Defending Non-Citizens in Illinois, Indiana, and Wisconsin

by Maria Theresa Baldini-Potermin

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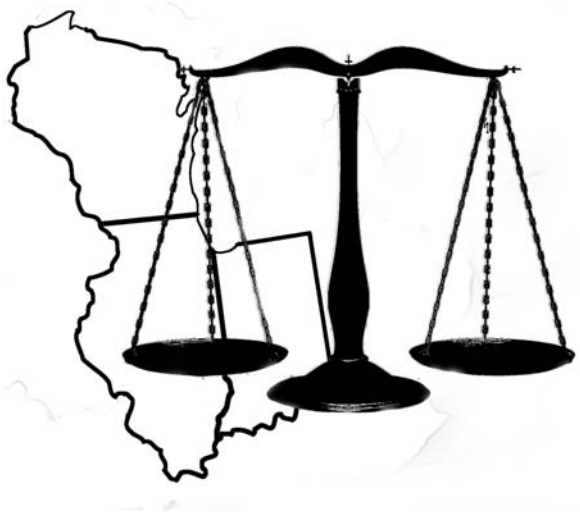

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"[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

DISCLAIMER

This manual is NOT INTENDED to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to public defenders and criminal defense attorneys who are working with non-citizen clients. Due to the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, and federal court rulings, attorneys are strongly urged to contact and collaborate closely with an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.

CHAPTER

6

Immigration Remedies and Defenses under the Immigration and Nationality Act for Non-Citizens

Immigration Proceedings: Past and Present

Through provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[644] which became effective April 1, 1997, Congress created a new system of removal proceedings to deport or remove non-citizens from the United States. Deportation and exclusion proceedings were combined into a single proceeding called a removal proceeding. A removal order has the same result as a deportation or exclusion order: the non-citizen is ordered to be physically removed from the United States.

[644] *See* Pub. L. No. 104-208, 110 Stat. 3009 (1996).

The charging document issued by the former INS or the DHS control whether a non-citizen is in deportation, exclusion, or removal proceedings. A non-citizen who was issued an "Order to Show Cause" by the former INS that was filed with the Immigration Court prior to April 1, 1997 remains in deportation proceedings; a non-citizen issued another charging document for exclusion proceedings by the former INS that was filed with the Immigration Court prior to April 1, 1997 remains in exclusion proceedings.[645] A non-citizen who was granted advance parole and paroled into the U.S. before April 1, 1997 could be properly placed into exclusion rather than deportation proceedings.[646] Since April 1, 1997, the former INS and the DHS have issued a "Notice to Appear" to place a non-citizen into "removal" proceedings. The distinction is critical because different forms of relief are available to non-citizens depending on whether they have been placed in deportation, exclusion or removal proceedings.

The DHS has issued memorandums regarding its authority to exercise prosecutorial discretion in its enforcement of the immigration laws.[647] Favorable exercises of discretion may include decisions not to issue a charging document and not to place a non-citizen in removal proceedings.[648] The DHS has clearly stated, however, that any favorable exercise of its prosecutorial discretion will not grant any immigration status to a non-citizen, immunity from future removal proceedings, or any enforceable right or benefit upon the

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[645] *See* Morales-Ramirez v. Reno, 209 F.3d 977, 982-83 (7th Cir. Apr. 13, 2000) (holding that proceedings begin when the I.N.S. files the appropriate charging document with the Immigration Court, not when the charging document is served on the non-citizen); *see also*, *In re* G-N-C-, 22 I&N Dec. 281 (BIA Sept. 17, 1998) (holding that the I.N.S. can exercise its prosecutorial discretion to institute removal or other proceedings or to cancel a Notice to Appear or other charging document before it is filed with the Immigration Judge; once the charging document is filed with the Immigration Court, the INS may move to terminate proceedings, a motion which the Immigration Judge then adjudicates on the merits but is not required to grant based on the INS' invocation of prosecutorial discretion); 8 C.F.R. § 1240.16; Memo, Bo Cooper, General Counsel, (HQCOU 90/16.1-P) (Dec. 7, 1999), *reprinted in* 77 Interpreter Releases 39, 55-56 (Jan. 10, 2000). *See also*, Proposed rule: Delegation of authority to the Immigration and Naturalization Service to terminate deportation proceedings and initiate removal proceedings, 65 Fed. Reg. 71273-71277 (2000) (proposing rules to allow the INS at its discretion to move the Immigration Court or the Board of Immigration Appeals to terminate pending deportation proceedings for lawful permanent residents rendered ineligible for section 212(c) relief by the AEDPA and to "repaper" or initiate removal proceedings to allow those eligible to apply for cancellation of removal as well as to "repaper" or initiate removal proceedings for non-citizens who were previously eligible for suspension of deportation prior to the enactment of IIRAIRA to apply for cancellation of removal).

[646] *See* 8 C.F.R. § 245.2(a)(4)(ii); Landon v. Plasencia, 459 U.S. 21, 25-27 (Nov. 15, 1982); Dimenski v. I.N.S., 275 F.3d 574, 576-78 (7th Cir. Dec. 19, 2001) (holding that the INS was not required to advise a non-citizen that he would be placed in exclusion rather than deportation proceedings upon his return with advance parole); Morales-Ramirez v. Reno, 209 F.3d 977, 983 (7th Cir. Apr. 13, 2000) (holding that exclusion proceedings commence when the INS files the charging document with the Immigration Court). Persons in deportation proceedings have made an "entry" for immigration purposes and, as a result, have more rights and constitutional protections than those in exclusion proceedings who have not made an "entry" for immigration purposes. For a thorough discussion regarding advance parole, *see* Samirah v. O'Connell, 335 F.3d 545, 549-51 (7th Cir. Jul. 2 2003).

[647] *See* Memorandum from William Howard, Principal Legal Advisor, DHS, Oct. 24, 2005 ("Howard Memo"); Memorandum from Doris Meissner, Commissioner, INS, Nov. 17, 2000, 77 *Interpreter Releases* 1661.

[648] *See* Howard Memo at 2.

non-citizen.[649] Despite the ability of the DHS to consider requests for a favorable exercise of prosecutorial discretion, immigration consequences for criminal convictions still need to be avoided for non-citizens.

Final Administrative Removal Orders under I.N.A. § 238(b), 8 U.S.C. § 1228(b)

Where a non-citizen is not a permanent resident, the DHS may administratively order him removed with the issuance of a Final Administrative Removal Order (FARO) without a hearing before the Immigration Court. The DHS has greatly increased the use of the issuance of FAROs since 2002. In 2002, the DHS issued 10,005 FAROs under I.N.A. § 238(b), 8 U.S.C. § 1228(b), totaling 43 percent of all removal orders. The other 57 percent of removal orders were issued by the Immigration Court. In 2006, the numbers reversed, with 55 percent of FAROs issued by the DHS and only 45 percent of final removal orders issued by the Immigration Courts. In Fiscal Year 2008, ICE obtained 6,514 FAROs and 30,707 stipulated orders of removal (reviewed and signed by an immigration judge without a court hearing).[650]

To invoke the procedures under I.N.A. § 238(b), 8 U.S.C. § 1228(b), ICE issues a Notice of Intent to Issue a Final Administrative Removal Order ("Notice of Intent"), alleging that the non-citizen is not a lawful permanent resident and that he has been convicted of a crime and charging that he is deportable for having been convicted of an aggravated felony as defined under 8 U.S.C. § 1101(a)(43).[651] A non-citizen who has been served a Notice of Intent has ten calendar days to respond to the charges in writing to ICE and rebut the charges.[652] A non-citizen who is placed in a final administrative removal proceeding is not eligible to be granted any form of discretionary relief.[653] If the non-citizen does not timely respond to the charges in writing, then an ICE supervisory officer shall issue the FARO and remove her 14 days after the issuance of the order.[654] Where a non-citizen does not fear persecution or torture in the designated country of removal, a petition

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[649] *See id.* at 11-12.

[650] ICE Fiscal Year 2008 Annual Report, at 28, available at http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf.

[651] Such non-citizens include those who are not lawfully admitted for permanent residence when the proceedings commence or who have conditional permanent residence status. *See* I.N.A. § 238(b)(2), 8 U.S.C. § 1228(b)(2). Asylees and refugees are not lawful permanent residents; however, they are placed in removal proceedings under I.N.A. § 240, 8 U.S.C. 1229a and charged accordingly with having been admitted and inadmissible.

[652] *See* 8 C.F.R. §§ 238.1(b)(2), 238.1(c)(1).

[653] *See* I.N.A. § 238(b)(5), 8 U.S.C. § 1228(b)(5). In comparison, where a non-lawful permanent resident who has been convicted of an aggravated felony is placed in removal proceedings before the Immigration Court, he may still be eligible for discretionary relief before the Immigration Judge, such as a § 212(h) waiver or, in the case of an asylee or refugee, a § 209(c) waiver in conjunction with adjustment of status. *See* I.N.A. § 240, 8 U.S.C. § 1229a.

[654] *See* I.N.A. § 238(c), 8 U.S.C. § 1228(c); 8 C.F.R. § 238.1(d); *see also*, U.S. v. Santiago-Ochoa, 447 F.3d 1015 (7th Cir. May 19, 2006) (holding that where a non-citizen waived his right to contest the Notice of Intent to Issue a Final Administrative Removal Order issued by the DHS, he failed to exhaust his administrative remedies and did not meet his duty to exhaust under I.N.A. § 276(d)(1), 8 U.S.C. § 1326(d)(1) in a prosecution for illegal entry); Fonseca-Sanchez v. Gonzales, 484 F.3d 439 (7th Cir. Apr. 13, 2007).

for review to challenge the DHS' FARO must be filed with the Seventh Circuit Court of Appeals within 14 days of the issuance of the FARO.[655]

Where a non-citizen contests the charges contained in the Notice of Intent and responds in writing within the ten day period, ICE may then either issue the FARO or issue a Notice to Appear and place her in regular removal proceedings before the Immigration Court. If ICE places a non-citizen in removal proceedings by issuing a Notice to Appear, the non-citizen may apply for all forms of relief for which she is eligible, including discretionary relief.

If ICE issues a FARO, a non-citizen who fears persecution or torture in his home country may still be eligible to appear before the Immigration Court to apply for withholding of removal or relief under Convention against Torture. In order to determine whether or not the DHS will allow the non-citizen to appear before the Immigration Judge for these forms of relief, a CIS asylum officer will conduct an interview to determine whether the non-citizen's fear of persecution or torture is reasonable.[656] If the non-citizen is then referred to the Immigration Judge to allow him to apply for withholding of removal or relief under CAT, he may not apply for any other form of relief.[657] If an asylum officer finds that a non-citizen does not have a reasonable fear of persecution or torture, the non-citizen may request that an Immigration Judge review the decision. An appeal from the Immigration Judge's decision regarding the asylum officer's finding and/or the merits of the withholding of removal or torture claim must be filed with the Board of Immigration Appeals within 30 days of the Immigration Judge's decision. The Board's decision may be appealed by filing a petition for review with the Seventh Circuit Court of Appeals within 30 days of issuance of the Board's decision.[658]

Typically, a DHS officer will serve a Notice of Intent to Issue a FARO on a non-citizen who is detained at a local county jail or a department of corrections facility. Thus, it is critical that defense counsel advise their non-citizens clients who are not permanent residents that they should contact an immigration attorney immediately upon receiving the Notice of Intent to Issue a FARO as there is only a ten day window in which to respond to the charges. The response must be in writing to the DHS. By advising non-citizens who are not lawful permanent residents but who have been convicted of what may be deemed aggravated felonies, non-citizens can attempt to challenge the final administrative removal orders. Where a non-citizen is removed from the U.S. pursuant to a FARO issued by DHS based on an aggravated felony conviction, he will be barred from returning to the U.S. for a minimum of 20 years, unless a waiver under I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3) is

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[655] *See* I.N.A. § 238(b)(3), 8 U.S.C. § 1228(b)(3).

[656] *See* 8 C.F.R. § 208.31(b)-(c).

[657] A non-citizen who has been convicted of an aggravated felony is statutorily barred from applying for asylum. *See* I.N.A. §§ 208(b)(2)(A)(ii), (B)(i), 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i).

[658] *See* I.N.A. § 242(b)(1), 8 U.S.C. § 1252(b)(1). However, review of the underlying facts involving a claim of persecution or torture by the Seventh Circuit Court of Appeals is unlikely where the non-citizen is not successful in challenging the aggravated felony finding of the Board. *See* Petrov v. Gonzales, 464 F.3d 800 (7th Cir. Oct. 6, 2006) (holding that the court of appeals does not have the jurisdiction to review claims of withholding of removal or relief under the Convention Against Torture (CAT) where the non-citizen has been convicted of an aggravated felony).

granted in conjunction with a nonimmigrant visa to allow him to return to the U.S. for a temporary period.[659]

Reinstatement of Prior Orders

Where a non-citizen was ordered removed under the expedited removal statute, illegally reentered the U.S. and then married a U.S. citizen after September 1996 which rendered him eligible to apply for a waiver and lawful permanent residence, the DHS can reinstate the prior order of removal.[660] A non-citizen is ineligible for a waiver of the permanent bar under I.N.A. § 212(a)(9)(C)(ii), 8 U.S.C. § 1182(a)(9)(C)(ii) unless more than 10 years have elapsed since the date of his last departure from the U.S.[661] The Seventh Circuit has held that reinstatement of removal orders under I.N.A. § 241(a)(5), 8 U.S.C. § 1231(a)(5) trumps eligibility for adjustment of status under I.N.A. § 245(i), 8 U.S.C. § 1255(i).[662] Within the jurisdiction of the Seventh Circuit, an exception to reinstatement of removal is available to non-citizens who both illegally reentered and applied for adjustment of status prior to September 30, 1996.[663]

When the DHS intends to reinstate a prior order of removal, the DHS must determine the identity of the non-citizen, whether he was subject to a prior removal order, and whether he left and reentered the country. The DHS then issues a notice of intent to reinstate and serves it on the non-citizen. If the non-citizen does not challenge the DHS's intent to reinstate the removal order or the DHS decides that any response does not affect the DHS's intent to reinstate the removal order, the DHS will issue a final order reinstating the prior removal order. Unless the non-citizen has a credible fear of persecution or torture in the home country, the DHS can then remove the non-citizen immediately or as soon as

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659 *See* I.N.A. § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A); I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3).

660 *See* Gomez-Chavez v. Perryman, 308 F.3d 796 (7th Cir. Oct. 24, 2002); *see also* Fernandez-Vargas v. Gonzales, 126 S. Ct. 2422 (Jun. 22, 2006) (finding that the conduct of remaining unlawfully in the U.S. after entry is an indefinitely continuing violation that a non-citizen can end by voluntarily leaving the U.S., that the non-citizen had ample warning of the change in immigration law that went into effect on April 1, 1997 and could have left the U.S. to avoid the effects of the change in law, and that his 2001 marriage to a U.S. citizen did not render the presumption against retroactive application of the law applicable to his case as he could have married her between 1989 and 2001 and applied for adjustment of status before April 1, 1997).

661 *See In re* Torres-Garcia, 23 I&N Dec. 866 (BIA Jan. 26, 2006) (also holding that even where an alien obtained the Attorney General's permission to reapply for admission before reentering unlawfully, the alien is inadmissible under I.N.A. § 212(a)(9)(C)(i)(II), 8 U.S.C. § 1182(a)(9)(C)(i)(II) where 10 years had not elapsed between his date of departure and application for permission to return to the U.S.); *cf. In re* Rodarte, 23 I&N Dec. 905 (BIA Apr. 6, 2006) (holding that the 10 year unlawful presence bar of inadmissibility under I.N.A. § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)((9)(B)(i) was triggered only where the departure was preceded by at least one year of unlawful presence which began to accrue on or after April 1, 1997).

662 *See* Lino v. Gonzales, 467 F.3d 1077, 1080-81 (7th Cir. Nov. 6, 2006); Guijosa De Sandoval v. United States AG, 440 F.3d 1276, 1284-85 (11th Cir. Feb. 27, 2006); Berrum-Garcia v. Comfort, 390 F.3d 1158, 1163 (10th Cir. Nov. 23, 2004); Lattab v. Ashcroft, 384 F.3d 8, 21 (1st Cir. Sept. 14, 2004); Warner v. Ashcroft, 381 F.3d 534, 540 (6th Cir. Apr. 16, 2004); Flores v. Ashcroft, 354 F.3d 727, 731 (8th Cir. Dec. 31, 2003); Padilla v. Ashcroft, 334 F.3d 921, 925 (9th Cir. Jul. 1, 2003) (applicant did not file I-212 prior to reinstatement of removal order).

663 *See* Faiz-Mohamed v. Ashcroft, 395 F.3d 799 (7th Cir. Jan. 26, 2005).

practically possible.[664] A non-citizen who is subject to reinstatement of a prior order of deportation or removal under I.N.A. § 241(a)(5), 8 U.S.C. § 1231(a)(5) has no right to a hearing before an Immigration Judge.[665] In the Seventh Circuit, prior removal orders are routinely reinstated by the DHS and these non-citizens are removed or deported without the opportunity to apply for immigrations benefits, even when they are married to U.S. citizens.[666]

For more information regarding possible waivers for certain grounds of inadmissibility, see Waivers under I.N.A. § 212(h), 8 U.S.C. § 1182(h) and Waivers under I.N.A. § 212(i), 8 U.S.C. § 1182(i), *infra* at 6-58 and 6-62. For additional information about other classes of non-citizens who may be eligible for adjustment of status, such as non-citizens who filed late for adjustment of status under the 1986 Amnesty program, contact an immigration attorney.

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664 *See* 8 U.S.C. § 1231(a)(5).

665 *See In re* W-C-B-, 24 I&N Dec. 118 (BIA Mar. 19, 2007) (holding that the Immigration Judge did not error in terminating removal proceedings as improvidently begun by the DHS where the non-citizen was subject to reinstatement of his prior order of deportation).

666 *See* Lino v. Gonzales, 467 F. 3d 1077 (7th Cir. Nov. 6, 2006). The interpretation of the law has varied elsewhere. The Ninth and Tenth Circuit Courts of Appeals have held that persons who were unlawfully present in the U.S. for more than one year, leave the U.S., unlawfully reenter and are subject to the 10 year permanent bar under I.N.A. § 212(a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I) may apply to adjust their status if they are covered by I.N.A. § 245(i), 8 U.S.C. § 1255(i). *See* Acosta v. Gonzales, 439 F.3d 550 (9th Cir. Feb. 23, 2006); Padilla-Caldera v. Gonzales, 426 F.3d 1294, *amended on reh'g by* 453 F.3d 1237 (10th Cir. Oct. 18, 2005). Litigation on the issue remains ongoing. *See Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), *pet. for reh'g and reh'g en banc denied* (9th Cir. Jan. 16, 2009) (overruling *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. Aug. 13, 2004) in which the court had held that non-citizens ordered removed or deported were eligible to apply for adjustment of status under INA §245(i) with a concurrent I-212 waiver application); *Mora v. Mukasey*, 550 F.3d at 236-238 (2nd Cir. Dec. 16, 2008) (finding that the Tenth Circuit's decision in *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2006) and the Ninth Circuit's decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) appear to no longer be good law or persuasive authority in light of the deference owed to the BIA's subsequent precedent decisions in In re Briones, 24 I. & N. Dec. 355 (B.I.A. Nov. 29, 2007) and In re Torres-Garcia, 23 I. & N. Dec. 866 (B.I.A. Jan. 26, 2006)). Subsequent to the 2007 *Duran Gonzales* decision, a class action lawsuit was filed challenging the USCIS's interpretation of *Perez-Gonzalez* decision; the district court denied relief and an appeal is pending before the Ninth Circuit. *See Duran Gonzalez v. U.S. Department of Homeland Security and Napolitano*, 2009 U.S. Dist. LEXIS 18753 (W.D.WA Feb. 27, 2009), appeal case no. 09-35174 (9th Cir.). For additional information regarding the *Duran Gonzales* litigation, see American Immigration Law Foundation, "Lawsuit to Challenge DHS' Refusal to Follow *Perez-Gonzalez*, Ninth Circuit I-212 Decision," available at http://www.ailf.org/lac/lac_lit_92806.shtml. The USCIS recently issued another memo that it will not follow the *Acosta* or *Padilla-Caldera* decisions. *See* Neufield, Scialabba, and Chang, "Memorandum: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," USCIS, May 6, 2009.

Removal Proceedings

Where a non-citizen files an application with the CIS for an immigration benefit for which he is not eligible at that time, the DHS may use the information in the application to place that person in removal proceedings or otherwise carry out its enforcement authority.[667] In certain instances, it may also issue a final administrative removal order where the non-citizen has been convicted of an aggravated felony.[668]

Where a non-citizen has not been ordered removed by the DHS under I.N.A. § 238(b), 8 U.S.C. § 1228(b), the DHS may begin removal proceedings by issuing and serving upon him a Notice to Appear (NTA).[669] Once the NTA has been filed with the Immigration Court, the Immigration Judge has jurisdiction over a non-citizen's immigration case.[670]

NTAs can be issued by ICE, CBP or CIS. Many applications for immigration benefits are now filed with the different CIS service centers around the country. Where a CIS Service Center denies an application for an immigration benefit, it may issue an NTA and serve it upon the non-citizen by regular mail.[671] The issuance of an NTA by the CIS operates by the same manner as that issued by ICE or CBP. The non-citizen may challenge the NTA once she is before the Immigration Court in removal proceedings.

After serving the NTA upon the non-citizen, the DHS will file it with the Immigration Court with jurisdiction over the location of the non-citizen's residence. For detained cases in the Chicago Immigration Court, it takes approximately one to three weeks for the initial master calendar hearing to be scheduled. This initial hearing may be scheduled more quickly through the filing of a motion for a bond hearing, even where a non-citizen is not technically eligible for bond or release from DHS custody.[672] Generally, the Immigration Court must schedule a bond hearing within three business days of receiving the motion. For non-detained cases, it may take two weeks to three months for the initial master calendar hearing to be scheduled.

At the initial master calendar hearing, the Immigration Court will inform a non-citizen of her rights in removal proceedings, similar to advisals provided in a criminal court arraignment. At the hearing, a non-citizen has the right to request one continuance to

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667 *See* Gutierrez v. Gonzales, 458 F.3d 688 (7th Cir. Aug. 16, 2006) (holding that even where an attorney who has subsequently been found to have engaged in a pattern of misconduct in immigration cases, the DHS may still use the evidence provided in the application to place the non-citizen in removal proceeding).

668 *See* Final Administrative Removal Orders, *supra* at 6-3.

669 *See* 8 C.F.R. § 1003.14(a); Dandan v. Ashcroft, 339 F.3d 567, 575-76 (7th Cir. Aug. 11, 2003) (holding that removal proceedings commence with the filing of the Notice to Appear with the Immigration Court and finding that because a non-citizen had not been physically present for ten years prior to being served with the NTA, he was ineligible for cancellation of removal as a non-lawful permanent resident).

670 *See* 8 C.F.R. § 1003.14. For a quick overview of the deportation/removal process, see Appendix 6A, Flow Chart: Non-Citizen Removal (Deportation) Proceedings.

671 *See* Memorandum from Michael Aytes, Associate Director, Domestic Operations, "Disposition of Cases Involving Removable Aliens," Jul. 11, 2006, available at http://www.uscis.gov.

672 *See* 8 C.F.R. § 1003.19.

obtain legal counsel to represent her before the Immigration Court.[673] If the non-citizen appears with an attorney at the initial hearing, the attorney may request one continuance for attorney preparation. Either the non-citizen or the attorney may also decide to plead to the factual allegations and charge(s) of deportability/inadmissibility at the hearing. To plead to the factual allegations or charge(s), she will either admit or deny each of the allegations and charge(s) of deportability/inadmissibility. [674] Where a non-citizen has been admitted to the U.S., the burden of proving deportability lies with the DHS; in comparison, if the non-citizen is charged as an arriving alien and is not a lawful permanent resident, the burden of proving admissibility to the U.S. lies with her. [675]

After pleadings are taken at either the first or second master calendar hearing, the Immigration Judge will ask the non-citizen whether she wishes to designate the country for removal, should it become necessary. The Immigration Judge will also request information regarding the non-citizen's eligibility for any forms of immigration relief. If eligible, the Immigration Judge will then order the non-citizen to pay the requisite filing fee to the DHS, obtain a biometrics (fingerprint) appointment, and file the application(s) for relief and supporting documentation by a certain date.[676] The Immigration Judge will also advise the non-citizen (and her attorney) of the final date for a hearing on the merits of the application for relief. If the non-citizen does not file the application for relief by the chosen date or fails to comply with biometrics processing, the Immigration Judge may deem the application for relief as abandoned and may order the non-citizen removed from the U.S.[677]

At the final merits hearing (also known as an individual hearing), the non-citizen and other witnesses present their testimony.[678] The DHS may also present witnesses and

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[673] *See* 8 C.F.R. § 1003.29. Non-citizens may be represented before the Immigration Court or Board of Immigration Appeals by attorneys, law students in a law school clinical program or working with an accredited non-profit agency, or accredited representatives. *See* 8 C.F.R. § 1292.1. For purposes of discussion herein, the term "attorney" will be used to denote a legal representative before the Immigration Court and the Board.

[674] In the Notice to Appear, the DHS must include factual allegations that a person is not a U.S. citizen and that she is native and citizen of one or more countries other than the U.S. Due to the many changes in the composition and geography of nation states during the 1930s, 1940s, 1950s, 1960s, and 1990s, it may be necessary to ask the non-citizen about the name of the country at the time that she and/or her parents were born. For example, the geographical boundaries of Ethiopia, Eritrea, Ukraine, Poland, and Germany changed during World War II and the immediate period thereafter. Israel was created following World War II. The former U.S.S.R. was dissolved in December 1991. The former Yugoslavia also dissolved in the early 1990s. The analysis regarding place of birth and possible citizenship is relevant to determining whether a non-citizen may be stateless, in which case the DHS may not be able to obtain travel documents to remove him if he is deportable and ineligible for relief from a removal order. *See* Orders of Supervision, *infra* at 7-8.

[675] *See* I.N.A. § 240, 8 U.S.C. § 1229a.

[676] *See* 8 C.F.R. §§ 1003.31, 1003.32. Pursuant to the Immigration Court Practice Manual, any documentation in support of the application's relief must be filed at least 15 days prior to the date of the merits hearing. *See* Immigration Court Practice Manual, Chapter 3.1(b), available at http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm. Several Immigration Judges use pre-hearing statement orders and often will require the supporting documentation to be filed three to four weeks before the date of the merits hearing, particularly for the cases of non-citizens who are not in DHS custody.

[677] *See* 8 C.F.R. §§ 1003.47(c)-(d).

[678] *See* 8 C.F.R. § 1003.34.

documentary evidence to the Immigration Court. The Immigration Judge will either render an oral decision on the day of the hearing or wait until a later date to issue an oral or written decision. The Immigration Judge cannot grant an application for relief until the DHS has obtained the results of the biometrics and background check.[679]

If the Immigration Judge denies an application for relief, the non-citizen must reserve appeal and file a Notice of Appeal with the Board of Immigration Appeals within 30 calendar days of the date of the Immigration Judge's decision.[680] If a Notice of Appeal is not received by the Board within 30 days, the order of removal by the Immigration Judge is final.[681] If the DHS chooses to appeal the decision of the Immigration Judge, it must also file a Notice of Appeal within 30 days.

After the Board receives a Notice of Appeal, the Board will order a transcription of the tapes recorded during the master calendar and merits hearings.[682] Upon receipt of the transcript, the Board will issue a briefing schedule and will send it, along with a transcript copy, to the non-citizen and the DHS. In the cases of detained non-citizens, the appeal process generally lasts from 1-4 months. For non-citizens who are not in DHS custody, the appeal process generally lasts from four to twelve months, depending on the complexity of the case and the issues presented in the appeal.

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[679] *See* 8 C.F.R. § 1003.47. Where a case has been remanded to an Immigration Judge for completion of the appropriate background checks, he is required to enter a final order granting or denying the requested relief from removal. *See In re* M-D-, 24 I&N Dec. 138 (BIA Apr. 12, 2007). The Immigration Judge may not reconsider the prior decision of the Board, but he reacquires jurisdiction over the removal proceedings and may consider additional evidence regarding new or previously considered relief if the evidence meets the requirements for reopening the removal proceedings. *See id*. The Immigration Judge may, in the exercise of discretion, determine whether to conduct an additional hearing to consider new evidence that may affect a non-citizen's eligibility for relief before he enters an order granting or denying relief. *See In re* Alcantara-Perez, 23 I&N Dec. 882 (BIA Feb. 23, 2006); 8 C.F.R. § 1004.47(h).

[680] The Notice of Appeal must be received by the Board within 30 days. *See* 8 C.F.R. § 1003.38; *see also, In re* Liadov, 23 I&N Dec. 990 (BIA Sept. 12, 2006) (holding that the failure of an overnight delivery service to deliver the Notice of Appeal on time did not constitute an exceptional circumstance to warrant the consideration of an untimely notice of appeal by the Board under 8 C.F.R. § 1003.1); *In re* Jean, 23 I&N Dec. 373 (A.G. May 2, 2002). The filing fee for a non-citizen to appeal the Immigration Judge's decision is $110 which must be paid to the Department of Justice unless a fee waiver is requested by the non-citizen and granted by the Board. To challenge the validity of an appeal waiver, a non-citizen may file a motion to reconsider with the Immigration Judge or an appeal directly with the BIA. *See In re* Patino, 23 I&N Dec. 74 (BIA May 9, 2001).

[681] *See* 8 C.F.R. § 1003.39. *See also*, I.N.A. § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A) (defining an order of removal as final when the Board of Immigration Appeals affirms the order on appeal or the period for seeking Board review has expired); Guevara v. Gonzales, 472 F.3d 972 (7th Cir. Jan. 8, 2007) (holding that where an Immigration Judge has found a non-citizen deportable but granted relief and the Board of Immigration Appeals reverses the decision granting relief, the Immigration Judge's initial determination of deportability is sufficient to meet the definition of a removal order under I.N.A. § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A) which becomes final upon the Board's reversal of the grant of relief from removal); 8 C.F.R. § 1.1(l).

[682] *See* 8 C.F.R. § 1003.5.

If the Board sustains or grants a non-citizen's appeal, it may return the case to the Immigration Court for further proceedings or may grant the relief requested.[683] If the Board denies the appeal, the order of removal becomes final. Where relief is granted by the Immigration Court or the Board, then the non-citizen will be processed by the CIS for the issuance of the proof of the relief granted, such as a lawful permanent resident card.

In general, a non-citizen may file one motion to reopen or reconsider in removal proceedings with the Board of Immigration Appeals or the Immigration Court, whichever last rendered a decision in his case.[684] If a non-citizen files a motion to reopen with the Board and the Board grants the motion, the grant vacates the prior order of removal and reinstates the previous immigration proceedings.[685]

To obtain review of the Board's denial of an appeal, a non-citizen must file a petition for review, along with a $450 filing fee or an affidavit *in forma pauperis*, within 30 calendar days of the Board's order with the federal Circuit Court of Appeals having jurisdiction over the Immigration Court where the removal proceedings took place.[686] For immigration cases where the removal proceedings were conducted by the Chicago Immigration Court, petitions for review are filed with the Seventh Circuit Court of Appeals.[687] If the petition for review is not filed within the 30 day period, the Court of Appeals will not have the jurisdiction to review the Board's order. If the non-citizen is in DHS custody or has received a notice to appear for deportation ("bag and baggage notice") with the DHS, an emergency motion for a stay of removal may be filed with the Court of Appeals to request that her removal from the U.S. be stayed while the petition for review is pending before the Court of Appeals.[688]

After the petition for review is filed with the Court of Appeals, the U.S. Department of Justice has 40 days to file the administrative record with the Court of Appeals. The administrative record includes the hearing transcripts, all documents previously filed with the Immigration Court and Board, and decisions by the Immigration Court and Board.

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683 *See* 8 C.F.R. § 1003.1(d)(7).

684 *See* I.N.A. §§ 240(c)(6)-(7), 8 U.S.C. § 1229a(c)(6)-(7).

685 *See* Bronisz v. Ashcroft, 378 F.3d 632, 637 (7th Cir. Aug. 5, 2004).

686 *See* I.N.A. § 242(b)(1), 8 U.S.C. § 1252(b)(1); Sankarapillai v. Ashcroft, 330 F.3d 1004, 1006 (7th Cir. Jun. 4, 2003) (holding that the thirty-day statutory period for filing appeals from final orders of the BIA is a jurisdictional requirement).

687 *See* Ramos v. Ashcroft, 371 F.3d 948 (7th Cir. Jun. 15, 2004) (holding that where the Immigration Judge is located controls as the place that proceedings were conducted, rather than the location where the non-citizen appeared via televideo for his final removal hearing); *see also*, Ramos v. Gonzales, 414 F.3d 800, 803 (7th Cir. Jul. 12, 2005) (reaffirming Ramos v. Ashcroft, 371 F.3d 948 (7th Cir. Jun. 15, 2004) regarding venue for a petition for review).

688 *See Nken v. Holder*, 129 S.Ct. 1749, 1760-61 (Apr. 22, 2009) (holding that the traditional test applies to motions for stays of removal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."). Where a non-citizen fails to report to the DHS and then faces a motion to dismiss his petition for review under the fugitive disentitlement doctrine, he may still surrender to the DHS and preserve his appeal. *See* Gutierrez-Almazan v. Gonzales, 453 F.3d 956, 957 (7th Cir. Jul. 17, 2006); *see also* Sapoundjiev v. Ashcroft, 376 F.3d 727, 729 (7th Cir. Jul. 22, 2004).

Once the administrative record is filed, the briefing process begins. The appeal process before the Court of Appeals may take from two to twelve months.[689] If a non-citizen cannot be removed from the U.S. within six months following a final order of removal by the BIA, she may be eligible for release from DHS custody under an order of supervision.[690]

If the Court of Appeals grants the petition for review, it will return the case to the BIA for further proceedings. If the Court of Appeals denies the petition for review, the non-citizen has the right to file a petition for rehearing with the panel who reviewed the petition, a petition for rehearing with all the judges in the Court of Appeals (*en banc)*, or a petition for a writ of certiorari with the U.S. Supreme Court. Within the Seventh Circuit Court of Appeals, it is very rare that a petition for rehearing either by the panel or *en banc* will be granted. Furthermore, it is extremely rare for the U.S. Supreme Court to accept a petition for a writ of certiorari, unless the federal circuit courts of appeals have split on the legal issue(s) in previously issued opinions.

Once a non-citizen has exhausted her rights before the Board and the Court of Appeals, the DHS will take steps to physically remove her from the U.S. These include requiring the non-citizen to sign an application for a travel document if she does not have a current passport or other form of identification to enter the country designated for removal. The DHS will then contact the embassy or consulate of the country to which the DHS seeks to remove her to process the travel document application or otherwise obtain permission from that country to remove her there.[691]

If the non-citizen is not in DHS custody, ICE will send a "bag and baggage" notice to the non-citizen's last address. If she does not appear at the ICE Office on the date indicated on the bag and baggage notice, then her file will be transferred to the Fugitive Operations Unit within the local ICE Office. Officers from the Fugitive Operations Unit may appear at her home or work place at any time to detain her, pending her physical removal from the U.S.[692] A warrant will also be issued and notice will be placed in a National Crime Information Center (NCIC) database. Any law enforcement official in the country will then have access to the fact that a warrant for arrest and a final removal order have been entered against the non-citizen.[693] A local law enforcement officer who encounters the non-citizen may arrest her and detain her until she is transferred to DHS custody which will then take the necessary steps to remove her from the U.S.

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689 For more information regarding the timing and processing of a petition for review before the Seventh Circuit Court of Appeals or any other federal court of appeals, *see* I.N.A. § 242, 8 U.S.C. § 1252.

690 *See* Orders of Supervision, *infra* at 7-8.

691 *See* Lian v. Ashcroft, 379 F.3d 457, 458-459 (7th Cir. Aug. 12, 2004).

692 *See* National Fugitive Operations Program at http://www.ice.gov/pi/dro/nfop.htm. Fugitive operations teams will increase from 52 to 75 by the end of 2007 with the goal of arresting 75,000 non-citizens who have been convicted of crimes or ordered removed. *See* Michael Martinez, "Deportations Strand Young U.S. Citizens," *Chicago Tribune*, Apr. 29, 2007.

693 *See, e.g.*, Ramirez-Vicario v. Achim, 2004 U.S. Dist. LEXIS 2798 at *3-4 (N.D.IL Feb. 20, 2004).

Good Moral Character – A Requirement for Many Forms of Relief

Good Moral Character (GMC) is a statutory requirement under the INA for certain forms of immigration relief in removal, deportation, and exclusion proceedings. Relief for which a showing of good moral character is required includes registry,[694] voluntary departure,[695] suspension of deportation,[696] naturalization,[697] and cancellation of removal for certain nonpermanent residents.[698] An assessment of good moral character may also affect the exercise of discretion in the adjudication of applications for discretionary relief, including asylum[699] and adjustment of status to lawful permanent residence.[700]

A finding of good moral character is both a statutory and discretionary matter. Certain statutory bars to demonstrating good moral character have been enumerated in the immigration statute under I.N.A. § 101(f), 8 U.S.C. § 1101(f) and include:

- Engaging in prostitution.
- Assisting or encouraging any undocumented non-citizen to enter the U.S.
- Practicing polygamy.
- Having committed a crime involving moral turpitude.
- Having committed a violation related to a controlled substance.
- Having been convicted of two or more offenses for which the aggregate sentences to confinement were five years.
- Being a drug trafficker or having obtained a financial benefit from illicit activity.
- Having been convicted of two or more gambling offenses.
- Having been confined, as a result of a conviction, to a penal institution for an aggregate period of 180 days or more.
- Having been convicted of an aggravated felony.[701]

The statutory list, however, is not exhaustive. Courts have created two tests to determine whether an applicant has shown good moral character in the exercise of discretion. In *Postusta v. United States*, Judge Learned Hand stated that good moral character should be defined based on the ethical standards current at the time.[702] Other courts have defined good moral character as "conduct which measures up as good among the average citizens of the community in which the applicant lives, or that it is conduct which conforms to the 'generally accepted moral conventions current at the time.'"[703] The Board of Immigration Appeals held that good moral character "does not mean moral

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694 *See* I.N.A. § 249, 8 U.S.C. § 1259.
695 *See* I.N.A. § 240B, 8 U.S.C. § 1229c.
696 *See* I.N.A. § 244(a), 8 U.S.C. § 1254(a) (1995).
697 *See* I.N.A. § 310, 8 U.S.C. § 1421; I.N.A. § 316, 8 U.S.C. § 1427.
698 *See* I.N.A. § 240A(b), 8 U.S.C. § 1229b(b).
699 *See* Asylum and Refugees, *infra* at 6-31.
700 *See* Grounds of Inadmissibility, *supra* at 4-1; Adjustment of Status, *infra* at 6-18.
701 A conviction for an aggravated felony entered on or after November 29, 1990 bars a finding of good moral character. *See* I.N.A. § 101(f), 8 U.S.C. § 1101(f); Gorenyuk v. DHS, 2007 U.S. Dist. LEXIS 82951 (Nov. 8, 2007).
702 *See* Postusta v. U.S., 285 F.2d 533, 535 (2nd Cir. Jan. 6, 1961).
703 *See In re* Denssy, 200 F. Supp. 354, 358 (D. Del. Dec. 8, 1961); *see also*, *In re* Paoli, 49 F. Supp. 128, 130 (N.D. Cal. Mar. 11, 1943).

excellence and that it is not destroyed by 'a single incident.'"[704] Rather, a non-citizen's general conduct may be a factor to be considered in determining whether a non-citizen has good moral character.[705]

Exceptions to Statutory Bars and Other Case Law involving Good Moral Character

Two exceptions exist to the statutory bars for crimes involving moral turpitude.[706] First, a crime classifiable as a petty offense under I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) is not subject to the bar. Second, a Presidential or gubernatorial pardon for a conviction for a crime involving moral turpitude will not trigger the mandatory bar.[707]

A non-citizen's application for an immigration benefit can be denied on account of bad moral character if she provides false testimony with an intent to deceive a U.S. official for the purpose of obtaining U.S. citizenship or other benefits under immigration law.[708] A conviction for willfully and knowingly transporting an alien in violation of U.S. law precludes a finding of good moral character.[709] Association with a gangster will not preclude a finding of good moral character.[710]

The failure to disclose arrests and convictions for crimes involving moral turpitude or controlled substance offenses in an application for adjustment of status may later lead to the loss of lawful permanent residence where the convictions constituted grounds of

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[704] *See In re* Sanchez-Linn, 20 I&N Dec. 362 (BIA Jul. 30, 1991).

[705] *See In re* Carbajal, 17 I&N Dec. 272 (Comm. Oct. 26, 1978); *In re* T-, 1 I&N Dec. 158 (BIA Sept. 4, 1941).

[706] Expungements for convictions for crimes involving moral turpitude under state rehabilitative statutes are no longer given effect in immigration proceedings. *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999); *see also*, Definition of Conviction, *supra* at 2-3.

[707] Pardons forgive convictions under moral turpitude deportation grounds only. *See* I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v); *see also*, *In re* Lindner, 15 I&N Dec. 170 (BIA Jan. 31, 1975). In an application for naturalization, a pardon for murder will not erase the basis for a finding of a lack of good moral character since the fact of murder still exists. *See, e.g.*, *In re* Salani, 196 F. Supp. 513 (D.C. Cal. June 27, 1961); *In re* Armando de Angelis, 139 F. Supp. 779 (E.D.N.Y. Apr. 11, 1956).

[708] *See* Kungys v. U.S., 485 U.S. 759, 779, 108 S.Ct. 1537, 1551, 99 L.Ed.2d 839 (May 2, 1988) (also noting and distinguishing that willful misrepresentations because of embarrassment, fear, or a desire for privacy are not sufficiently culpable to brand an applicant as someone who lacks good moral character); Fedorenko v. U.S., 449 U.S. 490, 66 L.Ed.2d 686, 101 S.Ct. 737 (Jan. 21, 1981); U.S. v. Schellong, 547 F.Supp. 569 (N.D. Ill. Sept. 9, 1982); Application of Murra, 178 F.2d 670, 674-677 (7th Cir. Dec. 14, 1949) (considering the totality of the circumstances, including a longitudinal analysis of the applicant's life and the credentials of those giving testimony on her behalf); Plewa v. I.N.S., 77 F.Supp.2d 905, 910 (N.D.IL Dec. 21, 1999) (holding that the applicant did not lack good moral character where she gave false testimony by failing to disclose a prior arrest based on the advice of an experienced immigration counselor); *In re* R-S-J-, 22 I&N Dec. 863 (BIA Jun. 10, 1999) (holding that false oral statements given knowingly under oath to an asylum officer constituted false testimony for purposes of good moral character under I.N.A. § 101(f)(6), 8 U.S.C. § 1101(f)(6) which is required for suspension of deportation and voluntary departure).

[709] *See* Lopez-Blanco v. I.N.S., 302 F.2d 553 (7th Cir. May 10, 1962).

[710] *See* Rassano v. I.N.S., 492 F.2d 220, 226-27 (7th Cir. Feb. 21, 1974).

inadmissibility at the time of the granting of adjustment of status.[711] Where a non-citizen was not eligible for adjustment of status and remains ineligible for adjustment of status at the time of his removal proceeding, his lawful permanent residence can be revoked and he can be ordered removed.[712] In some instances, he may eligible for adjustment of status and/or other relief from removal.[713]

The date of a conviction for an aggravated felony impacts upon whether good moral character can be demonstrated. Whether good moral character may be found for non-citizens with convictions entered prior to November 29, 1990 that are deemed to be aggravated felonies depends on the immigration benefit sought. For example, a conviction on or after November 18, 1988 for a crime deemed to be an aggravated felony is a statutory bar to voluntary departure.[714] A non-citizen who was convicted prior to November 29, 1990 of a crime subsequently deemed to be an aggravated felony is generally not statutorily barred from demonstrating good moral character for suspension of deportation under I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1995) or naturalization, but he may still be subject to grounds of deportability.[715] In contrast, a conviction for an aggravated felony on or after November 29, 1990 is a permanent bar to naturalization, even for wartime veterans.[716]

Once a Notice to Appear has been issued against a non-citizen, the DHS cannot adjudicate an application for naturalization.[717] In order for the Board or an Immigration Judge to terminate pending removal proceedings against a lawful permanent resident, the DHS must affirmatively communicate that the non-citizen is prima facie eligible for

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[711] *See* Rosales-Pineda v. Gonzales, 452 F.3d 627 (7th Cir. Jun. 19, 2006) (discussing removal proceedings initiated where the former INS discovered the non-citizen's two theft convictions and a controlled substance offense during a background check for his application for naturalization).

[712] *See id.*

[713] *See* I.N.A. § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H); *In re* Fu, 23 I&N Dec. 985 (BIA Sept. 6, 2006) (holding that a waiver under I.N.A. § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H) explicitly provides for a waiver of the ground of inadmissibility for fraud or willful misrepresentation of a material fact under I.N.A. § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), whether innocent or not, and additional grounds of inadmissibility which directly result from the fraud or misrepresentation, such as I.N.A. § 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for lack of a valid immigrant visa or entry document); I.N.A. § 212(k), 8 U.S.C. § 1182(k); Adjustment of Status, *infra* at 6-18; Asylees and Refugees, *infra* at 6-31; Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36.

[714] *See* I.N.A. § 240B(a)-(b), 8 U.S.C. § 1229c(a)-(b).

[715] *See In re* Reyes, 20 I&N Dec. 789 (BIA Apr. 28, 1994) (holding that a conviction for murder is a statutory bar to demonstrating good moral character).

[716] *See* O'Sullivan v. USCIS, 453 F.3d 809, 816-17 (7th Cir. Jul. 6, 2006) (upholding 8 C.F.R. § 329.2 which requires that wartime veterans demonstrate good moral character for one year prior to filing their application for naturalization and finding that the aggravated felony bar under I.N.A. § 101(f)(8), 8 U.S.C. § 1101(f)(8) applies to wartime veterans, even where they apply under I.N.A. § 316, 8 U.S.C. §1427 and I.N.A. § 329, 8 U.S.C. §1440); *see also*, 8 C.F.R. § 316.10 (a conviction for murder at any time and a conviction for an aggravated felony on or after November 29, 1990 are bars good moral character). One district court has suggested that a non-citizen may first obtain a gubernatorial pardon to eliminate the aggravated felony bar to good moral character and then apply for naturalization. *See* Polizzi v. U.S.D.H.S., 2006 U.S. Dist. LEXIS 37958 (Jun. 8, 2006). For more information about the effect of pardons on immigration consequences, see Pardons, *infra* at 8-25.

[717] *See* I.N.A. § 318, 8 U.S.C. § 1429; *In re* Acosta-Hidalgo, 24 I&N Dec. 103, 106-07 (BIA Mar. 8, 2007) (finding that the DHS's adjudication of the non-citizen's application for naturalization is not an affirmative communication of the prima facie eligibility for naturalization).

naturalization.[718] Neither the Immigration Judge nor the Board has the authority to compel the DHS to acknowledge that a non-citizen is eligible for naturalization.[719] If the DHS refuses to convey such communication, the Immigration Judge does not have the authority to terminate removal proceedings. If the Immigration Judge grants relief to a non-citizen, the non-citizen may pursue a pending naturalization application with the CIS or file a new naturalization application.

A person may be denaturalized if he did not disclose material facts in an application for an immigrant visa, adjustment of status, or naturalization.[720] A non-citizen who fails to disclose an arrest, charge, or conviction for a crime that falls within one of the statutory bars to demonstrating good moral character as required under I.N.A. § 101(f)(8), 8 U.S.C. § 1101(f)(8) may also be subject to denaturalization.[721]

Application to Cases

Good Moral Character and Naturalization

Case of Xia from Laos

Xia came to the United States as a refugee in 1999 and adjusted his status to become a lawful permanent resident in 2000. He was convicted for fifth degree felony possession of opium in Wisconsin in 2005.

Analysis: An applicant for citizenship must demonstrate his good moral character for five years as a lawful permanent resident prior to application. Xia's opium conviction statutorily precludes him from establishing good moral character. In addition, the DHS can place him in removal proceedings based on his drug conviction if he applies for naturalization or otherwise comes to the attention of the DHS.

Case of John from Finland

John entered the United States as a university student in 1970. In 1975, he married a United States citizen and became a lawful permanent resident. In 2005, he was convicted for felony credit card fraud and served 150 days in jail. In 2006, he was convicted for welfare fraud for which he served 100 days in jail.

Analysis: John is statutorily ineligible for citizenship because he has served an aggregate of 250 days in jail within the five year period required for good moral character. In addition, he is deportable for having been convicted of two crimes involving moral

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[718] *See In re* Acosta-Hidalgo, 24 I&N Dec. 103, 104 (BIA Mar. 8, 2007) (holding that 8 C.F.R. § 1239.2(f) and *In re* Cruz, 15 I&N Dec. 236 (BIA Apr. 3, 1975) control).
[719] *See In re* Acosta-Hidalgo, 24 I&N Dec. 103, 107 (BIA Mar. 8, 2007).
[720] *See* Fedorenko v. U.S., 449 U.S. 490, 505 (Jan. 21, 1981); Naujalis v. I.N.S., 240 F.3d 642, 646 (7th Cir. Feb. 15, 2001); U.S. v. Firishchak, 468 F.3d 1015 (7th Cir. Nov. 20, 2006); U.S. v. Wittje, 422 F.3d 479 (7th Cir. Sept. 1, 2005); U.S. v. Kumpf, 438 F.3d 785 (7th Cir. Feb. 23, 2006).
[721] *See* U.S. v. Vlamakis, 2002 U.S. Dist. LEXIS 2409 (N.D.IL Feb. 15, 2002); U.S. v. Santillan-Garcia, 2001 U.S. Dist. LEXIS 20779 (N.D.IL Nov. 14, 2001).

turpitude since he became a lawful permanent resident.

Good Moral Character and Non-Immigrant Visas

Case of Marla from Argentina

Marla entered the United States in 2004 on a student visa to attend a technical college. In 2006, she stopped attending the technical college and began working as a waitress. She married John, a U.S. citizen in June 2008 and they filed a visa petition and adjustment of status application for her with the USCIS.

In December 2008, Marla was driving home from work when the police pulled her over for failing to come to a complete stop at a red light in Indianapolis. As Marla got out of the car to follow the officer to his squad car, a baggie containing two grams of cocaine fell out of her coat pocket. She was charged with and pled guilty to felony possession of two grams of cocaine in violation of IC 35-48-4-6. The court sentenced her to first offender probation. The state's attorney called the DHS which detained Marla without bond.

In removal proceedings in May 2009, the Immigration Judge found that Marla was deportable for having violated her F-1 visa status on account of her separation from the college and based on her controlled substance conviction. Marla requested adjustment of status, which the judge denied based on her heroin disposition after lengthy legal argument was presented by her attorney regarding her eligibility for adjustment of status. She then requested the immigration relief of voluntary departure. An applicant for voluntary departure must show good moral character for at least five years immediately preceding the application unless she requests voluntary departure prior to the completion of removal proceedings.[722] The Immigration Judge found Marla statutorily ineligible for voluntary departure based on her cocaine conviction and ordered her removed from the United States.

Analysis: Under the removal order, Marla is barred from returning to the United States for ten years. Based on her controlled substance conviction, however, she is permanently inadmissible based for an immigrant visa. She may be eligible for a temporary non-immigrant visa with a discretionary waiver from the Attorney General to return to the United States.[723]

Good Moral Character and Suspension of Deportation and Non-Permanent Resident Cancellation of Removal

Case of Jose from Guatemala

Jose entered the United States illegally in 1989, fleeing forced recruitment by the Guatemalan Army. In 1991, he filed for immigration status as part of the *American Baptist Churches* settlement, which permitted Salvadorans and Guatemalans to have their claims for asylum adjudicated under fair terms. In January 1997, he was convicted for

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[722] *See* I.N.A. § 240B(a), 8 U.S.C. § 1229c(a); *cf.* I.N.A. § 240B(b), 8 U.S.C. § 1229c(b); *see also*, *In re* Arguelles, 22 I&N Dec. 811 (BIA Jun. 7, 1999); *In re* Ocampo, 22 I&N Dec. 1301 (BIA Mar. 24, 2000); *In re* Cordova, 22 I&N Dec. 966 (BIA Aug. 6, 1999).

[723] *See* I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3).

misdemeanor assault for a bar fight in which Jose defended himself against racially biased comments by another patron. Based on arguments by his public defender, the judge ordered Jose to serve 100 days in jail and agreed to suspend the remainder of the six month sentence.

Analysis: Jose has not been convicted of an aggravated felony and remains *prima facie* eligible for suspension of deportation. Misdemeanor assault is generally not a crime involving moral turpitude.

Case of Sylvia from Sierra Leone

Sylvia entered the United States illegally in 1982. In 1985, she gave birth to a United States citizen son. In 1988, she pled guilty to misdemeanor driving under the influence and was placed on probation. In June 2008, ICE officers arrested her during a workplace raid and began removal proceedings against her.

Analysis: Sylvia is statutorily eligible for cancellation of removal as her conviction for driving under the influence is not a statutory bar to good moral character.[724] To be eligible for cancellation of removal, Sylvia must show that she has been physically present in the United States for at least ten years, that she has had good moral character for the past ten years, and that her removal from the United States would result in exceptional and extremely unusual hardship to her United States citizen son.[725]

Practice Tips

Where a non-citizen would otherwise be eligible for relief from deportation or removal and has been charged with a crime triggering one of the mandatory bars to good moral character, an attempt should be made to have the non-citizen charged under another provision of law which will not trigger such bars. In addition, the immigration definition of "conviction" must be considered where the non-citizen is required to plead guilty, plead nolo contendere or to admit facts on the record in order to be eligible for pretrial diversion or a restorative justice program.[726]

Forms of Immigration Relief in Removal Proceedings

Non-citizens in removal proceedings may be eligible for certain forms of immigration relief. Lawful permanent residents with criminal convictions may be eligible for several forms of relief, including cancellation of removal for certain lawful permanent residents, § 212(h) waiver for an adjustment of status, asylum, withholding of removal, and relief under the Convention against Torture. The granting of an immigration waiver offers relief from removal but not from the underlying criminal conviction which remains part of a non-citizen's immigration record for consideration at any time.[727] Undocumented persons, asylees, and refugees may be eligible for non-permanent cancellation of removal,

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[724] *See In re* Lopez-Meza, 22 I&N Dec. 1188 (BIA Dec. 21, 1999).
[725] *See* Cancellation of Removal for Non-Permanent Residents, *infra* at 6-28.
[726] *See* Definition of Conviction, *supra* at 2-3.
[727] *See In re* Balderas, 20 I&N Dec. 389 (BIA Aug. 20, 1991).

adjustment of status, voluntary departure, asylum, withholding of removal, and relief under the Convention against Torture.

Adjustment of Status

The grounds of inadmissibility apply to non-citizens seeking admission to the U.S. In general, a non-citizen must prove that he is admissible to the U.S. when he presents himself at a border or international airport. He must also prove that he is admissible when he presents himself to an Immigration Judge or DHS official and requests admission to the U.S. through an application for an immigration benefit, such as adjustment of status for lawful permanent residence. A non-citizen may become a lawful permanent resident through adjustment of status within the U.S. or through consular processing at a U.S. Embassy or Consulate abroad.

There are certain categories of non-citizens who are eligible to adjust their status to become lawful permanent residents under I.N.A. § 245, 8 U.S.C. § 1255. An immediate family member of a U.S. citizen or lawful permanent resident who wants to immigrate based on his family relationship must first have his family member file a visa petition with the CIS, which must either approve or deny the application.[728] As part of the visa petition process, backgrounds checks are conducted by the CIS regarding the petitioner as well as the non-citizen beneficiary.[729] Once the visa petition is approved, the non-citizen may have to wait from several months to years until an immigrant visa becomes available in order to apply to adjust status to a lawful permanent resident.[730] Non-citizens who are the beneficiaries of approved employment-based visa petitions are also eligible to apply for adjustment of status, provided that certain other conditions are met.[731]

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[728] *See* I.N.A. § 204(b), 8 U.S.C. § 1154(b). Non-citizens as well as U.S. citizens may be prosecuted for knowingly entering into a marriage for the purpose of evading a provision of the immigration law and imprisoned for up to five years. *See* I.N.A. § 275(c), 8 U.S.C. § 1325(c); U.S. v. Darif, 446 F.3d 701 (7th Cir. May 3, 2006). A non-citizen who is found to have entered into a marriage to a U.S. citizen solely to obtain lawful permanent residence will be permanently barred from adjustment of status.

[729] *See* 71 Fed. Reg. 70413-92 (Dec. 4, 2006) (discussing the new Background Check Service (BCS) system of record checks which include a FBI fingerprint check, a FBI name check, and a CBP Treasury Enforcement Communication System/Interagency Border Inspection System (TECS-IBIS) name check and the forwarding of information regarding fraudulent or criminal activity to federal and/or local law enforcement agencies).

[730] An exception may be available to non-citizens for whom visa petitions were filed as the children of lawful permanent residents or U.S. citizens under the Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002). The formula for calculating the age of a non-citizen in relationship to the priority date can be confusing. For discussions regarding the history of the CSPA and its application to visa petitions, *see In re* Wang, 25 I&N Dec. 28 (BIA Jun. 16, 2009) (holding that the automatic conversion and priority date retention of the CSPA do not apply to an alien who ages out of eligibility for an immigrant visa as the derivate beneficiary of a fourth-preference visa petition and on whose behalf a second-preference visa petition is later filed by a different petitioner); *In re* Avila-Perez, 24 I&N Dec. 78 (BIA Feb. 9, 2007); Baruelo v. Comfort, 2006 U.S. Dist. LEXIS 94309 (N.D.IL Dec. 29, 2006); *see also,* "2006 Update on Child Status Protection Act: New Administrative Interpretations," Practice Advisory, *American Immigration Law Foundation,* http://www.ailf.org/lac/admin_interpretation_90606.pdf, Sept. 26, 2006.

[731] *See* I.N.A. §§ 204(b), 245, 8 U.S.C. §§ 1154(b), 1255; *see also*, *In re* Perez Vargas, 23 I&N Dec. 829 (BIA Oct. 28, 2005) (holding that an IJ has no authority to determine whether the validity of a non-

The availability of family-based and employment-based immigrant visas is subject to a priority date system based on the relationship of the petitioner to the beneficiary and the filing date of the visa petition. Unless the non-citizen is in the U.S. under a form of temporary status or a non-immigrant visa that allows for it, he may not have a legal right to remain or work in the U.S. until an immigrant visa becomes available.[732] Once the priority date of the petition is current, an immigrant visa is available and the non-citizen can apply for adjustment of status.[733] Eligible immediate relatives of U.S. citizens can file the visa petition and adjustment of status application simultaneously with the CIS where the non-citizen is not in removal proceedings.

Other non-citizens can apply to adjust their status without having a visa petition filed on their behalf or being subject to the priority date system. For example, asylees and refugees must apply to adjust their status to become lawful permanent residents after being in the United States as refugees or asylees for one year and do not need an approved visa petition.[734] Cubans who enter the United States with or without inspection may also apply for adjustment of status one year after their arrival.[735]

An exception to the possibility of being subject to removal from the U.S. while waiting for the immigrant visa to become available exists where the non-citizen is eligible for a "V"

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citizen's approved employment-based visa petition is preserved under 8 U.S.C. § 1154(j) after the non-citizen changes jobs or employers).

[732] *See* Hadayat v. Gonzales, 458 F.3d 659, 662 (7th Cir. Aug. 15, 2006) (discussing the affect of I.N.A. § 245(i)(1), 8 U.S.C. § 1255(i)(1) and the effect that an approved immigrant visa petition has when the non-citizen falls within the preference categories and is not an immediate relative, meaning that he is not a spouse or child under age 21 of a U.S. citizen); Subhan v. Ashcroft, 383 F.3d 591 (7th Cir. Sept. 7, 2004) (discussing the right to a continuance in removal proceedings and eligibility for adjustment of status through an employment-based labor certification and visa petition). For a discussion about "V" visas available to spouses and unmarried children of lawful permanent residents whose I-130 visa petitions have been pending for years for the priority date to become current, see Baruelo v. Comfort, 2006 U.S. Dist. LEXIS 94309 (N.D.IL Dec. 29, 2006).

[733] *See In re* Villareal-Zuniga, 23 I&N Dec. 886 (BIA Mar. 9, 2006) (holding that once an approved immigrant visa petition has been used by the beneficiary to obtain adjustment of status or admission as an immigrant, it cannot be used again to obtain adjustment of status).

[734] *See* Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36; I.N.A. § 209, 8 U.S.C. § 1159 (adjustment of status for refugees and asylees); I.N.A. § 245A, 8 U.S.C. § 1255a (adjustment of status under legalization or amnesty program).

[735] *See* Cuban Refugee Adjustment Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (Nov. 2, 1966). Whether the non-citizen can adjust before the immigration court or the U.S. Citizenship & Immigration Service (USCIS) has recently changed. Only where a non-citizen eligible for adjustment of status under the Cuban Adjustment Act departed the U.S., returned to the U.S. pursuant to a grant of advance parole to pursue an already filed adjustment of status application, and is placed in removal proceedings will the immigration judge have jurisdiction to adjudicate the adjustment of status application. *See In re* Martinez-Montalvo, 24 I&N Dec. 778 (BIA Apr. 20, 2009), *In re* Artigas, 23 I&N Dec. 99 (BIA May 11, 2001), superseded. Non-citizens who qualify for adjustment of status under the Cuban Adjustment Act but who are not in removal proceedings may apply for adjustment of status with the appropriate USCIS district director. *See* 8 C.F.R. § 245.2(a)(1). Those non-citizens who have not departed the U.S. and returned pursuant to advance parole but who are in removal proceedings may apply to the USCIS district director based on the amended federal regulations. *See In re* Martinez-Montalvo, 24 I&N Dec. at 783; 8 C.F.R. §245.2(a)(1) (2006); 8 C.F.R. §1245.2(a)(1) (2006).

visa, a non-immigrant visa created by Congress in December 2000.[736] Where a lawful permanent resident filed a visa petition on or before December 21, 2000 for his or her spouse or child under the age 21 and the visa petition has been pending for three years or more, the non-citizen spouse or child may be eligible for a non-immigrant "V" visa.[737] A "V" visa will allow her to remain in the United States with employment authorization until an immigrant visa is available and she is eligible to apply for adjustment of status within the United States.[738]

In order to be granted adjustment of status, a non-citizen must file the application for adjustment of status, demonstrate that an immigrant visa is immediately available to him, show that he is not inadmissible to the U.S. based on one of the grounds of inadmissibility, and demonstrate that he merits lawful permanent residence in the exercise of discretion.[739] If he is inadmissible, he may be eligible to submit an application for a waiver of the ground of inadmissibility.[740]

Adjustment of status is a discretionary form of relief. In addition to having an approved visa petition, an available visa (current priority date), and meeting the above requirements, a non-citizen must demonstrate that he merits the grant of adjustment of status in the exercise of discretion.[741] The CIS and/or the Immigration Judge can consider a non-citizen's immigration history, any fraud committed, criminal offenses, non-payment of child support, contributions to the community, filing of tax returns, and other evidence relating to positive equities and negative factors.[742]

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[736] *See* Title XI, Encouraging Immigrant Family Reunification, "Family Legal Immigration Family Equity Act (LIFE Act)," §§ 1101, 1102(a)-(b), Title XI of H.R. 5548, enacted by reference in H.R. 4942, 106 Pub. L. No. 553, 114 Stat. 2762 (Dec. 21, 2000).

[737] *See id.*

[738] *See id.*

[739] *See* I.N.A. § 245(a), 8 U.S.C. § 1255(a); Palmer v. I.N.S., 4 F.3d 482 (7th Cir. Aug. 26, 1993); *see also*, Fornalik v. Perryman, 223 F.3d 523 (7th Cir. Aug. 8, 2000) (ordering the enforcement of a grant of deferred action by one I.N.S. office for a child whose visa petition as an abused child of a lawful permanent resident under the Violence Against Women Act (VAWA) had been approved but for whom a visa was not yet available based on the priority date of the petition); Hassan v. I.N.S., 110 F.3d 490, n.5 (7th Cir. Apr. 1, 1997) (discussing that the availability of a section 212(h) waiver does not necessarily bear upon the prima facie approvability of an application for adjustment of status).

[740] *See* § 212(h) waivers, *infra* at 6-58; § 212(i) waivers, *infra* at 6-62; § 209(c) waivers, *infra* at 6-36.

[741] *See* I.N.A. § 245(a); 8 U.S.C. § 1255(a); Singh v. Gonzales, 404 F.3d 1024, 1027-29 (7th Cir. Apr. 15, 2005); Sokolov v. Gonzales, 442 F.3d 566, 569-70 (7th Cir. Mar. 24, 2006).

[742] *See* Pede v. Gonzales, 442 F.3d 570-71 (7th Cir. Mar. 24, 2006) (finding that said convictions for conspiracy to commit visa fraud and visa fraud for causing women in Latvia to use false visas for entry into the U.S. to work as "dancers" in Chicago nightclubs was sufficient to justify the Immigration Judge's denial of a continuance for adjudication of her application of adjustment of status in light of the "ultimate hopelessness" of that application based on said convictions); Singh v. Gonzales, 404 F.3d 1024, 1027-29 (7th Cir. Apr. 15, 2005); Hamdan v. Gonzales, 425 F.3d 1051, 1059-60 (7th Cir. Oct. 13, 2005); Dashto v. I.N.S., 59 F.3d 697 (7th Cir. Jul. 11, 1995); Snajder v. I.N.S., 29 F.3d 1203 (7th Cir. Jul. 21, 1994); Patel v. I.N.S., 738 F.2d 239 (7th Cir. Jul. 5, 1984) (discussing adverse factors to include an absence of good faith entry to the U.S. and lack of close family ties in the U.S.); *In re* Rainford, 20 I&N Dec. 598 (BIA Sept. 9, 1992).

Main categories of non-citizens who may be eligible to apply for adjustment of status to a lawful permanent resident

- Certain relatives of U.S. citizens who have an approved family visa petition:
  - Spouses and unmarried children under age 21 of U.S. citizens.
  - Married children, unmarried children over age 21, and siblings of U.S. citizens who have a current priority date.
  - Parents of U.S. citizens.
- Spouses and unmarried children of lawful permanent residents who have an approved family visa petition with a current priority date.
- Non-citizens who have been battered or have suffered extreme cruelty by their U.S. citizen spouse, parent, son, or daughter and who have an approved VAWA self-petition.
- Non-citizens who have been battered or have suffered extreme cruelty by their lawful permanent resident spouse, parent, or child and who have an approved VAWA self-petition with a current priority date.
- Asylees.
- Refugees.
- Non-citizens who have been physically present in the U.S. for four years in U visa status.
- Employees who have been sponsored by an employer and have an approved labor certification and/or immigrant worker visa petition or religious worker's visa petition.
- Non-citizens who have been physically present in the U.S. for three years in T visa status or until the completion of the investigation or prosecution of the trafficking case, whichever time period is less.
- Non-citizens who have had an S visa for three years and have substantially contributed to the success of a criminal or terrorism investigation or prosecution.
- Non-citizens selected in an annual diversity visa lottery.

There are two types of adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255.[743] First, a non-citizen who was inspected and admitted or paroled into the U.S. may be eligible to adjust his status under I.N.A. § 245(a), 8 U.S.C. § 1255(a) when an immigrant visa is available.[744] For adjustment of status applications under I.N.A. § 245(c)(2), 8 U.S.C. § 1255(c)(2), a non-citizen who has failed to maintain his lawful status since entry into the U.S., other than through no fault of his own or for technical reasons, is ineligible for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a).[745] For example, a failure to maintain lawful status is not "for technical reasons" where the non-citizen filed an application for asylum while in lawful nonimmigrant status, the nonimmigrant status then expired, and the asylum application was referred to the Immigration Court for a hearing with the issuance of a Notice to Appear before the time at which the non-citizen applied for adjustment of status.[746] Where the DHS refers an asylum application to the Immigration

[743] For adjustment of status based on asylee or refugee status, *see* Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36.
[744] *See* I.N.A. § 245(a), 8 U.S.C. § 1255(a).
[745] *See In re* L-K-, 23 I&N Dec. 677 (BIA Sept. 30, 2004).
[746] *See id.*

Court, it has acted on the application other than favorably and this action ends the "technical reasons" for being out of lawful status.[747]

A non-citizen who entered with inspection and overstayed her visa is not subject to the requirement of having maintained lawful status in order to apply for adjustment of status where she is eligible for an immigrant visa as an immediate relative (i.e. a spouse, parent, or an unmarried child under age 21 of a U.S. citizen), qualifies under VAWA based on abuse by a U.S. citizen spouse, child, or parent, or qualifies under I.N.A. § 245(i), 8 U.S.C. § 1255(i).[748] A non-citizen who has been selected in the diversity visa lottery is not "grandfathered" on the basis of a diversity visa alone but may pursue an application for adjustment of status if he is considered grandfathered on another basis, such as the filing of a labor certification or a family visa petition prior to April 30, 2001.[749]

Second, a non-citizen who entered the U.S. without being inspected and admitted or has been paroled into the U.S. may be eligible to adjust her status in the U.S. under I.N.A. § 245(i), 8 U.S.C. § 1255(i) depending upon the date that the visa petition was originally filed with the former INS or CIS. Where a petitioner filed a visa petition for a non-citizen on or before January 14, 1998, the non-citizen may apply for adjustment of status in the U.S. when a visa becomes available and pay a $1,000 fine in lieu of having to return to her country of origin.[750] In addition, where a petitioner filed a visa petition for a non-citizen after January 14, 1998 but before April 30, 2001, and the non-citizen was physically present in the United States on December 21, 2000, the non-citizen may apply for adjustment of status in the U.S. when a visa becomes available and pay a $1,000 fine in lieu of having to return to her country of origin.[751] Such non-citizens may be placed in removal proceedings by the DHS prior to visa petitions being adjudicated or visas becoming available in their cases.

The Immigration Judge, as well as the Board of Immigration Appeals, has the authority to determine whether a non-citizen has established evidence of a bona fide marriage in order to continue removal proceedings until the DHS adjudicates the I-130 visa petition filed by the non-citizen's spouse.[752] Where the CIS has unreasonably delayed the adjudication of an immigrant visa petition or an application for adjustment of status, a non-

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747 *See id.* at 680.

748 *See id.* at 682; I.N.A. § 245(c), 8 U.S.C. § 1255(c); I.N.A. § 245(i), 8 U.S.C. § 1255(i).

749 *See In re* L-K-, 23 I&N Dec. 677, 678-79 (BIA Sept. 30, 2004) (discussing the interplay of I.N.A. § 245(i), 8 U.S.C. § 1255(i) and the regulations at 8 C.F.R. §§ 1245.10(h), 1245.1(d)(1)(ii), 1245.1(d)(2)(ii).

750 *See* I.N.A. § 245(i), 8 U.S.C. § 1255(i).

751 *See* Consolidated Appropriations Act, 2001, Title XV, "LIFE Act Amendments of 2000," §§ 1502, 1506, H.R. 5666 enacted by reference in H.R. 4577, 106 Pub. L. No. 554, 114 Stat. 2763 (Dec. 21, 2000); *see also*, *In re* Wang, 23 I&N Dec. 924 (BIA May 25, 2006) (holding that a non-citizen who entered without inspection is not eligible for adjustment of status under the Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969 in conjunction with I.N.A. § 245(i), 8 U.S.C. § 1255(i) because the adjustment of status application is not based on an immigrant visa petition).

752 *See* Ahmed v. Gonzales, 465 F.3d 806 (7th Cir. Oct. 16, 2006); Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. Nov. 30, 2005); Ssali v. Gonzales, 424 F.3d 556 (7th Cir. Sept. 14, 2005); *In re* Velarde, 23 I&N Dec. 253 (BIA Mar. 6, 2002); *In re* Aurelio, 19 I&N Dec. 458, 460 (BIA Sept. 1, 1987) (holding that an IJ does not have jurisdiction over visa petitions).

citizen and his petitioning relative may file for mandamus relief in federal district court. A district court may grant mandamus relief and order the CIS to adjudicate a visa petition or conduct an act that it has a legal obligation to carry out.[753]

Cancellation of Removal: Lawful Permanent Residents

In IIRAIRA,[754] Congress created a new form of relief for long-term permanent residents who have been convicted of crimes not constituting aggravated felonies and are placed in removal proceedings. Cancellation of Removal for Certain Permanent Residents, I.N.A. § 240A, 8 U.S.C. § 1229b, replaces § 212(c) relief which had been available to non-citizens convicted of crimes for which they could be deported. In limited cases, section 212(c) relief remains available to eligible non-citizens.[755]

Cancellation of removal for lawful permanent residents is available to long-term LPRs placed in removal proceedings on or after April 1, 1997 who have been convicted of certain crimes which are not aggravated felonies. An Immigration Judge has the discretion to weigh positive and negative equities in determining whether the ground for deportability which has arisen since the non-citizen became a permanent resident will be waived. Non-citizens who have previously been granted § 212(c) waivers, suspension of deportation, or cancellation of removal for certain permanent residents are ineligible for this relief.[756] In addition, a non-citizen cannot be granted a §212(c) waiver and cancellation of removal simultaneously where he has been convicted of an aggravated felony.[757]

Case Law

In order to be eligible for cancellation of removal, a non-citizen must be lawfully admitted for permanent residence for not less than five years, have resided in the U.S. continuously for seven years after having been admitted in any status, and have not been convicted of an aggravated felony.[758] Where a non-citizen acquired permanent resident status through fraud or misrepresentation, he has never been "lawfully admitted for permanent residence" and is statutorily ineligible for cancellation of removal.[759]

The period of continuous residence required to be eligible for cancellation of removal commences when the non-citizen has been admitted in any status, including admission as a temporary resident or as a nonimmigrant.[760] Continuous residence or physical presence is deemed to end on the *date that a qualifying offense has been committed*, not the date of

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[753] *See* Iddir v. I.N.S., 301 F.3d 492, 499 (7th Cir. Aug. 6, 2002).
[754] *See* Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[755] *See* Waivers, *infra* at 6-48; IIRAIRA § 347 (noting that replacement of § 212(c) applies prospectively from the date of the IIRAIRA enactment).
[756] *See* I.N.A. § 240A(c)(6), 8 U.S.C. § 1229b(c)(6).
[757] *See* Negrete-Rodriguez v. Mukasey, 518 F.3d 497, 504 (7th Cir. 2008); Esquivel v. Mukasey, 543 F.3d 919 (7th Cir. Sept. 11, 2008).
[758] *See* INA § 240A(a), 8 U.S.C. § 1229b(a).
[759] *See In re* Koloamatangi, 23 I&N dec. 548 (BIA Jan. 8, 2003).
[760] *See In re* Perez, 22 I&N Dec. 689 (BIA May 12, 1999) (temporary resident); *In re* Blancas-Lara, 23 I&N Dec. 458 (BIA Jun. 10, 2002) (nonimmigrant admission with a border crossing card).

conviction.[761] A qualifying offense that terminates the period of continuous physical presence or continuous residence is one that is referred to in I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2) that renders the alien inadmissible under I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2) or removable under I.N.A. § 237(a)(2), 8 U.S.C. § 1227(a)(2).[762] In addition, a non-citizen need not be charged and found inadmissible or removable on a ground specified in I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) in order for the alleged criminal conduct to terminate his continuous residence.[763]

Where a non-citizen has been convicted of two misdemeanor crimes involving moral turpitude, the timing of the commission of the offenses will affect whether he has accrued the requisite seven years of continuous residence following his admission to the U.S. as required for cancellation of removal. Where a lawful permanent resident commits his first misdemeanor offense for a crime involving moral turpitude within the seven year period and is sentenced to a term of imprisonment of six months or less, this offense will fall under the petty offense exception of I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II).[764] Where he accrues seven years of continuous residence prior to the commission of the second crime involving moral turpitude, he will have met the 7 years of continuous residence.[765] However, where he commits both misdemeanor crimes involving moral turpitude within seven years after the date of his admission to the U.S., he will be statutorily ineligible for cancellation of removal, even if he is convicted for the second offense after the 7 year period.[766]

A conviction for a firearms offense, while a deportable offense under I.N.A. § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) does not qualify as an offense to stop the accrual of time for the requirement of continuous residence as it is not an offense contained in I.N.A. § 212(a)(2), 8 U.S.C. § 1227(a)(2).[767] In *In re Campos-Torres*, *supra*, a lawful permanent resident was convicted of a single offense of unlawful use of a weapon in violation of Ch. 38 § 24-1(a)(7) of the Illinois Compiled Statutes Annotated, and sentenced to 18 months of probation. [768] He was convicted of the offense within 7 years of his admission to the United States.[769] More than 7 years after his admission to the United States, the Notice to Appear

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[761] *See In re* Perez, 22 I&N Dec. 689 (BIA May 12, 1999) (holding that the date of the commission of the qualifying offense terminates continuous residence even where the offense was committed prior to the enactment of IIRAIRA). The commission of a qualifying offense terminates a non-citizen's continuous residence on the date of the commission, even if the offense was committed prior to the enactment of IIRAIRA. *See In re* Robles-Urrea, 24 I&N Dec. 22 (BIA Sept. 27, 2006); *see also*, Bakarian v. Mukasey, 541 F.3d 775 (7th Cir. Sept. 4, 2008).

[762] *See In re* Campos-Torres, 22 I&N Dec. 1289 (BIA Mar. 21, 2000).

[763] *See In re* Jurado-Delgado, 24 I&N Dec. 29, 31 (BIA Sept. 28, 2006); *In re* Bautista Gomez, 23 I&N Dec. 893 (BIA Mar. 23, 2006) (holding that an application for cancellation of removal is a continuing one and the provision in 8 C.F.R. § 1003.23(b)(3) regarding the demonstration of eligibility for relief prior to the service of a Notice to Appear only applies to the continuous residence or physical presence requirement).

[764] *See In re* Deanda-Romo, 23 I&N Dec. 597 (BIA May 8, 2003).

[765] *See id.*

[766] *See id.*

[767] *See In re* Campos-Torres, 22 I&N Dec. 1289 (BIA Mar. 21, 2000).

[768] *See id.* footnote 1 (noting that the provision is now designated as 720 ILCS 5/24-1(a)(7)).

[769] *See id.*

was served and stopped the accrual of his continuous residence or physical presence.[770] Based on the facts of the case and its interpretation of the statute that a firearms offense did not stop the accrual of continuous residence or physical presence, the Board found that he was eligible for cancellation of removal.[771] However, a non-citizen convicted of two or more offenses, of which one constitutes a firearms offense, may be found ineligible for cancellation of removal as a result of the termination of the accrual of 7 years continuous residence where the aggregate sentences to confinement actually imposed were 5 years or more and the non-citizen is found to be inadmissible under I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2).[772]

Once a lawful permanent resident meets the statutory requirements for cancellation of removal, she must also establish that she warrants such relief as a matter of discretion.[773] The general standards set forth in *In re Marin*[774] regarding the exercise of discretion for § 212(c) relief apply to the exercise of discretion for cancellation.[775] The Immigration Judge must balance the favorable factors against the negative factors to determine whether on balance the "totality of the evidence" demonstrates that he warrants a favorable exercise of discretion.[776] The positive factors include: 1. family ties in the U.S.; 2. residency of long duration in the U.S.; 3. evidence of hardship to the lawful permanent resident and his family if deportation were to occur; 4. service in the U.S. armed forces; 5. history of employment; 6. existence of business or property ties; 7. existence of value and service to the community; 8. proof of genuine rehabilitation if a criminal record exists; and 9. evidence attesting to his good character.[777] The negative factors include: 1. the nature and underlying circumstances of the grounds of exclusion; 2. additional significant violations of the U.S. immigration laws; 3. existence of a criminal record; and 4. other evidence of bad character or undesirability.[778] Rehabilitation is a factor to be considered, but it is not an absolute prerequisite where a non-citizen has a criminal record.[779]

Application to Cases

Case of Joshua from England

Joshua entered the United States in January 1989 with a B-2 visitor's visa. He became a lawful permanent resident in May 1989 as the step-son of a United States citizen. He has four United States citizen children under the age of eight from a relationship with a U.S. citizen.

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770 *See id.*
771 *See id.*
772 *See* I.N.A. § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (multiple criminal convictions).
773 *See In re* C-V-T-, 22 I&N Dec. 7 (BIA Feb. 12, 1998).
774 *See In re* Marin, 16 I&N Dec. 581 (BIA Aug. 4, 1978); *see also*, § 212(c) and case law, *infra*, at 6-48.
775 *See In re* Perez, 22 I&N Dec. 689 (BIA May 12, 1999); § 212(c) and case law, *infra* at 6-48.
776 *See In re* Sotelo-Sotelo, 23 I&N Dec. 201 (BIA Oct. 25, 2001) (abandoning the outstanding equities requirement under *In re* Marin, *supra*).
777 *See In re* C-V-T-, 22 I&N Dec. 7 (BIA Feb. 12, 1998).
778 *See id.*
779 *See id.*

In January 1995, he was convicted for misdemeanor domestic assault. On December 15, 2008, he and his girlfriend had an argument during which he threw a snowbrush at her. He was arrested and charged with one count of misdemeanor domestic battery under 720 ILCS 5/12-3.2(a)(1). Joshua pled guilty to the charge on January 10, 2009. The state court ordered him to participate in anger management classes and placed him on probation for one year. In May 2009, the DHS served him with a Notice to Appear.

Analysis: Joshua is deportable due to his 2009 Illinois misdemeanor domestic battery conviction but not for the prior 1995 domestic assault conviction since that conviction was entered prior to the passage of IIRAIRA on September 30, 1996. He is statutorily eligible for cancellation of removal as he has been a lawful permanent resident for more than five years, has resided continually in the U.S. for more than seven years, and has not been convicted of an aggravated felony.

Case of Paul from Liberia

Paul came to the United States as a lawful permanent resident in January 1973 when he was 11 years old as the son of a lawful permanent resident. In 1976, he pled guilty to petty theft under a local city ordinance for stealing $5 worth of batteries from a gas station and was placed on probation for five months, which he completed. Under the city ordinance, the maximum penalty was six months probation and a $500 fine. In 2002, he pled guilty to possession of cocaine under Wis. Stat. § 961.41(3g) and was placed on probation for one year which he successfully completed.

In May 2009, Paul was arrested on suspicion of possession of crack, which turned out to be drywall plaster. Charges were never filed by the county attorney. Upon his arrest, however, the county jail called the DHS to report him. The DHS placed an immigration hold on him and he was transferred to DHS custody. ICE served a Notice to Appear on him, charging him with being deportable for his 1992 cocaine conviction.

Analysis: Paul is deportable as he has a conviction for immigration purposes based on his plea and period of probation for his cocaine offense. Even though his theft offense is a crime involving moral turpitude, it does not stop the accrual of his continuous residence nor make him deportable because it falls within the petty offense exception. Rather, his continuous residence period terminated in 2002 when he committed his offense for cocaine possession. At that time, he had accrued more than seven years of continuous residence. Paul has been a permanent resident for more than twenty-six years and has not been convicted of an aggravated felony. Therefore, he is eligible for cancellation of removal.

Case of Marcos from Mexico

Marcos entered the U.S. in March 1991 without inspection by an immigration officer. He became a lawful permanent resident on July 1, 1992, based on his marriage to a U.S. citizen. On December 15, 1996, he was arrested by the police for carrying a firearm without a license and charged with unlawful use of a firearm under 720 ILCS 5/24-1(4). He pled guilty and was sentenced to 30 days in the county jail on January 10, 1997. The state court judge placed him on probation for two years. On March 20, 2005, the DHS served him with a Notice to Appear.

Analysis: Marcos has not been convicted of an aggravated felony as his conviction was for an offense which in essence constitutes a conviction for unlawful possession of a weapon without intent to use it against another person or property. Although he committed the firearms offense within seven years of being admitted as a lawful permanent resident, his firearms offense does not stop the accrual of his physical presence or continuous residence under *In re Campos-Torres*, *supra.* In addition, the DHS served the Notice to Appear more than 7 years after Marcos was admitted to the U.S. as a lawful permanent resident. Marcos is eligible for cancellation of removal.

Cancellation of Removal: Nonpermanent Residents

Cancellation of removal for nonpermanent residents is a discretionary waiver for non-citizens who are not lawful permanent residents and have been physically present in the United States without being detected or arrested by the former INS or the DHS for at least ten years before applying for cancellation. These non-citizens must also demonstrate 10 years of good moral character and exceptional and extremely unusual hardship to a qualifying relative. Cancellation of removal is available as a defense to removal (deportation) in removal proceedings before the Immigration Judge. Prior to IIRAIRA, a similar form of relief called suspension of deportation was available to non-citizens who had been present in the U.S. for at least seven years and could show extreme hardship to themselves or a qualifying family member if the non-citizens were ordered deported.[780] Special rules apply to non-citizen spouses and children who have been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident spouse, parent, or child.[781]

A non-citizen who is granted the relief will be a lawful permanent resident as of the date that a visa number becomes available. Immigration Judges may only grant 4,000 cases per year, although certain nationalities are exempt from the yearly cap and the new standard of hardship under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).[782]

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[780] *See* Suspension of Deportation, *infra* at 6-63. Suspension of deportation was also available to non-citizens with criminal convictions who had been in the U.S. for at least 10 years and could show exceptional and extremely unusual hardship to themselves or a qualifying family member. *See* I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1996). For a discussion of the exceptional and extremely unusual hardship standard under Former I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1996), for suspension of deportation involving criminal convictions, see Cortes-Castillo v. I.N.S., 997 F.2d 1199 (7th Cir. Jun. 23, 1993); Rassano v. I.N.S., 492 F.2d 220, 226-27 (7th Cir. Feb. 21, 1974).

[781] *See* I.N.A. § 240A(b), 8 U.S.C. § 1229b(b); VAWA, *infra* at 6-67 to 6-72.

[782] For statutory eligibility requirements for Nicaraguans and Cubans who entered the United States on or before December 1, 1995, as well as Salvadorans, Guatemalans, and persons from the former Soviet Union and eastern block countries who entered the United States prior to the end of 1990 seeking refuge, see the NACARA, Pub. L. No. 105-100, 111 Stat. 2160 (1997), or contact an immigration attorney.

Case Law

In order to qualify for cancellation of removal, a non-citizen must be physically present in the U.S. for at least 10 years prior to the issuance and service of a Notice to Appear by the DHS or the former INS.[783] Under the stop-time rule, the issuance and service of the Notice to Appear terminates the accrual of the required 10 years of physical presence.[784] The demonstration of statutory eligibility prior to the service of the Notice to Appear applies only to the continuous physical presence requirement and does not bear on the issue of qualifying relatives, good moral character, or hardship.[785]

For purposes of the accrual of continuous physical presence for non-lawful permanent resident cancellation of removal, any absence outside of the U.S. for more than 90 days at a time or 180 days in total within the ten years prior to the issuance of the Notice to Appear terminates a non-citizen's physical presence.[786] The difference in immigration consequences for departures depends on whether a departure was voluntary or was compelled under the threat of deportation or removal proceedings. Where a non-citizen departed the U.S. under threat of deportation or removal proceedings, then the voluntary departure of the non-citizen constitutes a break in the accrual of continuous physical presence.[787] Where a non-citizen departed the U.S. without being under threat of deportation or removal proceedings, i.e. an arrest along the border where she was merely escorted back to the border and she subsequently reentered the U.S., the accrual of her continuous physical presence is not deemed to have been terminated by her voluntary departure.[788]

Good moral character for 10 years is required for this form of cancellation of removal. The period for which good moral character must be established ends with the entry of a final order by the Immigration Judge or the Board of Immigration Appeals.[789] Thus, the 10 year period is calculated backward from the date on which the application for non-LPR cancellation of removal is finally decided by the Immigration Judge or the Board.[790] In

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783 *See* I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1); Angel-Ramos v. Reno, 227 F.3d 942, 947-48 (7th Cir. Sept. 19, 2000).

784 *See* I.N.A. § 240A(d), 8 U.S.C § 1229b(d); Dababneh v. Gonzales, 471 F.3d 806, 810 (7th Cir. Dec. 19, 2006); *In re* Cisneros-Gonzalez, 23 I&N Dec. 668 (BIA Sept. 1, 2004) (distinguishing *In re* Mendoza-Sandino, 22 I&N Dec. 1236 (BIA Feb. 23, 2000) and holding that service of a charging document in a prior proceeding does not end the non-citizen's period of continuous physical presence with respect to an application for cancellation of removal filed in the current proceeding).

785 *See In re* Bautista Gomez, 23 I&N Dec. 893 (BIA Mar. 23, 2006).

786 *See* I.N.A. § 240A(d)(2), 8 U.S.C. § 1229b(d)(2); Tapia v. Ashcroft, 351 F.3d 795, 799 (7th Cir. Dec. 16, 2003).

787 *See In re* Romalez-Alcaide, 23 I&N Dec. 423 (BIA May 29, 2002).

788 *See* Morales-Morales v. Ashcroft, 384 F.3d 418 (7th Cir. Sept. 15, 2004) (distinguishing situations where a non-citizen agrees to voluntary depart in lieu of deportation or removal proceedings and those where a non-citizen is simply taken back to the border but is not threatened with deportation or removal proceedings); Lopez v. Gonzales, 427 F.3d 492, 498 (7th Cir. Oct. 26, 2005).

789 *See In re* Ortega-Cabrera, 23 I&N Dec. 793 (BIA Jul. 21, 2005).

790 *See id.*

addition, a non-citizen must establish statutory eligibility for cancellation of removal at the time an application is finally decided.[791]

The case law regarding eligibility for cancellation of removal under I.N.A. § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) where a non-citizen has been convicted of a crime involving moral turpitude that falls within the petty offense exception under I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) is currently unclear. The commission of one petty offense that is a crime involving moral turpitude does not bar a non-citizen from establishing the required good moral character under I.N.A. § 101(f)(3), 8 U.S.C. § 1101(f)(3).[792] In 2003, the Board held that a non-citizen who has been convicted of a crime involving moral turpitude that falls within the petty offense exception is not statutorily ineligible for cancellation of removal.[793] Then, in April 2009, the Board changed course and without discussing its prior precedent, it held that such an offense renders a non-citizen ineligible for cancellation of removal.[794]

> **Note:** A motion to reconsider the *Almanza-Arenas* decision is pending with the Board of Immigration Appeals, and challenges to the decision will be ongoing. For an excellent practice advisory, see K. Brady, "Defense Arguments against *Matter of Almanza-Arenas*, 24 I&N Dec. 772 (BIA 2009)," Immigrant Legal Resource Center, available at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

The IIRAIRA changed the standard of hardship for cases initiated since April 1, 1997, requiring a non-citizen to show "exceptional and extremely unusual hardship" to a U.S. citizen or permanent resident spouse, parent, or child. This new standard covers all cases initiated by the filing of a Notice to Appear in Removal Proceedings on or after April 1, 1997, except for the cases which fall under the NACARA for which the extreme hardship standard will be applied.

The Board of Immigration Appeals has interpreted the term "exceptional and extremely unusual hardship" to mean hardship to a qualifying family member that is substantially beyond that which would ordinarily be expected to result from the deportation of a non-citizen but need not be unconscionable.[795] The Board held that the hardship must

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[791] *See In re* Bautista Gomez, 23 I&N Dec. 893 (BIA Mar. 23, 2006) (holding that an application for cancellation of removal is a continuing one and the provision in 8 C.F.R. § 1003.23(b)(3) regarding the demonstration of eligibility for relief prior to the service of a Notice to Appear only applies to the continuous residence or physical presence requirement).

[792] *See* Good Moral Character, *supra* at 6-12.

[793] *See In re* Garcia-Hernandez, 23 I&N Dec. 590 (BIA May 8, 2003) (also holding that even where a non-citizen has more than one petty offense (meaning more than one misdemeanor offense), he remains eligible for non-permanent resident cancellation of removal if only one of those crimes is a crime involving moral turpitude). In addition, where a non-citizen was convicted before September 30, 1996 of an offense that would otherwise fall within I.N.A. § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E), he is not barred from establishing eligibility for cancellation of removal because his conviction predates the effective date of the provision enacted under IIRAIRA. *See In re* Gonzalez-Silva, 23 I&N Dec. 218 (BIA Jun. 27, 2007).

[794] *See In re* Almanza-Arenas, 24 I&N Dec. 771 (BIA Apr. 13, 2009).

[795] *See In re* Monreal, 23 I&N Dec. 56 (BIA May 4, 2001).

be beyond that required historically for suspension of deportation.[796] Factors to be considered include the ages, health, and circumstances of the qualifying family members.[797] Poor economic conditions and diminished educational opportunities in the home country, marital status of the non-citizen, lack of familiarity of the qualifying family members to communicate in the language of the non-citizen's home country, family ties in the U.S. and the home country, and the unavailability of an alternative means of immigration to the U.S. may also be considered.[798] Hardship factors relating to the non-citizen applicant may be considered only to the extent that they may affect the hardship to the qualifying family member, such as a lower standard of living or adverse country conditions in the home country.[799]

Application to Cases

Case of Margarita from Panama

Margarita entered the United States as an F-1 student in January 1987 to study English for one year. In November 1997, she married Pablo, a lawful permanent resident from Panama. Pablo was the only child of his parents who died when he was 22 years old. Pablo did not file a marriage visa petition for Margarita because he said that she did not need a green card since she was going to remain at home to care for their U.S. citizen son with cerebral palsy.

In May 2006, Pablo fell from a scaffold at a construction site and died from internal hemorrhaging. After his funeral, Margarita asked a neighbor to watch her son. She went to apply for a job at the mall where a store owner called the DHS after discovering that she did not have a green card. Margarita was arrested and then released to continue caring for her son. Margarita has a 2001 misdemeanor retail theft conviction for which she was completed 20 hours of community service as ordered by the state court.

Analysis: Margarita is eligible for cancellation of removal. She has been physically present in the United States for more than ten years, and she can demonstrate good moral character as her misdemeanor theft conviction falls within the "petty offense" exception under I.N.A. § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) as a crime involving moral turpitude. She must show that her United States citizen son would suffer exceptional and extremely unusual hardship if she were removed or deported to Panama. Such hardship can be shown through evidence of lack of medical facilities and support for her son in Panama, as well as the fact that if she is deported, her son does not have any other family in the United States who can care for him.

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[796] *See id.* (citing *In re* Anderson, 16 I&N Dec. 596 (BIA Aug. 31, 1978)); *see also*, Suspension of Deportation, *infra* at 6-63.

[797] *See id.* at 63.

[798] *See In re* Andazola-Rivas, 23 I&N Dec. 319 (BIA Apr. 3, 2002); *In re* Recinas. 23 I&N Dec. 467 (BIA Sept. 19, 2002).

[799] *See id.*; *see also* Leyva v. Ashcroft, 380 F.3d 303 (7th Cir. Aug. 13, 2004) (holding that the court of appeals does not have jurisdiction to review whether the non-citizen has demonstrated exceptional and extremely unusual hardship).

Case of Enrique from Spain

Enrique entered the United States as a B-2 tourist in 2001 and was informed by the INS that he could remain in the U.S. as a visitor for 60 days. He overstayed his sixty-day visit and started working for his uncle. In 2005, he married Sonia from Spain who was living in the U.S. unlawfully. Their U.S. citizen daughter was born in January 2007.

In November 2006, Enrique was stopped by the local police for running a red light. The police officer asked him for his license and his green card. Enrique told the officer that he did not have a green card. The officer called the DHS who arrested Enrique and issued him a Notice to Appear before an Immigration Judge. Enrique does not have any family member in the United States who can file a family visa petition for him which would give him an immediate relative visa.

Analysis: Enrique is not eligible for cancellation of removal. He has not been in the United States for the statutory minimum period of ten years. In addition, it is unlikely that he can demonstrate exceptional and extremely unusual hardship to his United States citizen daughter who is an infant. Enrique's only defense to removal is voluntary departure.[800]

Practice Tips

Since good moral character and the absence of certain criminal convictions is required for a non-citizen to establish eligibility for this form of cancellation of removal, it is essential to try to get a charge for a crime involving moral turpitude (such as fraud or theft) against the non-citizen dismissed. In the alternative, try to plead a non-citizen to a crime that will not bar her from eligibility for cancellation of removal. For cases involving criminal charges against a battered, mentally abused, or emotionally abused non-citizen who has been admitted to the U.S. and may otherwise qualify for cancellation of removal, a limited waiver may be available.[801]

Asylum and Refugees

Non-citizens may arrive in the United States after being forced to flee their home countries due to political threats on their lives. In certain countries, membership in a union, student group, religious organization, or political party which peacefully and politically opposes an elected or military government can put a person's life at risk. Many non-citizens have been arrested, imprisoned, and tortured or suffered other forms of persecution before arriving in the United States. They may have family members and friends who have been disappeared by governmental or non-governmental forces. They fear for their safety and their family's safety if forced to return to their home country.

Such non-citizens are eligible to apply for asylum unless they are statutorily barred based on certain criminal convictions, including aggravated felonies and particularly serious crimes, or other actions, such as material support to a terrorist organization (willful

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800 *See* Voluntary Departure, *infra* at 6-78.

801 *See* I.N.A. § 237(a)(7), 8 U.S.C. § 1227(a)(7).

or coerced), terrorist activity, presenting a danger to the security of the United States, persecution of other persons on enumerated grounds, or foreign convictions for serious non-political crimes.[802] Criminal convictions rendered by foreign courts may be subject to scrutiny in the U.S. asylum application process to determine the legitimacy of the conviction based on procedures followed and international reaction to the trial and conviction.[803]

Asylum applicants must meet the definition of "refugee" which is an international standard[804] adopted by the United States in the enactment of the Refugee Act of 1980.[805] A refugee is a person outside of his or her country of nationality or country of last habitual residence where he or she has no nationality 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 [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[806] A non-citizen must file his application for asylum within one year of arrival in the United States unless he can establish that extraordinary circumstances apply to his case or that country conditions have changed since his arrival.[807]

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[802] *See* I.N.A. § 208(b); 8 U.S.C. § 1158(b); *see also*, U.S. v. Kumpf, 483 F.3d 785 (7th Cir. Feb. 23, 2006) (finding that the person's actions as an armed guard at a Nazi concentration camp constituted personal assistance in persecution under the Refugee Relief Act and holding that denaturalization was warranted); U.S. v. Fedorenko, 449 U.S. 490, 505, 512 (Jan. 21, 1981) (discussing the Refugee Relief Act of 1953 and assistance or advocacy of persecution of another person or persons and holding that an armed guard with orders to shoot persons who attempted to escape from a camp assisted in the persecution of civilians); U.S. v. Ciurinskas, 148 F.3d 729, 734 (7th Cir. Jun. 19, 1998); Doe v. Gonzales, 484 F.3d 445 (7th Cir. Apr. 17, 2007) (discussion regarding participation in persecution and membership in the Salvadoran armed forces following the murder of six Jesuit priests); I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (May 3, 1999) (serious non-political crime); Comollari v. Ashcroft, 378 F.3d 694 (7th Cir. Aug. 10, 2004) (discussing country conditions to give context to whether acts constitute the commission of a serious non-political crime). In an exceptional case, the Seventh Circuit Court of Appeals allowed a non-citizen who had been convicted of an aggravated felony to apply for asylum nunc pro tunc where he was found deportable by the Immigration Judge at a hearing at which he was denied the right to counsel, the Board of Immigration Appeals reversed the decision of the Immigration Judge and remanded the case for a new hearing, and Congress in the interim enacted a law which rendered him ineligible for asylum. *See* Batanic v. I.N.S., 12 F.3d 662 (7th Cir. Dec. 17, 1993). In certain circumstances, material support to a terrorist organization may be waived by the DHS. *See* "Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act," Michael Chertoff, Secretary of Homeland Security, USDHS, April 27, 2007, available at www.dhs.gov and 72 Fed. Reg. 26138 (May 8, 2007); *see also*, *In re* S-K-, 23 I&N Dec. 936 (BIA Jun. 8, 2006) (holding that the Board did not have authority to grant a waiver to a non-citizen who provided "material support" to a terrorist organization and that no exception existed for cases involving the use of justifiable force to repel attacks by forces of an illegitimate regime); *In re* U-H-, 23 I&N Dec. 355 (BIA Apr. 5, 2002).

[803] *See* Doe v. Gonzales, 484 F.3d 445 (7th Cir. Apr. 17, 2007).

[804] *See* Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, T.I.A.S. No. 6577 (1951); Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, T.I.A.S. No. 6577 (1967).

[805] *See* Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (1980).

[806] *See* I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

[807] *See*, *e.g. In re* Y-C-, 23 I&N Dec. 286 (BIA Mar. 11, 2002).

An asylum applicant must prove that a possibility of persecution exists (10% chance)[808] which differs from the probability of persecution standard required for withholding of deportation/removal (51% or more likely than not).[809] An applicant for asylum can establish a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act.[810] An applicant may be granted asylum based on past persecution on account of one or more of the five grounds without showing a well-founded fear of future persecution.[811] However, if an applicant demonstrates past persecution, a rebuttable presumption of future persecution applies.[812] The DHS may rebut the presumption of future persecution by demonstrating that there has been a fundamental change in country conditions or circumstances or that the applicant could avoid persecution by relocating to another part of the proposed country for removal.[813] Case law regarding asylum is extensive and continually developing.

The CIS or an Immigration Judge may exercise her discretion in deciding whether to grant a non-citizen asylum. While most misdemeanor convictions and traffic violations will not statutorily bar a non-citizen from applying for asylum, such convictions and violations may be used to deny asylum in the exercise of discretion. A non-citizen who is granted asylum within the territory of the United States has the immigration status of an asylee and is eligible for certain benefits, including employment authorization.[814] One year after having been granted asylum, an asylee may apply for adjustment of status to become a lawful permanent resident.[815] An asylee's status is considered indefinite until he becomes a lawful permanent resident or his status is terminated by the DHS or an Immigration Judge.[816]

Refugees are non-citizens who have been determined by representatives of the United States government to meet the definition of refugee while overseas. Often they are recognized as refugees while in a refugee camp run by the United Nations High Commissioner for Refugees (U.N.H.C.R.). Non-citizens may also apply for refugee status at a United States Consulate or Embassy. Refugees are admitted to the United States under I.N.A. § 207, 8 U.S.C. § 1157. A non-citizen who is a refugee has the immigration status of

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808 *See* Cardoza-Fonseca v. I.N.S., 480 U.S. 421, 469 (Mar. 9, 1987).

809 *See* Stevic v. I.N.S., 467 U.S. 407, 430 (Jun. 5, 1984); Carvajal-Munoz v. I.N.S., 743 F.2d 562 (7th Cir. Sept. 12, 1984).

810 *See In re* Mogharrabi, 19 I&N Dec. 439 (BIA June 12, 1987). The Seventh Circuit has rejected derivative claims for asylum by non-citizen parents of U.S. citizen children based on potential hardship to the child in the event of the parent's removal from the U.S. *See, e.g.*, Oforji v. Ashcroft, 354 F.3d 609, 618 (7th Cir. Dec. 31, 2003).

811 *See* 8 C.F.R. § 208.13(b); *see also*, Kholyavskiy v. Mukasey, 540 F.3d 555 (7th Cir. Aug. 28, 2008); *In re* H-, 21 I&N Dec. 337 (BIA May 30, 1996); *In re* D-V-, 21 I&N Dec. 77 (BIA May 25, 1993); *In re* Chen, 20 I&N Dec. 16, 18-19 (BIA Apr. 25, 1989).

812 *See* 8 C.F.R. § 208.13(b)(1)(i)(B); Lhanzom v. Gonzales, 430 F.3d 833, 848-49 (7th Cir. Dec. 5, 2005); Ghebremedhin v. Ashcroft, 385 F.3d 1116, 1120 (7th Cir. Oct. 13, 2004); Bace v. Ashcroft, 352 F.3d 1133, 1140 (7th Cir. Dec. 18, 2003).

813 *See id.*

814 *See Asylee Eligibility for Resettlement Assistance: A Short Guide*, The National Asylee Information and Referral Line, CLINIC, January 2007.

815 *See* Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36.

816 *See id.*

a refugee indefinitely and may apply one year later for adjustment of status to become a lawful permanent resident.[817] A refugee who travels abroad and returns to the U.S. with a refugee travel document is subject to the grounds of inadmissibility.[818]

A non-citizen who is ineligible for asylum due to criminal acts or statutory bars may be eligible for withholding of removal, a mandatory form of relief. If she demonstrates that it is more likely than not that she will suffer persecution if returned to her country of nationality (or country of last habitual residence where an applicant has no nationality), the CIS or Immigration Judge must grant her withholding of removal/deportation unless she is statutorily ineligible on account of having been convicted of a "particularly serious crime" or other statutory bar.[819] A non-citizen who has been granted withholding may remain and work in the U.S. but cannot adjust her status to become a lawful permanent resident based on the grant of withholding.

A non-citizen may also be eligible for relief under the Convention against Torture if she can prove by substantial evidence that she will probably be tortured upon return to her country.[820] Similar to withholding of removal under I.N.A. § 241(b)(3), 8 U.S.C. § 1251(b)(3), a non-citizen whose removal has been withheld or deferred under the Convention against Torture may remain and work in the U.S. but cannot adjust her status to become a lawful permanent resident based on the grant of relief under the Convention against Torture. Where a non-citizen is ineligible for asylum, withholding of removal or relief under the Convention against Torture, analyzing the possibility of withdrawal of guilty pleas, sentence reductions, pardons, and post-conviction relief is critical.[821]

Case Law

Unlike withholding of deportation or removal and relief under the Convention against Torture which must be granted if the non-citizen proves her statutory eligibility, asylum may be denied in the exercise of discretion to a non-citizen who establishes statutory eligibility for the relief.[822] An asylum officer or Immigration Judge will consider the totality of the non-citizen's circumstances in the exercise of discretion.[823] Factors to be considered include: whether the non-citizen passed through any other countries or arrived in the United States directly from the country of persecution; whether orderly refugee procedures were in fact available to help him in any country he passed through and whether he made any attempts to seek asylum or refugee status before coming to the United States; the length of time he remained in a third country and the living conditions, safety, and potential for long-term residency there; personal ties to the United States; whether he

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817 *See id.*

818 *See* Shamoun v. District Director, I.N.S., 967 F.Supp. 1051, 1054-55 (N.D.IL Jun. 19, 1997) (holding that a non-citizen who was previously admitted to the U.S. as a refugee and who returned to the U.S. with a valid refugee travel document was properly excluded by the Immigration Judge based on his 1983 Illinois conviction for delivery of a controlled substance).

819 For the statutory bars to withholding of removal and a discussion on particularly serious crimes, see Withholding of Removal, *infra* at 6-40.

820 *See* Convention Against Torture, *infra* at 6-45.

821 *See* Post-Conviction Relief, *infra* at 8-12.

822 *See id.*; Cardoza-Fonseca v. I.N.S., 480 U.S. 421 (Mar. 9, 1987).

823 *See In re* Pula, 19 I&N Dec. 467 (BIA Sept. 22, 1987).

engaged in fraud to circumvent orderly refugee procedures and the seriousness of any fraud; age or health; immigration violations in the United States; and criminal history in the United States.[824] The danger of persecution should generally outweigh all but the most egregious of adverse factors in his case.[825]

Application to Cases

Case of Ivan from Bulgaria

Ivan was expelled from Bulgaria by Communist government officials for his political organizing activities in March 1988. He lived in Austria for three years where he applied for asylum, but his asylum claim was never adjudicated by the government. He came to the United States as a tourist in July 1991 and immediately applied for asylum with the former INS. His application was misplaced by the INS for several years.

In December 2004, Ivan was arrested for misdemeanor driving under the influence. He pled guilty and received fifteen days in the county jail.

Analysis: Ivan is eligible for asylum. He has not been convicted of an aggravated felony. His conviction will be considered in the totality of the circumstances and should not bar a favorable exercise of discretion if the Immigration Judge finds him credible and to have a well-founded fear of future persecution. In light of the changed country conditions and democracy now in Bulgaria, he may be denied asylum.[826] As a former citizen of an Eastern Bloc country, he may be eligible for cancellation of removal under the NACARA.[827]

Case of Michael from Sudan

Michael was forcibly recruited into a guerrilla force at age twelve to fight against the Muslim government in southern Sudan. Three years later, he defected and fled to a refugee camp in Kenya. In 2004, he was recognized by the United States Government as a refugee and brought to the United States, where he resettled in Wisconsin. In July 2005, he adjusted his status to become a lawful permanent resident.

In December 2005, he went with a friend to Indiana to visit friends. Outside of a grocery store, he was assaulted by some local teenagers looking for money. His friends called the police who arrived at the store. One of the officers grabbed Michael from behind and Michael kicked him, believing that the officer was one of the teens. He was arrested and later pled guilty to felony battery against a police officer under IC 35-42-2-1(a)(2)(A). He received a suspended sentence of nine months in jail and was placed on probation. In

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[824] *See id.*; *see also*, I.N.A. § 208(d), 8 U.S.C. § 1158(d); 8 C.F.R. § 1208.20; *In re* Y-L-, 24 I&N Dec. 151 (BIA Apr. 25, 2007) (holding that an Immigration Judge must allow an asylum applicant to account for any discrepancies or implausible aspects of the claim and then address the issue of frivolousness in an asylum application and make specific findings that an applicant deliberately fabricated material elements of an asylum claim before a non-citizen may be rendered permanently ineligible for any immigration benefits).

[825] *See id.*

[826] *See* 8 C.F.R. § 208.13(b)(1), "Asylum Procedures," 65 Fed. Reg. 76161 (2000).

[827] *See* Cancellation of Removal for Nonpermanent Residents, *supra* at 6-28.

May 2006, his probation officer told him to come to his office. Michael was surprised to see two ICE officers at the probation office. They arrested him for having committed a crime involving moral turpitude within five years of admission and placed him in removal proceedings.

Analysis: Michael is eligible to apply for asylum because he has not been convicted of an aggravated felony. The Immigration Judge will consider the seriousness of his conviction against the persecution that Michael would face if returned to Sudan. The Immigration Judge will also consider whether he has violated his probation and has support from the community where he now lives.

Practice Tips

Where a non-citizen fears persecution in her country of origin or last habitual residence and is charged with an aggravated felony, work with the prosecutor and the court to reduce the charge to a crime not considered to be an aggravated felony. This will allow the non-citizen to maintain her eligibility for asylum unless the resulting conviction is found to involve a particularly serious crime. In situations where the non-citizen may have committed the crime as a result of post-traumatic stress disorder, major depression, or other mental disorder, document the disorder through a psychiatric evaluation and move to continue the case to allow her to obtain appropriate professional treatment and to dismiss the charge against the non-citizen.[828]

Termination of Asylum and Adjustment of Status for Asylees and Refugees

The issues involving criminal offenses and convictions for asylees and refugees are relevant until after they become U.S. citizens. Refugees and asylees are eligible to apply to adjust their status to become lawful permanent residents after residing in the United States for one year.[829] At the time of their applications for adjustment, they are subject to all of the grounds of inadmissibility. Although a waiver of the grounds of inadmissibility under I.N.A. § 209(c), 8 U.S.C. § 1159 may be possible for their certain convictions, refugees and asylees may also be subject to the grounds of deportability for convictions.[830] Refugees and asylees may be placed in removal proceedings based on criminal convictions and/or other violations of the immigration laws without having had their asylee or refugee status terminated, even where they adjusted their status to become lawful permanent residents.[831]

The waiver of the grounds of inadmissibility for a refugee and an asylee is very broad. For humanitarian purposes, family unity, or when it is otherwise in the public interest, the

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[828] For assistance to obtain an evaluation and possible treatment for your client, see Appendices 1H and 1I for information about Marjorie Kovler Center and the Center for Victims of Torture.

[829] *See* I.N.A. § 209(a)-(b), 8 U.S.C. § 1159(a)-(b).

[830] *See* Grounds of Inadmissibility and Adjustment of Status, *supra* at 4-1; Grounds of Deportability, *supra* at 3-1.

[831] *See* Gutnik v. Gonzales, 469 F.3d 683 (7th Cir. Nov. 29, 2006); *In re* Smriko, 23 I&N Dec. 836, 839-42 (BIA Nov. 10, 2005) (holding held that an alien who was admitted as a refugee and then adjusted status to become a lawful permanent resident could be subject to removal proceedings based on a criminal conviction without his refugee status first being terminated).

DHS or the Attorney General may waive the majority of the grounds of inadmissibility, including public charge, most criminal convictions, unlawful presence, and false claims to U.S. citizenship.[832] Grounds of inadmissibility which cannot be waived include those related to drug traffickers, persons deemed to constitute a security threat, terrorist activities, activities which would have potentially adverse foreign policy consequences, Nazi persecution, and participation in genocide.[833] Where an alien has been convicted of a violent or dangerous crime, a waiver and adjustment of status will not be granted "except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of such status adjustment would result in exceptional and extremely unusual hardship."[834]

A non-citizen who entered the U.S. as a refugee, adjusted his status to become a lawful permanent resident, and then became deportable based on criminal convictions is not eligible to readjust his status under I.N.A. § 209(a), 8 U.S.C. § 1159(a) based on his prior entry as a refugee.[835] If he is granted asylum by the Immigration Judge or the Board of Immigration Appeals in removal proceedings, then he may be eligible to adjust his status under I.N.A. § 209(b), 8 U.S.C. § 1159(b) as an asylee one year after being granted asylum.[836]

Relevant to the ability of a refugee or an asylee to remain in the U.S. and pursue an application for adjustment of status and, where required a waiver, is whether his status may be terminated. A refugee's status may be terminated by the CIS or an Immigration Judge where it is proven that the refugee committed fraud or was not a refugee within the meaning of I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) at the time that he was admitted to the U.S.[837] In comparison, an asylee's status may be terminated by the DHS or an Immigration Judge if he is convicted of a crime constituting an aggravated felony or a particularly serious crime, among other reasons.[838]

Termination of asylee status based on a criminal conviction is not, however, mandatory.[839] Rather, an asylee who qualifies for and merits adjustment of status under I.N.A. § 209(b), 8 U.S.C. § 1159(b) along with a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c) may be granted such benefits by the CIS or by the Immigration Judge or the Board of Immigration Appeals after he is placed in removal proceedings.[840] A balancing of the

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832 *See* I.N.A. § 209(c), 8 U.S.C. § 1159(c).

833 *See id*; *see also*, *In re* H-N-, 22 I&N Dec. 1039 (BIA Oct. 13, 1999).

834 *See In re* Jean, 23 I&N Dec. 373 (A.G. May 2, 2002); Ali v. Achim, 468 F.3d 462, 466-67 (7th Cir. Nov. 6, 2006) (affirming the Board's ruling regarding the heightened standard for a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c) for violent or dangerous crimes in *In re* Jean, 23 I&N Dec. 373 (A.G. May 2, 2002)).

835 *See* Gutnik v. Gonzales, 469 F.3d 683, 688-92 (7th Cir. Nov. 29, 2006).

836 *See* I.N.A. § 209(b), 8 U.S.C. § 1159(b).

837 *See* I.N.A. § 207(c)(4), 8 U.S.C. §1157(c)(4) (providing for termination of refugee status where alien was not a refugee within I.N.A. § 101(a)(42), 8 U.S.C. §1101(a)(42) at time of admission).

838 *See* I.N.A. § 208(c)(2), 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 208.23; *cf.* I.N.A. § 207(c)(4), 8 U.S.C. § 1157(c)(4) (providing for termination of refugee status where the Attorney General determines that the non-citizen was not a refugee as defined at I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) at the time of admission); 8 C.F.R. § 207.9.

839 *See In re* K-A-, 23 I&N Dec. 661 (BIA Jun. 23, 2004).

840 *See id.* at 664-67.

equities of the asylee, including family ties, length of residence in the U.S., community ties, and other evidence indicating that the conviction is not indicative of her character and describing her as an asset to society, against any negative factors, such as prior immigration law violations and criminal history, should take place prior to the entry of a decision to terminate asylum. [841] Evidence of an asylee's equities should be presented in response to the DHS' Notice of Intent to Terminate Asylum.[842]

Once an asylee's status is terminated, he is no longer eligible for adjustment of status in conjunction with a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c). Depending upon the reason for the termination of asylum, he may be eligible for withholding of removal and/or relief under the Convention against Torture.[843]

On account of the delays in adjudicating asylee adjustment applications as well as the possibility that the CIS can terminate an asylee's status for certain criminal convictions, particular attention must be paid to situations where asylees are facing criminal charges which may constitute particularly serious crimes or aggravated felonies. Care must be taken in advising refugees, asylees, and other non-citizens who fear persecution and/or torture abroad about the immigration consequences of their pleas to criminal charges as an order of removal may result in the realistic possibility of persecution, torture, or even death.

Application to Cases

Case of Soua from Laos

Soua is a 75 year old man from Laos. He fought with General Vang Pao and other Hmong who assisted the United States government during the Vietnam War. In 1975, he and his family fled to Thailand where they lived in a refugee camp for 15 years. In 1998, he entered the United States as a refugee with his wife and they joined their son and his family in Rockford, Illinois. He never applied to adjust his status to become a lawful permanent resident.

In August 2008, Soua was arrested and charged with possession of 15 grams of morphine. He was released on his own recognizance by the sheriff the same day on account of his advanced age and health condition. In November 2008, he pled guilty and the court placed him on probation for two years under 720 ILCS 570/410 for possession of morphine. The court also ordered him to participate in a controlled substance treatment program which he completed. In January 2009, the DHS served him with a Notice to Appear, charging him as being deportable for having been convicted of a controlled substance offense after being admitted to the U.S. as a refugee.

Analysis: Soua is statutorily eligible to apply for adjustment of status and a § 209(c) waiver before the Immigration Court. If he had been convicted for sale of morphine or

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841 *See id.*; *see also*, *In re* H-N-, 22 I&N Dec. 1039, 1045 (BIA Oct. 13, 1999).

842 *See In re* K-A-, 23 I&N Dec. 661 (BIA Jun. 23, 2004) (discussing the process by which ICE or CIS can move to terminate an asylee's status and the balancing of positive and negative factors).

843 *See* Withholding of Removal, *infra* at 6-40; Convention Against Torture, *infra* at 6-45.

possession with the intent to deliver morphine, he would have been ineligible because the ground of drug trafficking could not be waived. It is likely that the Immigration Court would grant the request for the § 209(c) waiver in light of Soua's family ties in the U.S., his past military history assisting the U.S. forces in Laos during the Vietnam War, and his advanced age.

Case of Jean from the Democratic Republic of Congo

Jean entered the U.S. in January 1998. He applied for asylum in March 1998. In September 1998, the Chicago INS Asylum Office granted him asylum. In September 1999, he filed an asylee application for adjustment of status with the INS.

Jean became involved with a credit card fraud ring in Gary, Indiana. In February 2008, Jean was arrested for using the social security number and credit card of another person to credit and to purchase goods on-line which totaled $20,000. In November 2008, he was convicted of fraud under IC-35-43-5-4(1)(C), a Class D felony. In his plea, he admitted to having caused a loss of $15,000 to the victim. He was sentenced to 11 months in jail and placed on probation for 5 years.

Upon completion of his jail term, he was transferred to DHS custody. The DHS detained him under the mandatory detention provisions of I.N.A. § 236(c), 8 U.S.C. § 1226(c), charging him with having been convicted of an aggravated felony under I.N.A. § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M).[844] The DHS terminated his asylum status and then placed him in removal proceedings.

Analysis: Jean is ineligible for a waiver under I.N.A. § 209(c), 8 U.S.C. § 1159(c) because he is no longer an asylee. He is also ineligible to request asylum on account of his aggravated felony conviction. He is eligible for withholding of removal as his conviction will most likely not be found to constitute a particularly serious crime. In addition, he is eligible for relief under the Convention against Torture. Jean will remain in DHS custody under the mandatory detention provisions unless his application for relief is granted or unless his application is denied and he is removed from the United States.[845]

Case of Marcos from Guatemala

In 1989 Marcos fled persecution by a guerrilla group during the civil war in Guatemala. He entered the U.S. in 1993 and was granted asylum by the Immigration Judge in Texas. He has never applied for adjustment of status but instead has renewed his employment authorization document annually. The guerrilla group has since disbanded after the arrest, conviction, and imprisonment of its leader. The civil war also ended several years ago.

In November 2008, Marcos was arrested for drunk driving. He pled guilty to one misdemeanor count of operating a motor vehicle while intoxicated ("OWI") in violation of Wis. Stat. § 346.63(1)(b) and received one year of probation. When he applied to renew his

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[844] *See* Mandatory Detention, *infra* at 7-3.
[845] *See id.*

employment authorization card, the CIS sent him a notice to appear for a biometrics appointment. At the appointment, he was informed that he needed to appear at the Chicago CIS Asylum Office to discuss his immigration status.

Analysis: Marcos's asylee status should not be terminated based on his OWI conviction as it should be found not to constitute a particularly serious crime. However, he will need to prove that he remains a refugee as defined by I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) in order to avoid termination of his asylum based on changed conditions and to be eligible for adjustment of status as an asylee. Even if his asylee status is terminated, he may be eligible to apply for adjustment of status pursuant to the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).[846]

Withholding of Removal (formerly known as Withholding of Deportation)

The expansion and retroactivity of the definition of aggravated felony has greatly impacted non-citizens in Illinois, Indiana, and Wisconsin. Illinois is the home to refugees and asylees from many countries, including El Salvador, Ethiopia, Cuba, Guatemala, Laos, Liberia, Nicaragua, Somalia, the former Soviet Union, Sudan and Vietnam. Many refugees and asylees have become permanent residents but not United States citizens for various reasons, including difficulty in learning English.

Withholding of removal/deportation is a critical form of relief for asylees, refugees, and lawful permanent residents who face a probability of persecution, including torture and death, if they are forced to return to their home countries. If an Immigration Judge finds that a non-citizen has not been convicted of an aggravated felony but denies asylum in the exercise of discretion, then the Immigration Judge must grant withholding of removal/deportation where the non-citizen has proven that he or she would probably be persecuted if deported to his or her country of nationality or last habitual residence. A grant of withholding of removal will not lead to adjustment of status to become a lawful permanent resident ("green" card) for the non-citizen. A grant of withholding does, however, withhold the removal or deportation of the non-citizen to the country where she will face probable persecution. The Attorney General can revoke a grant of withholding upon a finding that she no longer faces a probability of persecution due to a change in country conditions.

Even where a non-citizen can prove that she will be harmed or killed upon her return, she is statutorily barred from withholding if an Immigration Judge determines that she has been convicted of a "particularly serious crime" or has been sentenced to an aggregate term of imprisonment of five years or more for an aggravated felony. Other statutory bars, including conviction of a serious non-political crime and persecution of others, may apply to render a non-citizen statutorily ineligible for withholding of removal.[847] A non-citizen will be removed after the order of removal is final and the government of the country to which she will be removed agrees to accept her.

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[846] *See* Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).

[847] *See* I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3); *see also*, Asylum and Refugees, *supra* at 6-31.

Particularly Serious Crimes

A non-citizen may be found to be convicted of a particularly serious crime for an aggravated felony as well as a crime which is not an aggravated felony.[848] A non-citizen convicted of one or more aggravated felonies for which the aggregate sentence is at least five years is considered to have committed a particularly serious crime, rendering him statutorily ineligible for withholding of deportation.[849] Where a non-citizen has been convicted of two or more convictions deemed to be aggravated felonies and has received concurrent sentences to imprisonment, the aggregate term of imprisonment is equal to the length of the longest concurrent sentence for purposes of determining eligibility for withholding of removal under I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3).[850]

For a non-citizen convicted of an aggravated felony and sentenced to less than five years imprisonment, the burden of proof and standard to determine whether he has been convicted of a particularly serious crime depends on whether the non-citizen is in deportation or removal proceedings. Where a non-citizen has been convicted of an aggravated felony or felonies, sentenced to less than five years imprisonment, and placed in removal proceedings, the Immigration Judge must conduct an individual examination of the nature of the conviction, the sentence imposed, and the circumstances and underlying facts of the conviction to determine whether he has been convicted of a particularly serious crime.[851] The DHS has the burden of proving that he has been convicted of a particularly serious crime in removal proceedings.[852]

For a non-citizen in deportation proceedings, however, a different standard is applied and the burden of proof is on the non-citizen. In deportation proceedings, a non-citizen convicted of an aggravated felony or felonies and sentenced to less than five years must rebut the presumption that she has been convicted of a particularly serious crime.[853] If an

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[848] *See* I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3); Ali v. Achim, 468 F.3d 462, 468-70 (7th Cir. Nov. 6, 2006); *see also,* Appendix 6H, Chart: Particularly Serious Crime Bars to Removal.

[849] *See In re* H-M-V-, 22 I&N Dec. 256 (BIA Aug. 25, 1998); *See In re* S-S-, 22 I&N Dec. 458 (BIA Jan. 21, 1999), overruled in *In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002); *In re* Q-T-M-T-, 21 I&N Dec. 639 (BIA Dec. 23, 1996).

[850] *See In re* Aldabesheh, 22 I&N Dec. 983 (BIA Aug. 30, 1999).

[851] *See In re* S-S-, 22 I&N Dec. 458 (BIA Jan. 21, 1999), overruled in *In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002) (following *In re* Frentescu, 18 I&N Dec. 244, 247 (BIA June 23, 1982), which held that whether a crime is a "particularly serious crime" depends on the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community). *See also*, *In re* L-S-, 22 I&N Dec. 645 (BIA Apr. 16, 1999) (holding that a non-citiizen convicted of bringing an illegal non-citizen into the U.S. in violation of I.N.A. § 274(a)(2)(B)(iii), 8 U.S.C. § 1324(a)(2)(B)(iii) and sentenced to 32 months' imprisonment had not been convicted of a particularly serious crime and was eligible to apply for withholding of removal).

[852] *See In re* S-S-, 22 I&N Dec. 458 (BIA Jan. 21, 1999), overruled in part by *In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002).

[853] *See In re* Q-T-M-T-, 21 I&N Dec. 639 (BIA Dec. 23, 1996). Prior to the 1996 statutory changes regarding withholding of deportation, a non-citizen in deportation proceedings who was convicted of an aggravated felony was statutorily ineligible for withholding of deportation under I.N.A. § 243(h)(2), 8 U.S.C. § 1253(h)(2) as amended by the Immigration Act of 1990, Pub.L. 101-649, 104 Stat. 4978 (1990). *See* Mansoori v. I.N.S., 32 F.3d 1020, 1022-1023 (7th Cir. Aug. 8, 1994); Groza v.

evaluation of the nature and circumstances of the offense indicates that the particular aggravated felony cannot be rationally deemed "particularly serious" in light of United States treaty obligations under the United Nations Protocol Relating to the Status of Refugees,[854] the presumption can be overcome.[855]

Prior to the 1996 statutory changes, certain crimes had been held to be inherently particularly serious crimes, including all aggravated felonies.[856] These categories or types of inherently particularly serious crimes no longer exist.[857]

Other crimes may be found to be "particularly serious crimes" based upon an analysis of the facts and the *Frentescu* test.[858] Such convictions include drug trafficking,[859]

I.N.S., 30 F.3d 814, 820 (7th Cir. Jul. 14, 1994); Garcia v. I.N.S., 7 F.3d 1320, 1323 (7th Cir. Oct. 21, 1993).

[854] *See* Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268, T.I.A.S. No. 6577 (1967).

[855] *See In re* Q-T-M-T-, 21 I&N Dec. 639 (BIA Dec. 23, 1996) (holding that robbery with a deadly weapon was a particularly serious crime where lives were threatened and endangered); *see also*, *In re* L-S-J-, 21 I&N Dec. 973 (BIA July 29, 1997) (holding that robbery with a deadly weapon was a particularly serious crime).

[856] *See* Mansoori v. I.N.S., 32 F.3d 1020 (7th Cir. Aug. 8, 1994) (attempted possession of cocaine with intent to deliver); Groza v. I.N.S., 30 F.3d 814, 822-23 (7th Cir. Jul. 14, 1994) (rape, aggravated battery, and aggravated kidnapping); Garcia v. I.N.S., 7 F.3d 1320, 1324-26 (7th Cir. Oct. 21, 1993) (conspiracy to deliver cocaine; also holding that once a non-citizen is found to have been convicted of an aggravated felony and therefore a particularly serious crime, he is automatically barred from withholding of deportation without a separate determination of whether he constitutes a danger to the community); Hernandez-Gonzalez v. Moyer, 907 F.Supp. 1224, 1227 (N.D.IL Dec. 12, 1995) (Illinois conviction for armed robbery). *See also*, Ahmetovic v. I.N.S., 62 F.3d 48 (2nd Cir. July 27, 1995) (first degree manslaughter); Dor v. I.N.S., 891 F.2d 997 (2d Cir. Dec. 8, 1989) (first degree manslaughter); Abascal-Montalvo, 901 F. Supp. 309 (D. Kan. Sept. 29, 1995) (armed criminal assault); Cepero v. I.N.S., 882 F. Supp. 1575 (D. Kan. Mar. 31, 1995) (aiding and abetting armed bank robbery); *In re* H-M-V-, 22 I&N Dec. 256 (BIA Aug. 25, 1998) (conspiracy to possession with intent to distribute heroin and possession with intent to distribute heroin); *In re* C-, 20 I&N Dec. 529 (BIA May 28, 1992) (murder); *In re* B-, 20 I&N Dec. 427 (BIA Nov. 19, 1991) (aggravated battery); *In re* Carballe, 19 I&N Dec. 357 (BIA Feb. 13, 1986) (armed robbery with a deadly weapon); *In re* Garcia-Garrocho, 19 I&N Dec. 423 (BIA Dec. 5, 1986) (first degree residential burglary).

[857] *See In re* S-S-, 22 I&N Dec. 458 (BIA Jan. 21, 1999), overruled in *In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270 (A.G. 2002) (explaining and distinguishing *In re* Gonzalez, 19 I&N Dec. 682 (BIA July 27, 1988)).

[858] *See, e.g.*, Hamma v. I.N.S., 78 F.3d 233 (6th Cir. Mar. 7, 1996) (an alien convicted of felonious assault, possession of firearm in commission of a felony, and carrying a pistol in a vehicle was found to pose a substantial risk of violence toward another person and thus was found to have been convicted of a particularly serious crime); Maashio v. I.N.S., 45 F.3d 1235 (8th Cir. Jan. 26, 1995) (two misdemeanor convictions for third degree sexual misconduct and repeated misdemeanor convictions for driving under the influence evidenced serious criminal misconduct and a danger to the community); *cf. In re* L-S-, 22 I&N Dec. 645 (BIA Apr. 16, 1999) (holding that a conviction for bringing an illegal alien into the U.S. in violation of I.N.A. § 274(a)(2)(B)(iii), 8 U.S.C. § 1324(a)(2)(B)(iii) was not a particularly serious crime).

[859] *See* Al-Salehi v. I.N.S., 47 F.3d 390 (10th Cir. Feb. 8, 1995) (guilty plea and conviction for possession with intent to distribute at least 500 grams of cocaine); Mosquera-Perez v. I.N.S., 3 F.3d 553 (1st Cir. Sept. 10, 1993) (conviction for possession of cocaine with intent to distribute); *In re* K-, 20 I&N Dec. 418 (BIA Nov. 5, 1991) (conviction for distribution and possession with intent to distribute); *In re* U-M-, 20 I&N Dec. 327 (BIA June 5, 1991) (conviction for sale of marijuana and

concealing stolen weapons,[860] and robbery.[861] Although drug trafficking crimes are presumed to be particularly serious crimes, a non-citizen may rebut that presumption by demonstrating the circumstances of the offense, minimally including: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.[862] Once all six criteria have been met, then other extenuating circumstances may be considered to determine that the offense is not particularly serious.[863] Cooperation with law enforcement authorities, prior limited criminal histories, downward sentencing departures, and post-arrest claims of innocence will not support a finding that the offense is not a particularly serious crime.[864]

In comparison, simple possession of a controlled substance is not an aggravated felony[865] and generally is not a particularly serious crime.[866] Two convictions for simple possession of a controlled substance, while a drug trafficking crime under Seventh Circuit precedent, may not be a particularly serious crime.[867] Where the initial charging document alleges a drug trafficking offense, such as possession with intent to deliver or delivery, attention and care must be taken to move to strike any police reports or other evidence from the state court record, to be specific in amending the charge to simple possession of a controlled substance and the amount, and to stating the factual basis for the plea allocution

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LSD); *In re* Gonzalez, 19 I&N Dec. 682 (BIA Jul. 27, 1988) (guilty plea and conviction for two counts of trafficking in heroin). A drug trafficking crime as defined in 18 U.S.C. § 924(c) is an aggravated felony. *See* I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). For a drug offense to be an aggravated felony, it must fall under 18 U.S.C. § 924(c)(2) as a felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substance Import and Export Act (21 U.S.C. § 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. § App. 1901, *et seq.*). *See* I.N.A. § 101(a)(43), 8 U.S.C. § 1101(a)(43); Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006). A drug offense falls within 18 U.S.C. § 924(c)(2) where the offense is punishable under the Controlled Substance Act, the Controlled Substance Import and Export Act, or the Maritime Drug Law Enforcement Act *and* the offense is a felony. *See* 21 U.S.C. § 802(13). An offense is a felony if the maximum term of imprisonment authorized for the offense is more than one year. *See* 18 U.S.C. § 3559(a)(1)(5). An offense is a misdemeanor if the maximum term of imprisonment is five days to one year. *See* 18 U.S.C. §§ 3559(a)(6)-(8).

860 *See* Yang v. I.N.S., 109 F.3d 1185, 1189-90 (7th Cir. Mar. 18, 1997).

861 *See In re* S-V-, 22 I&N Dec. 1306 (BIA May 5, 2000) (robbery); *In re* L-S-J-, 21 I&N Dec. 973 (BIA July 29, 1997) (robbery with a deadly weapon); Hernandez-Gonzalez v. A.D. Moyer, 907 F. Supp. 1224, 1227 (N.D.IL Dec. 12, 1995) (armed robbery); *In re* Carballe, 19 I&N Dec. 357, 360-61 (BIA Feb. 13, 1986) (armed robbery).

862 *See In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270, 276-77 (A.G. Mar. 5, 2002).

863 *See id.* at 277; *see also*, Tunis v. Gonzales, 447 F.3d 547, 548-50 (7th Cir. May 15, 2006).

864 *See id.*

865 *See* Lopez v. Gonzales, 549 U.S. 47 (Dec. 5, 2006); *but see In re* Moncada-Servellon, 24 I&N Dec. 62 (BIA Jan. 25, 2007); *In re* Davis, 20 I&N Dec. 536 (BIA May 28, 1992).

866 *See In re* Toboso-Alfonso, 20 I&N Dec. 819 (BIA Mar. 12, 1990) (designated by Attorney General Janet Reno as precedent on June 19, 1994) (holding that simple possession of a controlled substance is not a particularly serious crime).

867 *See* Bosede v. Mukasey, 512 F.3d 946 (7th Cir. Jan. 14, 2008).

and sentencing factors as the transcripts of the plea hearing and sentencing hearing may all be considered initially by the Immigration Judge to determine whether the offense of simple possession of a controlled substance is a particularly serious crime.

Application to Cases

Case of Cheng from Laos

Cheng is Hmong. He fought with the U.S. CIA in Laos from 1960 to 1975 under the direction of General Pao. In 1975, he fled to Thailand where he lived with his family in a refugee camp. In September 1980, he came to the United States as a refugee and later adjusted his status to become a lawful permanent resident.

Cheng was arrested in St. Paul on August 31, 1990, and charged with possession with intent to distribute 800 grams of opium and with fourth degree assault. In two jury trials in 1991, he was convicted and then sentenced to serve 47 months for the opium possession and twelve months for the assault. Cheng moved to Chicago in 1997 and applied for naturalization. At his naturalization interview in October 2008, the DHS served him with a Notice to Appear and placed him in removal proceedings.

Analysis: Cheng is deportable for his controlled substance conviction and for his assault conviction. His controlled substance offense constitutes drug trafficking as an aggravated felony under I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), and his assault conviction is an aggravated felony as a crime of violence under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). Cheng has been sentenced to 59 months in prison for his aggravated felony convictions, one month less than the five year aggregate imprisonment bar.

In removal proceedings, the DHS will have the burden to prove that he has been convicted of a particularly serious crime, and Cheng may attempt to demonstrate that he has not.[868] If the Immigration Judge finds that he has not been convicted of a particularly serious crime, he will then be allowed to apply for withholding of removal based on his fear that he will probably be killed by the Communist Laotian government on account of his participation with the CIA and political opposition to the Communist government. If the Immigration Judge finds that he has been convicted of a particularly serious crime, Cheng may be granted deferred removal under the Convention Against Torture if he can prove a probability of torture by the Laotian government in Laos.

Since Cheng's convictions constitute convictions for aggravated felonies, Cheng cannot defend his "green card" or lawful permanent residence through cancellation of removal, even though he has been a lawful permanent resident for more than 20 years.[869] He is also ineligible for a § 212(c) waiver as he was convicted at trial, not by guilty plea.[870]

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[868] *See In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270, 276-77 (A.G. Mar. 5, 2002).
[869] *See* I.N.A. § 240A(a), 8 U.S.C. § 1229b(a); Cancellation of Removal, *supra* at 6-23.
[870] *See* § 212(c) Waivers, *infra* at 6-48.

Post-conviction relief, however, may provide relief for Cheng if he is able to obtain both a reduction in his sentence for the assault and a vacatur of the controlled substance conviction. If he is successful in state court on both convictions, he will be able to move to terminate his removal proceedings because he will no longer be deportable. A judgment that is vacated eliminates the conviction *ab initio*, as having been illegal from the time it was imposed.[871]

Practice Tips

To avoid the effect of the retroactive expanded definition of aggravated felony, seek to have a non-citizen who was originally convicted of a single crime (which is now defined as an aggravated felony) and sentenced to a term of imprisonment of more than five years to be re-sentenced to a term of imprisonment of less than five years (i.e. 59 months) in order to preserve eligibility for withholding of removal/deportation.[872] Defense counsel may try to have a non-citizen convicted of a single aggravated felony for which he was originally sentenced to a term of imprisonment of more than one year to be re-sentenced to less than one year (i.e. 11 months or 364 days), thus preserving eligibility for other forms of relief, such as cancellation of removal for certain permanent residents and asylum. Reducing a sentence by one day (from 365 to 364 days) for a sentence-based aggravated felony will still result in a conviction for the prosecution but will allow an otherwise eligible non-citizen the opportunity to apply for relief from immigration consequences.

In addition, "good" facts should be entered into the record when a non-citizen client pleads guilty to a crime. Such facts may include where an unloaded gun or toy gun was used in the case of a burglary offense or where a victim consented when a non-citizen is charged with criminal sexual conduct involving his underage girlfriend.

Convention Against Torture

For non-citizens who face probable torture if returned to their country of origin, another form of relief from removal may be available to them.[873] The United States is a party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[874] Under Article 3 of the CAT, the United States is prohibited from removing a non-citizen to a country where there are substantial grounds for believing that she would be in danger of being subjected to torture.[875]

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871 *See In re* Kaneda, 16 I&N Dec. 677 (BIA Feb. 28, 1979); *In re* Sirhan, 13 I&N Dec. 592 (BIA Jun. 19, 1970).

872 *See* Post-Conviction Relief, *supra* at 8-12 to 8-24.

873 For a discussion regarding the time frames for filing a motion to reopen to apply for relief under the Convention against Torture, see Kay v. Ashcroft, 387 F.3d 664 (7th Cir. Oct. 29, 2004).

874 *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 (entered into force for the United States Nov. 20, 1994). *See also*, 136 Cong. Rec. S17486-92 (daily ed. Oct. 27, 1990).

875 *See* Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a)-(b), Pub. L. 105-277, Div. G, Oct. 21, 1998, reprinted in 144 Cong. Rec. H11265 (daily ed. Oct. 19, 1998) (incorporating Article 3 of the Convention Against Torture into U.S. law and enacting implementing legislation for the Convention Against Torture); 64 Fed. Reg. 8478 (1999) (amending Title 8 of the Code of Federal

Treaty

Article 3, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[876]

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Case Law

The torture faced by a non-citizen in her country of origin or country to which she may be removed includes physical or mental torture.[877] A non-citizen must prove that the torture would be inflicted by or with the acquiescence of a public official or another person acting in an official capacity.[878] All evidence relevant to the possibility of torture of a non-citizen within the country of removal must be considered.[879] An individual may establish

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Regulations to allow non-citizens to apply for relief under the Convention Against Torture). Prior to the passage of implementing legislation and the promulgation of regulations pertaining to the Convention Against Torture, the federal courts and the Executive Office for Immigration Review did not have jurisdiction over claims brought under the Convention Against Torture. *See* Calderon v. Reno, 39 F.Supp.2d 943 (N.D.IL Dec. 3, 1998); *In re* H-M-V-, 22 I&N Dec. 256 (BIA Aug. 25, 1998).

[876] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, U.N. GAOR, 34th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 (entered into force for the United States Nov. 20, 1994).

[877] Torture has been defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a). *See also*, Comollari v. Ashcroft, 378 F.3d 692, 697 (7th Cir. Aug. 10, 2004) (stating that assassination is a form of torture and rejecting the government's "clean kill" philosophy that assassination is not torture).

[878] *See In re* J-E-, 23 I&N Dec. 291 (BIA Mar. 22, 2002); *In re* S-V-, 22 I&N Dec. 1306 (BIA May 5, 2000) (holding that protection under the Convention Against Torture extends to persons who fear that torture would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity and that protection does not extend to persons who fear entities that a government is unable to control); *see also*, Mansour v. I.N.S., 230 F.3d 902 (7th Cir. Oct. 16, 2000) (holding that a non-citizen's claim under the Convention Against Torture must be considered apart from his claim for asylum).

[879] *See* 8 C.F.R. §208.16(c)(3); *see also*, Lian v. Ashcroft, 379 F.3d 457 (7th Cir. Aug. 12, 2004); Doe v. Gonzales, 484 F.3d 445 (7th Cir. Apr. 17, 2007) (discussing evidence of country conditions, including reports by national and international commissions and expert witness testimony, that the

that he will be tortured based on a combination of factors, including his religion, his ethnicity, the duration of his residence in the United States, and the fact that he is a criminal deportee.[880] Female genital mutilation has been found to constitute torture.[881]

Thus, a non-citizen who is ineligible for asylum or withholding of removal may be eligible to have his removal deferred until a time when he does not face the probability of torture in that country upon his return. Similar to withholding of removal, a grant of deferral of removal will not lead to lawful permanent residency. Moreover, a grant of deferral of removal does not guarantee release from ICE custody and the grant may be reconsidered when conditions in the country for removal change.

Whether a non-citizen is entitled to relief under the Convention against Torture for his prior cooperation with local, state, or federal authorities in the investigation and prosecution of criminal offenses is a matter which may be considered.[882] Where a non-citizen has been convicted of an aggravated felony, however, the Seventh Circuit Court of Appeals has held that it does not have jurisdiction to consider whether an Immigration Judge or the Board of Immigration Appeals correctly considered, interpreted, and weighed the evidence presented in denying a claim for relief under the Convention against Torture.[883]

Application to Cases

Case of Michael from Sudan

Michael entered the U.S. in June 1998 on a tourist visa. In December 1998, he married a U.S. citizen. He was granted lawful permanent residency in April 1999 by the INS in Bloomington, Minnesota. He and his wife moved to Illinois in June 1999.

Prior to coming to the United States, Michael was arrested by government forces in Sudan in October 1997 and held in prison for eight months during which time soldiers interrogated him about his political activities. The soldiers beat him daily with pieces of barbed wire and electrically shocked him in various parts of his body. He was released and told to report daily to his local police station and not to have any contact with persons involved in politics or the rebels. The same government forces which tortured Michael remain in control of the majority of the country and the war between the government and the rebel forces continues.

Immigration Judge overlooked in his decision and remanding the case to the Board of Immigration Appeals for further proceedings); *In re J-F-F-*, 23 I&N Dec. 912 (A.G. May 1, 2006) (holding that the evidence must establish each step in the hypothetical chain of events regarding the claim that torture is more likely than not to happen).

[880] *See In re G-A,* 23 I&N Dec. 366 (BIA May 2, 2002).

[881] *See* Tunis v. Gonzales, 447 F.3d 547, 550-52 (7th Cir. May 15, 2006).

[882] *See* Enwonwu v. Gonzales, 438 F.3d 22, 35 (1st Cir. Feb. 13, 2006) (remanding to the BIA for further consideration where the non-citizen provided evidence that the Nigerian military would take retribution against him because of his cooperation with the U.S. drug enforcement administration); *cf. In re* M-B-A-, 23 I&N Dec. 474 (BIA Sept. 24, 2002).

[883] *See* Petrov v. Gonzales, 464 F.3d 800 (7th Cir. Oct. 6, 2006); Hamid v. Gonzales, 417 F.3d 642, 647-48 (7th Cir. Jan. 31, 2005); *cf.* Tunis v. Gonzales, 447 F.3d 547 (7th Cir. May 15, 2006).

In August 2008, Michael suffered a severe flashback regarding his torture by government soldiers. When a man approached him late at night on a sidewalk in front of the local public library, Michael believed that the man was one of the government soldiers. Fearing that the man was going to hit him with barbed wire, Michael punched the man in the face, breaking his nose. Michael continued to beat him until he lost consciousness. He was arrested by the police two blocks away.

Michael pled guilty to aggravated battery under 720 ILCS 5/12-4(a). The court sentenced him to two years in prison and three years of probation. Upon completion of his prison sentence, he was transferred to the custody of the DHS and detained under the mandatory detention provisions. The DHS served him with a Notice to Appear and filed the charging document with the Immigration Court.

Analysis: Michael is eligible to apply for withholding of removal under I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) and relief under the Convention against Torture. He is not, however, eligible for asylum or adjustment of status with a § 212(h) waiver.[884] Aggravated battery with great bodily injury is a crime of violence under 18 U.S.C. § 16(b) and an aggravated felony under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

If the Immigration Judge finds that his conviction is a particularly serious crime, then he will be eligible only for deferral of removal under the Convention against Torture based on his claim that he faces probable torture by government officials in Sudan. His past experiences of torture and the fact that the government which tortured him remains in power will be considered by the Immigration Judge. If the Immigration Judge grants him the relief of deferral of removal under the Convention against Torture, then the DHS may consider his release from custody under the procedures for an order of supervision.[885]

Waivers under I.N.A. § 212(c), 8 U.S.C. § 1182(c)

Section 212(c) relief is a discretionary waiver of the grounds of exclusion (inadmissibility) that an Immigration Judge can grant to a lawful permanent resident convicted of certain crimes. Originally only available to returning residents in exclusion proceedings, it was made available to lawful permanent residents who had not departed the United States but were in deportation proceedings.[886] In essence, it allows a lawful permanent resident a second chance to keep his or her legal residency in the United States.[887] Before changes made by the AEDPA and IIRAIRA, section 212(c) relief was often granted to non-citizens with convictions such as misdemeanor possession of a controlled substance, theft and assault. Non-citizens in the United States who were placed in deportation proceedings prior to the enactment of the AEDPA but found statutorily

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[884] *See* Asylum and Refugees, *supra* at 6-31; 212(h) Waivers, *infra* at 6-58.
[885] *See* Mandatory Detention, *infra* at 7-3.
[886] *See* Francis v. I.N.S., 532 F.2d 268 (2d Cir. Mar. 9, 1976); *see also*, Leal-Rodriguez v. I.N.S., 990 F.2d 939, 949 (7th Cir. Apr. 6, 1993), as amended Apr. 19, 1993.
[887] *See* I.N.S. v. St. Cyr, 533 U.S. 289, 296, n. 5 (Jun. 25, 2001) (citing statistics that indicate that 51.5% of the 212(c) applications in which a final decision was reached between 1989 and 1995 were granted).

ineligible for relief under section 212(c) due to the enactment of the AEDPA may be eligible to apply for relief under section 212(c).[888] A lawful permanent resident who committed an offense before AEDPA § 440(d) but was convicted after the enactment of AEDPA is not eligible for a § 212(c) waiver.[889]

In the landmark case of *I.N.S. v. St. Cyr*, the Supreme Court held that a § 212(c) waiver "remains available for aliens. . . whose convictions were obtained through plea agreements and who, not withstanding those convictions, would have been eligible for the § 212(c) relief at the time of their plea under the law then in effect."[890] Thus, a lawful permanent resident who pled guilty prior to April 24, 1996 to controlled substance offenses, multiple crimes involving moral turpitude, or certain aggravated felony offenses for which he served less than five years of imprisonment remains eligible for a § 212(c) waiver in exclusion, deportation, or removal proceedings.

1996 Amendments to I.N.A. § 212(c) and the Subsequent Litigation

The history of the 1996 amendments to I.N.A. § 212(c), 8 U.S.C. § 1182(c), and subsequent 11 years of litigation remain relevant to the analysis of eligibility for § 212(c) relief for lawful permanent residents with old convictions. It is also relevant to former lawful permanent residents who were deported between 1996 and 2001 and who may be facing illegal reentry charges. Furthermore, the litigation at the federal courts of appeals continues today regarding the 1996 amendments and availability of relief for lawful permanent residents who went to trial rather than pleading guilty to criminal charges.

Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) eliminated the availability of § 212(c) for non-citizens convicted of any controlled substance offense (including misdemeanor possession offenses), any aggravated felony, any firearms offense, or more than one felony offense for a crime involving moral turpitude. On February 21, 1997, the Attorney General issued a decision on certification in *In re Soriano*,[891] following her previous vacatur of the Board's published opinion on September 12, 1996. Attorney General Reno determined that the application of AEDPA § 440(d) to I.N.A. § 212(c) does not impair a right, increase a liability, or impose new duties on criminal aliens and concluded that AEDPA § 440(d) could be applied retroactively to applications under I.N.A. § 212(c) involving controlled substance or firearms offenses pending before the Immigration Court on April 24, 1996.

In re Soriano, *supra*, led to the filing of more than 800 cases in federal court.[892] Eight circuit courts of appeals overturned the Attorney General's decision in *In re Soriano, supra*.[893] The Seventh Circuit Court of Appeals was the only circuit to uphold the Attorney

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[888] *See* Executive Office for Immigration Review: Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436 (2001).
[889] *See* Domond v. I.N.S., 244 F.3d 81, 84-85 (2nd Cir. Mar. 23, 2001).
[890] *See* I.N.S. v. St. Cyr, 533 U.S. 289, 326 (Jun. 25, 2001).
[891] *See In re* Soriano, 21 I&N Dec. 516 (A.G. Feb. 21, 1997).
[892] *See* Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436, 6438 (2001).
[893] Constitutional challenges were brought in federal courts on whether AEDPA § 440(d) applies retroactively to 212(c) cases filed with the Immigration Court on or before April 24, 1996 in light of

General's decision that the AEDPA § 440(d) applied retroactively to non-citizens in deportation proceedings at the time of enactment.[894]

In light of the favorable precedent decisions by federal circuit courts of appeal other than the Seventh Circuit Court of Appeals and the need for uniform application of the immigration law nationwide, the Attorney General provided, by regulation, that AEDPA § 440(d) does not apply to the cases of lawful permanent residents whose deportation proceedings began prior to the enactment of the AEDPA on April 24, 1996.[895] Known as the *Soriano* regulations, they permit those lawful permanent residents to apply for relief under § 212(c) if they were statutorily eligible and placed in deportation proceedings prior to the enactment of the AEDPA. Such eligible lawful permanent residents with final

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the United States Supreme Court decision in Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (Apr. 26, 1994) (holding that a presumption against retroactivity applies when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive because "settled expectations should not be lightly disrupted"). The federal courts that have decided the issue on statutory interpretation grounds held that AEDPA section 440(d) does *not* apply retroactively to lawful permanent residents who filed applications for section 212(c) relief prior to the enactment of the AEDPA. *See* Goncalves v. Reno, 144 F.3d 110, (1st Cir. May 15, 1998), *cert. denied*, Reno v. Goncalves, No. 98-835, 119 S. Ct. 1140 (Mar. 8, 1999); Henderson v. Reno, 157 F.3d 106 (2nd Cir. Sept. 18, 1998), *cert. denied sub nom.* Reno v. Navas, No. 98-996, 526 U.S. 1004, 119 S. Ct. 1140, 143 L.Ed.2d 208 (Mar. 8, 1999); Sandoval v. Reno, 166 F.3d 225, 239-42 (3rd Cir. Jan. 26, 1999); Tasios v. Reno, 204 F.3d 544, 547-52 (4th Cir. Feb. 28, 2000); Shah v. Reno, 184 F.3d 719 (8th Cir. Jul. 1, 1999); Magana-Pizano v. I.N.S., 200 F.3d 603 (9th Cir. Dec. 27, 1999); Mayers v. I.N.S., 175 F.3d 1289, 1301-04 (11th Cir. May 20, 1999). The First Circuit Court of Appeals held that the AEDPA section 440(d) does not apply to lawful permanent residents placed in deportation proceedings prior to the passage of AEDPA, even if they had not requested relief under section 212(c) until after the enactment of the AEDPA. *See* Wallace v. Reno, 194 F.3d 279, 285-88 (1st Cir. Oct. 26, 1999). Three circuit courts of appeals held that the AEDPA section 440(d) bars eligibility for section 212(c) relief for lawful permanent residents placed in proceedings after the enactment of the AEDPA, even where their criminal offenses were committed prior to the enactment of the AEDPA. *See* DeSousa v. Reno, 190 F.3d 175, 185-87 (3rd Cir. Aug. 25, 1999); Requena-Rodriguez v. Pasquaraell, 190 F.3d 299, 306-8 (5th Cir. Sept. 15, 1999); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1147-52 (10th Cir. Aug. 19, 1999), *cert. denied sub nom.* Palaganas-Suarez v. Greene, No. 99-7964, 120 S.Ct. 1539 (Mar. 27, 2000). Four circuit courts of appeals held that the AEDPA section 440(d) does not apply to non-citizens who pled guilty and were convicted of a qualifying offense if the non-citizen could show reliance on the availability of relief under section 212(c) at the time of the plea. *See* Jideonwo v. I.N.S., 224 F.3d 692, 700 (7th Cir. Aug. 23, 2000); Tasios v. Reno, 204 F.3d 544 (4th Cir. Feb. 28, 2000); Mattis v. Reno, 212 F.3d 31 (1st Cir. May 8, 2000); Magana-Pizano v. I.N.S., 200 F.3d 603 (9th Cir. Dec. 27, 1999). Two circuit courts of appeals held that the AEDPA section 440(d) does not apply to non-citizens who pled guilty prior to the enactment of the AEDPA. *See* St. Cyr v. I.N.S., 229 F.3d 406 (2nd Cir. Sept. 1, 2000) *cert. granted*, I.N.S. v. St. Cyr, 121 S.Ct. 848, 148 L.Ed.2d 733 (Jan. 12, 2001), *affirmed,* I.N.S. v. St. Cyr, 533 U.S. 289 (Jun. 25, 2001); Tasios v. Reno, 204 F.3d 544 (4th Cir. Feb. 28, 2000).

894 *See* LaGuerre v. I.N.S., 164 F.3d 1035, 1041 (7th Cir. Dec. 22, 1998), *cert. denied*, No. 99-148, 120 S.Ct. 1157 (Feb. 22, 2000) (holding that the AEDPA § 440(d) applies retroactively to aliens convicted of crimes that were committed before the date of enactment of the AEDPA); Musto v. Perryman, 193 F.3d 888 (7th Cir. Sept. 20, 1999); Chow v. Reno, 193 F.3d 892 (7th Cir. Sept. 20, 1999); Turkhan v. I.N.S., 188 F.3d 814, 824-28 (7th Cir. Aug. 16, 1999), rehearing and rehearing en banc denied (7th Cir. Oct. 12, 1999).

895 *See* 8 C.F.R. § 212.3(g); Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436-6446 (2001).

administrative deportation orders from the Board of Immigration Appeals or an Immigration Judge who are presently in the United States without having departed or been deported from the U.S. had to file motions to reopen their deportation cases by July 23, 2001.[896] However, these regulations do not apply to non-citizens who have been physically deported from the U.S.[897] or to those non-citizens whose applications were denied on substantive grounds or in the exercise of discretion.[898]

The Seventh Circuit has recognized three situations where there may still exist 212(c) relief in deportation proceedings. First, where a non-citizen had a colorable defense to deportation but conceded deportability in reliance on the possibility of receiving a waiver under § 212(c), then AEDPA § 440(d) cannot be applied to his deportation case.[899] Second, where a non-citizen can demonstrate through specific facts that he relied, at least in part, upon the availability of § 212(c) relief when deciding whether to plead guilty to a criminal charge considered to be an aggravated felony for immigration purposes, the AEDPA § 440(d) cannot be applied retroactively to bar him from receiving a discretionary waiver under § 212(c).[900] Third, where the INS issued and filed the charging document with the Immigration Court prior to the enactment of the AEDPA and years of delay on the part of the INS and the Immigration Court eliminated the non-citizen's ability to file for a waiver under I.N.A. § 212(c), the non-citizen who persistently tried to have his case resolved before the Immigration Court prior to the passage of AEDPA § 440(d) may apply for a waiver under I.N.A. § 212(c).[901]

After more than five years of litigation and the split among the federal circuit courts of appeals, the U.S. Supreme Court stepped in, and on June 30, 2001, it held that the 1996 restrictions on the availability of § 212(c) relief do not apply to lawful permanent residents

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[896] *See* 8 C.F.R. § 3.44(f) as amended by Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, 66 Fed. Reg. 6436, 6445-6446 (2001); Executive Office for Immigration Review; Section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996, Correction, 66 Fed. Reg. 8149 (2001).

[897] *See id.* at 6439.

[898] *See id.*

[899] *See* Reyes-Hernandez v. I.N.S., 89 F.3d 490, 492-93 (7th Cir. Jul. 17, 1996); *cf.* Yang v. I.N.S., 109 F.3d 1185 (7th Cir. Mar. 18, 1997) (holding that where a non-citizen conceded the lack of a colorable defense to deportation, judicial review of the BIA's denial of a discretionary § 212(c) waiver was precluded by AEDPA § 440(a)); Arevalo-Lopez v. I.N.S., 104 F.3d 100, 101 (7th Cir. Jan. 3, 1997), rehearing, suggestion for rehearing en banc, and suggestion for consolidation denied Jan. 30, 1997.

[900] *See* Jideonwo v. I.N.S., 224 F.3d 692, 700 (7th Cir. Aug. 23, 2000); *cf.* Morales-Ramirez v. Reno, 209 F.3d 977, 982-983 (7th Cir. Apr. 13, 2000) (holding that where the INS served the charging exclusion document on the non-citizen but failed to file it with the Immigration Court for more than four years to commence exclusion proceedings and then served a charging document on the non-citizen and filed it with the Immigration Court to commence removal proceedings against the non-citizen, thereby eliminating the possibility of a § 212(c) waiver for the non-citizen convicted of an aggravated felony, actual reliance on the availability of § 212(c) could not be demonstrated and the non-citizen was ineligible for cancellation of removal in removal proceedings on account of his aggravated felony conviction).

[901] *See* Singh v. Reno, 182 F.3d 504, 510-511 (7th Cir. Aug. 10, 1999) (finding that the non-citizen had a "Homeric odyssey through the administrative and judicial process" in a highly unusual case and holding that the non-citizen could proceed before the Immigration Court with his claim that the foot-dragging of the I.N.S. led to a denial of his due process rights under the U.S. Constitution).

who pled guilty prior to April 24, 1996, the effective date of the AEDPA.[902] It also held that lawful permanent residents who are placed in removal or deportation proceedings may apply for a § 212(c) waiver.[903]

Subsequent to the U.S. Supreme Court's decision, the Department of Justice issued regulations which provide that the date on which the plea was agreed to by the prosecution and the non-citizen controls to determine § 212(c) eligibility.[904] The agreement for the plea must have been reached prior to April 1, 1997 and the non-citizen must have been otherwise eligible for a § 212(c) waiver at the time that the agreement was reached.[905] For non-citizens who were previously issued deportation or removal orders and who were eligible under the *St. Cyr* decision for a § 212(c) waiver, they had to file a *St. Cyr* motion to reopen on or before April 26, 2005.[906]

The U.S. Supreme Court did not address whether a § 212(c) waiver is available to lawful permanent residents who elected to go to trial and were subsequently convicted instead of pleading guilty to criminal charges. This issue has been an area of ongoing litigation around the U.S. Some courts of appeals have held that § 212(c) waivers are available to lawful permanent residents who lost at trial in certain circumstances while other circuit courts of appeals have found that § 212(c) waivers are not available.[907]

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[902] *See* I.N.S. v. St. Cyr, 533 U.S. 289 (Jun. 5, 2001).

[903] *See id.*

[904] *See* Executive Office for Immigration Review: Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, final rule, 69 Fed. Reg. 57826, 57832 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240); 8 C.F.R. § 1003.44(h) (2004).

[905] *See id.* For an excellent outline and discussion of the *Soriano* regulations and the 2004 regulations, *see* Beth Werlin, "*St. Cyr* Regulations and Strategies for Applicants Who Are Barred From Section 212(c) Relief Under the Regulations," American Immigration Law Foundation, Oct. 19, 2004, http://www.ailf.org/lac/lac_pa_101904.pdf.

[906] *See* 8 C.F.R. § 1003.44(h) (2004); Johnson v. Gonzales, 478 F.3d 795 (7th Cir. Feb. 28, 2007) (holding that the regulation requiring a non-citizen to file a special *St. Cyr* motion to reopen for § 212(c) relief by the deadline is procedural and within the authority of the Attorney General and therefore did not violate his due process rights and that the Board of Immigration Appeals did not abuse its discretion by refusing to reopen his immigration proceedings *sua sponte*). The validity of the time limitations of this regulation may be subject to future litigation in other federal circuit courts of appeals and possibly the U.S. Supreme Court.

[907] *See* Restrepo v. McElroy, 369 F.3d 627, 638-39 (2nd Cir. Apr. 1, 2004) (remanding case to the district court to determine whether a lawful permanent resident must make an individualized showing that he decided to forego an opportunity to file for 212(c) relief in reliance on his ability to file it later or whether there is a categorical presumption of reliance by a LPR who might have applied for 212(c) relief when it was available but did not do so, in light of *In re* Gordon, 17 I&N Dec. 389 (BIA Jun. 6, 1980), other case law and regulations); Wilson v. Gonzales, 471 F.3d 111 (2nd Cir. Dec. 7, 2006) (following Restrepo); Ponnapula v. Ashcroft, 373 F.3d 480 (3rd Cir. Jun. 28, 2004) (section 212(c) available if individual turned down plea agreement); Atkinson v. Atty. Gen., 479 F.3d 222 (3rd Cir. Mar. 8, 2007) (section 212(c) available to individuals convicted after a trial); Carranza-de Salinas v. Gonzales, 477 F.3d 200 (5th Cir. Jan. 23, 2007) (section 212(c) available if individual can make an individualized showing of reliance on availability of relief); Thaqi v. Jenifer, 377 F.3d 500 (6th Cir. Jul. 23, 2004) (section 212(c) available to individual convicted of two CIMTs, the first of which was a trial conviction and the second of which was a plea agreement); Hem v. Maurer, 458 F.3d 1185 (10th Cir. Aug. 18, 2006) (section 212(c) available to a lawful permanent resident who waived his right to appeal his conviction following a trial); *cf.* Dias v. I.N.S., 311 F.3d 456 (1st Cir.

The Seventh Circuit Court of Appeals has held that a lawful permanent resident who was convicted following a trial prior to April 24, 1996 is not eligible for a § 212(c) waiver.[908] However, in that case, the Seventh Circuit did not address other legal arguments, such as: 1. a lawful permanent resident is eligible for a § 212(c) waiver where an INS attorney appeared at the sentencing hearing to inform the state court that a motion for a Judicial Recommendation against Deportation (J.R.A.D.) should be denied because the lawful permanent resident would have a § 212(c) hearing before an Immigration Judge; or 2. that a lawful permanent resident forewent his right to appeal his conviction based on availability of § 212(c) at the time of his conviction. Thus, areas for litigation regarding eligibility for § 212(c) waivers for lawful permanent residents convicted at trial remain to be litigated at the Seventh Circuit.

Current Law Regarding Eligibility for Relief under I.N.A. § 212(c)

To be eligible for relief under I.N.A. § 212(c), a non-citizen must be lawfully domiciled in the U.S. for 7 years.[909] Lawful domicile includes time from the date that a non-citizen becomes a temporary lawful permanent resident[910] and ends upon the entry of a final administrative order of deportation or removal.[911]

Lawful permanent residents who have served five years or more in prison for one or more aggravated felony convictions entered after November 29, 1990 are ineligible for a waiver under § 212(c).[912] A lawful permanent resident who pled guilty to an aggravated felony or felonies prior to November 29, 1990 for which he served more than 5 years of imprisonment remains eligible for a § 212(c) waiver.[913]

To determine whether a lawful permanent resident who has served five years or more of imprisonment remains eligible for § 212(c) relief, the date of the application for 212(c)

Nov. 27, 2002) (section 212(c) not available); Rankine v. Reno, 319 F.3d 93 (2nd Cir. Jan. 28, 2003) (no per se right to apply for 212(c) relief); Thom v. Ashcroft, 369 F.3d 158 (2nd Cir. May 27, 2004) (following Rankine); Chambers v. Reno, 307 F.3d 284 (4th Cir. Oct. 15, 2002) (section 212(c) not available); Hernandez-Castillo v. Moe, 436 F.3d 516 (5th Cir. Jan. 12, 2006) (no per se right to apply for 212(c) relief); Montenego v. Ashcroft, 355 F.3d 1035 (7th Cir. Jan. 22, 2004) (section 212(c) not available); Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. May 30, 2002) (section 212(c) not available); Brooks v. Ashcroft, 283 F.3d 1268 (11th Cir. Mar. 1, 2002) (section 212(c) not available).

908 *See* Montenegro v. I.N.S., 245 F. Supp.2d 936 (C.D. Ill. 2003), *aff'd sub nom*. Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. Jan. 22, 2004).

909 *See* I.N.A. § 212(c), 8 U.S.C. § 1182(c).

910 *See* Avelar-Cruz v. I.N.S., 58 F.3d 338, 341 (7th Cir. Jun. 27, 1995); Castellon-Contreras v. I.N.S., 45 F.3d 149 (7th Cir. Jan. 10, 1995).

911 *See In re* Cerna, 20 I&N Dec. 399 (BIA Oct. 7, 1991).

912 *See* I.N.A. § 212(c), 8 U.S.C. § 1182(c); *see, e.g.*, *In re* Davis, 22 I&N Dec. 1411 (Nov. 2, 2000); *In re* Cazares, 21 I&N Dec. 188 (BIA Jan. 3, 1996); Executive Office for Immigration Review: Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, final rule, 69 Fed. Reg. 57826, 57832 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240).

913 *See* Executive Office for Immigration Review: Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, final rule, 69 Fed. Reg. 57826, 57832 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240).

relief controls, not the date of the guilty plea.[914] Time served in pre-trial detention counts as part of the term of imprisonment for an aggravated felony to determine eligibility for a § 212(c) waiver where the criminal court included the time as being served for the term of imprisonment imposed.[915] Thus, where a lawful permanent served five years or more in pre-trial custody and post-trial custody, he is ineligible for a § 212(c) waiver.[916] Where a lawful permanent resident's application for 212(c) relief was erroneously denied based on the BIA's and Seventh Circuit's precedent decisions between 1996 and 2001, a request for *nunc pro tunc* relief may be the appropriate remedy where the lawful permanent resident accrued more than five years in prison subsequent to the legally erroneous denial of his § 212(c) application.[917]

Although I.N.A. § 212(c) applies on its face only to lawful permanent residents who departed from the United States and subsequently attempt to return, this section has been extended by court decisions to permanent residents who have not left the United States but are in deportation proceedings for certain criminal convictions. In Francis v. I.N.S.,[918] the Second Circuit Court of Appeals held that section 212(c) relief is available to lawful permanent residents in deportation proceedings under the equal protection component of the Fifth Amendment's due process clause which requires extension of the exclusion waiver to similarly situated lawful permanent residents in deportation hearings. The Seventh Circuit Court of Appeals also adopted this reasoning.[919] A § 212(c) waiver continues to be available to lawful permanent residents in exclusion proceedings.[920]

A waiver under I.N.A. § 212(c) may be granted to a lawful permanent resident facing deportation only when there is a ground of exclusion comparable to the deportation charge.[921] Since the U.S. Supreme Court's *St. Cyr* decision, the Board of Immigration

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914 *See* Velez-Lotero v. Achim, 414 F.3d 776 (7th Cir. Jul. 11, 2005) (finding that where a lawful permanent resident pled guilty to an aggravated felony offense prior to April 24, 1996 and was sentenced to more than five years in prison, appeared before the IJ before he had served five years but did not argue eligibility, apply for §212(c) relief, or appeal the IJ's decision, he was not eligible for §212(c) relief where he filed a motion to reopen based on *St. Cyr* after he had served five years in prison for the aggravated felony offense). The controlling date differs in other circuits. *See e.g.*, Buitrago-Cuesta v. INS, 7 F.3d 291 (2nd Cir. Oct. 13, 1993) (holding that the five year period for time served is to be determined at the time of the IJ's decision).

915 *See* Moreno-Cebrero v. Gonzales, 485 F.3d 395 (7th Cir. May 10, 2007).

916 *See id.*

917 *See* Edwards v. I.N.S., 393 F.3d 299, 312 (2nd Cir. Dec. 17, 2004); I.N.S. v. St. Cyr, 533 U.S. at 296 n. 5 (citing statistics that indicate that 51.5% of the 212(c) applications in which a final decision was reached between 1989 and 1995 were granted).

918 *See* Francis v. I.N.S., 532 F.2d 268, 273 (2nd Cir. Mar. 9, 1976); *see also*, *In re* Silva, 16 I&N Dec. 26 (BIA Sept. 10, 1976).

919 *See* Guillen-Garcia v. I.N.S., 60 F.3d 340, 341 (7th Cir. Jul 17, 1995), rehearing and suggestion for rehearing en banc denied Aug. 16, 1995; Cortes-Castillo v. I.N.S., 997 F.2d 1199, 1202 (7th Cir. Jun. 23, 1993); Cordoba-Chaves v. I.N.S., 946 F.2d 1244, 1247 (7th Cir. Oct. 22, 1991).

920 *See In re* Fuentes-Campos, 21 I&N Dec. 905 (BIA May 14, 1997) (holding that the bars to § 212(c) relief enacted in the AEDPA do not apply to aliens in exclusion proceedings); 8 C.F.R. §§ 212.3(g), 1213.3(g).

921 *See* Leal-Rodriguez v. I.N.S., 990 F.2d 939, 948-52 (7th Cir. Apr. 6, 1993), as amended Apr. 19, 1993 (holding that a lawful permanent resident who illegally reenters the U.S. is not eligible for a 212(c) waiver). *See also*, Dashto v. I.N.S., 59 F.3d 697 (7th Cir. Jul. 11, 1995) (holding that a certificate of statement of conviction by the court clerk stating that the alien had used a handgun is

Appeals has issued two decisions (*Blake/Brieva*) which narrow the scope of availability of a § 212(c) waiver for lawful permanent residents involving comparable grounds of deportability and excludability (or inadmissibility). The Board has held that where a lawful permanent resident is deportable for an aggravated felony for sexual abuse of a minor under I.N.A. § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), he is ineligible for a § 212(c) waiver because that aggravated felony does not have a statutory counterpart in the grounds of inadmissibility under I.N.A. § 212(a), 8 U.S.C. § 1182(a).[922] Similarly, the Board has held that a lawful permanent resident who is deportable for an aggravated felony for a crime of violence under I.N.A. § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), is ineligible for a § 212(c) waiver because that aggravated felony does not have a statutory counterpart in the grounds of inadmissibility under I.N.A. § 212(a), 8 U.S.C. § 1182(a).[923]

The Seventh Circuit Court of Appeals has repeatedly affirmed the Board's *Blake* decision.[924] Thus, a lawful permanent resident who pled guilty prior to April 24, 1996 to an offense constituting an aggravated felony that is not a controlled substance offense, a crime involving moral turpitude, or prostitution will be ineligible for a § 212(c) waiver.

An exception to the *Blake/Brieva* rule continues to exist for lawful permanent residents who have been convicted of a firearms offense and either a controlled substance offense or one or more crimes involving moral turpitude. Where a lawful permanent resident pled guilty to an offense prior to the 1996 amendments that renders him inadmissible for a crime involving moral turpitude as well as removable for an aggravated felony or a firearms offense, he may seek a waiver of the ground of inadmissibility under

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not satisfactory proof to sustain a finding of deportability for a conviction for a firearms offense where the court records did not confirm that the alien in fact used a handgun in connection with an armed robbery and did not bar eligibility for relief under I.N.A. § 212(c), 8 U.S.C. § 1182(c)); Variamparambil v. I.N.S., 831 F.2d 1362, 1364, n.1 (7th Cir. Oct. 15, 1987); *In re* Gabryelsky, 20 I&N Dec. 750 (BIA Nov. 3, 1993) (holding that a non-citizen could simultaneously apply for a waiver of deportability under I.N.A. § 212(c), 8 U.S.C. § 1182(c) in conjunction with an application for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a) under which a firearms conviction was not a ground of exclusion).

922 *See In re* Blake, 23 I&N Dec. 722, 728 (BIA Apr. 6, 2005) (holding that while there need not be a "perfect match" in order to satisfy the "statutory counterpart" requirement for the grounds of deportability, the grounds must be substantially equivalent to those grounds of inadmissibility in order for a lawful permanent resident to be eligible for a § 212(c) waiver and finding that the ground of deportability for sexual abuse of a minor was distinctly different and narrower than the ground of excludability for crimes involving moral turpitude); 8 C.F.R. § 1212.3(f)(5).

923 *See In re* Brieva, 23 I&N Dec. 766 (BIA Jun. 7, 2005).

924 *See* Zamora-Mallari v. Mukasey, 514 F.3d 679, 690 (7th Cir. 2008); Valere v. Gonzales, 473 F.3d 757, 760-61 (7th Cir. Jan. 11, 2007) (finding that the Board did not err in its *Blake* decision because a lawful permanent resident who pled guilty to indecent assault of a minor (constituting an aggravated felony for sexual abuse of a minor) was not eligible for a § 212(c) waiver at the time of his plea as his offense had no statutory counterpart in I.N.A. § 212(a), 8 U.S.C. § 1182(a)); *see also*, Esquivel v. Mukasey, 543 F.3d 919 (7th Cir. Sept. 11, 2008) (holding that even where a non-citizen was previously granted a §212(c) waiver before 1996 for an attempted murder conviction, his conviction constituted an aggravated felony and therefore he was ineligible to apply for a second §212(c) waiver to waive his two subsequent misdemeanor retail theft convictions).

I.N.A. § 212(c) in conjunction with an application for adjustment of status.[925] Similarly, where a lawful permanent resident pled guilty to a controlled substance offense and a firearms offense prior to April 24, 1996, he may seek a waiver of the ground of inadmissibility for the controlled substance offense under I.N.A. § 212(c) in conjunction with an application for adjustment of status.[926]

An applicant for § 212(c) relief must establish that he or she warrants the favorable exercise of discretion.[927] The court must consider and balance favorable and unfavorable factors that demonstrate his undesirability as a permanent resident in the U.S.[928] Relevant favorable factors for the exercise of discretion include family ties in the United States, length of residence in the United States, U.S. military service, employment history, property ownership, business ties, community service, rehabilitation after criminal convictions, and good moral character references.[929] The likelihood of persecution in the country to which the non-citizen could be ordered deported should also be considered.[930] Unfavorable factors include adverse immigration history, reports of general bad moral character, and the nature, seriousness and recency of criminal convictions.[931] Where a criminal conviction is involved, the court will look to the nature and seriousness of the offense, the length of sentence, frequency or recency of convictions and the presence or absence of rehabilitation.[932] In cases involving a serious drug crime, a grave crime or a pattern of serious criminal misconduct, the applicant must show outstanding and unusual countervailing equities to obtain relief.[933]

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925 *See In re* Azurin, 23 I&N Dec. 695, 697-99 (BIA Mar. 9, 2005) (reaffirming *In re* Gabryelsky, 20 I&N Dec. 750 (BIA Nov. 3, 1993)); *In re* Rainford, 20 I&N Dec. 598 (BIA Sept. 9, 1992); *see also*, Snajder v. I.N.S., 29 F.3d 1203, 1208 (7th Cir. Jul. 21, 1994).

926 *See In re* Gabryelsky, 20 I&N Dec. 750 (BIA Nov. 3, 1993).

927 *See* Palmer v. I.N.S., 4 F.3d 482, 487 (7th Cir. Aug. 26, 1993).

928 *See* Henry v. I.N.S., 8 F.3d 426, 432 (7th Cir. Oct. 15, 1993); Cortes-Castillo v. I.N.S., 997 F.2d 1199, 1202 (7th Cir. Jun. 23, 1993).

929 *See In re* Marin, 16 I&N Dec. 581 (BIA Aug. 4, 1978); Cortes-Castillo v. I.N.S., 997 F.2d 1199, 1202 (7th Cir. Jun. 23, 1993); Akinyemi v. I.N.S., 969 F.2d 285, 288 (7th Cir. Jul. 16, 1992) (holding that rehabilitation must be considered); *In re* Edwards, 20 I&N Dec. 191 (BIA May 2, 1990); *In re* Arreguin, 21 I&N Dec. 38, 40 (BIA May 11, 1995) (holding that while rehabilitation is an important factor for § 212(c) relief, it is not a prerequisite); Drobny v. I.N.S., 947 F.2d 241, 246 (7th Cir. Oct. 21, 1991), rehearing den'd Jan. 9, 1991 (holding that the applicant's possible paternity regarding a yet unborn U.S. citizen child must be considered as an equity); Guillen-Garcia, 999 F.2d 199 (7th Cir. Jul. 2, 1993) (holding that acknowledgment of guilt is only one factor to be considered regarding rehabilitation).

930 *See* Bastanipour v. I.N.S., 980 F.2d 1129 (7th Cir. Dec. 2, 1992).

931 *See id.*

932 *See In re* Edwards, 20 I&N Dec. 191 (BIA May 2, 1990); Guillen-Garcia v. I.N.S., 60 F.3d 340, 343-344 (7th Cir. Jul. 17, 1995), rehearing and suggestion for rehearing en banc denied (7th Cir. Aug. 16, 1995); Groza v. I.N.S., 30 F.3d 814, 820 (7th Cir. Jul. 14, 1994); Palacios-Torres v. I.N.S., 995 F.2d 96, 99 (7th Cir. May 18, 1993); *see also*, Guevara v. I.N.S., 52 F.3d 714, 715 (7th Cir. Apr. 19, 1995); Henry v. I.N.S., 8 F.3d 426, 432 (7th Cir. Oct. 15, 1993).

933 *See In re* Edwards, 20 I&N Dec. 191 (BIA May 2, 1990) (holding that the applicant must show outstanding and unusual equities for a serious drug offense, especially one relating to trafficking or sale of drugs); *In re* Buscemi, 19 I&N Dec. 628 (BIA Apr. 13, 1988); Groza v. I.N.S., 30 F.3d 814 (7th Cir. Jul. 14, 1994) (holding that a single criminal episode that gave rise to convictions for rape, aggravated battery and aggravated assault required a showing of unusual or outstanding equities); Espinoza v. I.N.S., 991 F.2d 1294, 1297 (7th Cir. Apr. 22, 1993); Cordoba-Chaves v. I.N.S., 946 F.2d

Repapering

Certain lawful permanent residents who are barred from relief under I.N.A. § 212(c), 9 U.S.C. § 1182(c) in deportation proceedings may be eligible for cancellation of removal if they were to be placed in removal proceedings by the DHS. Cancellation of removal is a discretionary waiver in removal proceedings, similar to a waiver under I.N.A. § 212(c), 8 U.S.C. § 1182(c) for lawful permanent residents in deportation proceedings. Non-citizens are eligible for cancellation of removal if they have been lawful permanent residents for at least 5 years, resided continuously in the U.S. for 7 years before committing the offense or being served with a Notice to Appear, and have been convicted for deportable offenses which do not constitute aggravated felonies.[934]

Under IIRAIRA § 309(c), the Attorney General has the discretion to terminate deportation or exclusion proceedings and initiate removal proceedings where an evidentiary hearing has not yet taken place.[935] In December 1998, the Department of Justice decided that lawful permanent residents with cases pending before the Immigration Court or the Board of Immigration Appeals who would be eligible for Cancellation of Removal for Permanent Residents could be "repapered" at the discretion of the INS; these lawful permanent residents can request the DHS to have their cases in deportation proceedings terminated and to be placed in removal proceedings in order to apply for cancellation of removal.[936]

For example, Mario has been a permanent resident for eight years and has only one conviction, a misdemeanor conviction for possession of a controlled substance following a trial in 1992. The former INS placed him in deportation proceedings in December 1996. Mario's case is what is known as a "gap case": he is a long-term permanent resident who would be eligible for § 212(c) relief but for AEDPA § 440(d), which the DHS argues retroactively eliminated such relief for any non-citizen convicted of *any* controlled substance crime, including misdemeanor simple possession. Mario would be eligible for cancellation of removal if the DHS would move to terminate deportation proceedings and initiate removal proceedings.

For those lawful permanent residents who have exhausted their appeal rights to the Board of Immigration Appeals, the process of "repapering" is not available.[937] Post-conviction relief and pardons are important options for non-citizens with gap cases who would not be eligible for cancellation of removal and who do not fall within the defined class

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1244, 1247 (7th Cir. Oct. 22, 1991); Palacios-Torres v. I.N.S., 995 F.2d 96, 99 (7th Cir. May 18, 1993); Akrap v. I.N.S., 966 F.2d 267, 272 (7th Cir. Jun. 26, 1992).

934 *See* I.N.A. § 240A(a), 8 U.S.C. § 1229b(a); Cancellation of Removal, *supra* at 6-23.

935 *See* IIRAIRA § 304(b) repealed section 212(c) effective on the Title III-A effective date, April 1, 1997. However, section 306(d) of IIRAIRA amends AEDPA section 440(d), which in turn amends former I.N.A. § 212(c), 8 U.S.C. § 1251(c), which is in effect during the transition period and for cases that fall within IIRAIRA § 309(c)'s sweep, that is, cases where the I.N.S. issued an Order to Show Cause on or before March 31, 1997 for deportation or exclusion proceedings and an evidentiary hearing had not yet taken place.

936 *See* Memorandum from Michael J. Creppy, Chief Immigration Judge, Dec. 9, 1998; Memorandum from Paul W. Virtue, General Counsel for the INS, Dec. 7, 1998.

937 *See id.*

of non-citizens in the 2001 or 2004 regulations as promulgated by the Department of Justice.

Waivers under I.N.A. § 212(h), 8 U.S.C. § 1182(h)

A § 212(h) waiver allows the CIS or an Immigration Judge to waive grounds of inadmissibility for non-citizens who have committed certain criminal convictions: one crime involving moral turpitude, prostitution, commercialized vice, multiple criminal convictions, a single offense of possession of thirty grams or less of marijuana, or a single offense for possession of drug paraphernalia related to the use of thirty grams or less of marijuna.[938] A non-citizen must show extreme hardship to a qualifying relative who is statutorily defined as a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. If the non-citizen has been convicted of or otherwise found to be inadmissible for prostitution and does not have a qualifying relative, then she must show that she committed the act of inadmissibility more than fifteen years before applying for the waiver, has been rehabilitated, and is not a danger to the United States.[939]

Non-citizens who previously adjusted their status to become lawful permanent residents or who are first applying to adjust their status to become lawful permanent residents may be eligible to apply for the waiver, with some exceptions. For example, a § 212(h) waiver is not available to a non-citizen who has committed murder or a criminal act involving torture. In addition, a lawful permanent resident who has been convicted of an aggravated felony or who has not resided lawfully in the United States for seven years before initiation of removal proceedings is statutorily ineligible for a § 212(h) waiver. If the CIS or an Immigration Judge grants the § 212(h) waiver to an eligible non-citizen in conjunction with an application for adjustment of status, then he will be a lawful permanent resident.

A lawful permanent resident who departs from the U.S. and is found to be inadmissible upon his return may be eligible for a "stand-alone" § 212(h) waiver.[940] However, a lawful permanent resident who has not departed the U.S. is not eligible for a "stand-alone" § 212(h) waiver; he must otherwise be eligible for adjustment of status in conjunction with a § 212(h) waiver in order to be granted such relief where he is charged as deportable.[941]

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938 *See* I.N.A. § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A); Escobar Barraza v. Mukasey, 519 F.3d 388 (7th Cir. Mar. 13, 2008) (drug paraphernalia).

939 *See* I.N.A. § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A).

940 *See In re* Abosi, 24 I&N Dec. 204, 207 (BIA Jun. 19, 2007) (holding that a returning lawful permanent resident seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with an application for a § 212(h) waiver).

941 *See* Klemntanovsky v. Gonzales, 501 F.3d 788 (7th Cir. Aug. 28, 2007).

Case Law

Eligibility Issues

Eligibility for a § 212(h) waiver for a non-citizen who has been convicted of an aggravated felony currently depends on the offense(s) and whether he has been admitted to the U.S. as a lawful permanent resident. A non-citizen who has not been previously admitted as a lawful permanent resident is statutorily eligible for a § 212(h) waiver, despite a conviction for an aggravated felony.[942] He must also be eligible to adjust his status at the time of his application for a § 212(h) waiver. In contrast, a lawful permanent resident who has been convicted of an aggravated felony is ineligible for a § 212(h) waiver.[943] The IIRAIRA amended definition of aggravated felony applies retroactively to a lawful permanent resident in deportation proceedings who filed a § 212(h) waiver prior to the enactment of IIRAIRA.[944]

The Board of Immigration Appeals denied a motion to reopen deportation proceedings for a former lawful permanent resident to apply for a § 212(h) waiver in conjunction with an application for adjustment of status.[945] The Board held that he would be ineligible for a § 212(h) waiver because his conviction would be considered an aggravated felony under the IIRAIRA amended definition of aggravated felony if deportation proceedings were reopened.[946]

Extreme Hardship Standard

The Board of Immigration Appeals has stated that "extreme hardship" encompasses both present and future hardship and necessarily depends on all of the facts and circumstances of each case.[947] Extreme hardship means more than common results of exclusion, such as separation and financial difficulties.[948] An applicant for the waiver must demonstrate some additional significant or potential injury that the denial of the waiver would cause to the relevant citizen or lawful permanent resident family member in order for extreme hardship to be found.[949] For example, in *In re Pao*, the Administrative Appeals

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[942] *See In re* Michel, 21 I&N Dec. 1101 (BIA Jan. 30, 1998); *see also*, *In re* Kanga, 22 I&N Dec. 1206 (BIA Jan. 7, 2000) (holding that an alien convicted of an aggravated felony is not inadmissible under I.N.A. § 212(a)(8)(A), 8 U.S.C. § 1182(a)(8)(A) as an alien permanently "ineligible to citizenship" because such section refers only to those aliens who are barred from naturalization by virtue of their evasion of military service); *In re* Ayala-Arevalo, 22 I&N Dec. 398 (BIA Nov. 30, 1998).

[943] *See* Lara-Ruiz v. I.N.S., 241 F.3d 934, 947-48 (7th Cir. Mar. 6, 2001); *In re* Martinez-Recinos, 23 I&N Dec. 175 (BIA Oct. 15, 2002); *In re* Yeung, 21 I&N Dec. 610 (BIA Oct. 7, 1997); *see also*, *In re* Pineda, 21 I&N Dec. 1017 (BIA Aug. 26, 1997).

[944] *See id.*

[945] *See In re* Pineda, 21 I&N Dec. 1017 (BIA Aug. 26, 1997).

[946] *See id.*

[947] *See In re* Shaughnessy, 12 I&N Dec. 810 (BIA July 29, 1968).

[948] *See id.*

[949] *See* Palmer v. I.N.S., 4 F.3d 482,487-88 (7th Cir. Aug. 26, 1993) (holding that the extreme hardship standard under I.N.A. § 212(h), 8 U.S.C. § 1182(h) is the same as the extreme hardship standard required for suspension of deportation under Former I.N.A. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995)) (citations to other cases omitted). *See also*, Marquez-Medina v. I.N.S., 765 F.2d 673, 676 (7th Cir. Jun. 19, 1985) (finding that emotional hardship caused by the severance of family

Unit held that where an applicant's wife suffered from clinical depression due to the applicant's exclusion from the United States, a finding of hardship was warranted.[950] Where an offense is considered to be violent or dangerous, a heightened standard of hardship will apply.[951]

Once extreme hardship is shown, the CIS or an Immigration Judge will determine whether the non-citizen deserves a favorable exercise of discretion to grant the waiver. The factors to be considered include the nature of the offense, the circumstances leading to the offense, whether the offense is isolated or is part of a pattern of criminal behavior, evidence of rehabilitation, the extent of hardship to her qualifying U.S. citizen or lawful permanent resident family members, and the stability of her marriage, if she is married to a U.S. citizen or lawful permanent resident.[952]

Application to Cases

Case of Kim from Korea

Kim entered the United States in January 1990 on an F-1 student visa and attended college. In November 1995, he married a United States citizen. Their daughter was born in Chicago on August 20, 1996. In September 1996, he adjusted his immigration status to become a lawful permanent resident based on marriage to his U.S. citizen wife. In January 1997, he was arrested for paying for a $300 lawnmower with a forged check at a hardware store. He pled guilty to the charges and was placed on one year probation with a stay of imposition of sentence. In August 2008, the DHS arrested him and placed him in removal proceedings.

Analysis: Kim is deportable for having committed a crime involving moral turpitude within five years of becoming a lawful permanent resident. He is eligible, however, for a § 212(h) waiver. His wife can file another visa petition for him with the CIS based on their marriage. If the CIS approves the visa petition, Kim will be able to file an adjustment of status application, along with Form I-601 for the § 212(h) waiver, with the Immigration Judge. Kim will need to show the Immigration Judge that his United States citizen wife and daughter will suffer extreme hardship if he is deported. If the Immigration Judge grants Kim's § 212(h) waiver application, then the Immigration Judge will adjudicate, and should grant, his adjustment of status application for lawful permanent residence.

Case of Michael from Nigeria

Michael entered the United States in July 2003 as a B-2 tourist to visit his grandmother. He overstayed his visa and began working at a local nursery.

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and community ties is a common result of deportation); Hernandez-Patino v. I.N.S., 831 F.2d 750, 752 (7th Cir. Oct. 6, 1987); Suspension of Deportation, *infra* at 6-63.

950 *See In re* Pao, A70 270 864 (Comm'r [AAU] Apr. 23, 1992).

951 *See* 8 C.F.R § 212.7(d).

952 *See id.*; *see also*, *In re* Mendez, 21 I&N Dec. 296 (BIA Apr. 12, 1996); Dashto v. I.N.S., 59 F.3d 697 (7th Cir. Jul. 11, 1995); Palmer v. I.N.S., 4 F.3d 482 (7th Cir. Aug. 26, 1993).

In November 2005, his grandmother asked him to pick up her mail at her box at the post office. Her younger neighbor, Tom, asked him for a ride to the post office and Michael agreed. At the post office, they both retrieved mail from the respective boxes and walked out. They drove a block away when the local police stopped them. The police arrested Tom for receiving stolen property (stolen checks) and Michael for aiding and abetting the receipt of stolen property because he drove the car. Michael pled guilty to the charge and was placed on probation for five years. After the sentencing hearing in January 2009, Michael was transferred to DHS custody.

Analysis: Michael is deportable for having violated the terms of his visitor's visa by committing a crime involving moral turpitude and overstaying his visa. He is *not* eligible for a § 212(h) waiver because he does not have any means by which he can adjust his status to become a lawful permanent resident. He is eligible for voluntary departure if he requests it at his initial master calendar hearing.[953]

Case of Fernandes from the Philippines

Fernandes met and married his U.S. citizen wife in the Philippines in 2003. They moved to the U.S. in September 2005 and he was admitted as a lawful permanent resident based on his marriage to his U.S. citizen wife

On April 1, 2006, he was arrested and charged with possession of .1 grams of cocaine in Wisconsin. He received first offender probation under Wis. Stat. § 961.47. He completed his probation and the charge was dismissed.

In February 2009, Fernandes went back to the Philippines to visit his mother. When he returned to the U.S., he was arrested by the DHS at the airport and placed in removal proceedings. The DHS charged him with being inadmissible under I.N.A. § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a controlled substance violation.

Analysis: Fernandes is inadmissible and ineligible for relief from removal. His disposition for first offender probation required that he enter a plea of guilty and he was placed on probation, which he successfully completed. However, he has a conviction under I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). He is not eligible for cancellation of removal under I.N.A. § 240A(a), 8 U.S.C. § 1229b(a) as he has not resided continuously in the U.S. for at least seven years and has not been a lawful permanent resident for at least 5 years.[954] He is also ineligible for a § 212(h) waiver or for re-adjustment of status with a § 212(h) waiver because his controlled substance offense involved cocaine, not marijuana.[955] Fernandes's only hope to retain his lawful permanent resident status is post-conviction relief.[956]

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953 *See* Voluntary Departure, *infra* at 6-78.
954 *See* Cancellation of Removal, *supra* at 6-23.
955 *See* I.N.A. § 212(h), 8 U.S.C. § 1182(h).
956 *See* Post-Conviction Relief, *infra* at 8-12 to 8-24.

Waivers under I.N.A. § 212(i), 8 U.S.C. § 1182(i)

The CIS and the Immigration Judge have the power to waive the ground of inadmissibility relating to fraud or willful misrepresentations made by a non-citizen where she has a qualifying relative and can prove extreme hardship to the relative if she were to be refused admission for lawful permanent residence. Qualifying relatives include a U.S. citizen or lawful permanent resident spouse or parent.[957] Fraud or willful misrepresentations that can be waived include use of a false green card in order to obtain employment or to cross the United States border from Canada or Mexico. With limited exceptions, falsely representing oneself to be a U.S. citizen *cannot* be waived for such misrepresentations made on or after September 30, 1996 and such misrepresentation constitutes grounds of inadmissibility and deportability.[958]

Case Law

A willful misrepresentation of fact refers to the misrepresentation of such facts as would have justified the refusal of a visa or admission had they been disclosed.[959] A non-citizen who knowingly enters the U.S. on a false passport has engaged in willful fraud and misrepresentation of a material fact.[960]

In 1996, Congress amended the standard to require extreme hardship for § 212(i) waivers. The factors to be considered in determining whether a non-citizen has established extreme hardship to a qualifying relative include, but are not limited to: the presence of lawful permanent resident or U.S. citizen family ties; her qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to those countries; the financial impact of the departure from the United States and significant conditions of health and lack of availability of suitable medical care in the country where the qualifying relative would relocate.[961] In addition to demonstrating extreme hardship, a non-citizen must also show that she merits a grant of the § 212(i) waiver in the exercise of discretion.[962] Further, the underlying fraud or misrepresentation for which the non-citizen seeks a

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[957] Where a non-citizen qualifies for adjustment of status under VAWA, extreme hardship may be demonstrated to the non-citizen or her U.S. citizen, lawful permanent resident, or qualified non-citizen parent or child. *See* I.N.A. § 212(i), 8 U.S.C. § 1182(i).

[958] *See* Grounds of Deportability, *supra* at 3-3; Grounds of Inadmissibility and Adjustment of Status, *supra* at 4-1.

[959] *See* Garcia v. I.N.S., 31 F.3d 441 (7th Cir. Jul. 27, 1994) (willful misrepresentation regarding marital status); Calvillo v. Robinson, 271 F.2d 249 (7th Cir. Nov. 3, 1959) (holding that failure to disclose previous residence in the U.S. was not a willful misrepresentation of fact).

[960] *See* Esposito v. I.N.S., 936 F.2d 911 (7th Cir. Jul. 3, 1991), rehearing and rehearing en banc denied Aug. 8, 1991 (holding also that foreign *in absentia* convictions for criminal association, forgery, and unlawful possession of firearms as well as pending foreign murder charges can be considered by a court to determine whether to favorably exercise discretion and grant a request for a waiver under § 212(i)).

[961] *See In re* Cervantes, 22 I&N Dec. 560 (BIA Mar. 11, 1999); *see also*, *In re* Kao, *In re* Lin, 23 I&N Dec. 45 (BIA May 4, 2001) (holding that the standard for extreme hardship for suspension of deportation applies to waivers of inadmissibility under I.N.A. §212(i), 8 U.S.C. § 1182(i)).

[962] *See* I.N.A. § 212(i), 8 U.S.C. § 1182(i); Cervantes de Hernandez v. Chertoff, 2007 U.S. App. LEXIS 2353 (7th Cir. Jan. 25, 2007).

waiver of inadmissibility may be considered as an adverse factor in adjudicating the waiver application in the exercise of discretion.[963]

Application to Cases

Case of Dominique from Haiti

Dominique fled political turmoil in Haiti in December 1990 and entered the United States, using her twin sister's green card which she presented to a United States immigration officer at the Miami Airport. In February 1991, she used her sister's green card again to obtain employment as a nursery school janitor. In March 1997, she married a United States citizen. In July 1997, she gave birth to twin daughters who are United States citizens. Dominque and her husband filed a marriage petition, application for adjustment of status and a § 212(i) waiver application with the CIS in January 2009.

Analysis: Dominique is eligible for a § 212(i) waiver and adjustment of status. She misrepresented herself as being a permanent resident to an immigration officer. She must demonstrate extreme hardship to her U.S. citizen husband as well as other evidence that she merits a favorable exercise of discretion for both applications.

Suspension of Deportation

Suspension of deportation is a form of relief available to non-citizens in deportation proceedings, not exclusion proceedings.[964] There are two forms of suspension of deportation: a.) 7 year suspension for non-citizens who have not been convicted of a deportable offense; and b.) 10 year suspension for non-citizens who have been convicted of a deportable offense, including an aggravated felony, among other grounds. The difference lies in the period of good moral character that must be demonstrated. For 7 year suspension, a non-citizen must have resided in the United States for at least seven years,[965] demonstrate that his deportation will result in extreme hardship to themselves or a qualifying relative, and demonstrate good moral character.[966] For 10 year suspension, a non-citizen must demonstrate residence in the United States for an additional 10 years following the date of the commission of the deportable offense, 10 years of good moral character following the date of the commission of the deportable offense, and exceptional and extremely hardship to himself and/or a qualifying family member.[967] Where a non-

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963 *See In re* Cervantes, 22 I&N Dec. 560 (BIA Mar. 11, 1999) (following *In re* Tijam, 22 I&N Dec. 408 (BIA Dec. 10, 1998)).

964 *See* Sherifi v. I.N.S., 260 F.3d 737, 740-41 (7th Cir. Aug. 1, 2001) (finding that NACARA did not amend the I.N.A. to allow non-citizens for whom evidentiary hearings were conducted prior to April 1, 1997 and final administrative decisions rendered in exclusion proceedings to apply for suspension of deportation); *In re* Torres, 19 I&N Dec. 371 (BIA Apr. 18, 1986).

965 Suspension of deportation is only available to non-citizens in deportation proceedings, not exclusion proceedings. *See* Hernandez-Gonzalez v. Moyer, 907 F.Supp. 1224 (N.D.IL Dec. 8, 1995).

966 *See* Good Moral Character, *supra* at 6-12.

967 *See* I.N.A. § 244(a), 8 U.S.C. § 1254(a) (1995); Hernandez v. Gonzales, 437 F.3d 341, 350-01 (3rd Cir. Feb. 14, 2006) (holding that the repeal of I.N.A. § 244(a), 8 U.S.C. § 1254(a) (1995) did not violate due process because a non-citizen does not have a right to continue to conceal his illegal status in order to accrue the necessary time to be eligible for 10 year suspension of deportation).

citizen has been convicted of a crime involving moral turpitude which renders him deportable, the 10 year period begins with the date of conviction for the crime involving moral turpitude, not the date of the commission of the offense.[968]

Amendments by the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) apply retroactively under the "stop-time rule" to terminate the amount of time that a non-citizen has accumulated for purposes of the seven year physical presence requirement. The service of the Order to Show Cause by the INS upon the non-citizen ends the accrual of the requisite 7 years of continuous physical presence. In addition, certain nationalities will be treated more favorably based on the NACARA, including the exemption of certain groups from the stop-time rule.

Case Law

Extreme hardship may only be demonstrated with respect to the non-citizen or his U.S. citizen or lawful permanent resident spouse, parent, or child.[969] The standard for extreme hardship for suspension of deportation under I.N.A. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995) was defined by the Board of Immigration Appeals to include the age of the non-citizen, his family ties in the U.S. and abroad, his length of residence in the U.S., his health, conditions in the country to which he is deportable (including economic and political conditions), his financial status (including employment and occupation), the possibility of other means of adjustment of status, whether he is of special assistance to the U.S. or his community, his immigration history in the U.S. (including immigration violations) and his ties to the U.S. community, including community service.[970] Economic hardship alone and the emotional hardship caused by a severing family and community ties are a common result of deportation and do not rise to the level of extreme hardship.[971]

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968 *See In re* Lozada, 19 I&N Dec. 637, 640 (BIA Apr. 13, 1988).

969 *See* I.N.A. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1995); *see, e.g.*, Kuciemba v. I.N.S., 92 F.3d 496 (7th Cir. Aug. 7, 1996) (holding that hardship to cousins and community members cannot be considered in the analysis of extreme hardship).

970 *See In re* Anderson, 16 I&N Dec. 596 (BIA Aug. 31, 1978); *In re* Kao, *In re* Lin, 23 I&N Dec. 45 (BIA May 4, 2001). *See also*, Salameda v. I.N.S., 70 F.3d 447 (7th Cir. Nov. 9, 1995) (holding that community service by the non-citizen must be considered as well as hardship to the non-citizen child of the deportees who would effectively be deported upon the deportation of his parents); *cf.* Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. Jun. 16, 1960), (holding that the lack of family ties and failure to establish other roots after residing for 17 years in the U.S. were sufficient grounds to find an insufficient showing of hardship), *rehearing denied* Jul. 22, 1960, *cert. denied* 365 U.S. 860, 381 S.Ct. 828, 5 L.Ed.2d 82 (1961). Hardship may only be considered as to the statutorily mentioned relationships of the applicant's spouse, parent or child. *See* I.N.S. v. Hector, 479 U.S. 85, 107 S.Ct. 379, 93 L.Ed.2d 326 (Nov. 17, 1986); Drobny v. I.N.S., 947 F.2d 241 (7th Cir. Oct. 21, 1991), rehearing den'd Jan. 9, 1991. For a discussion of the exceptional and extremely unusual hardship standard under I.N.A. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1995) for suspension of deportation involving criminal convictions, *see* Cortes-Castillo v. I.N.S., 997 F.2d 1199 (7th Cir. Jun. 23, 1993); Rassano v. I.N.S., 492 F.2d 220, 226-27 (7th Cir. Feb. 21, 1974).

971 *See* Urban v. I.N.S., 123 F.3d 644 (7th Cir. Aug. 21, 1997); Cortes-Castillo v. I.N.S., 997 F.2d 1199, 1204 (7th Cir. Jun. 23, 1993); Hernandez-Patino v. I.N.S., 831 F.2d 750, 752 (7th Cir. Oct. 6, 1987); Marquez-Medina v. I.N.S., 765 F.2d 673, 677 (7th Cir. Jun. 19, 1985); Diaz-Salazar v. I.N.S., 700 F.2d 1156 (7th Cir. Mar. 1, 1983), *cert. denied*, 462 U.S. 1132, 103 S.Ct. 3112, 77 L.Ed.2d 1367 (1983); Mendoza-Hernandez v. I.N.S., 664 F.2d 635 (7th Cir. Nov. 4, 1981); I.N.S. v. Jong Ha Wang, 450 U.S. 139, 144, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (Mar. 2, 1981).

The stop-time rule enacted in IIRAIRA applies to Orders to Show Cause and suspension of deportation proceedings pending at the time that IIRAIRA became effective.[972] The stop time rule ends the accrual of the period of continuous presence upon the issuance of the Order to Show Cause by the former INS; the seven years of continuous presence must be shown by the non-citizen to be statutorily eligible for suspension of deportation.[973]

An exception to the stop-time rule exists for certain non-citizens under the Nicaraguan Adjustment and Central American Relief Act (NACARA).[974] The deadline for filing relief under NACARA was September 11, 1998.[975]

Application to Cases

Case of Ian from Ireland

Ian entered the United States without inspection by canoe through the Boundary Waters in northern Minnesota in August 1985. He used a false green card to obtain employment on a construction crew. In January 1997, he was arrested by the former INS during a raid on a construction site and was issued an Order to Show Cause.

Analysis: Ian is statutorily eligible for suspension of deportation. He does not have a criminal record, has good moral character for the seven year statutory period, and has been in the United States for more than seven years. He will have to demonstrate extreme hardship to himself beyond the normal consequences of deportation.

Temporary Protected Status

Temporary Protected Status (TPS) is a form of temporary immigration relief for nationals and citizens of certain countries who cannot return home because of armed conflict, natural disasters, or other temporary factors. The Secretary of the DHS designates countries for TPS based on consultation with other government agencies.

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[972] *See* Angel-Ramos v. Reno, 227 F.3d 942 (7th Cir. Sept. 19, 2000).

[973] *See id. See also,* I.N.A. § 203(a)(1), 8 U.S.C. § 1153(a)(1); *In re* Nolasco, 22 I&N Dec. 632 (BIA Apr. 15, 1999); *In re* N-J-B-, 22 I&N Dec. 1057 (BIA Feb. 20, 1997), *vacated by* Att'y Gen. Order No. 2093-97 (Jul. 10, 1997); Angel-Ramos v. Reno, 227 F.3d 942 (7th Cir. Sept. 19, 2000); *In re* Mendoza-Sandino, 22 I&N Dec. 1236 (BIA Feb. 23, 2000) (holding that a non-citizen cannot accrue the 7 years of continuous physical presence required for suspension of deportation after the Order to Show Cause and Notice of Hearing have been served by the I.N.S. on the non-citizen because the service of the Order to Show Cause ends her continuous physical presence under I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1)).

[974] *See* Nicaraguan Adjustment and Central American Relief Act (NACARA), Pulb. L. No. 105-100, 111 Stat. 2160, Title II, § 201 *et seq* (1997); Useinovic v. I.N.S., 313 F.3d 1025, 1034-35 (7th Cir. Dec. 27, 2002) (discussing motion to reopen deadline for NACARA applicants).

[975] *See* 8 C.F.R. § 1003.43(e)(1); Useinovic v. I.N.S., 313 F.3d 1025, 1035 (7th Cir. Dec. 27, 2002); *See also*, Buzdygan v. I.N.S., 259 F.3d 891 (7th Cir. Aug. 9, 2001) (holding that where an IJ already denied a suspension application for lack of extreme hardship, the Board of Immigration Appeals properly denied his motion to remand based on NACARA).

The Secretary of the DHS reviews TPS designations every 6 – 18 months to determine whether the conditions in a country continue to merit immigration relief for its nationals. Depending on the conditions within the country, the DHS Secretary may extend or terminate a TPS designation. Each time that the TPS designation is extended, TPS beneficiaries must re-register within the designated re-registration period.[976] As long as a non-citizen is a TPS beneficiary, she cannot be removed from the U.S. and can obtain employment authorization to lawfully work in the U.S.[977] If TPS is terminated, the beneficiary returns to the status she had prior to being granted TPS and, if appropriate, may be placed in removal proceedings and/or deported from the U.S. TPS does not lead to lawful permanent residence.

Countries currently designated for TPS[978]
Sudan, Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia

In order to be eligible for TPS, a non-citizen must meet the following requirements:

- Establish her nationality of a country designated for TPS.
- Be physically present and continuously residing in the U.S. since the date the country was designated.
- Register for TPS within the initial registration period (when the country was first designated for TPS) or fall within one of the limited exceptions to file a late application for initial registration.[979]

Currently, an eligible non-citizen may also initially register for TPS with the CIS. She may also apply for TPS before the Immigration Judge in removal proceedings, even if her TPS application had been previously denied by the CIS.[980]

A non-citizen is ineligible for TPS if she falls under any of the following criminal bars:

- Has been convicted of any felony.[981]
- Has been convicted of two or more misdemeanors.[982]
- Is considered to be a person who:
  - Participated in the persecution of others;
  - Was convicted of a particularly serious crime;

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976 *See* 8 C.F.R. §§ 244.17, 1244.17.
977 *See* I.N.A. §§ 244(f)(3), (a)(1)(B), 8 U.S.C. §§ 1254a(f)(3), (a)(1)(B).
978 *See* "Temporary Protected Status," CIS, www.uscis.gov.
979 Late filing is permitted if the non-citizen did not initially register because of a pending application for other immigration relief or because of having been granted another immigration status. In that case, she must apply for TPS within 60 days of the denial of an application or of the expiration or termination of another status. *See* 8 C.F.R § 244.2(g).
980 *See In re* Barrientos, 24 I&N Dec. 100 (BIA Mar. 1, 2007).
981 Defined as a crime committed in the United States that is punishable by imprisonment of more then a year. *See* 8 C.F.R. § 244.1.
982 Defined as a crime punishable by one year or less. Any crime punishable by a maximum of five days or less is not considered a misdemeanor. *See* 8 C.F.R. § 244.1.

- Committed a non-political crime outside the U.S. before arrival to the U.S.; or
- Is a danger to the security of the U.S. under any other reasonable ground.[983]

If a non-citizen is ineligible for TPS based on one of the above bars, she may be eligible for other immigration relief, including asylum and non-LPR cancellation of removal, depending on the gravity and nature of her offenses.[984] Where an otherwise eligible non-citizen has been convicted of a minor felony or two misdemeanor offenses, post-conviction relief may be an area to explore to eliminate one of the misdemeanor offenses. Where a non-citizen has been convicted of one misdemeanor and is charged with a second misdemeanor, a disposition for a city or county ordinance violation may prevent her from being convicted of a second misdemeanor for immigration purposes.[985]

Additional Forms of Relief

Immigration relief for non-citizens who are subjected to battery and extreme cruelty or who can be of assistance to law enforcement authorities in criminal investigations or prosecutions became available in 1994 through the Violent Crime Control and Law Enforcement Act.[986] It has since evolved through the Victims of Trafficking and Violence Protection Act of 2000[987] and the Violence Against Women and Department of Justice Reauthorization Act of 2005.[988]

As a result of the legislation, five avenues of immigration relief are available to qualifying non-citizens:

- Violence Against Women Act (VAWA) Visa Self-petition
- VAWA Cancellation of Removal
- T (Trafficking) Visa
- U Visa
- S Visa

VAWA Visa Self-petition

In order for a non-citizen to become an LPR based on a family relationship, the CIS must first approve an immigrant visa petition. Normally, the non-citizen must have a family member to submit the petition on her behalf. The family member is known as the "petitioner." However, the following non-citizens may file a self-petition without the assistance of a petitioner:

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983 *See* I.N.A. § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B); I.N.A. § 244(c), 8 U.S.C. § 1254a(c).
984 *See* Appendix 6B, Immigration Relief from Deportability and Inadmissibility.
985 *See* Definition of Conviction, *supra* at 2-3; *In re* Eslamizar, 23 I&N Dec. 684 (BIA Oct. 19, 2004).
986 *See* Pub. L. No. 103-322, 108 Stat. 1795 (Sept. 13, 1994).
987 *See* Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000).
988 *See* Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006). For more information on the cross-section of immigration law and domestic violence, *see* http://www.asistaonline.org/.

- A spouse who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen spouse. The non-citizen does not have to be currently married to the abuser; however, a petition must be filed within two years of the entry of a divorce decree from the LPR or U.S. citizen spouse. Although women are typically the victims of domestic abuse, men are also eligible to file self-petitions under VAWA.
- A child who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen parent.
- A parent of a child who has been battered or subjected to extreme cruelty by the parent's LPR or U.S. citizen spouse.
- A parent who has been battered or subjected to extreme cruelty by a current U.S. citizen child or a U.S. citizen child who died or lost or renounced U.S. citizenship (related to a domestic violence incident) within the past two years.[989]

By removing the abusive petitioner from the visa petition process, a battered non-citizen may pursue her immigration status independently.[990] A non-citizen can include her children as derivative beneficiaries in her self-petition. There is no annual limit to the number of immigrant visa self-petitions that the CIS can approve.[991]

Battery or extreme cruelty includes a variety of forms of abuse: hitting, pushing, throwing things, bringing prostitutes into the home, public humiliation, cursing, isolation or restricting freedom, threatening deportation, withholding household money, forced sexual intercourse, reproductive coercion, stalking, and threatening to do any of the above.[992] It may be difficult to determine whether your non-citizen client suffers from one of these forms of abuse. Many victims may be afraid of reporting such abuses because of possible repercussions, including separation of family, further abuse, deportation, or embarrassment. A victim may also fail to communicate the abuse if she does not feel comfortable sharing such information with an attorney (especially of the opposite sex), if a family member is translating for her, if the abusive partner is accompanying her, or if she does not consider certain acts as abuse.[993]

If defense counsel suspects that a non-citizen client suffers from physical, mental, or emotional abuse, meeting with her apart from any family members may elicit information regarding the abuse. If an interpreter is required, a person who is not related to her should be used to interpret with an explanation to both the non-citizen and the interpreter that the information discussed cannot be disclosed to anyone else without the non-citizen's consent.[994] As the idea of what is considered abuse may differ among persons and cultures, it is important to frame questions around "behavior" and not "abuse." This choice of words will result in a better understanding of the nature of the relationship in question.[995] If you

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989 A child includes a son or daughter 21 years or older.

990 Although both men and women can be victims of abuse and both are eligible for relief under VAWA, victims are generally women and will be referred to as such throughout the remainder of this section.

991 *See* I.N.A. § 204(a), 8 U.S.C. § 1154(a).

992 *See* Sana Loue, J.D., Ph.D., M.P.H, "Family Violence in the Context of Immigration: Sources and Solutions," *Immigration Briefings* No. 06-12, Dec. 2006, p. 2.

993 *See id.* at p. 6.

994 *See id.*

995 *See id.* at 7.

believe your non-citizen client may be eligible to file a VAWA visa self-petition or one of the other immigration remedies under VAWA, consult an immigration attorney. If counsel is defending the alleged abuser, the alleged abusive non-citizen may face immigration consequences for offenses related to domestic violence.[996]

In order to be eligible to file a VAWA self-petition, the non-citizen must demonstrate that:

- She has resided with the LPR or USC spouse, parent, or child;
- She was subjected to battery or extreme cruelty by the LPR or USC spouse, parent, or child;
- If the self-petitioner is a spouse or child, the marriage was entered into in good faith and not for the sole purpose of obtaining an immigration benefit; and
- She is a person of good moral character. A battered child does not need to meet this requirement.

If a self-petitioner falls under one of the bars to good moral character defined by I.N.A. § 101(f), 8 U.S.C. § 1101(f), she must demonstrate that the act or conviction was related to being battered or subjected to extreme cruelty.[997] Even if a non-citizen does not fall under any of these statutory bars, the CIS may still find that she does not demonstrate good moral character based on her conduct within the U.S. or abroad.[998]

Once a visa self-petition is approved, the non-citizen may also be eligible to apply to adjust her status to become a lawful permanent resident under I.N.A. § 245, 8 U.S.C § 1255. This eligibility depends on various factors, including the immigration status of the abuser. If the abuser is a U.S. citizen, the non-citizen may apply for adjustment of status immediately upon approval of the visa self-petition. If the abuser is an LPR, the non-citizen must wait to apply for adjustment of status until an immigrant visa is available.

Availability of an immigrant visa is determined by the family-based priority categories in the U.S. Department of State's Visa Bulletin, published monthly. Within those categories, the availability of an immigrant visa is based on the "priority date" of a visa petition. This priority date is the date upon which the CIS received the visa petition from the self-petitioning non-citizen. This essentially means that non-citizens with approved visa self-petitions are waiting in a line behind other beneficiaries of visa petitions who filed their visa petitions at an earlier date. According to recent visa bulletins, non-citizens whose qualifying family members are LPRs are waiting between five and seven years, depending on the non-citizen's country of nationality or citizenship, for an immigrant visa to be available in order to apply for adjustment of status.[999] Non-citizens who must wait for

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[996] *See* Crimes Involving Domestic Violence, Stalking, Child Abuse, Child Neglect, and Child Abandonment, *supra* at 3-26.

[997] *See* I.N.A. § 204(a)(1)(C), 8 U.S.C § 1154(a)(1)(C).

[998] *See* Good Moral Character, *supra* at 6-12.

[999] For example, a non-citizen from Mexico who filed her visa self-petition on January 1, 2006 based on the battery or extreme cruelty she suffered by her LPR husband will have a priority date of January 1, 2006 in the 2A family preference category. For the month of July 2009, visa numbers for the 2A category are currently available for visa petitions filed on or before June 22, 2002. The Visa

a visa to become available are granted deferred action and are eligible for employment authorization and public benefits.[1000]

Eligibility for adjustment of status also depends on whether the non-citizen falls under any of the grounds of inadmissibility listed in I.N.A. § 212, 8 U.S.C. § 1182. If so, she may not adjust her status unless she is also eligible to apply for a waiver of inadmissibility. Under I.N.A. § 212(h), 8 U.S.C. 1182(h), a non-citizen with an approved visa self-petition can apply for a waiver of crimes involving moral turpitude, simple possession of 30 grams or less of marijuana, two or more offenses for which aggregate sentences to confinement were five years or more, or prostitution.[1001] In order to be granted the waiver, she must demonstrate that her removal from the U.S. would cause extreme hardship to her U.S. citizen or LPR spouse, child, or parent. She may apply for a waiver of inadmissibility for fraud or willful misrepresentation under I.N.A. § 212(i), 8 U.S.C. 1182(i) if she can demonstrate that her removal from the U.S. would cause extreme hardship to herself or her U.S. citizen or LPR child or parent.[1002]

VAWA Cancellation of Removal

If a non-citizen who has been subjected to domestic battery or extreme cruelty is in removal proceedings before an Immigration Judge, she may be eligible to apply for VAWA Cancellation of Removal under I.N.A. § 240A(b)(2), 8 U.S.C. § 1229b(b)(2).[1003] If granted cancellation of removal, she will become a lawful permanent resident.

Non-citizens who may be eligible to apply for VAWA cancellation of removal are:

- A spouse who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen spouse. Unless they have also been battered or subjected to extreme cruelty, non-citizen children of the abused spouse cannot be included in the application for cancellation of removal as derivatives;
- A non-citizen who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen whom she intended to marry but whose marriage is not legitimate because of his bigamy;
- A child who has been battered or subjected to extreme cruelty by an LPR or U.S. citizen parent; or
- A parent of a child who has been battered or subjected to extreme cruelty by the parent's LPR or U.S. citizen spouse.

Bulletin is updated each month and is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

[1000] *See* I.N.A. § 204(a)(1)(K), 8 U.S.C. § 1154(a)(1)(K); 74 Interpreter Releases 971, (Jun. 16, 1997); 77 Interpreter Releases 1413 (Oct. 2, 2000).

[1001] For additional information regarding waivers under I.N.A. § 212(h), 8 U.S.C. § 1182(h), see 212(h) waivers, *supra* at 6-58.

[1002] For additional information regarding waivers under I.N.A. § 212(i), 8 U.S.C. § 1182(i), see 212(i) waivers, *supra* at 6-62.

[1003] The Immigration Court may only cancel the removal of 4,000 non-citizens nationally each year, including cancellation of removal for other categories under I.N.A. § 240A(b), 8 U.S.C. 1229b(b).

Unlike the VAWA visa self-petition, a non-citizen parent who has been battered or subjected to extreme cruelty by a child who is or was a U.S. citizen is not eligible for cancellation of removal.

In addition, where a non-citizen has been convicted or committed an act that would otherwise bar the Attorney General from finding good moral character, it may be waived by the Attorney General if he finds that the act or conviction was connected to the non-citizen's having been battered or subjected to extreme cruelty and that a waiver is warranted.[1004] Finally, a non-citizen who has been ordered deported or removed may file a motion to reopen to apply for VAWA cancellation or a VAWA self-petition up to a year, or even longer, after the order becomes final where the Attorney General finds that the non-citizen demonstrates extraordinary circumstances or extreme hardship to her child.[1005]

In order to be eligible for VAWA Cancellation of Removal, the applicant must demonstrate that:

- She was subjected to battery or extreme cruelty by the LPR or USC spouse or parent;
- She has been physically present in the U.S. for a continuous period of not less than 3 years immediately preceding the date of the application;
- She has been a person of good moral character for the 3 years preceding the date of the application;[1006] and
- Her removal would result in extreme hardship to herself, her child, or her parent.

A non-citizen is ineligible to apply for VAWA cancellation of removal if she has been convicted of an aggravated felony. She is also ineligible if she falls under the criminal and national security related grounds of inadmissibility.[1007] The grounds of deportability rendering a non-citizen ineligible for VAWA cancellation of removal are related to criminal activity, threats to national security, marriage fraud, failure to register a change of address, and document fraud.[1008] There are no waivers available for these grounds of inadmissibility and deportability.

[1004] INA § 240A(b)(2)(C), 8 U.S.C. § 1229b(b)(2)(C).

[1005] INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv); *see also*, Sanchez v. Keisler, 505 F.3d 641 (7th Cir. Oct. 4, 2007).

[1006] *See In re* Ortega-Cabrera, 23 I&N Dec. 793 (BIA Jul. 21, 2005) (calculating the good moral character period backward from the date on which the application is finally resolved by the Immigration Judge or BIA); Good Moral Character, *supra* at 6-12.

[1007] *See* I.N.A. §§ 212(a)(2), (a)(3), 8 U.S.C. §§ 1182(a)(2), (a)(3).

[1008] *See* I.N.A. §§ 237(a)(1)(G), (a)(2)-(a)(4), 8 U.S.C. §§ 1227(a)(1)(G), (a)(2)-(a)(4).

U Visa and Deferred Action

U Visa

Congress created the U visa through the Victims of Trafficking and Violence Protection Act of 2000[1009] for non-citizens who have suffered physical or mental abuse as a victim of or being solicited to commit certain types of crimes, including:

- Rape
- Abusive sexual conduct
- Sexual exploitation
- Sexual assault
- Incest
- Felonious assault
- Domestic violence
- Manslaughter
- Murder
- Prostitution
- Female genital mutilation
- Being held hostage
- Torture
- Trafficking
- Peonage
- Involuntary servitude
- Slave trade
- Kidnapping
- Abduction
- Perjury
- Witness tampering
- Obstruction of justice
- Unlawful criminal restraint
- False imprisonment
- Blackmail
- Extortion

The U visa is a viable alternative to filing a VAWA visa self-petition for a non-citizen victim of domestic battery or extreme cruelty if the perpetrator is not an LPR or USC family member. Further, the non-citizen victim does not need to be related to the offender.

In order to be eligible for a U visa, the non-citizen must:

- Demonstrate that she has suffered substantial physical or mental abuse as a victim of a certain crime;
- Establish that the crime violated the laws of the U.S. or occurred in the U.S.;
- Possess information related to the crime; and
- Obtain a certification verifying her assistance in the investigation or prosecution of the crime from law enforcement authorities, a judge, or any federal agency including the DHS.

The benefits of the U visa are broad. If the non-citizen victim is under 21 years old, her spouse, children, unmarried siblings under the age of 18, and parents may also be granted a U visa, whether they are also in the U.S. or abroad. If the non-citizen victim is 21 years old or older, only her spouse and children are eligible for a U visa. The CIS may grant 10,000 U visas each year, not including derivatives of the principal applicant.[1010] A non-citizen who has been granted a U visa may apply for adjustment of status after she has

[1009] *See* Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000); I.N.A. §§ 101(a)(15)(U), 214(p), 245(m), 8 U.S.C. §§ 1101(a)(15)(U), 1184(p), 1255(m).

[1010] *See* I.N.A. § 214(p)(2), 8 U.S.C. § 1184(p)(2).

been physically present in the U.S. for three years after being admitted in U visa status and meets the other requirements.[1011]

Deferred Action

Deferred action status allows a non-citizen to remain in the U.S., although the DHS can initiate removal proceedings at any time through the issuance of a Notice to Appear. Prior to the issuance of the U regulations, CIS issued deferred action status to non-citizens who were the victims of the enumerated crimes.[1012] Where a non-citizen has been convicted of an aggravated felony, the CIS was able to deny her request for deferred action status under its memoranda.[1013] In the interim, a non-citizen with deferred action status has been eligible for certain benefits, including employment authorization. A non-citizen had to apply to renew deferred action and employment authorization each year.[1014] ICE may also issue a final administrative removal order where a non-citizen is not a lawful permanent resident and has been convicted of an aggravated felony.[1015]

If a non-citizen is eligible to apply for the U visa but is inadmissible under I.N.A. § 212, 8 U.S.C. § 1182, she may file a waiver for the ground of inadmissibility demonstrating that it is in the public or national interest that she be granted the visa.[1016] The only ground for which the CIS cannot grant a waiver is that related to Nazi persecution.

A non-citizen with deferred action status is eligible under regulations for the U visa to apply to adjust her status if:

- She has been in the U.S. for a continuous period of three years;
- Her continued presence in the U.S. is justified on humanitarian grounds to ensure family unity or is otherwise in the public interest; and
- She has cooperated with law enforcement authorities in the criminal investigation and prosecution.[1017]

[1011] *See* 8 C.F.R. § 245.24(b).

[1012] *See* Memorandum, Michael D. Cronin, Acting Exec. Assoc. Comm'r, Victims of Trafficking and Violence Protection Act of 2000 (VAWA II), Policy Memorandum #2 -- T and U Nonimmigrant Visas (Aug. 30, 2001), available in Gallagher, Immigration Law Service 2d, Selected Presidential and Agency Documents, Vol. 8; Memorandum, William R. Yates, Assoc. Director of Operations, Centralization of Interim Relief for U Nonimmigrant Status Applicants (Oct. 8, 2003), available in Gallagher, Immigration Law Service 2d, Selected Presidential and Agency Documents, Vol. 8.

[1013] *See id*. (citing CIS Memoranda dated Aug. 30, 2001 and Oct. 8, 2003); *see also,* Final Administrative Removal Orders, *supra* at 6-3.

[1014] Memorandum from William R. Yates, Associate Director of Operations, to Director of Vermont Service Center, "Centralization of Interim Relief for U Nonimmigrant Status Applicants," Oct. 8, 2003.

[1015] *See* Fonseca-Sanchez v. Gonzales, 484 F.3d 439 (7th Cir. Apr. 13, 2007) (discussing the issuance of final administrative removal orders by DHS and adjudication of requests for deferred action in light of the absence of regulations for the issuance of U visas and finding that the non-citizen had not exhausted her administrative remedies regarding the CIS' denial of her request for deferred action).

[1016] *See* I.N.A. § 212(d)(14), 8 U.S.C. § 1182(d)(14); 72 Fed. Reg. 53021-22; 8 C.F.R. § 214.14(c)(2)(iv).

[1017] *See* I.N.A. § 245(m), 8 U.S.C. § 1255(m). For a summary of the U visa adjustment of status regulations, see "Summary of U Adjustment Regulations," National Network to End Violence against Immigrant Women, Dec. 2008, available at

Non-citizens who requested or were granted U visa interim relief on or before October 17, 2007, were required to file an application for the U nonimmigrant visa by April 14, 2008.[1018] Once the non-citizen granted a U visa has been granted lawful permanent residence, her spouse and children may also apply to adjust their status. If the non-citizen is a child, the CIS may grant lawful permanent residence to the parent if it is determined that the child would face extreme hardship if the parent was removed from the U.S.[1019]

T (Trafficking) Visa

In addition to the U visa, the Victims of Trafficking and Violence Protection Act of 2000 established the T visa for victims of severe human trafficking.[1020] "Severe trafficking" is defined as the use of force, fraud, or coercion for sex trafficking and/or involuntary servitude, peonage, debt bondage, or slavery.[1021] If a non-citizen under 21 years old is granted a T visa, his spouse, parents, unmarried siblings under the age of 18, and children can also be granted a visa, whether they are in the U.S. or abroad. If the non-citizen is 21 years old or older, only his spouse and children may also be granted T visas.

Few non-citizens eligible for a T visa identify themselves as victims of trafficking, perhaps seeing their situation as a necessary price to pay for coming to the U.S. Most trafficking victims are not identified until they are discovered by social service organizations or police related to other issues, such as domestic violence or prostitution. Due to threats of deportation or abuse by traffickers, victims who would like to seek help may fear the consequences for themselves or their family members. Some victims are isolated or confined, making seeking help impossible.[1022]

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http://asistahelp.org/U%20Adjustment%20Fact%20Sheet.pdf. The Immigrant Legal Resource Center has also published *The U Visa: Obtaining Status for Immigrant Victims of Crimes*, 1st ed. by Sally Kinoshita, 2009, available at https://www.ilrc.org/publications/detail.php?id=64.

[1018] *See* 72 Fed. Reg. 53014 (Sept. 17, 2007).

[1019] For more information about U Visas and deferred action, *see* Sherizaan Minwalla, "The U Non-immigrant Visa: A Practitioner's Guide," *Immigration Briefings* 06-7, July 2006; Sally Kinoshita, *How to Obtain U Interim Relief: A Brief Manual for Advocates Assisting Immigrant Victims of Crime*, Immigrant Legal Resource Center, http://www.ilrc.org/resources/U%20Visa/2006%20U%20Manual%20Complete.pdf, Aug. 2006.

[1020] *See* Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000); I.N.A. §§ 101(a)(15)(T), 214(o), 245(l), 8 U.S.C. §§ 1101(a)(15)(T), 1184(o), 1255(l); 8 C.F.R. § 214.11.

[1021] *See* 22 U.S.C. § 7102.

[1022] *See* "Connecticut Human Trafficking Suit Filed: Guatemalan Workers Subjected to Forced Labor in Granby, Connecticut," *Bender's Immigration Bulletin*, Feb. 8, 2007; *Immigration and Nationality Law Handbook*, American Immigration Lawyers Association, 2006-2007 Ed., "Obtaining "T" status and Other Relief for Human Trafficking Survivors," pp. 698-700; Cynthia L. Cooper, "Trafficking Victims: Helping to Stop Abuse," *Legal Services Corporation Equal Justice Magazine*, www.ejm.lsc.gov, Winter 2005.

In order to be eligible for a T visa, the non-citizen must demonstrate that:

- He is or has been the victim of a severe form of trafficking;
- He is physically present in the U.S.;
- He has complied with reasonable requests for assistance by law enforcement authorities in the investigation and prosecution of the traffickers. This requirement is waived for victims under the age of 18; and
- He would suffer extreme hardship or harm upon removal from the U.S.

The T visa is a non-immigrant visa that is valid for a maximum of four years.[1023] It can only be renewed if law enforcement authorities still require his assistance for ongoing criminal investigation or prosecution. The only bar to eligibility for a T visa is if there is reason to believe that the victim has also committed an act of severe trafficking.[1024]

If eligible, a non-citizen granted a T visa may apply to adjust his status to a lawful permanent resident. Spouses, siblings, parents or children who were also granted T visas may apply to adjust their status as well. In order to be eligible for adjustment of status, a non-citizen must:

- Be physically present in the U.S. for three years in T visa status or physically present in the U.S. until the completion of the investigation or prosecution of the trafficking case, whichever time period is less;
- Comply with reasonable requests for assistance in the criminal investigation or prosecution of the trafficking case or demonstrate that he would suffer extreme hardship involving unusual and severe harm if removed from the U.S.; and
- Maintain good moral character through the duration of T visa status.

A non-citizen granted a T visa is ineligible to adjust his status if he falls under one of the grounds of inadmissibility listed in I.N.A. § 212(a), 8 U.S.C. § 1182(a).[1025] However, the applicant may apply for a waiver of inadmissibility for health-related and public charge grounds if the offense was caused by the severe trafficking.[1026] The grounds of inadmissibility for security related grounds, international child abduction, and former renunciation of U.S. citizenship to avoid taxation cannot be waived.[1027]

[1023] *See* I.N.A. § 214(o)(7)(A), 8 U.S.C. § 1884(o)(7)(A).
[1024] *See* I.N.A. § 214(o)(1), 8 U.S.C. § 1184(o)(1).
[1025] *See* Grounds of Inadmissibility, *supra* at 4-1; Adjustment of Status, to 6-18.
[1026] *See* I.N.A. § 212(d)(13), 8 U.S.C. § 1182(d)(13).
[1027] *See* I.N.A. § 245(l), 8 U.S.C. § 1255(l).

S Visa

For non-citizens who are arrested and charged with crimes, including drug crimes, cooperating with and informing the government about the activities of their cohorts in crime may be an opportunity to avoid immigration consequences through the "S" visa. Congress created the S visa as part of the Violent Crime Control and Law Enforcement Act of 1994 to allow the lawful admission and adjustment of status to lawful permanent residence for non-citizens who provide testimony or information about criminal activities to law enforcement authorities.[1028] The spouse, children, and parents of an S visa applicant may also be granted S visas in the U.S. or abroad.

In order to be eligible for an S visa, the non-citizen must:
▪ Possess information concerning a criminal organization or enterprise; ▪ Willingly share this information with federal or state courts; and ▪ Be essential to the success of the investigation or prosecution of the criminal organization or enterprise.

Under I.N.A. § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S), two types of S visas are available. First, for non-citizens whose presence is required for the investigation or prosecution of criminal organizations, up to 200 visas may be issued each year. Second, for non-citizens who have reliable information about terrorist groups or organizations, up to 50 visas may be issued each year.[1029]

The S visa is a non-immigrant visa valid for three years with no possible extension. During this period, the non-citizen granted the S visa must make quarterly reports to the Attorney General.[1030] Unlike the T visa and the U visa (presently deferred action), non-citizens and their attorneys cannot apply for S visas. Rather, only federal or state law enforcement agencies can file applications with the Assistant Attorney General of the Criminal Division of the U.S. Department of Justice to obtain the S visas. The law enforcement agency must agree to conditions relating to the non-citizen and certify the need for the S visa for the particular non-citizen. The Assistant Attorney General then has seven days to respond to the request.[1031] The DHS can still arrest a non-citizen to initiate removal proceedings against him if the request to the Assistant Attorney General is denied or the non-citizen commits another crime at any time.

At the end of the three year S visa period, the state or federal agency with which the non-citizen has cooperated must decide whether the non-citizen has substantially contributed to the success of the investigation or prosecution. If so, the agency must file a

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[1028] *See* Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994); 8 C.F.R. §§ 212.4(i), 212.1, 214.2, 245.11, 248.3(h), 1212.1, 1212.4(i), 1245.1; *see also*, Wang v. Gonzales, 445 F.3d 993, 999, n.2 (7th Cir. Apr. 28, 2006); U.S. v. Zedeli, 180 F.3d 879, 881 (7th Cir. Jun. 17, 1999).

[1029] *See* I.N.A. § 214(k), 8 U.S.C. § 1184(k).

[1030] *See Immigration: S visas for Criminal and Terrorist Informants*, CRS Report for Congress, Congressional Research Service, http://www.fas.org/sgp/crs/terror/RS21043.pdf, Jan. 23, 2007, p. 4.

[1031] *See* 8 C.F.R. § 214.2(t).

form to allow the non-citizen to apply for adjustment of status.[1032] The non-citizen's spouse, married and unmarried sons and daughters, and parents may also apply. In the case of a non-citizen who has supplied information regarding terrorist organizations, the non-citizen must have substantially contributed to the prevention or frustration of an act of terrorism against a United States person or property or have contributed to the success of an investigation or prosecution of a person involved in an act of terrorism. The DHS may waive any ground of inadmissibility under I.N.A. § 212, 8 U.S.C. § 1182 except that related to participation in Nazi persecution for S visa holders who apply for adjustment of status.[1033]

A non-citizen who has cooperated with local, state or federal law enforcement authorities may still be subject to removal from the U.S. based on the commission of his own offenses. Although the Seventh Circuit has not yet ruled on whether a non-citizen may avoid removal from the U.S. based on the state-created danger theory, other circuits have rejected such theory and found that non-citizens are still subject to removal.[1034] A non-citizen may also be eligible for asylum, withholding of removal, and relief under the Convention against Torture where a non-citizen fears that he may be persecuted or tortured by a foreign government or persons that the foreign government is unable to control.[1035]

There may be physical and personal risks for a non-citizen who agrees to cooperate with law enforcement. If a non-citizen client is interested in working with a law enforcement agency, contact an immigration attorney who can assist the local law enforcement agency to prepare the application for the S visa.

Voluntary Departure

If a non-citizen is not eligible for any of the above forms of immigration relief, she may be eligible for voluntary departure. Under a grant of voluntary departure, she must leave the U.S. within the time period ordered, therefore avoiding a deportation or removal order. Whereas an order of removal bars a non-citizen from applying for either a non-immigrant or immigrant visa in the future for 10 years from the date of departure (unless a waiver is granted), a grant of voluntary departure maintains a non-citizen's eligibility for certain visas in the future without having to wait or be granted a waiver at a U.S. consulate or embassy. A non-citizen granted voluntary departure may be detained by the DHS until she departs.[1036]

[1032] *See Immigration: S visas for Criminal and Terrorist Informants*, CRS Report for Congress, Congressional Research Service, Jan. 23, 2007, p. 4.
[1033] *See* I.N.A. § 245(j), 8 U.S.C. § 1255(j).
[1034] *See* Enwonwu v. Gonzales, 438 F.3d 22, 31 (1st Cir. Feb. 13, 2006); Kamara v. A.G. of the U.S., 420 F.3d 202, 218 (3rd Cir. Aug. 29, 2005).
[1035] *See* Pronsivakulchai v. Gonzales, 461 F.3d 903 (7th Cir. Aug. 29, 2006); Wang v. Gonzales, 445 F.3d 993 (7th Cir. Apr. 28, 2006) (discussing evidentiary and nexus issues for asylum versus a fear of retribution based on personal animosity where a non-citizen cooperated with U.S. authorities to investigate and prosecute a crime ring in exchange for a reduction in her own sentence).
[1036] Al-Saddiqi v. Achim, 531 F.3d 490 (7th Cir. Jun. 27, 2008); *In re M-A-S-*, 24 I&N Dec. 762 (BIA Mar. 19, 2009) (regarding voluntary departure "under safeguards").

A non-citizen may be granted voluntary departure by the DHS in lieu of being subject to removal proceedings. She may also be granted voluntary departure by an Immigration Judge after removal proceedings have begun. There are two sections of law under which a non-citizen can be granted voluntary departure during removal proceedings: at the beginning of the proceedings and at the conclusion of proceedings after consideration of all forms of relief.[1037] Under either section of the law, she must establish that she merits a favorable exercise of discretion to be granted voluntary departure.[1038] For either form of voluntary departure, a non-citizen must be given written notice in English and Spanish and also oral notice in a language he understands about the consequences of failing to depart within the time granted under voluntary departure.[1039] For a non-citizen in removal proceedings, the Immigration Judge must inform the non-citizen of the penalties for failing to voluntarily depart on time in his order granting voluntary departure.[1040]

To be granted voluntary departure by the DHS prior to removal proceedings or at a master calendar hearing prior to the completion of the removal proceedings, a non-citizen must demonstrate that she has not been convicted of an aggravated felony and is not a security threat to the U.S.[1041] Under this section of the law, a non-citizen may have a prior criminal record and other undesirable characteristics and still be granted voluntary departure in the exercise of discretion. Prior to the completion of the removal proceedings and the grant of voluntary departure by an Immigration Judge, the non-citizen must expressly waive her right to appeal the Immigration Judge's decision.[1042] In return, she may be granted voluntary departure for up to 120 days.[1043]

A non-citizen may also be granted voluntary departure at the end of proceedings, after the Immigration Judge has denied other applications for relief from removal and issued a removal order. To be granted voluntary departure at the final hearing, a non-citizen is subject to different requirements. The non-citizen must: 1) have been physically present in the U.S. for at least one year prior to the date that the Notice to Appear was served on her; 2) demonstrate that she is a person of good moral character for at least five years immediately before requesting voluntary departure; 3) not have been convicted of an aggravated felony; 5) not constitute a security risk to the U.S.; and 4) establish by clear and

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1037 *See* I.N.A. § 240B, 8 U.S.C. § 1229c.

1038 *See In re* Arguelles, 22 I&N Dec. 811 (BIA Jun. 7, 1999) (citing the factors set forth in *In re* Gamboa, 14 I&N Dec. 244 (BIA Dec. 7, 1972)); *see also*, *In re R-S-H- et al.*, 23 I&N Dec. 629 (BIA Aug. 4, 2003) (holding that where an Immigration Judge has issued a protective order regarding disclosure of protected information during removal proceedings, the mandatory consequence of a violation of that order is ineligibility for any form of discretionary relief, except for bond, unless the non-citizen fully cooperates with the U.S. government relating to the noncompliance and establishes by clear and convincing evidence either that extraordinary and extremely unusual circumstances exist or that failure to comply with the order was beyond the control of the non-citizen and his attorney).

1039 *See* I.N.A. § 242B(f)(2), (d)(3) (1995), 8 U.S.C. § 1252b(f)(2), (d)(3) (1995).

1040 *See* I.N.A. § 240B(d), 8 U.S.C. § 1229c(d).

1041 *See* I.N.A. § 240B(a), 8 U.S.C. § 1229c(a).

1042 *See In re* Ocampo, 22 I&N Dec. 1301 (BIA Mar. 24, 2000) (discussing the differences between voluntary departure available at the outset of the removal proceedings and at the conclusion of proceedings).

1043 *See* I.N.A. § 240B(a)(2), 8 U.S.C. § 1229c(a)(2).

convincing evidence that she has the means to depart the U.S. and intends to do so.[1044] If the Immigration Judge (or the Board of Immigration Appeals) grants her voluntary departure, the period of voluntary departure cannot exceed 60 days.[1045]

A voluntary departure bond may be required by the Immigration Judge where it is granted at the beginning and must be required where it is granted at the conclusion of proceedings.[1046] The voluntary departure regulations that became effective on January 22, 2009 are extremely technical and complicated.[1047] The failure to post a voluntary departure bond results in the automatic vacatur of the departure order and other consequences.[1048]

A non-citizen may be granted voluntary departure only once in removal proceedings under I.N.A. § 240B, 8 U.S.C. § 1229c.[1049] In comparison, a non-citizen used to be eligible for a voluntary departure grant numerous times in deportation proceedings under I.N.A. § 244(e), 8 U.S.C. § 1254(e) (1995). Thus, if a non-citizen was granted voluntary departure under the old law, departed the U.S., and reentered the U.S., she may be eligible to apply for voluntary departure again in removal proceedings.[1050]

When a non-citizen requests and receives voluntary departure, she must depart within the voluntary departure period. If a non-citizen is granted voluntary departure under the provisions for removal proceedings and fails to depart the U.S. within the time allowed, he is subject to a civil penalty of not less than $1,000 and not more than $5,000 and he is also ineligible for a period of ten years for discretionary relief, including cancellation of removal, adjustment of status, change of non-immigrant status classification, and registry.[1051] Neither the BIA nor an Immigration Judge has the authority to recognize an equitable exception to the bar to discretionary relief beyond that specified in the statute.[1052]

[1044] *See* I.N.A. § 240B(b)(1), 8 U.S.C. § 1229c(b)(1).
[1045] *See* I.N.A. § 240B(b)(2)-(3), 8 U.S.C. § 1229c(b)(2)-(3).
[1046] *See* I.N.A. §§ 240B(a)(3), (b)(3), 8 U.S.C. §§ 1229c(a)(3), (b)(3).
[1047] *See* Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76927 (Dec. 18, 2008); Voluntary Departure Rule Q&A", American Immigration Law Foundation, Dec. 22, 2008, available at http://www.ailf.org/lac/lac_pa_topics.shtml#section12.
[1048] *See id*. One exception that may still exist under the new regulations: where a non-citizen, through no fault of her own, was unaware of the grant of voluntary departure until after the period expired, she cannot be said to have "voluntarily" failed to depart within the voluntary departure period. *In re* Zmijewska, 24 I&N Dec. 87 at 94-95 (BIA Feb. 21, 2007) (finding that a non-citizen's failure to depart due to ineffective assistance of counsel by a representative not informing the non-citizen of the voluntary departure period until after it began was involuntary and that situations in which departure within the period would involve exceptional hardship to the non-citizens or close family members or lack of funds to be able to depart would not constitute an involuntarily failure to depart).
[1049] *See In re* Arguelles, 22 I&N Dec. 811 (BIA Jun. 7, 1999).
[1050] *See id.*
[1051] *See* I.N.A. § 240B(d), 8 U.S.C. § 1229b(d).
[1052] *See In re* Zmijewska, 24 I&N Dec. 87, 91 (BIA Feb. 21, 2007) (finding that a voluntary departure agreement is an exchange of benefits between a non-citizen and the government in which a non-citizen avoids certain adverse consequences of a removal order, such as a 10 year bar under I.N.A. § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii)).

One exception exists for failing to depart under voluntary departure. Where a non-citizen can demonstrate in her application for non-permanent resident cancellation of removal, adjustment of status based on a self-petition by a non-citizen under the Violence Against Women Act (VAWA), or suspension of deportation that extreme cruelty or battery was at least one central reason for overstaying the grant of voluntary departure, then she will not be barred from eligibility for these forms of relief.[1053]

[1053] *See id.*

FLOW CHART: NON-CITIZEN REMOVAL (DEPORTATION) PROCEEDINGS

What happens to non-citizens who are removable from the U.S.?

Department of Homeland Security
Immigration and Customs Enforcement

Initiates removal proceeding by issuing a Notice to Appear (NTA) which charges a non-citizen with immigration law violations. If the non-citizen is already detained in local, state, or federal custody, he will generally be transferred to ICE custody when his criminal sentence is completed. If he is not already detained, ICE decides whether to detain for removal proceedings. If he is not an asylee, refugee, or LPR and has been convicted of an aggravated felony, DHS may issue a final administrative removal order under 8 U.S.C. §1228(b).

Department of Justice
Executive Office for Immigration Review

Immigration Court (Immigration Judge)

Bond Hearing	Master Calendar Hearing(s)	Individual Hearing
Reviews ICE's initial custody and bond determination and may set bond amount unless non-citizen is subject to mandatory detention under 8 U.S.C. § 1226(c).	Reviews factual allegations and legal charges in the NTA and determines initial eligibility for relief from removal.	Adjudicates applications for relief from removal. Grants relief or denies relief and orders removal.

Board of Immigration Appeals (BIA)

A single member or a panel of members reviews appeals from bond and individual hearing decisions of the Immigration Judge. Affirms, reverses, and/or remands case back to Immigration Judge for further proceedings. If the BIA does not remand the case, the order of the BIA is the final administrative removal order.

Judicial Branch (Article III Courts)

U.S. District Court

Reviews habeas corpus petitions challenging detention, mandamus actions and declaratory actions related to immigrant visa petitions, and affirmative applications for immigration benefits. Does *not* review appeals of removal orders issued by the BIA.

U.S. Circuit Court of Appeals

Reviews appeals of final orders issued by the DHS or BIA. Also reviews appeals from federal district court decisions regarding petitions for writs of habeas corpus challenging detention, mandamus actions, and declaratory actions.

Supreme Court

Reviews appeals of decisions by Circuit Court of Appeals that it chooses to accept by granting petitions for writs of certiorari.

Defending Non-Citizens in Illinois, Indiana, and Wisconsin. June 26, 2009.

Forms of Immigration Relief

Form of Relief	Eligibility	Bars to Eligibility
Acquired and derived U.S. citizenship: 8 U.S.C. §§ 1431, 1401a, 1402-1407, 1409	An individual may not be aware that he is already a citizen based on a relationship to a U.S. citizen parent or grandparent. Acquired citizenship depends on one or both of the individual's parents having been a U.S. citizen before the individual's birth. Derived citizenship depends on one or both of the individual's parents having naturalized as a U.S. citizen after the individual became an LPR and before he turned 18 years old. The rules surrounding eligibility for these two forms of citizenship are highly technical and depend on a number of factors, including but not limited to the date of birth of the individual, when and whether his parents married, when his U.S. citizen parent(s) resided in the United States, and when one or both parents naturalized as citizens. **Posthumous citizenship through death while on active-duty service in the armed forces may result in a parent or child of the soldier being eligible for immigration benefits or derivative citizenship. For more information, see 8 U.S.C. § 1440-1.**	None.
U.S. citizenship – military service: 8 U.S.C. §§ 1439, 1440	An individual who has served in the U.S. Armed Forces for a period or periods aggregating one year may file an application for naturalization while still in the Armed Forces or within six months of the honorable termination of such service. He does not need to meet the naturalization requirement of 5 years of continuous residence in the U.S. but does need to demonstrate good moral character. For provisions regarding military service during World War I, World War II, the Korean conflict, the Vietnam conflict, or other recognized period of hostilities, see 8 U.S.C. § 1440.	Conviction of an aggravated felony on or after 11/29/90.
Cancellation of removal: 8 U.S.C. § 1229b(a) **This is the simplest and best relief available to an LPR convicted of a crime.**	Must have been LPR for at least 7 years or for at least 5 years with additional 2 years of residence in the U.S. after having been admitted into the U.S. Applicant must have met these requirements *before* committing the crime rendering him inadmissible or deportable. He must also establish with positive equities that he warrants a favorable exercise of discretion under the totality of circumstances.	Conviction of an aggravated felony.
Waiver of exclusion (inadmissibility) known as "212(c) waiver": 8 U.S.C. § 1182(c)	Available to LPRs who: • were placed in deportation proceedings prior to April 1, 1997 or are in removal proceedings; • pled guilty to an aggravated felony or other crime which falls within the grounds of	Confinement of 5 years or more for one or more aggravated felonies, conviction of a firearms offense under 241(a)(2)(C), conviction of an aggravated

Form of Relief	Eligibility	Bars to Eligibility
	inadmissibility, depending on the availability of relief under § 1182(c) at the time of the plea; • had a defense to deportation but conceded deportability, relying on the availability of relief under § 1182(c); • has been domiciled in the U.S. for at least 7 years; and • merits a favorable exercise of discretion.	felony that does not have a comparable ground of inadmissibility. For conviction entered on or after 4/24/1996 for 2 or more crimes involving moral turpitude if more than one conviction resulted in a sentence or confinement of 1 year or longer.
Cancellation of removal for certain nonpermanent residents: 8 U.S.C. § 1229b(b)	Non-citizen must have been physically present in the U.S. for a continuous period of at least 10 years prior to application, must demonstrate good moral character, and must establish that his removal from the U.S. would cause exceptional and extremely unusual hardship to his LPR or U.S. citizen spouse, parent or child.	Conviction of a crime involving moral turpitude, controlled substance offense, aggravated felony, or other immigration offense (including document fraud).
VAWA Cancellation of Removal: 8 U.S.C. § 1229b(b)(2)	Non-citizen who has been subjected to battery or extreme cruelty by an LPR/USC spouse or parent or who is the parent of a child who has been batted or subjected to extreme cruelty by a LPR or former LPR parent, has been physically present in the U.S. for a continuous period of not less than 3 years immediately preceding the date of the application, has been a person of good moral character for 3 years, and has demonstrated that her removal would result in extreme hardship to her, her USC or LPR child, or her parent. Noncitizen who was subject to a bigamous marriage due to her spouse's bigamy and otherwise qualifies may also apply.	Conviction of an aggravated felony. Inadmissibility under the criminal and national security related grounds or deportability under grounds related to criminal activity, threats to national security, marriage fraud, failure to register a change of address, and document fraud. There are no waivers available for these grounds of inadmissibility and deportability.
Waiver of inadmissibility known as a "212(h) waiver": 8 U.S.C. § 1182(h)	Available to LPR or applicant for adjustment of status for certain felony and misdemeanor convictions. Applicant must demonstrate that her U.S. citizen or LPR spouse, child, or parent would suffer extreme hardship in the case of her removal from the U.S. A waiver may also be available if the conviction(s) were entered 15 years before the application for admission to the U.S.	Conviction of an aggravated felony for an LPR and drug offenses with an exception for one simple possession offense for 30 grams or less of marijuana.
Waiver of inadmissibility known as a "212(i) waiver": 8 U.S.C. § 1182(i)	Available to an LPR or applicant for adjustment of status for certain felony convictions related to immigration fraud or misrepresentation. Applicant must demonstrate that her U.S. citizen or LPR spouse or parent (a child is not a qualifying relative) would suffer extreme hardship in the case of her deportation.	False claim to U.S. citizenship on or after 9/30/96 (unless LPR meets one of the limited exceptions).
Readjustment of status for an LPR: 8 U.S.C. § 1255	An LPR who is deportable or inadmissible may apply to readjust her status as an LPR if she has a qualifying family member (spouse, child over the age of 21, or parent who can file a petition for her and an immigrant visa would be immediately	Conviction of an aggravated felony, unless the applicant is simultaneously eligible for a waiver under 8 U.S.C. § 1182(c).

Form of Relief	Eligibility	Bars to Eligibility
	available to her.	If not eligible for a waiver under 8 U.S.C. § 1182(c), a controlled substance offense other than simple possession of 30 grams or less of marijuana.
Asylum: 8 U.S.C. § 1158	Non-citizen fears persecution in his country of birth, nationality, citizenship, or last habitual residence on account of her race, religion, nationality, membership in a particular social group, or political opinion. Application must be filed within one year of entry to the U.S. unless he meets a listed exception, such as a material change of circumstances in the country of removal.	Conviction for an aggravated felony or a crime deemed to be particularly serious, reason to believe the non-citizen committed a serious crime outside the U.S., or reason to believe he is a danger to U.S. security.
Withholding of removal: 8 U.S.C. § 1231(b)(3)	Non-citizen fears that his life or freedom in his country of removal will be threatened based on persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. Unlike asylum, there is no filing deadline and a grant of withholding does not allow him to apply for lawful permanent residence.	Conviction of an aggravated felony for which the non-citizen has been sentenced to a term of imprisonment of 5 years or longer, conviction of a particularly serious crime, reason to believe he committed a serious crime outside the U.S., or reason to believe he is a danger to U.S. security.
Relief under the Convention Against Torture: 8 C.F.R. § 1208.16	Non-citizen fears that she will be subjected to torture by government officials or persons acting with the acquiescence of government officials in her country of removal.	None.
Special adjustment of refugee or asylee status to lawful permanent resident: 8 U.S.C. § 1159	Refugee or asylee must have been physically present in the U.S. for at least 1 year. For certain criminal convictions, a waiver of inadmissibility must be filed and may be granted for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.	Reason to believe that the refugee or asylee has been convicted of murder or drug trafficking, that he is or has been a controlled substance trafficker, that he is a threat to U.S. security, that he has been involved in genocide, or that he has been a Nazi persecutor.
Adjustment of status to lawful permanent resident: 8 U.S.C. § 1255(a)	Non-citizen who entered the U.S. on a temporary visa and stayed beyond the time allotted by the DHS may apply for adjustment of status if he is physically present in the U.S., is the spouse, parent, or child of a U.S. citizen who has filed a family visa petition on his behalf, and there is an immigrant visa available.	Non-citizen falls under one of the grounds of inadmissibility listed in 8 U.S.C. § 1182. He may, however, be eligible for a waiver under 8 U.S.C. § 1182(h) or (i), depending on the ground of inadmissibility.

Form of Relief	Eligibility	Bars to Eligibility
Adjustment of status to lawful permanent resident under "245(i)": 8 U.S.C. § 1255(i)	Non-citizen who entered the U.S. without inspection (illegally) may apply for adjustment of status if he is physically present in the U.S., has a qualifying relative or employer who filed a visa petition on her behalf on or before 4/30/01, and there is an immigrant visa available. If the petition was filed after 1/14/98, the non-citizen must have been physically present in the U.S. on 12/21/00.	Non-citizen falls under one of the grounds of inadmissibility listed in 8 U.S.C. § 1182. She may, however, be eligible for a waiver under 8 U.S.C. § 1182(h) or (i) depending on the violation.
T visa: 8 U.S.C. §§ 1101(a)(15)(T), 1184(o)	Non-citizen who is or has been a victim of a severe form of human trafficking, is physically present in the U.S., has complied with reasonable requests for assistance by law enforcement authorities in investigating and prosecution of the traffickers, and would suffer extreme hardship or harm upon removal from the U.S. A non-citizen granted a T visa may apply for adjustment of status under 8 U.S.C. § 1255(l).	Reason to believe that the victim has also committed an act of severe human trafficking.
U Visa: 8 U.S.C. §§ 1101(a)(15)(U), 1184(p)	Non-citizen who has suffered substantial physical or mental abuse as a victim of an enumerated crime that violated the laws of the U.S. or occurred in the U.S. The non-citizen must possess information related to the crime and obtain a certification from law enforcement authorities, a judge, or any federal agency including the DHS, verifying her assistance in the investigation or prosecution of the crime. A noncitizen who is granted a U visa may apply for adjustment of status under 8 U.S.C. § 1255(m) after having U visa nonimmigrant status for 3 years.	The DHS may waive any ground of inadmissibility under 8 U.S.C. § 1182 except that related to participation in Nazi persecution.
S visa: 8 U.S.C. § 1101(a)(15)(S)	Non-citizen must possess information concerning a criminal organization or enterprise, willingly share this information with federal or state courts, and be essential to the success of the investigation or prosecution. A non-citizen granted an S visa may apply for adjustment of status under 8 U.S.C. § 1255(j). **Only federal or state law enforcement agencies can file applications for a non-citizen to obtain an S visa.**	The DHS may waive any ground of inadmissibility under 8 U.S.C. § 1182 except that related to participation in Nazi persecution.
VAWA visa self-petition: 8 U.S.C. § 1154(a)	Non-citizen must have resided with an LPR or USC spouse, parent, or child who has subjected her to battery or extreme cruelty. In the case of a self-petition based on battery by a spouse or parent, the victim must demonstrate that her marriage with the abuser was entered into in good faith and not for the sole purpose of obtaining an immigration benefit. She must also demonstrate that she is a person of good moral character. If her self-petition is approved, she may apply for adjustment of status under 8 U.S.C. § 1255(a).	Failure to demonstrate good moral character. Bars to good moral character are listed under 8 U.S.C. § 1101(f). Good moral character may also be determined by other factors in the CIS's discretion.

Form of Relief	Eligibility	Bars to Eligibility
Voluntary Departure (VD) prior to or at an initial master calendar hearing before the Immigration Court: 8 U.S.C. § 1229c(a) Non-citizen may be granted up to 120 days to depart the U.S. at her own expense. A grant of VD may maintain her eligibility for immigrant and nonimmigrant visa applications in the future.	Non-citizen must admit the factual allegations, concede to the charges of removability, and request VD before removal proceedings are initiated or at the first hearing before the Immigration Judge. In addition, she must waive her right to appeal the decision of the Immigration Judge. VD may be granted or denied in the exercise of discretion.	Conviction of an aggravated felony and participation in terrorist activities.
VD at conclusion of removal proceedings: 8 U.S.C. § 1229c(b): Non-citizen may be granted up to 60 days of VD at the conclusion of removal proceedings or in the BIA's appeal decision.	Non-citizen must be physically present in the U.S. for at least 1 year prior to initiation of removal proceedings, must be able to prove good moral character for at least 5 years prior to the request for VD, must clearly establish financial ability to leave at her own expense, and must not have previously been granted VD in removal proceedings. VD may be granted or denied in the exercise of discretion. A voluntary departure bond is required and must be posted within 5 days; if not, the grant of VD turns into a removal order.	Conviction of an aggravated felony, lack of good moral character for 5 years prior to requesting VD, participation in terrorist activities.

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A
Case No:

In the Matter of:

Respondent: _____ currently residing at:

C/O ILLINOIS RIVER CORR.,CEN./B57524 ROUTE 9 WEST, P.O.BOX 999
CANTON ILLINOIS 61520 (309)647-7030
(Number, street, city state and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.
☐ 2. You are an alien present in the United States who has not been admitted or paroled.
☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
2004 SEP -7 AM 8:54
CHICAGO, ILLINOIS

The Service alleges that you:

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: _____
55 East Monroe Street Suite 1900 Chicago ILLINOIS US 60603
(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set (Date) at a time to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

[redacted]
ACTING RESIDENT AGENT IN CHARGE
(Signature and Title of Issuing Officer)

Date: June 28, 2004

[redacted]
(City and State)

EXHIBIT 20
SEP 13 2004

See reverse for important information

Form I-862 (Rev. 3/22/99)N

00035 #1

Appendix 6-C

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

_____
(Signature of Respondent)

Before:

_____
(Signature and Title of INS Officer)

Date: _____

Certificate of Service

This Notice to Appear was served on the respondent by me on June 28, 2004 (Date), in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☐ in person ☐ by certified mail, return receipt requested ☒ by regular mail

☐ Attached is a credible fear worksheet.

☐ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

_____
(Signature of Respondent if Personally Served)

SPECIAL AGENT [redacted]
(Signature and Title of Officer)

Form I-862 (Rev. 3/22/99)N

Alien's Name	File Number Case No: A	Date June 28, 2004

The Service alleges that you:

1) You are not a citizen or national of the United States;

2) You are a native of AFGHANISTAN and a citizen of AFGHANISTAN;

3) You were admitted to the United States at Seattle, Washington on or about September 29, 1983 as a REFUGEE;

4) Your status was adjusted to that of lawful permanent resident on October 2, 1984 under section 249 of the Act;

5) You were, on September 19, 2002, convicted in the Circuit Court Cook County Illinois for the offense of Retail Theft, in violation of 720 I.L.C.S., Section 5/16A-3(A);

6) You were sentenced to a two year term of imprisonment.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year was imposed.

Signature	Title
[redacted]	ACTING RESIDENT AGENT IN CHARGE

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Custody Determination

Case No:
File No: A
Date: 11/01/2004

INDIANAPOLIS, IN 46225

FIN #:

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

- ☐ detained in the custody of this Service.
- ☒ released under bond in the amount of $2,500.00.
- ☐ released on your own recognizance.

☒ You may request a review of this determination by an immigration judge.

☐ You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.

[redacted]
(Signature of authorized officer)

SUPERVISORY SPECIAL AGENT
(Title of authorized officer)

INDIANAPOLIS, IN
(INS office location)

☒ I do ☐ do not request a redetermination of this custody decision by an immigration judge.

☒ I acknowledge receipt of this notification.

(Signature of respondent) (Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director ☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:

☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to _____
☐ Release-Order of Recognizance
☐ Release-Personal Recognizance
☐ Other: _____

(Signature of officer)

U.S. Department of Justice

Immigration and Naturalization Service

Warrant for Arrest of Alien

Case No:

File No. A

Date: June 28, 2004

To any officer of the Immigration and Naturalization Service delegated authority pursuant to section 287 of the Immigration and Nationality Act:

From evidence submitted to me, it appears that:

_____
(Full name of alien)

an alien who entered the United States at or near Seattle, Washington (Port) on September 29, 1983 (Date) is within the country in violation of the immigration laws and is therefore liable to being taken into custody as authorized by section 236 of the Immigration and Nationality Act.

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I command you to take the above-named alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations.

[redacted]
(Signature of authorized INS official)

for [redacted]
(Print name of official)

ACTING RESIDENT AGENT IN CHARGE
(Title)

Certificate of Service

Served by me at _____ on _____ at _____.
I certify that following such service, the alien was advised concerning his or her right to counsel and was furnished a copy of this warrant.

_____
(Signature of officer serving warrant)

_____
(Title of officer serving warrant)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
CHICAGO, ILLINOIS

IN THE MATTER OF: EN EL ASUNTO DE: [redacted]	IN REMOVAL PROCEEDINGS EN LOS TRAMITES DE REMOVIENTO FILE NO: [redacted] NUMERO DE REGISTRO: A:

RESPONDENT: [redacted]
DEMANDADO

STIPULATED REQUEST FOR REMOVAL ORDER
AND WAIVER OF HEARING
DEMANDADO DE ESTIPULADO POR UN ORDEN DE REMOVIMIENTO
Y RENUNCIA DE AUDIENCIA

I, [redacted], Respondent herein make the following requests, statements, admissions and stipulations:
Yo, , Demandado en esto demando, declaro, admito, y estipulo lo siguiente.

1. **I have received a copy of the Notice to Appear (NTA) dated August 5, 2003, and my full, true and correct name is as indicated therein. See attached NTA. I have also received a legal aid list. I (have/do not have) an attorney who will represent me in this matter. See attached Form EOIR-28.**
Yo he recibido una copia de la notificacion a paracer (NTA) con la fecha , y mi nombre es completo, veradero, y correcto como indicado alli dentro. Mire la notificacion(NTA). Yo tambien he recibido una lista de ayuda legal. Yo (tengo/no tengo) un abogado lo quien va a representarme en este asunto. Mire la forma EOIR-28.

2. **I request that my deportation proceedings be conducted completely on a written record, without a hearing. I waive all my rights and advisals contained in 8 C.F.R. §§ 240.10 and 240.11, including my right to have a hearing, to be advised by the Immigration Judge of any apparent eligibility of relief from deportation, to present witnesses and evidence on my behalf, and to require the government to prove my deportability.**
Yo solicito que mi precedimientos de deportacion sea conducido completamente en un registro escrito, sin una audiencia. Yo renuncio a todos mis derechos y avisos contenido en 8 CFR § 240.10 y 240.11, incluyendo mi derecho a tener una audiencia, ser aconsejado del juez de inmigracion por alguna eligibilidad aparente para aliviar de deportacion, presentar testigos y evidencia para mi, y requerir que el gobierno prueba mi deportabilidad.

3. **I admit all the allegations contained in the NTA, and concede that I am deportable as charged.**
Yo admito todos los alegatos contenido en el NTA y concedio que yo soy deportable como acusado.

4. **I agree that I am not eligible, or if eligible, I waive by right to apply for relief from deportation. I am not seeking voluntary departure, asylum, adjustment of status, registry, de novo review of a termination of conditional resident status, de novo review of a denial or revocation of temporary protected status, cancellation of removal, or any other possible relief under the Immigration and Nationality Act.**
Yo estoy de acuerdo que no soy elegible o si elegible, yo renuncio mi derecho para solicitar por remedio de deportacion. No estoy buscando a salido voluntaria, asilo, cambio de estado migratorio, registro, nueva revision de terminacion de estado de residente condicional, nueva revision de negacion or revocacion de estado de protegido temporal, cancelacion de removiento, or alguno otro remedio posible bajo el acto de inmigracion y nacionalidad.

5. **I consent to the introduction of this "Stipulated Request" as an exhibit to the record of proceedings.**
Yo consiento a la introduccion de este "Demandado de Estipulado" como un exhibido al archivo de procedimientos.

6. **I designate ETHIOPIA as my country of choice for removal..** Yo designo como el pais de mi eleccion por removimiento.

7. **I will accept a written order for my removal to the above country as a final disposition of these Removal proceedings, and I waive appeal of the written order for my Removal from the United States.**
Yo aceptare una orden escrita por mi removimiento al pais arriba como una disposicion final de estos procedimientos de removimientos, y renuncio apelado de la orden escrita por mi removimiento de los estados unidos.

8. **I understand that by accepting an order of removal, I give up my right to apply for any relief for which I might have been eligible. I understand that I (am/am not) a permanent resident immigrant and that accepting an order of Removal terminates my permanent resident status. I also understand that I cannot return to the United States legally for a period of five (5) years if found inadmissible under section 212; a period of ten (10) years if found deportable under section 237; a period of twenty (20) years after having been previously excluded, deported, or removed and found inadmissible under section 212, or deportable under section 237; or at any time because I have been found inadmissible or excludable under section 212, or deportable under section 237 of the Act, and have been convicted of a crime designated as an aggravated felony.**
Yo comprendo que al aceptar una orden de removimiento, abandono mi derecho para solicitar por alguno remedio para es posible que yo he sido eligible. Yo comprendo que (soy/no soy) un residente permanente y que para aceptando una orden de removimiento, mi estado como un residente permanente va a terminar. Tambien, yo entiendo que no puedo regresar a los estados unidos legalmente por un periodo de cinco (5) anos si funda inadmisible bajo seccion 212; un periodo de diez (10) anos si deportable bajo seccion 237; un periodo de vente (20) anos depues de habia sido excluido, deportado, o removado y funda inadmisible bajo seccion 212, or deportable bajo seccion 237; o en alguno tiempo porque yo he sido fundado inadmisible o excuible bajo seccion 212, o deportable bajo seccion 237 del acto, y he sido convictado del crimen designado una felonia agrevada.

9. **In the event that my Removal proceedings are scheduled for a hearing. I waive any right to notice of such a hearing. Additionally, I waive my right to be present in person and, I also waive the presence of my attorney,**
En caso de que mi procedimientos de removimientos esta programado por una audiencia. Yo renuncio alguno derecho para notificacion de la audiencia. Tambien, yo renuncio mi derecho para presentarme y presentar mi abogado.

10. **I, or my attorney (if any), have read, (or have read to me in a language I understand), this entire "Stipulated Request". I fully understand its consequences. I can unequivocally state that I have submitted this "Stipulated Request" voluntarily, knowingly and intelligently.**
Yo o mi abogado (si tengo), he leido (o he habia leido a mi en una lengua lo que comprendo), este demando de estipulado entero. Yo entiendo todas de las consecuencias de estos. Yo puedo declarar inequivoco que he presentado este "Demando de Estipulado" voluntariamente, de modo instruido, y inteligente.

I certify that all the information I have given in the "Stipulated Request" is true and correct.
Yo certifico que toda la informacion lo que he dado en el "Demando de Estipulado" es verdadera y correcta.

08/05/03 [redacted]
(Date) / (Fecha) — **(Signature of Respondent)** / (Firma del Demandado)

[redacted]
(Printed name of Respondent)
(Letra de molde de Demandado)

(Date) / (Fecha) — **(Signature of attorney, if any)** / (Firma del Abogado)

(Printed name of attorney, if any)
(Letra de molde del Abogado)

8/14/2003 [redacted]
(Date) / (Fecha) — **(Signature of District Counsel or Deputy District Counsel)** / (Firma del Consejero de Distrito o Asistente)

[redacted]
(Printed name of District Counsel or Deputy District Counsel)
(Letra de molde del Consejero de Distrito o Asistente)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File #: A [redacted]

In the Matter of:)
[redacted])
) IN REMOVAL PROCEEDINGS
Respondent)

Charge(s): Section 237(a)(1)(B)

Application: None

On Behalf of Respondent:

Pro Se

On Behalf of the Service:

[redacted]
Omaha, NE

DECISION OF THE IMMIGRATION JUDGE

On 08/05/03 the Immigration & Naturalization Service issued a Notice to Appear alleging that the respondent was deportable/inadmissible from the United States as charged above. The respondent has executed a stipulation waiving a personal hearing before the Immigration Judge, admitting the truthfulness of the factual allegations and charges contained in the Notice to Appear, conceding that he/she is deportable/inadmissible on the charge(s) set forth above, designating ETHIOPIA as the country of removal, conceding that he/she is ineligible for or has made no application for relief from removal, and requesting issuance by this Court of an order of removal to ETHIOPIA. The respondent has further stipulated that he/she would waive his right to appeal from this order. The Service has concurred in this stipulation.

These stipulations constitute a conclusive determination of the alien's removability from the United States. Based upon the foregoing, the following Order shall therefore be entered:

ORDER: IT IS HEREBY ORDERED that the respondent be removed from the United States to ETHIOPIA on the charge(s) contained in the Notice to Appear.

Entered: August 15, 2003

[redacted]
Immigration Judge

PARTICULARLY SERIOUS CRIME BARS TO WITHHOLDING OF REMOVAL

OFFENSE	PARTICULARLY SERIOUS CRIME (PSC)?	STATUTE/CASE LAW/ NOTES
IN GENERAL		
Felony or misdemeanor which constitutes an aggravated felony under 8 U.S.C. § 1101 (a)(43)	For asylum: Yes, regardless of sentence. For withholding of removal under 8 U.S.C. §1251(b)(3): Yes, if sentenced to 5 or more years in prison. Yes, if conviction involves unlawful trafficking in controlled substances. Possibly, if sentenced to less than 5 years and conviction does not involve unlawful trafficking in a controlled substance.	For asylum purposes, an aggravated felony is deemed to be a PSC by statute. 8 U.S.C. 1158(b)(2)(B)(i). Rebuttable presumption of particularly serious crime for drug trafficking in limited circumstances. *In re* Y-L-, A-G-, R-S-R-, 23 I&N Dec. 270, 276-77 (A.G. Mar. 5, 2002) Requires a closer examination of the nature of the offense, the circumstances underlying the facts of the conviction, the sentence imposed, and whether the non-citizen is a danger to the U.S. community. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-*, 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988). However there is a rebuttable presumption that a conviction for an aggravated felony is a particularly serious crime in deportation proceedings. *Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996). In addition, the Board of Immigration Appeals has generally held that crimes of violence against the person constitute particularly serious crimes whereas crimes against the property do not.
Misdemeanor (single) that is not an aggravated felony	Usually not.	Without unusual circumstances, a single conviction of a misdemeanor offense is not a PSC. *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988).
Felony that is not an aggravated felony OR Misdemeanor (second or subsequent) that is not an aggravated felony	Possibly.	Requires a closer examination of the nature of the offense, the circumstances underlying the facts of the conviction, the sentence imposed, and whether the non-citizen is a danger to the U.S. community. *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), *modified, Matter of C-*, 20 I&N Dec. 529 (BIA 1992), *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988); *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999); *In re S-S-*, Int. Dec. 3374 (BIA 1999) (following *Matter of Frentescu*, *supra*).

PARTICULARLY SERIOUS CRIME BARS TO WITHHOLDING OF REMOVAL

TRAFFIC OFFENSES		
Driving Under the Influence (DUI) with a Suspended/Revoked License *625 ILCS 5/11-501* *IC 9-24-19-X* *Wis. Stat. 346.63*	Probably not.	
Aggravated Driving Under the Influence (DUI) *625 ILCS 5/11-501(d)(1)(A)*	Probably not.	Possibly where conviction involved injury to person or property or where multiple convictions as non-citizen may be seen as a danger to the community.
SEX CRIMES		
Indecent Solicitation of a Child *720 ILCS 5/11-6* Child Solicitation *IC 35-42-4-6* Child Enticement *Wis. Stat. 948.07*	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A). Probably for withholding of removal.	
Sexual Exploitation of a Child *720 ILCS 5/11-9.1(a)(1) or (2)* Child Exploitation *IC 35-42-4-4* Sexual Exploitation of a Child *Wis. Stat. 948.05*	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A). Probably for withholding of removal.	
Unlawful Sexual Intercourse with a minor *720 ILCS 5/12-15, 16* *IC 35-42-4-9* *Wis. Stat. 948.02*	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A). Probably for withholding of removal.	*Bogle-Martinez v. INS*, 52 F.3d 332 (9th Cir. 1995). May be able to argue it is not a particularly serious crime for withholding if non-citizen is now married to the person who was a minor at the time.
Soliciting a Juvenile Prostitute *720 ILCS 5/11-15(a)(1), (a)(2), (a)(3)* Soliciting a Child for Prostitution *Wis. Stat. 948.08*	Yes for asylum as an aggravated felony under 8 U.S.C. §1101(a)(43)(A). Probably for withholding of removal.	
Prostitution *720 ILCS 5/11-14* *IC 35-45-4-2* *Wis. Stat. 944.30*	Probably not.	
Soliciting for a Prostitute *720 ILCS 5/11-15(a)(1), (a)(2), and (a)(3)*	IL: No under (a)(1). Possibly under (a)(2), and yes where a minor is involved under (a)(3).	

PARTICULARLY SERIOUS CRIME BARS TO WITHHOLDING OF REMOVAL

Wis. Stat. 944.32		
Patronizing a Prostitute *720 ILCS 5/11-18* *IC 35-45-4-3* *Wis. Stat. 944.31*	Probably not.	
CRIMES AGAINST THE PERSON		
First Degree Murder *720 ILCS 5/9-1(a)(1)-(3)* Murder *IC 35-42-1-1* First Degree Intentional Homicide *Wis. Stat. 940.01*	Yes.	*Ahmetovic v. INS*, 62 F.3d 38 (2nd Cir. 1995).
Shooting with Intent to Kill	Yes.	*Nguyen v. INS*, 991 F.2d 621 (10th Cir. 1993).
Second Degree Murder *720 ILCS 5/9-2(a)* *IC 35-42-1-?* Second Degree Intentional Homicide *Wis. Stat. 940.05*	Yes.	*Matter of Jean*, 23 I&N Dec. 373 (AG 2002).
Reckless Homicide *720 ILCS 5/9-3(a)* *IC 35-42-1-5* First Degree Reckless Homicide *Wis. Stat. 940.02*	Yes.	
Involuntary Manslaughter *720 ILCS 5/9-3(a)* *IC 35-42-1-4*	Probably.	*Franklin v. INS*, 72 F.3d 571 (8th Cir. 1996).
Assault *720 ILCS 5/12-1* Criminal Recklessness *IC 35-42-2-2*	No.	*Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988).
Aggravated Assault *720 ILCS 5/12-2*	Possibly.	*Hamana v. INS*, 78 F.3d 233 (6th Cir. 1996); *Yousefi v. INS*, 260 F.3d 318 (4th Cir. 2001); *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988).
Battery *720 ILCS 5/12-3* *IC 35-42-2-1* *Wis. Stat. 940.19*	No unless record of conviction indicates sexual abuse of a minor.	
Aggravated Battery *720 ILCS 5/12-4* *IC 35-42-2-1.5*	Probably.	*Matter of B-*, 20 I&N Dec. 427 (BIA 1991).
Domestic Battery *720 ILCS 5/12-3.2* *IC35-42-2-1.3* *Wis. Stat. 940.19*	Possibly.	

PARTICULARLY SERIOUS CRIME BARS TO WITHHOLDING OF REMOVAL

Aggravated Domestic Battery *720 ILCS 5/12-3.3*	Probably.	
Aggravated Battery of a Child *720 ILCS 5/12-4.3*	Probably.	
Criminal Sexual Assault *720 ILCS 5/12-13* Rape *IC 35-42-4-1* Sexual Assault *Wis. Stat. 940.225*	Probably.	*Smith v. USDOJ*, 218 F. Supp. 2d 357 (W.D.N.Y. 2002); *Gatalski v. INS*, 72 F.3d 135 (9th Cir. 1995)[attempted rape].
Criminal Sexual Abuse of an Adult *720 ILCS 5/12-15* Sexual battery of an Adult *IC 35-42-4-8*	Probably.	
Stalking *720 ILCS 5/12-7.3* *IC 35-45-10-1* *Wis. Stat. 940.32*	Possibly.	
Child Abandonment *720 ILCS 5/12-21.5* *IC 35-46-1-4* *Wis. Stat. 948.20*	Possibly.	
Violation of Order of Protection *720 ILCS 5/12-30* Invasion of Privacy *IC 35-46-1-15.1* Violation of Court Orders *Wis. Stat. 940.48*	Possibly.	

CRIMES AGAINST PROPERTY

Home Invasion *720 ILCS 5/11* Residential Entry *IC 35-43-2-1.5* Criminal Trespass to Dwellings *Wis. Stat. 943.14*	Probably.	*Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982).
Theft *720 ILCS 15/16-1* *IC 35-43-4-2* Theft; Receiving Stolen Property *Wis. Stat. 943.20*	Possibly.	
Robbery *720 ILCS 5/18-1* *IC 35-42-5-1* *Wis. Stat. 943.32*	Probably.	*Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986); *Cepero v. BIA*, 882 F.Supp. 1575, 1580 (D.Kan. 1995); *Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997); *Matter of S-V*, 22 I&N Dec. 1306 (BIA 200).

PARTICULARLY SERIOUS CRIME BARS TO WITHHOLDING OF REMOVAL

Armed Robbery *720 ILCS 5/18-2* *IC 35-42-5-1* *Wis. Stat. 943.32*	Probably.	*Matter of S-S-*, 22 I&N Dec. 458 (BIA 1999), *overruled in part, Matter of Y-L*, 23 I&N Dec. 270 (A.G. 2002); *Matter of L-S-J*, 21 I&N Dec. 973 (BIA 1999); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990)
Retail Theft *720 ILCS 5/16A-3* *IC 35-43-4-2 (theft)* *Wis. Stat. 943.50*	Possibly.	
Burglary *720 ILCS 5/19-1* *IC 35-43-2-1* *Wis. Stat. 943.10*	Possibly.	*Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986)[burglary of a dwelling which included aggravated circumstances]; *Matter of Gonzalez*, 19 I&N Dec. 683 (BIA 1988); *Matter of Toboso Alfonso*, 20 I&N Dec. 819 (A.G. 1994)
Arson *720 ILCS 5/20-1.1* *IC 35-43-1-1* *Wis. Stat. 943.02-.04*	Probably.	
Acts taken against property based on race, religion, nationality, and membership in a particular social group *Wis. Stat. 943.012*	Yes.	
CRIMES INVOLVING CONTROLLED SUBSTANCES		
Possession of Cannabis *720 ILCS 550/4* *IC 35-48-4-11* *Wis. Stat. 961.41(3g)*	No, for small amounts. Possibly for larger amounts, particularly if the original charge involved trafficking or an intent to traffic marijuana.	
Possession of Controlled Substance *Wis. Stat. 961.41(3g)* *720 ILCS 570/402(c)* *IC 35-48-4-6*	No, for small amounts. Possibly for larger amounts, particularly if the original charge involved trafficking or an intent to traffic marijuana.	*Matter of Toboso Alfonso*, 20 I&N Dec. 819 (A.G. 1994)
Manufacture/Delivery of Cannabis (drug trafficking) *720 ILCS 550/5* Dealing in Marijuana *35-48-4-10* Manufacture, Distribution or Delivery *Wis. Stat. 961.41(1)*	Yes.	*Matter of Y-L, A-G, R-S-R*, 23 I&N Dec. 270 (A.G. 2002); *Chong v. Dist. Dir.*, 264 F.3d 378 (3rd Cir. 2001); *Al-Salehi v. I.N.S.*, 47 F.3d 390 (10th Cir. Feb. 8, 1995); *Mosquera-Perez v. INS*, 3 F.3d 553 (1st Cir. 1993); *Matter of U-M-*, 20 I&N Dec.327 (BIA 1991); *In re K-*, 20 I&N Dec. 418 (BIA Nov. 5, 1991); *Beltran-Zavala v. INS*, 912 F.2d 1027 (9th Cir. 1990); *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988); *Matter of Gonzalez*, 19 I&N 682 (BIA 1988); *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986).
First Offender Probation for Cannabis, Simple Possession *720 ILCS 550/10* *IC 35-48-4-12* *Wis. Stat. 961.47*	No	*Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (AG 1994).

PARTICULARLY SERIOUS CRIME BARS TO WITHHOLDING OF REMOVAL

First Offender Probation for Controlled Substances, *720 ILCS 570/410* *Wis. Stat. 961.47*	No	*Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (AG 1994).
MISCELLANEOUS		
Alien Smuggling *8 U.S.C. 1324(a)(1)(A)(i)*	Yes for asylum as an aggravated felony. Possibly for withholding of removal.	*Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999).
Unlawful Use of Possession of Weapons by Felons *720 ILCS 5/24-1.1* *IC 35-47-4-5* *Wis. Stat. 941.29*	Possibly.	*Hamama v. INS*, 78 F.3d 233 (6th Cir. 1996).
Firearm Trafficking	Yes.	*Matter of Q-T-M-T-*, 21 I&N Dec. 639 (BIA 1996).

Good Moral Character

I.N.A. § 101(f), 8 U.S.C. § 1101(f) [1]

For the purposes of this Act— No person shall be regarded as, or found to be a person of good moral character who, during the period for which good moral character is required to be established, is, or was

(1) a habitual drunkard;

(2) [Removed] [referred to adulterers]

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D) [prostitution and commercialized vice], (6)(E) [smuggling aliens], and (9)(A) [certain aliens previously removed] of section 212(a) of this Act; or subparagraphs (A) [crimes involving moral turpitude or controlled substances] and (B) [multiple criminal convictions] of section 212(a)(2) and subparagraph (C) [controlled substance traffickers] thereof such section (except as such paragraph relates to a single offense of simple possession of thirty grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be based on it.[2]

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[1] [Emphasis in bold and information in brackets added by the author.]

[2] As amended by sections 201(a)(1)-(2) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000): "Effective date—The amendment made by paragraph (1) shall be effective as if included in the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009-546) and shall apply to individuals having an application fro a benefit under the Immigration and Nationality Act pending on or after September 30, 1996."

Cancellation of Removal for Certain Permanent Residents

I.N.A. § 240A, 8 U.S.C. § 1229b[3]

(a) Cancellation of Removal for Certain Permanent Residents

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.

. . . .

(c) Aliens Ineligible for Relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) – (5) [Ineligible aliens include crewmen; exchange students, particularly medical exchange students; threats to national security under 212(a)(2) or 237(a)(4); and those barred from withholding of removal on account of their past persecution of others.]

(6) An alien whose removal has been previously cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(d) Special Rules Relating to Continuous Residence or Physical Presence

(1) Termination of Continuous Period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a) that renders the alien inadmissible to the United States under section 212(a)(2) [convictions of certain crimes] or removable from the United States under section 237(a)(2) [criminal offenses] or 237(a)(4) [security and related grounds], whichever is earliest.

(2) Treatment of Certain Breaks in Presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity Not Required Because of Honorable Service in Armed Forces ...

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[3] [Emphasis in bold added by the author.]

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents

I.N.A. § 240A, 8 U.S.C. § 1229b[4]

(b) Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents

(1) In General

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

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2) [conviction of certain crimes], 237(a)(2) [criminal offenses], or 237(a)(3) [security and related grounds]; and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special Rule for Battered Spouse or Child[5]

(A) The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a

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[4] [Emphasis in bold added by the author.]

[5] As amended by section 1504 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-406, 114 Stat. 1464 (Nov. 1, 2000). "Effective Date—Any individual who becomes eligible for relief by reason of the enactment of the amendments made by subsections (a) and (b), shall be eligible to file a motion to reopen pursuant to section 240(c)(6)(C)(iv). The amendments made by subsections (a) and (b) shall take effect as if included in the enactment of section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009). Such portions of the amendments made by subsection (b) that relate to section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) shall take effect as if included in subtitle G of title IV of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322, 108 Stat. 1953 et. seq.)."

continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of paragraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraph (1)(G) or (2) through (4) of section 237(a) (except in a case described in section 237(a)(7) where the Attorney General exercises discretion to grant a waiver), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical Presence—Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(i)(II) or for purposes of section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in section 240A(b)(2)(B) and section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good Moral Character—Notwithstanding section 101(f), an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(I)(III) or section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible Evidence Considered—In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General. . . .

(c) Aliens Ineligible for Relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) – (5) [Ineligible aliens include crewmen; exchange students, particularly medical exchange students; threats to national security under 212(a)(2) or 237(a)(4); and those barred from withholding of removal on account of their past persecution of others.]

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 244(a) or who has been granted relief under section 212(c), as such sections were in effect before the date of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

(d) Special Rules Relating to Continuous Residence or Physical Presence

(1) Termination of Continuous Period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.

(2) Treatment of Certain Breaks in Presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity Not Required Because of Honorable Service in Armed Forces. . . .

(e) Annual Limitation

The Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 244(a) (as in effect before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment and whether such an alien had previously applied for suspension of deportation under such section 244(a).

Authority to Apply for Asylum

I.N.A. § 208, 8 U.S.C. § 1158[6]

(a) Authority To Apply for Asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section, or where applicable, section 235(b).

(2) Exceptions

(A) [An immigrant who could go to safe third country may not apply]

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) [An immigrant who has previously applied for asylum may not apply again]

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review . . . .

(b) Conditions for Granting Asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

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[6] [Emphasis in bold added by the author.]

(v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 212(a)(3)(B)(i) or removable under section 237(a)(4)(B) (relating to terrorist activities), unless, in the case only of an alien inadmissible under subclause (IV) of section 212(a)(3)(B)(i), the Attorney General determines, in the Attorney General's discretion, that there are reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulations establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review . . . .

(3) Treatment of spouse and children . . . .

(c) Asylum Status

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances [in the country of nationality or last habitual residence from which the alien fled persecution];

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and

obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section 212(a) and 237(a), and the alien's removal or return shall be directed by the Attorney General in accordance with sections 240 and 241.

Termination of Asylum for Asylees and Refugees

I.N.A. § 209(c), 8 U.S.C. § 1159(c)[7]

Applicability of Other Federal Statutory Requirements

The provisions of paragraphs (4) [public charge], (5) [labor certification], and (7)(A) [documentation requirements] of section 212(a) shall not be applicable to any alien seeking adjustment of status under this section, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) [controlled substance traffickers] or subparagraph (A), (B), (C), or (E) of paragraph (3) [security and related grounds]) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

[7] [Emphasis in bold and information in brackets added by the author.]

Restriction on Removal to a Country Where Alien's Life or Freedom Would be Threatened

I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3)[8]

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that—

(i) the alien 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;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an *aggregate* term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) [terrorist activity] shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

[8] [Emphasis in bold and italics added by the author.]

Waiver[9] under I.N.A. § 212(c), 8 U.S.C. § 1184(c)[10]

Nonapplicability of Subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii) [aggravated felony], (B) [controlled substances], (C) [firearm offenses], (D) [miscellaneous crimes, i.e. espionage, treason], or any offense covered by section 241(a)(2)(A)(ii) [two or more convictions for crimes involving moral turpitude] for which both predicate offenses are without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) [crime involving moral turpitude].[11]

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9 Information added in brackets by the author.

10 In cases initiated prior to the AEDPA amendments on April 24, 1996, the AEDPA amendments do not apply to I.N.A. § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1951(a)(2)(A)(i)(II) according to AEDPA section 435(a) and the following statutory language applies:

> (i) Crimes of moral turpitude.
>
> Any alien who—
>
> (I) is convicted of a crime involving moral turpitude committed within 5 years after the date of entry, *and*
>
> (II) either is *sentenced* to confinement *or* is *confined* therefor *in a prison or correctional institution* for *one year or longer*, is deportable.

I.N.A. § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1951(a)(2)(A)(i)(II) (1995) [emphasis added]

In cases initiated on or after April 24, 1996 and prior to April 1, 1997, the AEDPA amendments do apply to I.N.A. § 241(a)(2)(A)(i), 8 U.S.C. § 1241(a)(2)(A)(i) and the following statutory language is in effect:

> (i) Crimes of moral turpitude.
>
> Any alien who—
>
> (I) is convicted of a crime involving moral turpitude committed within 5 years or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) [snitch visa adjustment] of this title after the date of entry, *and*
>
> (II) is convicted of a crime for which a *sentence of one year or longer* may *be imposed,* is deportable. [emphasis added]

I.N.A. § 241(a)(2)(A)(i)(II), 8 U.S.C. § 1951(a)(2)(A)(i)(II) as amended by AEDPA.

11 I.N.A. § 212(c), 8 U.S.C. § 1182(c) prior to AEDPA and IIRAIRA amendments:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, *may* be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). *The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.*

I.N.A. § 212(c), 8 U.S.C. § 1182(c) (1995) [emphasis added].

Waivers for Certain Criminal Offenses under I.N.A. § 212(h)

I.N.A. § 212(h), 8 U.S.C. § 1182(h)[12]

Waiver of Subsection (a)(2)(A)(i)(I), (II), (B), (D) and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) [crime involving moral turpitude], (B) [multiple criminal convictions with aggregate sentences to confinement imposed for 5 years or more], (D) [prostitution and commercialized vice], and (E) [certain aliens involved in serious criminal activity who have asserted immunity from prosecution] of subsection (a)(2) and subparagraph (A)(i)(II) [violation of controlled substance laws] of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1) (A) [Relates to prostitution offenses which occurred more than 15 years in the past, where rehabilitation is shown.]

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B); and[13]

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. 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 either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

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[12] [Emphasis in bold and information in brackets added by the author.]

[13] As amended by section 1505(e) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-406, 114 Stat. 1464 (Nov. 1, 2000).

Waivers for Fraud and Misrepresentations under I.N.A. § 212(i)

I.N.A. § 212(i), 8 U.S.C. § 1182(i)

Admission of Immigrant Inadmissible for Fraud or Willful Misrepresentation of Material Fact

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Temporary Protected Status

I.N.A. § 244, 8 U.S.C. § 1254a

(a) Granting of status

(1) In general

In the case of an alien who is a national of a foreign state designated under subsection (b) of this section (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c) of this section, the Attorney General, in accordance with this section—

(A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect, and

(B) shall authorize the alien to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

(2) Duration of work authorization

Work authorization provided under this section shall be effective throughout the period the alien is in temporary protected status under this section.

(3) Notice

(A) Upon the granting of temporary protected status under this section, the Attorney General shall provide the alien with information concerning such status under this section.

(B) If, at the time of initiation of a removal proceeding against an alien, the foreign state (of which the alien is a national) is designated under subsection (b) of this section, the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.

(C) If, at the time of designation of a foreign state under subsection (b) of this section, an alien (who is a national of such state) is in a removal proceeding under this subchapter, the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.

(D) Notices under this paragraph shall be provided in a form and language that the alien can understand.

(4) Temporary treatment for eligible aliens...

(5) Clarification

Nothing in this section shall be construed as authorizing the Attorney General to deny temporary protected status to an alien based on the alien's immigration status or to require any alien, as a condition of being granted such status, either to relinquish nonimmigrant or other status the alien may have or to execute any waiver of other rights under this chapter. The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this chapter.

(b) Designations

(1) In general

The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if—

(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(B) the Attorney General finds that—

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph; or

(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless notice of the designation (including a statement of the findings under this paragraph and the effective date of the designation) is published in the Federal Register. In such notice, the Attorney General shall also state an estimate of the number of nationals of the foreign state designated who are (or within the effective period of the designation are likely to become) eligible for temporary protected status under this section and their immigration status in the United States.

(2) Effective period of designation for foreign states...

(3) Periodic review, terminations, and extensions of designations...

(4) Information concerning protected status at time of designations...

(5) Review...

(c) Aliens eligible for temporary protected status

(1) In general

(A) Nationals of designated foreign states

Subject to paragraph (3), an alien, who is a national of a state designated under subsection (b)(1) of this section (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state), meets the requirements of this paragraph only if—

(i) the alien has been continuously physically present in the United States since the effective date of the most recent designation of that state;

(ii) the alien has continuously resided in the United States since such date as the Attorney General may designate;

(iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B); and

(iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.

(B) Registration fee...

(2) Eligibility standards

(A) Waiver of certain grounds for inadmissibility

In the determination of an alien's admissibility for purposes of subparagraph (A)(iii) of paragraph (1)—

(i) the provisions of paragraphs (5) and (7)(A) of section 1182(a) of this title shall not apply;

(ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest; but

(iii) the Attorney General may not waive—

(I) paragraphs (2)(A) and (2)(B) (relating to criminals) of such section,

(II) paragraph (2)(C) of such section (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marijuana, or

(III) paragraphs (3)(A), (3)(B), (3)(C), and (3)(E) of such section (relating to the national security and participation in the Nazi persecutions or those who have engaged in genocide).

(B) Aliens ineligible

An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that—

(i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States, or

(ii) the alien is described in section 1158(b)(2)(A) of this title.

(3) Withdrawal of temporary protected status...

(4) Treatment of brief, casual, and innocent departures and certain other absences...

(5) Construction...

(6) Confidentiality information...

(d) Documentation...

(e) Relation of period of temporary protected status to cancellation of removal...

(f) Benefits and status during period of temporary protected status...

(g) Exclusive remedy...

(h) Limitation on consideration in Senate of legislation adjusting status...

(i) Annual report and review...

I.N.A. § 101(15)(T), 8 U.S.C. § 1101(15)(T)

(T)(i) subject to section 1184(o) of this title, an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security and the Attorney General jointly;[sic] determines—

(I) is or has been a victim of a severe from of trafficking in persons, as defined in section 7102 of Title 22,

(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking,

(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime; or

(bb) has not attained 18 years of age, and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal;

(ii) if accompanying, or following to join, the alien described in clause (i)—

(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) if the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(III)(aa), the request is unreasonable.

I.N.A. § 214(o), 8 U.S.C. § 1184(o) Requirements

(o) Trafficking in persons; conditions of nonimmigrant status

(1) No alien shall be eligible for admission to the United States under section 1101(a)(15)(T) of this title if

there is substantial reason to believe that the alien has committed an act of a severed form of trafficking in persons (as defined in section 7102 of Title 22).

(2) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 1101(a)(15)(T) of this title may not exceed 5,000.

(3) The numerical limitation of paragraph (2) shall only apply to principal aliens and not to the spouses, sons, daughters, siblings, or parents of such aliens.

(4) An unmarried alien who seeks to accompany, or follow to join, a parent grated status under section 1101(a)(15)(T)(i) of this title, and who was under 21 years of age on the date on which such parent applied for such status, shall continued to be

classified as a child for purposes of section 1101(a)(15)(T)(ii) of this title, if the alien attains 21 years of age after such parent's application was filed but while it was pending.

(5) An alien described in clause (i) of section 1101(a)(15)(T) of this title shall continue to be treated as an alien described in clause (ii)(I) of such section if the alien attains 21 years of age after the alien's application for status under such clause (i) is filed but while it is pending.

(6) In making a determination under section 1101(a)(15)(T)(i)(III)(aa) of this title with respect to an alien, statements from State and local law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking in persons (as defined in section 7102 of Title 22) appear to have been involved, shall be considered.

(7)(A) Except as provided in subparagraph (B), an alien who is issued a visa or otherwise provided non-immigrant status under section 1101(a)(15)(T) of this title may be granted such status for a period of not more than 4 years.

(B) An alien who is issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(T) of this title may extend the period of such status beyond the period described in subparagraph (A) if a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking or certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity.

U visa

I.N.A. § 101(15)(U), 8 U.S.C. § 1101(15)(U)

(U)(i) subject to section 1184(p) of this title, an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that—
(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause(iii);
(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);
(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend o the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and
(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

(ii) if accompanying, or following to join, the alien described in clause (i)—
(I) in thecase of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or
(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

I.N.A. § 214(p), 8 U.S.C. § 1184(p) Requirements

(p) Requirements applicable to section 1101(a)(15)(U) visas

(1) Petitioning procedures for section 1101(a)(15)(U)

The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title. This certification may also be provided by an official of the Service whose ability to provide such certification is not limited to information concerning immigration violations. This certification shall state that the alien "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii)

of this title.

(2) Numerical limitations

(A) The number of aliens who may be issued visas or otherwise provided status as nonimmigrants under section 1101(a)(15)(U) of this title in any fiscal year shall not exceed 10,000.

(B) The numerical limitations in subparagraph (A) shall only apply to principal aliens described in section 1101(a)(15)(U)(i) of this title, and not to spouses, children, or, in the case of alien children, the alien parents of such children.

(3) Duties of the Attorney General with respect to "U" visa nonimmigrants

With respect to nonimmigrant aliens described in subsection (a)(15)(U)[sic]—

(A) the Attorney General and other government officials, where appropriate, shall provide those aliens with referrals to nongovernmental organizations to advise the aliens regarding their options while in the United States and the resources available to them; and

(B) the Attorney General shall, during the period those aliens are in lawful temporary resident status under that subsection, provide the aliens with employment authorization.

(4) Credible evidence considered...

(5) Nonexclusive relief

Nothing in this subsection limits the ability of aliens who qualify for status under section 1101(a)(15)(U) of this title to seek any other immigration benefit or status for which the alien may be eligible.

(6) Duration of status

The authorized period of status of an alien as a nonimmigrant under section 1101(a)(15)(U) of this title shall be for a period of not more than 4 years, but shall be extended upon certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating or prosecuting criminal activity described in section 1101(a)(15)(U)(iii) of this title that the alien's presence in the United States is required to assist in the investigation or prosecution of such criminal activity.