, Kate M. & Garvey, Todd. Prosecutorial Discretion in Immigration Enforcement: Legal Issues <https://www.fas.org/sgp/crs/misc/R42924.pdf> (last visited, May 12, 2016).
- Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil

Kerlikowske, Comm’r, U.S. Customs & Border Protection, Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec’y for Policy 2 (Nov. 20, 2014)

https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (last visited, May 12, 2016).

- United States Citizenship and Immigration Services, *available at* www.uscis.gov/portal/site/uscis (follow "Forms" hyperlink; then follow "Form G-325A" hyperlink), (last visited May 12, 2016)
- United States Citizenship and Immigration Services, How to File a FOIA/PA Request, *available at* <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request> (last visited, May 12, 2016).
- United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov> (locate "Other Services"; select "Humanitarian" hyperlink; choose "Temporary Protected Status" hyperlink), (last visited, May 12, 2016).
- United States Department of Homeland Security, United States Citizenship and Immigration Services, Immigration Benefits in EOIR Removal Proceedings, 2, *available at* <https://www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf> (last visited, May 12, 2016).
- United States Department of Justice, Executive Office for Immigration Review, Application for Cancellation of Removal for Certain Permanent Residents, Instructions, *available at* www.justice.gov/eoir/formslis.htm (last visited, May 12, 2016).
- United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf (last visited, May 12, 2016).
- United States Department of Justice, Executive Office for Immigration Review (follow "Form EOIR-28" hyperlink) *available at* www.justice.gov/eoir/formslis.htm (last visited, May 12, 2016).
- United States Department of Justice, Executive Office for Immigration Review (follow "Form EOIR-42A" hyperlink) *available at* www.justice.gov/eoir/formslis.htm (last visited, May 12, 2016).
- United States Immigration and Customs Enforcement, FOIA Overview: Submitting FOIA Requests, *available at*, <https://www.ice.gov/foia/overview> (last visited, May 12, 2016).

Cases Cited

- United States v. Gonzalez-Longoria, No. 15–40041, 2016 WL 537612 at *235 (5th Cir. 2016).
- In re: Francisco Rodriguez-Trinidad, A044 892640, (BIA Feb. 24, 2016).
- Orozco-Velasquez, No. 13-1685, 2016 WL 930241 (3d Cir. 2016).
- Mellouli v. Lynch, 135 S. Ct. 1980 (2015).
- Singh v. Attorney General, 807 F.3d 547 (3d Cir. 2015).
- Ijomah-Nwosu v. Holder, Civ. No. 14–2527 (WJM), 2015 WL 5097925 (D.N.J. 2015).
- Matter of Ordaz-Gonzalez, 26 I. & N. Dec. 637 (BIA 2015).
- Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469 (3d Cir. 2015).
- Bautista v. Attorney General, 744 F.3d 54 (3d Cir. 2015).
- Bautista v. Attorney General, 608 Fed. Appx. 83 (3d Cir. 2015).
- Oliveira v. Attorney General, 618 Fed. Appx. 126 (3d Cir. 2015).
- United States v. Vivas-Cejas, 808 F.3d 719, 721 (7th Cir. 2015).
- Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015).
- Medina-Rosales v. Holder, 778 F.3d 1140, 1146 (10th Cir. 2015).
- Matter of J-H-J, 26 I. & N. Dec. 563, 564 (BIA 2015).
- Matter of Paek, 26 I. & N. 403 (BIA 2014), *aff'd*, 793 F.3d 330 (3d Cir. 2015).
- Guzman v. Attorney General, 770 F.3d 1077 (3d Cir. 2014).
- Negrete-Ramirez v. Holder, 741 F.3d 1047 (9th Cir. 2014).
- Mattie v. Attorney General, 585 Fed. Appx. 821 (3d Cir. 2014).
- Lepianka v. Attorney General, 586 Fed. Appx. 869 (3d Cir. 2014).
- Roberts v. Holder, 745 F.3d 928 (8th Cir. 2014).
- Kporlor v. Attorney General, 529 Fed. Appx. 173 (3d Cir. 2013).
- Moncrieffe v. Holder, 133 S.Ct. 1678 (2013).
- Descamps v. US, 133 S.Ct. 2276 (2013).
- Vargas v. Attorney General, 543 Fed. Appx. 162 (3d Cir. 2013).
- Hanif v. United States, 694 F.3d 479 (3d Cir. 2012).
- Bracamontes v. Holder, 675 F.3d 380, 387-388 (4th Cir. 2012).
- Holder v. Martinez Gutierrez, 132 S.Ct. 2011 (2012).
- Aguilar v. Attorney General, 663 F.3d 692 (3rd Cir. 2011).
- Lee v. Attorney General, 431 Fed. Appx. 184 (3d Cir. 2011).
- Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011).
- Matter of M-A-M- 25 I. & N. Dec. 474 (BIA 2011).
- Matter of Nelson, 25 I. & N. Dec. 410 (BIA 2011).
- Matter of Camarillo, 25 I. & N. Dec. 644 (BIA 2011).
- Johnson v. US, 559 U.S. 133, 140 (2010).

- Gallimore v. Attorney General, 619 F.3d 216 (3d Cir. 2010).
- Restrepo v. Attorney General 617 F.3d 787 (3d Cir. 2010).
- Padmore v. Holder, 609 F.3d 62 (2d Cir. 2010).
- Matter of Richardson, 25 I. & N. Dec. 226 (BIA 2010).
- Marte v. Attorney General, 339 Fed. Appx. 265, 268 (3d Cir. 2009).
- Cadet v. Attorney General, 339 Fed. Appx. 273 (3d Cir. 2009).
- Jurado-Delgado v. Attorney General, 488 Fed. App. 107 (3d Cir. 2009).
- Nijhawan v. Holder, 557 U.S. 29 (2009).
- Martinez v. Mukasey, 519 F.3d 532, 545 (5th Cir. 2008).
- Drakes v. Attorney General, 266 Fed. Appx. 184, 186 (3d Cir. 2008).
- Augustin v. Attorney General, 520 F.3d 264 (3d Cir. 2008)
- Jimenez-Gonzalez v. Mukasey, 548 F.3d 557, 560 (7th Cir. 2008).
- Matter of Ramirez-Vargas, 24 I. & N. Dec. 599 (BIA 2008).
- Joseph v. Attorney General, 236 Fed. Appx. 787 (3d Cir. 2007).
- Atkinson v. Attorney General, 479 F.3d. 222 (3d Cir. 2007).
- Brooks v. Attorney General, 297 Fed. Appx. 205 (3rd Cir. 2006).
- Matter of Bautista Gomez, 23 I. & N. Dec. 893 (BIA 2006).
- Matter of Jurado, 24 I. & N. Dec. 29 (BIA 2006).
- Park v. Attorney General, 472 F.3d 66 (3d Cir. 2006).
- Sinotes-Cruz v. Gonzales, 468 F.3d 1190 (9th Cir. 2006).
- Dudley v. Attorney General, 129 Fed. Appx. 747 (3d Cir. 2005).
- Okeke v. Attorney General, 407 F.3d 585 (3d Cir. 2005).
- Rodriguez-Munoz v. Attorney General, 419 F.3d 245 (3d Cir. 2005).
- Leocal v. Ashcroft, 543 U.S. 1 (2004).
- Murali Krishna Ponnappula v. Ashcroft, 373 F.3d 480 (3d Cir. 2004).
- Matter of Cisneros-Gonzalez, 23 I. & N. Dec. 668 (BIA 2004).
- Matter of Deanda-Romo, 23 I. & N. Dec. 597 (BIA 2003)
- Matter of Blancas-Lara, 23 I. & N. Dec. 458 (BIA 2002).
- Matter of Small, 23 I. & N. Dec. 448 (BIA 2002).
- INS v. St. Cyr, 533 U.S. 289 (2001).
- Zadvydas v. Davis, 533 U.S. 678 (2001).
- Matter of Sotelo-Sotelo, 23 I. & N. Dec. 201 (BIA 2001).
- Matter of Campos-Torres, 22 I. & N. Dec. 1289 (BIA 2000).
- Matter of Perez, 22 I. & N. Dec. 689 (BIA 1999).
- Matter of Joseph, 22 I. & N. Dec. 799 (BIA 1999).
- Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (1999).
- Scheidemann v. INS, 83 F.3d 1517 (3d Cir. 1996).

- Matter of Arreguin, 21 I. & N. Dec. 38 (BIA 1995).
- Varela-Blanco v. INS, 18 F.3d 584 (8th Cir. 1994).
- Matter of Roberts, 20 I. & N. Dec. 294 (BIA 1991).
- Matter of Edwards, 20 I. & N. Dec. 191 (BIA 1990).
- Matter of Huang, 19 I. & N. Dec. 749 (BIA 1988).
- Matter of Correa, 19 I. & N. Dec. 130 (BIA 1984).
- Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978).

Book Citations

- Stephen H. Legomsky and Cristina M. Rodriguez, Immigration and Refugee Law and Policy, 626 (6th ed.) (2015).

Other Citations

- American Immigration Law Foundation, Practice Advisory: Arrest, Detention and Bond Procedures for Non-Citizens Without Criminal Convictions (July 2008), http://www.asistahelp.org/documents/resources/AIC_on_detention_etc_DDCBEEBCF_CBD0.pdf.
- American Civil Liberties Union, Practice Advisory: Prolonged Mandatory Detention and Bond Eligibility in the Third Circuit (May 12, 2015), <https://www.aclu.org/files/assets/DiopAdvisory.pdf>.
- Barbara Hines, Suggested Documentation and/or Testimony for Cancellation of Removal and section 212(c) relief.
- Center for Immigrants' Rights and the American Bar Association, To File or Not to File a Notice to Appear: Improving the Government's Use of Prosecutorial Discretion (last visited May 12, 2016).
- Erica Steinmiller-Perdomo, Consequences Too Harsh For Noncitizens Convicted of Aggravated Felonies?, 41 Fla. St. U. L. Rev. 1173, 1173 (2014).
- Immigration Defense Project, Practice Advisory: Descamps v. United States and the Modified Categorical Approach (July 17, 2013), <http://immigrantdefenseproject.org/wp-content/uploads/2013/06/Descamps-advisory-7-17-FINAL.pdf>.
- Immigration Defense Project, Practice Advisory: Matter of Chairez-Castrejon: BIA Applies Moncrieffe and Descamps to Modify and Clarify its Views on Proper Application of the Categorical Approach (July 31, 2014) https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2014_13Jul_chairez-castrejon.pdf.
- Individual Access and Review Request Form – SP4-170, <http://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx#.VvRWDI-cG6M> (last visited May 12, 2016).

- Pennsylvania State Police, Request a Criminal Record, <http://www.psp.pa.gov/Pages/Request-a-Criminal-History-Record.aspx#.VzPAi4-cF6U> (last visited May 12, 2016).
- National Immigration Project of the National Lawyers Guild, “The Burden Of Proof To Overcome The Aggravated Felony Bar To Cancellation Of Removal”, available at https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2007_22Mar_proof-burden-agfel.pdf (last visited May 12, 2016).
- New Jersey State Police, NJ Criminal History Records Information, <http://www.njsp.org/criminal-history-records/> (last visited May 12, 2016).
- Shoba Sivaprasad Wadhia, The History of Prosecutorial Discretion In Immigration Law http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605164 (last visited May 12, 2016).
- State of Delaware, State Bureau of Identification, http://dsp.delaware.gov/state_bureau_of_identification.shtml (last visited May 12, 2016).
- The Florence Immigrant and Refugee Rights Project, available at <http://www.firrp.org> (choose "Resources" and follow "How to Defend Your Case" hyperlink, scroll to "Cancellation of Removal for Legal Permanent Residents (green card holders) and select "English" hyperlink), (last visited May 12, 2016).

Practitioner/Stakeholder Citations

- Anna M. Gallagher, Esq., Maggio-Kattar P.C. (2009).
- Christina Powers, Esq. (2009).
- George M. Baurkot, Esq., Baurkot & Baurkot (2016).
- Jack Herzig, Esq. (2009).
- Jeff Joseph, Esq., Joseph Law Firm P.C. (2009).
- Joyce Antila Phipps, Esq., Casa de Esperanza, Bound Brook, NJ (2009).
- Julie C. Ferguson, Esq. (2009).
- Lisa Brodyaga, Esq., Refugio Rio Grande Law Office (2009).
- Maria Baldini-Potermin, Esq., Maria Baldini-Potermin & Associates, P.C. (2009).
- Matthew Lamberti, Esq., Pennsylvania Immigration Resource Center, York, PA (2016).
- Raymond G. Lahoud, Esq., Baurkot & Baurkot (2016).
- Rosina Stambaugh, Esq., The Law Office of Christopher A. Ferro, LLC (2009).
- Shelley Wittevrongel, Esq. (2009).
- Siobhan Waldron, Esq., formerly at Immigration Center for Women and Children (Los Angeles, CA), currently at Centro Legal de la Raza (Oakland, California) (2016).
- Susan Compennolle, Esq. (2009).
- Toni Maschler, Esq., Bromberg, Kohler Maya & Maschler, PLLC (2009).

PART 2 (REDACTED)