34th Annual
Conference on Immigration and Nationality Law
October 20-22, 2010
Austin, TX

Removal Proceedings: Selected Types of Relief from Removal

Jeffrey N. Brauwerman

Jeffrey N. Brauwerman
Brauwerman Law Firm, P.A.
Coral Gables, FL

Jbrauwerman@brauwermanlaw.com
305.758.1234

Removal Proceedings: Selected Types of Relief From Removal © [1]

Introduction

If DHS[2] is able to establish that the alien is subject to removal on either a ground of inadmissibility or deportability, the immigration judge will enter an order of removal unless the alien is capable of establishing that he or she is eligible to apply for some type of relief from removal and convince the immigration judge to grant that relief.[3]

---

[1] Copyright © 2010 by Jeffrey N. Brauwerman.
Jeffrey N. Brauwerman is the sole shareholder of the Brauwerman Law Firm, P.A. He is Board Certified in Immigration and Nationality Law. Mr. Brauwerman was Vice-Chair of the inaugural Florida Bar Immigration and Nationality Law Certification Committee and as such co-authored the first board certification examination in 1995 as well as the two succeeding board certification examinations. He is a graduate of Hunter College, City University of New York (B.S. Accounting) and Brooklyn Law School (J.D.). Mr. Brauwerman is admitted to practice in New York and Florida as well as before the U.S. Supreme Court and various U.S. Courts of Appeal and U.S. District Courts.

Since 1995 Mr. Brauwerman has been listed in *The best Lawyers in America* and later on in the *Top lawyers in Florida, Mardindale-Hubbell Preeminent Lawyers* as well as *Florida Super Lawyers.* The Brauwerman Law Firm, P.A. was recently selected by U.S. News and World Report as one of *The Best Law Firms in America* ("Tier 1" practice area-immigration law.)

Prior to establishing his firm he served as a U.S. Immigration Judge. Mr. Brauwerman also served as Regional Counsel, Southern Region and Chief Counsel, Florida District, for the legacy Immigration and Naturalization Service. Other positions that he served in include, Trial Attorney (Immigration) and General Attorney (Nationality).

Between 1997 and 2003, Mr. Brauwerman appeared on WLRN-TV (South Florida public television) on the highly rated "Immigration, U.S.A." weekly telecast. He has authored articles for the Florida Bar Journal and lectured at Florida Bar/South Florida AILA seminars. In the past, Mr Brauwerman has served on the South Florida AILA Board of Directors.

When INS and State of Florida relations were at an all time low, Mr. Brauwerman was invited by the Governor of Florida to play the role of the INS commissioner in the Crisis Management Workshop.

[2] "DHS" ("U.S. Department of Homeland Security") will be used throughout this paper as the designation for Assistant Chief Counsel, ICE. Prior titles include Assistant District Counsel, Assistant Chief Legal Officer and Trial Attorneys for the legacy INS.

[3] It goes without saying that counsel for the alien should consider very seriously whether there is a basis for contesting inadmissibility or deportability. Often counsel should deny the allegations and/or the charge(s) and force DHS to provide evidence and legal arguments that the alien is subject to removal. This will preserve the issue for a possible appeal.

Other sections of the materials have discussed grounds of admissibility and available waivers as well as some of the grounds of deportability. Discussed herein will be some of the types of relief available in removal proceedings, the various standards and burdens of proof along with the practical aspects of case presentation, guided, at times, by the Immigration Court Practice Manual.[4]

Relief may be found in subsections of the INA[5] that are today denominated "waivers"[6] such as INA sections 212(a)(9)(B)(v) and (C)(iii), 212(d)(11) and (12), 212(g), (h) (i), and 237(a)(1)(H) as examples, as well as sections dealing with asylum, withholding of removal and relief under the Convention Against Torture, cancellation of removal, voluntary departure, and relief under the repealed section 212(c)[7].

Voluntary Departure

In the event that it appears that the alien does not have any relief available that would permit him[8] to remain in the United States, he may still try to avoid an order of removal by applying for voluntary departure either prior to or at the conclusion of proceedings.[9] An alien should not apply for voluntary departure unless he intends to depart since aside from the order of voluntary departure becoming an order of removal[10], he is subject to sanctions including the unavailability of relief for ten years[11] and civil penalties of not less than $1,000.00 and not more than

---

[4] "ICPM" hereinafter.

[5] Immigration and Nationality Act of 1952, as amended.

[6] Prior to the Immigration Act of 1990 the words "waive" or "waiver" do not appear in sections such as INA sections 212(g), (h) and (i) as examples. INA 212(c) which was repealed by Sec. 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 never contained the words "waive" or "waiver. " Those subsections stated that, if complying with certain conditions, aliens,"shall" be admitted or, "may" be admitted, depending on the subsection.

[7] INA sections 208, 241(b)(3), 8 CFR 208.16-18, 1208.16-18, INA sections 240A and 240B. INA section 212(c) was repealed by Sec. 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub.L. No. 104-208, 110 Stat. 3009.

[8] The author is using the words "he" or "him" at times, but, of course, the words "she" and "her" are equally applicable.

[9] INA section 240B.

[10] 8 CFR(c)(4)(d).

[11] Cancellation of removal under INA section 240A, Adjustment of Status under INA section 245, Change of Status under INA section 248 and Registry under INA section 249.

$5,000.00.[12]

Voluntary departure is discretionary and "an immigration judge has broader authority to grant voluntary departure in discretion under section 240B(a) than under section 240B(b)". [13]

Some of the factors that can be considered include the alien's criminal and immigration history, length of residence and ties to the U.S., the existence of any U.S. citizen or lawful permanent resident family ties and humanitarian factors.[14]

Voluntary Departure Prior to Completion of Proceedings

To be eligible for voluntary departure the maximum period of 120 days, the alien must not have been convicted of an aggravated felony[15] and not be deportable under the security and related provisions of 237(a)(4).

The alien must request voluntary departure prior to or at the master calendar at which the case is initially set for a merits hearing.

Since neither the INA nor the regulations define "master calendar hearing" for the purposes of section 240B, the Board of Immigration Appeals (hereinafter "BIA" or "Board") interpreted it to be "a preliminary stage of the proceedings at which, even though little or no testimony is taken, the Immigration Judge has great flexibility to identify issues, make preliminary determinations of possible eligibility for relief, resolve uncontested matters and schedule further hearings."[16]

8 CFR 1240.26(b) also requires that the alien make no additional requests for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure), concedes removability and waives appeal of all issues.

Arriving aliens are not eligible for prehearing voluntary departure under section 240B(a)(4). However, the DHS may request the Immigration Judge to terminate and grant 120 days voluntary

[12] INA section 240B(d)(1).

[13] *Matter of Arguelles*, 22 I&N Dec. 811, 817 (BIA 1999).

[14] See, *Matter of Gamboa,* 14 I&N Dec. 244 (BIA 1972) and *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980).

[15] A crime described in INA 101(a)(43).

[16] *Matter of Ocampo,* 22 I&N Dec. 1301 (BIA 2000).

departure.[17] INA section 235(a)(4) also permits an alien to request withdrawal of his application for admission.

Any time prior to the completion of proceedings the parties may stipulate to 120 days voluntary departure.[18]

The immigration judge may impose certain conditions as he may deem reasonable to ensure the timely departure of the alien including the posting of a bond and the presentation of the alien's travel document to DHS.[19]

Since there are monetary penalties as well as bars to relief for not departing in conformance with the order of the Immigration Judge, an alien and his counsel is well-advised to consider whether or not it is wise to apply for voluntary departure, if the alien is uncertain whether he will want to depart in a timely fashion or at all and whether or not he may be eligible for some other type of relief at a later date.

Voluntary Departure at the Conclusion of Removal Proceedings

At the conclusion[20] of removal proceedings the Immigration Judge may grant voluntary departure for a period not to exceed sixty days.[21]

The alien must be physically present in the United States for at least one year preceding the date of service of the Notice to Appear.[22] An arriving alien can apply for voluntary departure at the conclusion of proceedings if otherwise eligible. He must be a person of good moral character and have been such for a period of five years immediately preceding the application for voluntary

---

[17] 8 CFR 240.25(d)(1).

[18] 8 CFR 1240.26(b)(3)(iii).

[19] 8 CFR 1240.26(b)(3).

[20] In *Alvarado v. U.S. Att'y Gen*, No. 09-11376, ___ F.3d ___ (11th Cir. July 8, 2010) the Eleventh Circuit decided that an alien may request post conclusion voluntary departure "immediately after" the Immigration Judge issues his decision and prior to the conclusion of the hearing. The transcript indicates that the Immigration Judge asked, after rendering the decision denying asylum, etc, and ordering removal, "[i]s there anything else from either side?" Counsel for the respondents stated "[y]our Honor, the remaining issue of voluntary departure that they would be seeking in the alternative." The was the first time respondents' counsel mentioned voluntary departure. The Court stated it expressed "no opinion on the validity of a later request, which may compromise the government's interest in a prompt and costless departure."

[21] INA section 240B(d)(2).

[22] INA section 240B(b)(1)(A).

departure[23]. As with voluntary departure applications prior to the conclusion of removal proceedings, the alien cannot have been convicted of an aggravated felony nor be deportable on security or related grounds.[24]

Finally, the alien must establish by clear and convincing evidence that he has the means to depart the United States and the intention to do so. [25] He must post a bond within five days. It must be "in an amount necessary to ensure that the alien will depart, but in no case less than $500."[26] The Immigration Judge must advise the alien of the conditions related to the posting of the voluntary departure bond, including the amount, the effect of filing an appeal with the requirement of submitting proof of posting of the bond to the BIA, and the effect of filing a motion to reopen or reconsider.[27]

Under the current regulations as amended on January 20, 2009, if the alien fails to post the bond within the time required he must still depart the United States during the time allowed in the voluntary departure order. He is also not exempted from the consequences for failure to depart during the period allowed.[28]

If the alien had waived appeal of the Immigration Judge's decision, his failure to post the bond within the period allowed means that the alternate order of removal takes effect immediately except that an alien granted voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien: (i) departs the United States no later than 25 days after the failure to post bond; (ii) provides to DHS such evidence of his or her departure as the ICE field Office Director may require; and (iii) provides evidence DHS deems sufficient that he or she remains outside of the United States.[29]

In the event that the alien files an appeal with the Board of Immigration Appeals he must submit

---

[23] INA section 240B(b)(1)(B).

[24] INA section 240B(b)(1)(C).

[25] INA section 240B(b)(1)(D); 8 CFR 1240.26(c)(1)(i)-(iv).

[26] 8 CFR 1240.26(c)(3)(i).

[27] 8 CFR 1240.26(c)(3)(1)-(iii).

[28] 8 CFR1240.26(c)(4). *See*, *Matter of Diaz-Ruacho,* 24 I&N Dec. 47 (BIA 2006) holding that an alien who fails to post the voluntary departure bond required by INA 240B(b)(3) is not subject to penalties for failure to depart within the time period specified for voluntary departure since, under the prior version of 8 CFR 1240.26(c)(3) the voluntary departure order vacated automatically upon the failure to post the bond.

[29] 8 CFR 1240.26(c)(4)(i)-(iii).

sufficient proof of posting the bond to the Board within 30 days of filing the appeal. [30]

For those aliens granted voluntary departure on or after January 20, 2009[31], the filing of a motion to reopen or reconsider during the time allowed for voluntary departure automatically terminates voluntary departure and therefore does not toll, stay or extend the period for voluntary departure.[32] The penalties for failure to depart voluntarily under INA 240B(d) shall not apply.[33] For those aliens who accepted voluntary departure before January 20, 2009 the regulations do not apply and their cases are governed by *Matter of Diaz-Ruacho*, 24 I&N Dec.(BIA 2006).

An Immigration Judge or the Board may reinstate voluntary departure in reopened proceedings for a purpose other than solely making an application for voluntary departure but the total time period cannot exceed the 60 or 120 day statutory and regulatory period.[34]

If, prior to departing, the alien files any judicial challenge to the final order, voluntary departure shall terminate upon the filing and the alternate order of removal shall immediately take effect. However, if the alien departs the U.S. no later than 30 days following the filing of the judicial challenge, he will not be deemed to have departed under a removal order if he provides evidence satisfactory to ICE of his departure and provides evidence that he remains outside the U.S. If the alien remains in the U.S. to pursue the judicial challenge, he is not subject to the penalties for violating a voluntary departure order since voluntary departure terminated at the time of filing.[35]

Cancellation of Removal for Certain Permanent Residents

One of the best sections of the INA relating to relief in removal proceedings is cancellation of removal for (certain) permanent resident aliens, which is a discretionary form of relief.[36] An alien

---

[30] 8 CFR 1240.26(c)(3)(ii).

[31] *Matter of Velasco* 25 I&N Dec. 143 (BIA 2009).

[32] 8 CFR 1240.26(e)(1).

[33] Id.

[34] 8 CFR 1240.26(h).

[35] 8 CFR 1240.26(i).

[36] INA section 240A(a). "The Attorney General *may* cancel removal..." Emphasis added. In an unreported decision by the BIA [Matter of V---------, A090---- Chicago (BIA Aug. 19, 2010)] the BIA reversed the Immigration Judge who denied the application in discretion because of three criminal convictions and evidence of employment and payments of taxes that the board deemed "spotty." In Matter *of C-V-T,*22 I&N Dec. 7, (BIA 1998) the Board stated the exercise of discretion is based on he standards set out in *Matter of* Marin*,*16 I&N Dec. 581, 584-585 (BIA 1978).

is one of the "certain" permanent residents if he is not ineligible for relief[37], has been lawfully admitted for permanent residence for not less than five years,[38] has resided in the United States continuously for 7 years after having been admitted in any status,[39] is not barred by the "stop-time" rule[40] and has not been convicted of an aggravated felony.[41] Since this form of cancellation is available in removal proceedings regardless whether or not the charges sound in inadmissibility or deportability there is no issue of "statutory counterpart." According to a recent published opinion of the Second Circuit[42], although the statute is ambiguous, the alien must currently be a lawful permanent resident.

Aliens that are not eligible for relief under INA 240A(c) are those who entered the United States as crewmen after June 30, 1964[43]; were "J" exchange aliens for the purpose of receiving medical education or training, whether or not they were subject to or have fulfilled the two-year foreign residence requirement of INA 212(e)[44] ; were "J" exchange aliens other than to receive graduate medical education or training and are subject to INA 212(e) and have not fulfilled that requirement or received a waiver[45] ; are inadmissible or deportable under security and related

---

[37] INA section 240A(c)(1) - (6).

[38] INA section 240A(a)(1).

[39] INA section 240A(a)(2).

[40] INA section 240A(d) [Special Rules Relating to Continuous Residence or Physical Presence], (d)(1) [Termination of Continuous Period] as affected by (d)(2) and (d)(3). See the more thorough discussion of the "stop-time" rule under the section below relating to nonpermanent resident cancellation.

[41] INA section 240A(a)(3).

[42] *Padilla-Romero v. Holder*, No. 07-72492, ___ F.3d ___ (9th Cir. July 9, 2010). The Ninth Circuit, discussing the present perfect tense used by Congress admitted that the statute, as a purely grammatical matter, could connote either an event occurring at an indefinite past time or continuing to the present. The Court determined that the proper interpretation of the statute would require that permanent residence would have to continue up to the present. The alien had been, at one time, prior to having been removed, a lawful permanent resident for at least five years. Before being ordered removed, he was caught three separate times attempting to smuggle aliens into the U.S. and falsely claimed to be a U.S. citizen on two occasions. After being removed, he attempted to illegally reenter at least five times and falsely claimed to be a U.S. citizen. In his latest immigration court proceeding, he requested relief in the form of cancellation of removal for certain permanent residents.

[43] INA section 240A(c)(1).

[44] INA section 240A(c)(2).

[45] INA section 240A(c)(3)(A)-(C).

grounds[46] ; were "persecutors"[47]; and aliens who were recipients of relief of suspension of deportation, cancellation of removal or relief under INA section 212(c).[48]

This section would be utilized, if available, to those with convictions, other than convictions classified as aggravated felonies, that were entered on or after April 1, 1997.

An alien can apply for relief under INA section 240A(a)(1) [cancellation of removal for certain lawful permanent residents] when he is ineligible for relief under former INA section212(c). For example, if an alien entered into a plea agreement or plea agreements on or after 4/24/96 and prior to 4/1/97 and he is ineligible for relief because of the AEDPA amendment[49] to INA section 212(c), he could apply for relief under INA section 240A(a)(1), if otherwise eligible.

If the alien was convicted, for example, for one grand theft offense on or after 4/24/96 and prior to 4/1/97, relief could be sought under either former INA section 212(c) or 240A(a)(1).

"Aliens lawfully admitted for permanent residence who temporarily proceeded abroad...."[50]

Former INA section 212(c) permitted the Attorney General to admit into the United States, in his discretion, certain lawful permanent residents who had an unrelinquished domicile of seven consecutive years. The seven years can be accumulated up to the point that the administrative order becomes final.[51]

Since the *Francis,*[52] decision the BIA has applied INA section 212(c) to deportation cases arising in the Second Circuit and in the *Silva*[53] decision, the Board decided to apply it nationwide.

---

[46] INA section 240A(c)(4).

[47] INA section 240A(c)(5).

[48] INA section 240A(c)(6).

[49] Section 440(d), Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

[50] INA section 212(c), repealed by Sec. 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub.L. No. 104-208, 110 Stat. 3009. The discussion in this paper is not meant to be an exhaustive recitation of the evolution of INA section "212(c).

[51] 8 CFR 1003.44.

[52] *Francis v. INS*, 532 F.2d 268 (2nd Cir. 1976).

[53] *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976).

For section 212(c) relief to be available in deportation proceedings there had to be a ground of deportation that was comparable to a ground of exclusion. In 1991 the Board found that an alien deportable for a drug-related aggravated felony which could also form the basis for excludability under the drug-related section is not precluded from establishing eligibility for relief.[54] In the more recent cases the Board has taken a conservative approach when defining an inadmissibility "statutory counterpart" to a deportation statute that constituted an aggravated felony charge.[55]

In removal proceedings the Immigration Judge, balances the positive and negative factors[56] in arriving at his decision whether or not to exercise his discretion favorable and grant relief. A showing of heightened equities is required if the alien has an extensive criminal record.[57] A showing of rehabilitation is one factor to be considered.[58]

For some lawful permanent resident aliens with convictions entered prior to April 1, 1997, INA section 212(c) is the statute of choice for relief. Aliens with certain convictions are ineligible to apply for relief under section 212(c) if they pled or entered into a plea agreement on or after November 29, 1990[59] and prior to April 24, 1996 or between April 24, 1996[60] and prior to April 1, 1997.

---

[54] *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991). Meza was charged with deportability under the aggravated felony deportation section as well as the drug-related deportation section.

[55] *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) [aggravated felony charge of sexual abuse of a minor]; *Matter of Brieva-Perez*, 23 I&N Dec 766 (BIA 2005) [aggravated felony charge of crime of violence].

[56] *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) is the leading case on the factors to be considered and as such set out some of the factors to be considered.

[57] *Matter of Buscemi,* 19 I&N Dec. 628 (BIA 1988) discussing the necessity of the alien to show unusual and outstanding equities.

[58] *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990). *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988) clarified.

[59] Immigration Act of 1990, Pub. L. No. 101-649, Nov. 29, 1990, Sec. 511 & Sec. 601(d)(1). Relief became unavailable for aliens "convicted of an aggravated felony" who had "served a term of imprisonment of at least five years." See also section 511(b), to the effect that the amendment applies "to admissions occurring after the date of enactment [Nov. 29, 1990]." The Misc. Imm. & Nat. Technical Amendments of 1991, Pub. L. No. 102-232, Dec. 12, 1991 changed the language in the last sentence of 212(c) to read"...convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years."

[60] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Aliens with convictions for an aggravated felony, controlled substance offenses, certain firearms offenses, "miscellaneous crimes" and two crimes involving moral turpitude for which a sentence of imprisonment for one year or more has been imposed for each conviction, are ineligible for relief.

The regulations[61] state that relief shall be denied if, among other things, "the alien is charged and found to be deportable or removable on the basis of a crime that is an aggravated felony**,** as defined in 101(a)(43) of the Act (as in effect at the time the application for 212(c) relief is adjudicated)."[62] There are two exceptions to this rule. One exception is set out for aliens with plea agreements entered into on or after November 29, 1990 but prior to April 24, 1996. These aliens are only barred from relief if they served a five year term of imprisonment. Aliens who entered into plea agreements before November 29, 1990 that resulted in convictions for aggravated felonies, whether or not they served a five year term of imprisonment, are also not ineligible for relief.[63]

For plea agreements entered into between April 24, 1996 and April 1, 1997, aliens with convictions for an aggravated felony, controlled substance offenses, certain firearms offenses, "miscellaneous crimes" and two crimes involving moral turpitude for which a sentence of imprisonment for one year or more has been imposed for each conviction, are ineligible for relief.[64]

The regulations[65] make clear that for aliens who were in deportation proceedings that were commenced before the immigration court prior to April 24, 1996, section 440(d) of AEDPA does not apply and the paragraph immediately above is inapplicable.

The issue of combining a waiver application under former INA section 212(c) has not been settled by a precedent BIA decision, although unpublished decisions have been reviewed by various U.S. Courts of Appeal with approval.

In *Garcia-Jimenez v. Gonzales,*[66] the Court of Appeals for the Ninth Circuit held that INA section 240A(c)(6) makes clear that an alien who has received 212(c) relief at any time is barred from a grant of INA section 240A(a) cancellation of removal and rejects the argument that these two forms of relief may be afforded simultaneously. The Ninth Circuit again held an aggravated felony conviction which was waived for purposes of inadmissibility or removability still bars an alien from receiving cancellation.[67] The court therein found that even if an alien was able to waive his 1978 aggravated felony conviction for possession of marijuana for sale under INA

---

[61] 8 CFR 1212.3(f)(4)

[62] 8 CFR 1212.3(f)(4)(i).

[63] 8 CFR 1212.3(f)(4)(ii).

[64] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

[65] 8 CFR 1212.3(g).

[66] 488 F.3d 1082 (9th Cir. 2007).

[67] *Becker v. Gonzales,* 473 F.3d 1000, (9th Cir. 2007).

section 212(c), it would nonetheless remain an aggravated felony for purposes of precluding his application for cancellation of removal based on 2004 conviction.[68]

The Second Circuit[69] held “regardless of the availability of a § 212(c) waiver, [petitioner's] 1996 aggravated felony convictions remain and preclude his application for cancellation of removal under section 240A(a)."

The Fifth Circuit held in *Amouzadeh v. Winfrey*, [63] that a grant of relief under former INA section 212(c) for a prior drug-related conviction still bars relief under INA section 240(A) for a separate crime involving moral turpitude because relief under section 212(c) does not waive an aggravated felony conviction for purposes of the cancellation statute. Another Fifth Circuit case[64] involved a claim of ineffective assistance of counsel because the alien’s first counsel admitted the allegation relating to the making of a false claim to U.S. citizenship, although he denied the charge. The court therein stated that ”[t]herefore, if Mai received a waiver of inadmissibility for his burglary conviction under section 212(c), he would automatically be rendered ineligible for cancellation of removal under section 240A(a) for the false claim of citizenship charge and would still be inadmissible.” He was ineligible to waiver the burglary offense through cancellation of removal because of the stop-time rule.

The Seventh and Eighth Circuits have followed the Second, Fifth and Ninth Circuits.[65]

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents

The successor statute to former INA section 244 is INA section 240A(b)(1).[66] The adjustment of

---

[68] *See, Matter of Balderas*, 20 I&N Dec. 389, 391 (BIA 1991) (the grant of a 212(c) waiver does not eliminate or erase the underlying conviction).

[69] *Peralta-Taveras v. Gonzales*, 488 F.3d 580 (2nd Cir. 2007).

[63] 467 F.3d 451, (5th Cir 2006), at 458-459.

[64] *Mai v. Gonzales*, 473 F.3d 162, 167 (5th Cir. 2007).

[65] *Negrete-Rodriguez v. Mukasey,* 518 F.3d 497 (7th Cir. 2008); *Munoz-Yepe v. Gonzales*, 465 F.3d 347 (9th Cir. 2006).

[66] Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.

status of aliens granted relief is limited to 4,000 per fiscal year.[67]

INA section 240A adopts the "exceptional and extremely unusual" standard and ten year period of physical presence that was contained in former section 244(a)(2) which related to those who were deportable under certain grounds, some very serious, e.g., crimes involving moral turpitude, controlled substance offenses, possession of semi-automatic or automatic weapons, sawed-off shotguns, serious security related grounds, etc. Some of the grounds were very serious.

The statute states that alien must prove that he has been continuously present for ten years "immediately preceding the date of such application"[68] and "has been a person of good moral character during such period."[69] (However, the law is well-settled and as the Board stated in *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005), the statute has no operative effect on determining the period of continuous physical presence because of the "stop-time rule".) Additionally, the alien has to establish that he "has not been convicted of an offense" described "under section 212(a)(2), 237(a)(2), or 237(a)(3), subject to the domestic violence waiver.[70] INA section 240A(c)(1)-(6), [Aliens Ineligible for Relief] as discussed in the section relating to cancellation of removal for certain permanent residents is equally applicable here.[71]

The alien has to establish 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."[72]

The statute clearly omits the possibility of establishing that the alien's removal would result in a hardship to an offspring 21 years or over since the definition of a "child" does not include a son

---

[67] INA section 240A(e)(1).

[68] INA section 240A(b)(1)(A). See, *Garcia v. Holder*, 2010 WL 217092 (9th Cir. 2010) wherein the court found that the testimony of the male and female Mexican respondents, as well as the testimony of the female respondent's sister, and the California identification and Department of Motor Vehicles card issued to the male respondent constituted evidence sufficient to meet their burden.

[69] INA section 240A(b)(1)(B).

[70] INA section 240A(b)(1)(C).

[71] This section relates to crewmen who entered after June 30, 1964; "J" exchange aliens; aliens inadmissible or deportable under security related grounds; persecutors or those who have received relief of suspension of deportation, cancellation of removal or under former INA section 212(c).

[72] INA section 240A(b)(1)(D).

or daughter who is 21 years or older for this purposes of this section. [73] It is important to note that while an alien's hardship is generally not relevant,[74] the Board has stated that "factors that relate only to the respondent may be considered to the extent that they affect the potential level of hardship to her qualifying relatives."[75]

Continuous physical presence is no longer accumulated until the time of the decision of the Immigration Judge or BIA, as it was under former INA 244 (a) [suspension of deportation], because of the "stop-time rule. [76] Now it is cut off at the time the alien is served a Notice to Appear.[77]

Departures from the U.S. by the alien for any period in excess of 90 days or any periods in the aggregate exceeding 180 days will break his continuous physical presence.[78]

The continuous physical presence requirement is not applicable to an alien that was in the U.S. at the time of induction into the U.S. Armed Forces and has served in an active-duty status for a period of twenty-four months. If he has separated from the Armed Forces , it must have been under honorable conditions.[79]

The calculation of the period of good moral character is calculated backward from the time the application is finally resolved by the Immigration Judge or the Board. This is because the application is a continuing one. [80] It is not affected by the "stop-time" rule. This can be advantageous when proceedings are delayed or on-going for a long period of time as an earlier

---

[73] *Montero-Martinez v. Ashcroft*, 277 F.3d1137, 1144-45 (9th Cir. 2002).

[74] Under former INA section 244(a)(1) & (2) the alien could demonstrate a hardship to himself upon deportation.

[75] *Matter of Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

[76] INA section 240A(d)(1).

[77] Id.

[78] INA section 240A(d)(2).

[79] INA section 240A(d)(3).

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

act that could result in a lack of good moral character may move outside the statutory period.[81]

An alien who has *made* a false claim to U.S. citizenship may be considered a person who is not of good moral character, but the catch-all provision of INA section 101(f) does not require such a finding. [82] Indeed, the Board sustained the alien's appeal and granted the application where the false claim to U.S. citizenship was just one factor to be considered.[83] Note that had the alien in this case been *convicted* of making a false claim to U.S. citizenship she would have been ineligible for "cancellation" because of the provision of INA 240A(b)(1)(c). This subsection requires a conviction for making a false claim to U.S. citizenship to preclude eligibility for cancellation for non-permanent residents.

It is possible that an "admission" could be used as a predicate to bar a finding of good moral character but one Court[84] has rejected this DHS argument in a case involving a state counterpart to the Federal First Offender Act.

INA 240A(b)(1)(C) has been the subject of two recent cases decided by the Board.[85] The issue in both cases was whether or not the convictions of these aliens were for offenses that were "described under" INA 212(a)(2) or 237(a)(2).[86]

In *Matter of Cortez*, [87] the Board started its analysis with *Matter of Garcia-Hernandez,* [88] wherein

---

[81] *Id.* Applicant's alien smuggling in 1991 was outside the statutory period at the time of the Immigration Judge's decision in 2003.

[82] *Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008).

[83] *Id.* At 627-628 citing *Matter of K-*, 3 I&N Dec. 180 (BIA 1949) [an alien's good moral character is not destroyed by a single lapse and that it should be determined by considering the person's actions generally an the regard in which he or she is held by the community as a whole] and *Matter of U-*, 2 I&N Dec. 830 (BIA, A.G. 1947).

[84] *Romero v. Holder*, 568 F.3d 1054 (9th Cir. 2009).

[85] On August 13, 2010 the Board decided *Matter of Pedroza,* 25 I&N Dec. 312(BIA 2010) and *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).

[86] The statute reads "under" not "described under". However, the BIA substituted "described under" for "under" in its unreported decision *Matter of Gonzalez-Gonzalez* and the 9th Circuit adopted its reasoning in *Gonzalez-Gonzalez v. Ashcroft*, 390 F.2d 649, 652 (9th Cir. 2004).

[87] 25 I&N Dec.301 (BIA 2010).

[88] 23 I&N Dec. 590 (BIA 2003).

it found "that an alien who has committed a crime involving moral turpitude that falls within the 'petty offense' exception in section 212(a)(2)(A)(ii)(II) of the Act is not ineligible for cancellation of removal under section 240A(b)(1)(C)" because he was not convicted of an offense under 212(a)(2) because the entirety of that section includes the exception for petty offenses.[89]

The Board next discussed the 9th Circuit's decision in *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649. The Court therein decided that all the offenses listed in the three statutes listed should be read as cross-referenced. In other words, the alien therein who was charged with being inadmissible could be found to be ineligible for cancellation of removal based on his conviction for a deportable offense found in INA 237(a)(2). It read the statute to mean that an alien could be found to be ineligible for this relief if he was "convicted of an offense described under" either 212(a)(2), 237(a)(2), or 237(a)(3).[90]

The Board continued its analysis with a discussion of *Matter of Gonzalez-Silva*,[91] wherein it decided that an offense can be one "described under" section 237(a)(2)(E)(I) of the Act (domestic violence-related offenses) only if the conviction for that offense occurred after the effective date of the amended statute. Since the alien's conviction therein preceded the effective date he had not been "convicted of an offense" under that section.[92]

Next the Board discussed its decision in *Matter of Gonzalez-Zoquiapan,*[93]in which is decided that a misdemeanor conviction for disorderly conduct relating to prostitution neither rendered him inadmissible under INA 212(a)(2)(D)(ii) or ineligible for cancellation of removal because, even if it was for a crime involving moral turpitude, it qualified for the "petty offense" exception.[94]

Finally the Board discussed *Matter of Almanza*,[95] in which it held that, although the conviction was for a misdemeanor and fell within the "petty offense" exception, since the period of possible

---

[89] Id. at 593.

[90] 390 F.3d 649 at 652.

[91] 24 I&N Dec. 28 (BIA 2007).

[92] Id. at 220.

[93] 24 I&N Dec. 549 (BIA 2008).

[94] Id. at 554.

[95] 24 I&N Dec. 771 (BIA 2009).

incarceration included a period of time "of not more than one year"[96], it was a conviction described under INA 237(a)(2) ["a sentence of one year or longer..."]. This decision also held that under the REAL ID Act the alien had the burden of proof to demonstrate that he was not ineligible INA 240A(b)(1)(C).[97]

The Board concluded in *Cortez*, that the alien had been convicted of a crime involving moral turpitude for which a sentence of a year or longer may be imposed and therefore was convicted of a crime "described under" INA 237(a)(2), even though the maximum sentence that could have been imposed was one year, which would fall within the petty offense exception. It further concluded that in determining which offenses are "described under" sections 212(a)(2), 237(a)(2), and 237(a)(3) of the INA for the purposes of section 240(b)(1)(C), only language specifically pertaining to the criminal offense, such as the offense itself and the sentence imposed or potentially imposed, should be considered, rejecting the alien's argument that he was not ineligible for relief because the crime of which he was convicted was not committed within five years after the date of admission.[98]

In *Matter of Pedrosa,*[99] , wherein the Board followed *Matter of Cortez*, [100]the alien was convicted of a crime involving moral turpitude and sentenced to ten days in jail for an offense that was punishable by a sentence of incarceration for a period of time of less than one year. He thereby qualified for the "petty offense" exception and was not convicted of an offense "described under" INA section 237(a)(2).

It is important to note that there is no ten year statutory period in relation to convictions under 212(a)(2), 237(a)(2), and 237(a)(3).

Notwithstanding the heading of section 240A(b) of the INA, which only refers to nonpermanent residents, a lawful permanent resident who qualifies as a battered spouse may be eligible to apply

---

[96] California Welfare and Institutions Code section 10980(c)(2).

[97] INA section 240(c)(4)(A)(I) relating to burden of proof for relief from removal which applies to applications submitted on or after May 11, 2005.

[98] 25 I&N Dec. 301 (BIA 2010) at 310.

[99] 25 I&N Dec. 312 (BIA 2010).

[100] 25 I&N Dec. 301 (BIA 2010).

for cancellation of removal under section 240A(b)(2) of the Act.[101]

An alien that was in deportation or exclusion proceedings before April 1, 1997, is ineligible for cancellation of removal because proceedings were begun prior to April 1, 1997.[102]

The accumulation of continuous physical presence is deemed to end, for the purposes of the "stop-time" rule when the inadmissible offense is *committed* [103] under INA 212(a)(2), or a removable offense under INA 237(a)(2) or 237(a)(4).[104] The offense under INA 212(a)(2), 237(a)(2) or 237(a)(4) must be referred to in section 212(a)(2).[105] The accumulation of continuous physical presence is not ended by the commission of a petty offense before the necessary ten years, unless he later commits a second petty offense for a crime involving moral turpitude, within the ten year period. The second offense committed within the statutory ten year period would render the "petty offense" exception unavailable and the alien ineligible for relief.[106] Even if the petty offense would render the alien deportable based on a conviction for a crime involving moral turpitude committed within five years of admission for which he could have been sentenced to a year of incarceration, the Board has recently held that the "stop-time" rule would not come into play because it was not "an offense referred to in section 212(a)(2)."[107]

The service of the Notice to Appear also implicates the "stop-time" rule and whichever occurs first (commission of an inadmissible or deportable offense in 237(a)(2) or 237(a)(4) referred to in INA 212(a)(2) or the service of a Notice to Appear) stops the accumulation of continuous

---

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

[102] *Wu v. Holde*r*,* 567 F.3d 888 (7th Cir. 2009).

[103] *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).

[104] INA section 240A(d)(1)(B).

[105] *Id. Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

[106] *See, Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003). That case involved the seven year period of continuous residence under INA 240A(a) and the Board focused on the "renders the alien inadmissible...or removable" clause of INA section 240A(d)(1).

[107] See the September 13, 2010 decision of the Board in *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010) which focused on the "referred to in section 212(a)(2)" clause. Compare this decision to *Matter of Cortez* , *supra*., wherein the Board decided that the, in spite of the fact that the conviction qualified for the petty offense exception, it was "described under" INA section 237(a)(2), thereby disqualifying the alien from relief of cancellation of removal for nonpermanent residents.

physical presence.[108] The continuous physical presence (or continuous residence for INA 240A(a) relief) *ends*, as stated above, and the clock cannot be restarted, as Congress has distinguished the words *breaks*, as used in INA 240A(d)(2) and *ends*, as used in INA 240A(d)(1).[109]

Special Rule for Battered Spouse or Child

INA 240A(b)(2)(A) provides relief for alien spouses or children that have been battered or subjected to extreme cruelty. The requirements for a showing of good moral character and the physical presence requirements are modified if a nexus is proven between the inability to establish good moral character or the absences affecting continuous physical presence and the battering or extreme cruelty.[110] Additionally, only three years of physical presence is required.[111]

There is a parole provision for the children of battered aliens and the parents of battered alien children who are granted relief under INA 240A(b)(2) or INA 244(a)(3) as in effect prior to April 1, 1997.[112] There is a domestic violence waiver[113] that may apply since the battered spouse or child is still subject to the good moral character provision contained in INA 240A(b)(1)(B) and the “convicted” provision contained in INA 240A(b)(1)(C) and certain provisions contained in INA 240A(b)(2)(A)(iv).

Waiver under INA section 237(a)(1)(H)

The waiver that is available under INA section 23**7**(a)(1)(H) is both much misunderstood and overlooked by immigration counsel and therefore, probably, underutilized**.** It is a waiver, that, if granted, can permit an alien who never would have received a visa if the true facts were known at the time of visa issuance or admission, to remain a permanent resident and eventually apply for citizenship, should he so desire.

---

[108] INA section 240A(d)(1) & (2).

[109] *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000).

[110] INA section 240A(b)(3) and (b)(2).

[111] INA section 240A(b)(2)(A).

[112] INA section 240A(b)(4)(A).

[113] INA section 240A(b)(5).

The statute is the successor to the former INA section 241(f) which provided relief for some aliens that had been excludable at the time of entry as aliens that had sought or procured visas or other documentation or entry by fraud or misrepresentation. Aliens had to be "otherwise admissible." The purpose of the waiver section was based on the "family reunification" theme of the INA. The waiver was mandatory, if eligibility was established. [114] Over the years there was litigation including two Supreme Court cases of note.[115]

Currently, the statute applies to those aliens who seek the waiver based on inadmissibility at the time of admission or adjustment of status[116] because of fraud or willful or innocent misrepresentation. It does not apply to an alien that entered as a nonimmigrant and never became a permanent resident.[117] The waiver is discretionary. It specifically does not apply to an alien who assisted in Nazi persecution or engaged in genocide.

Since the theme of the waiver is family reunification, the alien must be the spouse, parent or son or daughter of a U.S. citizen or lawful permanent resident.[118] He must be "otherwise admissible" except for the provisions of the statute relating to the requirements for a labor certification and being in possession of an immigrant visa. The underlying ground of inadmissability must be a direct result of the fraud or misrepresentation. Finally, the alien must have been in possession of an immigrant visa or entry document. [119] An alien who would have been charged with having

---

[114] "The provisions...shall not apply ...to an alien..." *See,* Act of Sept. 26, 1961, Pub.L. No. 87-301, Sec. 16, 75 Stat. 650, 655. The Waiver was originally enacted in 1957 (Act of Sept. 11, 1957, Pub. L. 85-316, Sec. 7, 71 Stat. 639, 640.

[115] *INS v. Errico*, 385 U.S. 214, 223 (1966) " Congress must have felt that aliens who evaded quota restrictions by fraud would be 'otherwise admissible' at the time of entry." *Reid v. INS,* 420 U.S. 619 (1975) held that an alien was not eligible for section 241(f) relief when the INS charged entry without inspection ("EWI") based on a false claim to U.S. citizenship since the EWI charge did not rest on excludability.

[116] There is no Board case on point. In *Matter of Connelly,* 19 I&N Dec. 156 (BIA 1984) the Board held that (former) INA section 241(f) was unavailable to waive fraud committed during an adjustment of status proceeding. Section 241(f) was limited to fraud or misrepresentation at time of "entry." The current statute refers to "admission."Also, an earlier version of the INA [INA section 241(a)(1)] addressed excludability at time of "entry." The current statute INA section 237(a)(1) addresses aliens "[i]nadmissible at time of *entry or of adjustment of status..." See, Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999) holding that, an adjustment of status is an admission, at least in some contexts. Some Courts of Appeal have disagreed. See, for example, *Aremu v. DHS, 450 F.3d 578 (4th Cir. 2006).*

[117] *Matter of Mangabat*, 14 I&N Dec. 75 (BIA 1972).

[118] INA section 237(a)(1)(H)(i)(I).

[119] INA section 237(a)(1)(H)(i)(II).

entered without having been inspected as an alien by an immigration officer is not eligible for relief.[120]

The “anchor relative” need not be alive at the time of admission. [121] However, the relative must be alive and probably reside in the U.S. at the time of application and adjudication of the application since “the purpose of the fraud waiver is to unite aliens with their living United States citizen or lawful permanent resident family members.”[122]

The alien need not be charged with a violation of INA section 212(a)(6)(C)(I) and can be charged with a violation under 212(a)(5)(A) or 212(a)(7)(A).[123]

As stated above, the alien is eligible for the waiver, even if he would have been inadmissible based on the “true facts” as long as the ground of inadmissability directly results from the fraud or misrepresentation. Therefore, aliens who, although married, entered the U.S. as the unmarried son or daughter of a lawful permanent resident or the son or daughter of a lawful permanent resident that died after approval of the visa petition but before the issuance of the visa were eligible to apply for the waiver.[124] An alien that lied about his skills to obtain an alien labor certification would also be eligible, [125] as would an alien who was admitted in spite of perpetrating a “marriage fraud” that would fall under INA section 204(c).[126] An alien who did not obtain a divorce prior to marrying a U.S. citizen and concealed the fact of the first marriage when

---

[120] Id.; *Reid v. INS,* 420 U.S. 619 (1975).

[121] *Matter of Gonzalez,* 16 I&N Dec. 564 (BIA 1978). In this case the anchor relative (U.S. citizen child) was born after the alien’s entry into the U.S. *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006). In *Fu*, the petitioning father had died after approval of the petition but before the issuance of the visa for his son.

[122] *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008) The alien had been married although he was admitted as the unmarried son of a U.S. citizen.. By the time of the immigration judge’s decision on the 237(a)(H)(1) application, his mother had died. The BIA ruled that he was ineligible for the waiver. It left open whether the anchor relative would have to be alive at the time of the Board’s decision. Id. at 664.

[123] DHS cannot prevent an alien from applying for the waiver by charging INA section 237(a)(1) and 212(a)(7)(A) instead of (a)(6)(C). In point of fact, the statute contains a *non sequitur* since aliens described in 212(a)(6)(C) excludes those who make innocent misrepresentations. Innocent misrepresentations are included in 237(A)(1)(H).

[124] *See, Matter of Fu, supra.*

[125] INA section 237(a)(1)(H) and *Errico v. INS*, 385 U.S. 214 (1966).

[126] *Matter of Da Lomba*, 16 I&N Dec. 616 (BIA 1978).

applying for a visa would also be eligible.[127]

It appears that an alien inadmissible at time of admission for a conviction for a crime involving moral turpitude or a drug-related ground of inadmissibility would not be eligible for a waiver because the criminal ground of inadmissability does not directly result from the fraud or misrepresentation.

The alien may combine or "stack" a waiver application under INA section 237(a)(1)(H), if otherwise eligible and otherwise admissible, with an application for a waiver under former INA section 212(c), if the ground that the alien seeks to waive under INA 212(c) arose after the initial admission for law ful permanent residence. The lawfulness of the original admission is retroactive to the date of that admission if the 237(a)(1)(H) waiver is granted so as to make the alien eligible for the 212(c)waiver so far as the required seven years of lawful domicile is concerned.[128]

In *Matter of Koloamatangi*,[129] the Board decided that the alien was ineligible for relief under INA 240A(a) because he had obtained his permanent residence through the knowingly bigamous marriage to a U.S. citizen. The theory was that his lawful permanent residence was never "lawful" because he had obtained his visa through fraud. After finding him ineligible for relief for cancellation of removal for permanent residents, the board noted[130] that the alien "would appear to be eligible for a waiver under section 237(a)(1)(H) of the Act..." and noted as well that he may be eligible for relief under INA section 240A(B)(1).[131]

As stated above, INA section 237(a)(1)(H), contrary to its predecessor statute, is discretionary. The Board has decided that the initial fraud of the alien can be considered by the Immigration Judge when exercising his discretion.[132] A balancing of the equities test that is used in the

---

[127] In *Matter of Gonzalez*, 16 I&N Dec. 564 (BIA 1978), the alien was found ineligible under former INA section 241(f) because of the non-exemption from the alien labor certification requirement at time of entry. This requirement is now specifically exempted from the "otherwise admissible" proviso of INA section 237(a)(1)(H).

[128] *Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993) interpreting former INA section 241(f).

[129] 23 I&N Dec. 548 (BIA 2003).

[130] *Id.* at p. 552.

[131] *Id.*

[132] *Matter of Tijam*, 22 I&N Dec.408 (BIA 1998). This case provided the Board with an opportunity to extensively consider which factors could be considered when exercising discretion after the U.S. Supreme Court

adjudication of this waiver is similar to that set out in *Matter of Marin*[133] for use in "212(c)" cases.

Counsel should always have this waiver in the back of his mind and should also consider whether or not, in certain cases, a waiver under INA section 212(k) should be considered.

Waiver under INA section 212(k)

The waiver found at INA 212(k) is discretionary and does not require an anchor relative. The purpose is to overcome technical issues. It waives inadmissibility under INA sections 212(a)(5)(A)[alien labor certification] and 212(a)(7)(A)(I) [not in possession of valid unexpired visa or entry document]. The regulations[134] make it clear that the waiver may be renewed in removal proceedings. The Board has ruled[135] that an immigration judge has jurisdiction to adjudicate a waiver under INA section 212(k) without waiting for the district director to rule on it.

The alien must be in possession of an immigrant visa and must be otherwise admissible. The Immigration Judge or Board must be satisfied that the inadmissability was not known to, and could not have been ascertained by the exercise of due diligence by, the immigrant before departure from the foreign non-contiguous country or before application for admission if the alien is coming from a contiguous country.

In one Board case[136] the application was properly denied where the alien knew about her father's death prior to the issuance of the visa but failed to exercise reasonable diligence in ascertaining the effect on her immigration status. In another case[137] the Eighth Circuit upheld the grant of the

---

decided in *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996) that the statute permits the consideration of "initial fraud" [the acts of fraud committed by the alien in connection with his entry into the United States] and that the statute imposes no limitations on the factors that may be considered in determining which eligible aliens should be granted relief.

[133] 16 I&N Dec. 581 (BIA 1978).

[134] 8 CFR 212.10 and 8 CFR 1212.10.These regulations refer to former section 212(14),(20) and (21). Former subsection (21) is now found in 212(a)(7)(A)(i)(II).

[135] *Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987).

[136] *Id.*

[137] *Mayo v. Ashcroft*, 317 F.3d 867 (8th Cir. 2003).

waiver where the Immigration Judge believed that the alien did not know she was married when she entered the U.S. as the unmarried daughter of a permanent resident.

The Ninth Circuit[138] recently held that the unmarried son and daughter of a "lawful permanent resident" mother who bought her own "green card" from a crooked INS employee, were eligible to apply for a section 212(k) waiver, wherein the son and daughter were unaware that their mother paid an INS employee to create a record of lawful permanent residence for herself. The Court, over a vigorous dissent, stated that the son and were inadmissible under INA sections 212(a)(5)(A) and (7)(A)(i); in possession of an [invalid] immigrant visa; and otherwise admissible.

The Fifth Circuit[139] and the Ninth Circuit[140] have upheld the imputing of parents knowledge to the children. The Fifth Circuit cited with approval the Board's decision in *Matter of Zamora* a case that involved the imputation of the parent's abandonment of lawful permanent resident status to the children.

An alien cannot "bootstrap" waivers and must be separately eligible for each waiver in order to stack another waiver with a section 212(k) waiver.[141]

Adjustment of status

Adjustment of status plays an important role for aliens in removal proceedings who are eligible for this type of relief as a means to avoid an order of removal.

For aliens in removal or deportation proceedings, the immigration judge has exclusive jurisdiction over applications for adjustment of status, except, in general, for arriving aliens.[142] Of

---

[138] *Shin v. Holder,* Nos. 06-73782; 06-73785, ___F.3d _____ (9th Cir. June 11, 2010).

[139] *Mushtaq v. Holder*, 583 F.3d 875 (5th Cir. 2009).

[140] *Senica v. INS,* 16 F.3d 1013 (9th Cir. 1994).The children were age 6, 9 and 11 at the time of their admission. The immigration judge had granted relief and the Board sustained INS' appeal.

[141] *See, Matter of Roman*, 19 I&N Dec. 855 (BIA 1988) wherein the alien was inadmissible for having been deported and for not having a proper entry document. The Board held that she was not otherwise eligible for section 241(f) relief since advance permission to reapply for entry after deportation could not be granted *nunc pro tunc* if another waiver was needed to cure another ground of inadmissibility.

[142] 8 CFR 1245.2(a)(1)(i).

course, the alien must be eligible to receive an immigrant visa and an immigrant visa must be immediately available at the time of filing the application.[143] There is a list of restricted aliens and ineligible aliens.[144]

The immigration judge does have jurisdiction over an application for adjustment of status filed by an arriving alien when four conditions are met: (1) the alien properly filed an application for adjustment of status with the USCIS when he was in the U.S.; (2) the alien departed from and returned to the U.S. pursuant to a grant of advance parole to pursue the previously filed application for adjustment of status; (3) the application for adjustment of status was denied by the USCIS; and (4) DHS placed the alien in removal proceedings either upon the alien's return to the U.S. pursuant to the grant of advance parole or after USCIS denied the application.[145]

In two precedent decisions the Board decided that immigration judges have no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status under INA 245[146] or the Cuban Adjustment Act of November 2, 1966,[147] with the limited exception of an alien who has been placed in removal proceedings after returning to the U.S. pursuant to a grant of advance parole to pursue a previously filed and denied application.

Aliens that are deportable but not inadmissible may adjust status.[148] The application can be "stacked" with other applications for relief under other sections of the Act,.[149] Applications for relief under INA section 212(c) are often "stacked" with an application for adjustment of status.[150] A refugee who became a lawful permanent resident may not be able to readjust status as a refugee because of INA section 209(a)(1)(C) which states as a requirement for adjustment that the "alien has not acquired permanent resident status."[151]

---

[143] 8 CFR 245.1(a).

[144] See, 8 CFR 245.1(b) and (c).

[145] 8 CFR 1245.2(a)(1)(ii).

[146] *Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009).

[147] *Matter of Martinez-Montalvo*, 25 I&N Dec. 778 (BIA 2009).

[148] *Matter of Rainford*, 20 I&N Dec. 958 (BIA 1992).

[149] *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005).

[150] *Matter of Gabryelsky, supra.*

[151] *See, Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008).

It is important to note that at the time of the renewal of the application the alien does not need to meet the requirement of section 245(c) of the Act or 8 CFR 245.1(g) so long as they were met at the time that the application was filed with the USCIS.[152]

The Board has ruled that an immigration judge now has the authority to rule on portability under INA section 204(j).[153]

INA section 245(i) does not trump inadmissibility under sections 212(a)(9)(B)(i) or (C)(i).[154] The issue of who is "grandfathered" is still being litigated and is the subject of a September, 2010, BIA decision[155]. In this case the husband of an derivative alien beneficiary *derivative* beneficiary that qualified for adjustment of status under section 245(i) of the Act was found not to be independently eligible for adjustment under INA section 245(i). Only a *principal* alien's spouse or child is eligible to be "accompanying or following to join."[156]

Relief under INA Sections 212(h), (i), (a)(9)(B)(v) and (a)(9)(C)

Similar to relief through the adjustment of status process, relief under INA sections 212(h), (i) and (a)(9)(B)(v) is usually discussed in conjunction with consular processing of immigrant visa applications or adjustment of status. These types of relief, discussed in other places within these materials by other authors, will be discussed only briefly.

Relief under INA Section 212(h)

---

[152] 8 CFR 245.2(a)(5)(ii). INA section 245(c) contains restrictions on adjustment , for example, for certain aliens that have not maintained status or were employed without authorization. 8 CFR 245.1(g) relates to requirements for the availability of a visa number.

[153] *Matter of Marcal Neto*, 25 I&N Dec. 169 (BIA 2010).

[154] *Matter of Lemus-Losa*, 24 I&N Dec. 373 (BIA 2007). *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) addressed a similar claim regarding the interplay of INA section 245(i) and INA section 212(a)(9)(C).

[155] *Matter of Legaspi*, 25 I&N Dec. 328 (BIA 2010).

[156] The Board also pointed out that had the respondent been married to his wife at the time that the petition was filed, she would not be eligible for her derivative beneficiary status since she would no longer be eligible for classification as a "child." "The respondent simply cannot claim to independently qualify for section 245(i) adjustment of status on the basis of a relationship that would have precluded Ms. Blanco from qualifying in her own right." *Id.*, at 330.

When other more liberal waivers, such as relief under former INA section 212(c) or 240A(a), are unavailable, or, in some circumstances, the alien is ineligible for adjustment of status because there is no visa immediately available, a waiver under section 212(h) of the Act may be the only type relief of available.

Briefly, for those aliens eligible, a waiver under 212(h) of the Act would be available to waive criminal grounds of inadmissibility for a crime involving moral turpitude,[157] or multiple crimes where the aggregate sentence to imprisonment was five years or more[158]; a single offense of simple possession of thirty grams or less of marijuana[159]; commercial vice activities and prostitution[160] ; and serious criminal offenses involving a grant of immunity[161].

The waiver is available to certain immigrants including self-petitioners under the Violence Against Women Act (hereinafter "VAWA").[162] The aliens must meet the eligibility requirements[163] and a favorable exercise of discretion must be received. VAWA self-petitioners only need a favorable exercise of discretion. Certain applicants will have to meet a higher threshold showing of "hardship".[164] As discussed in the note below, a specific statutory grant permits the Attorney General to prescribe regulations regarding the exercise of his discretion.[165]

Those aliens who have been convicted of having committed, attempted or conspired to commit, or have committed acts that constitute murder or criminal acts involving torture are not

---

[157] INA section 212(a)(2)(A)(i)(I).

[158] INA section 212(a)(2)(B).

[159] INA section 212(a)(1)(A)(i)(II) and section 212(h).

[160] INA section 212(a)(2)(D).

[161] INA section 212(a)(2)(E).

[162] INA section 212(h)(1)(C).

[163] INA section 212(h)(1)(A) & (B).

[164] 8 CFR 212.7(d). [Criminal grounds of inadmissibility involving violent or dangerous crimes.]

[165] INA section 212(h)(2). Those aliens who have committed violent or dangerous crimes have to establish an "exceptional and extremely unusual hardship" or "extraordinary circumstances" in the cases where "national security or foreign policy considerations" are involved.

eligible.[166]

Aliens that have previously been granted lawful permanent resident status have additional hurdles to overcome.[167] These aliens must have lawfully resided in the U.S. for not less than seven years before removal proceedings have been initiated and they cannot have been convicted of an aggravated felony. [168]

INA section 212(h) sets out for four scenarios wherein aliens can apply for relief. The first category concerns aliens who are charged with prostitution as the only basis of inadmissibility. The second category, which would apply to aliens with any other criminal ground of inadmissibility for which the waiver is available, is where the activities that rendered the aliens inadmissible, occurred more than fifteen years before the date of the application for a visa, admission or adjustment of status.

The aliens in these two categories do not have to establish an " extreme hardship" to an "anchor relative". They must, however, prove that their admission would not be contrary to national welfare, safety or security interest of the U.S. and that they have been rehabilitated.[169]

The third category comprises those aliens with more recent criminal activities. For them, an "anchor relative" is required. These aliens have to establish that they are the spouse, parent or son or daughter of a U.S. citizen or lawful permanent resident and that "anchor relative" would suffer an extreme hardship if the applicant is denied admission. [170] Included in the definition of son or daughter would be a child. Other waivers such as those under section 212(i) and

---

[166] Id.

[167] In *Dobrova v. Holder*, Docket No. 09-2046-ag, ___ F.3d ___ (2nd Cir. June 9, 2010), the Second Circuit rejected the alien's argument that the phrase "has previously been admitted to the United States as an alien lawfully admitted for permanent residence" refers to the most recent admission and decided that Congress used the present perfect tense which refers to a time in the indefinite past or a past action that comes up to and touches the present. The alien had been admitted as a lawful permanent resident in 1983 and had been deported in 1989. The alien was erroneously admitted with his old I-551 card and a re-entry permit. After having been placed in removal proceedings, based on an approved immediate relative petition, he filed to adjust his status in December, 2006 and filed an application under INA section 212(h).

[168] INA section 212(h)(2).

[169] INA section 212(h)(1)(A)(i)-(iii).

[170] INA section 212(h)(1)(B). Those aliens who have committed violent or dangerous crimes have to establish an "exceptional and extremely unusual hardship" or "extraordinary circumstances" in the cases where "national security or foreign policy considerations" are involved.

212(a)(B)(v), of the Act, for example, do not make eligible for relief, aliens that are the *parents* of a U.S. citizen or lawful permanent resident. [171] INA section 240A makes eligible, *inter alia*, parents of a U.S. citizen or lawful permanent resident child, not a son or daughter (21 years or older).

The last category applies to those aliens applying for a waiver who are VAWA self-petitioners. They only need a favorable exercise of discretion.[172]

In certain circumstances the INA section 212(h) application can be used as a stand-alone application. The rules are different depending on whether the aliens are lawful permanent residents that are returning residents (arriving aliens) or whether they are charged with being deportable; and for those being charged with deportability, whether they have departed the U.S. and returned or have not departed.

Returning lawful permanent residents charged with a ground of inadmissibility may file a stand-alone waiver application.[173]

Non-permanent residents that are arriving aliens need to apply for admission as lawful permanent residents and be in possession of immigrant visas to be eligible for a stand-alone section 212(h) visa waiver application.[174]

Non-permanent residents charged with deportability need to apply for adjustment of status in conjunction with a section 212(h) application.[175]

---

[171] It seems paradoxical to the author that an additional type of "anchor relative", to wit, parents, is available to those who seek to waive criminal grounds of inadmissibility and yet parents are not considered "anchor relative" of those who wish to waive the willful misrepresentation or fraud or unlawful presence grounds of INA sections 212(a)(6)(C)(i) and 212(a)(9)(B).

[172] Subpar. (H)(1)(c) added by Sec. 1505(e), title V [Battered Immigrant Women Protection Act of 2000], div. B [Violence Against Women Act of 2000], Pub. L. No. 106-386 [Victims of Trafficking and Violence Protection Act of 2000], Act of Oct. 28, 2000, 114 Stat. 1464. Amended by Sec. 6(b)(3), Act of Aug. 12, 2006, Pub. L. No. 109-271, 120 Stat. 750 (Tech. Cors. To VAWDOJRA 2005).

[173] *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).

[174] *Matter of Millard,* 11 I&N Dec. 175 (BIA 1965). The grant must be *nunc pro tunc* since they were ineligible at the time they applied for a visa.

[175] *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992); *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998).

Lawful permanent residents who have departed the U.S. and returned after committing a deportable offense can file a stand-alone application if the deportable offense is also an inadmissible offense to which section 212(h) applies.[176]

The Eleventh Circuit[177] permits those who are charged with deportability and have not departed the U.S. to apply for a section 212(h) waiver on a stand-alone basis. Interestingly, there is a split among the immigration judges in the Miami court as to whether or not *Yeung*[178] applies to non-departing deportable aliens after the *Abosi* [179]decision.

The Fifth Circuit[180] and the Seventh Circuit[181] have decided that a stand-alone application is not available to aliens that are charged with deportability and have not departed the U.S. since committing the deportable offense. Equal protection arguments are still available to those in other circuits.

For the lawful permanent residents who cannot file a stand-alone application, they can file, if eligible, an application for adjustment of status in conjunction with the section 212(h) application.[182]

Relief under INA Section 212(i)

Relief under INA section 212(i) is available to waive inadmissibility under INA section 212(a)(6)(C)(i), relating to an alien who seeks to procure, has sought to procure or has procured, by willful misrepresentation of a material fact or fraud, a visa, other documentation, or admission into the U.S. or other benefit under the Act.

---

[176] *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980). The waiver may be granted *nunc pro tunc*.

[177] *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995). The BIA in its decision in *Matter of Balao*, which involved a complicated fact pattern and really focused on other issues stated that "[s]ection 212(h) relief is available in deportation proceedings in conjunction with an application for adjustment of status." The stand-alone issue doesn't appear to have been raised by the respondent.

[178] *Id.*

[179] *Matter of Abosi*, *supra.*

[180] *Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2007).

[181] *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007).

[182] *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968); *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980).

With one exception, unlike the waiver available under INA section 212(h), the waiver is unavailable to the alien parent of a U.S. citizen or lawful permanent resident.[183] The exception is that an alien applicant for this waiver who is also a VAWA self-petitioner may seek to establish an extreme hardship to himself or herself and to the alien's U.S. citizen or lawful permanent resident, or qualified alien parent or child.[184]

Relief under INA Section 212(a)(9)(B)(v)

Relief under INA section 212(a)(9)(B)(v) is available to an alien who is inadmissible for having been unlawfully present in the U.S. for either more than 180 days and less than one year, for which there is a three-year period of inadmissibility,[185] or one year or more, for which there is a ten-year period of inadmissibility.[186] He must be the spouse or son or daughter of a U.S. citizen or lawful permanent resident. It expressly does not apply to parents of a U.S. citizen or lawful permanent resident. Compare this statute with INA section 212(h).[187]

The section of inadmissibility is not trumped by INA section 245(i)[188] except in the 7th Circuit.[189]

Miscellany

The question sometimes arises as to the effect of the timely filing of an application for relief from removal but the untimely or total failure to file supporting documents. The BIA addressed this issue this year.[190] It decided that in the event that an *application* for relief has been timely filed but supporting documents have not been submitted within the time established, the Immigration

---

[183] INA section 212(i)(1).

[184] Id.

[185] INA section 212(a)(9)(B)(i)(I).

[186] INA section 212(a)(9)(B)(i)(II).

[187] INA 212(h),a waiver for criminal grounds of inadmissibility, paradoxically in the mind of the author, applies to an alien that is the parent of a U.S. citizen or lawful permanent resident.

[188] *Matter of Lemus-Losa*, 24 I&N Dec. 373 (BIA 2007). *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) addressed a similar claim regarding the interplay of INA section 245(i) and INA section 212(a)(9)(C).

[189] *Lemus-Losa v.Holder*, 576 F.3d 752 (7th Cir. 2009) rev'g *Matter of Lemus-Losa, supra.*

[190] *Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010).

Judge may decide that the opportunity to file the documents has been waived but he may not deem the application abandoned.[191] If an exhibit is filed, but untimely filed, "it shall not be entered into evidence or it is given less weight."[192]

For those who have decided not to apply for relief or find that they are not eligible for the relief for which they would like to apply, there remains the stipulated removal order. The Chief Immigration Judge, on September, 15, 2010, issued a comprehensive memorandum complete with sample motion and orders granting and denying the motion.[193]

---

[191] *Matter of* R-R-,20 I&N Dec. 547, 549 (BIA 1992); see, ICPM, sections,3.1(b)-(d) http://www.justice.gov/eoir/v11/OCIJ,sectionPracManual/ocij_page1.htm.

[192] ICPM, section3.1(d)(2).

[193] Operating Policies and Procedures Memorandum 10-0: *Procedures for Handling Requests for a Stipulated Removal Order.*