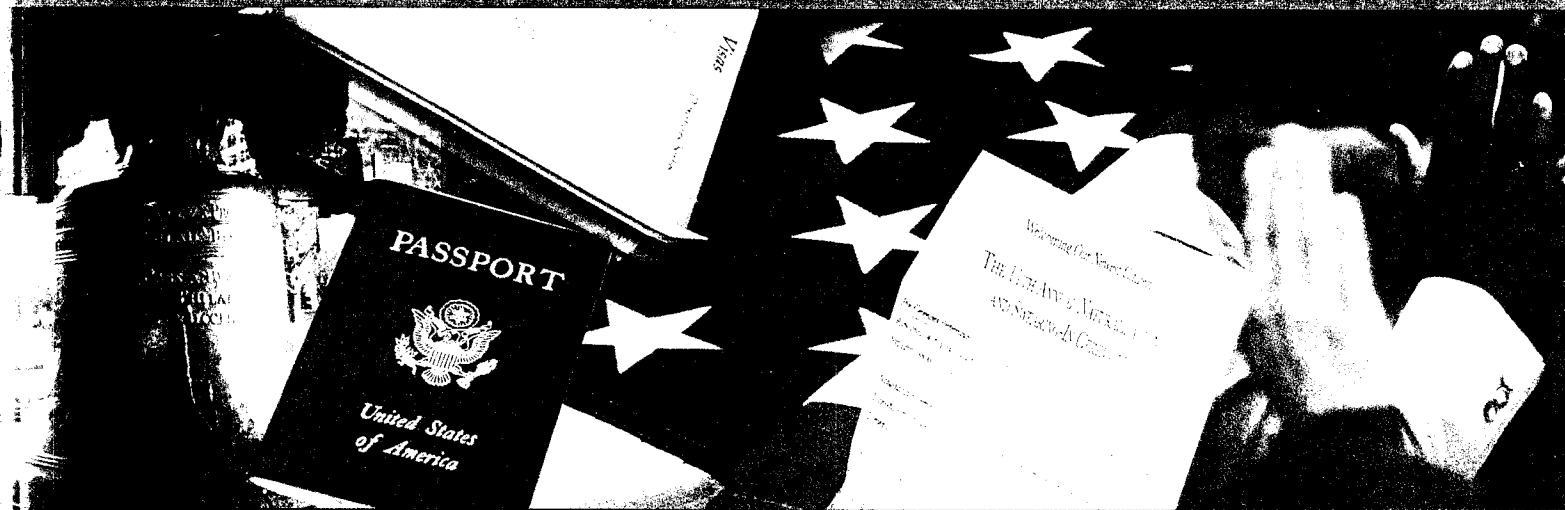


# IMMIGRATION & NATIONALITY LAW HANDBOOK

2004-05 EDITION

## VOLUME I

GENERAL IMMIGRATION, NATURALIZATION,  
ADMISSION, REMOVAL, AND RELIEF



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# CANCELLATION OF REMOVAL FOR NON-LAWFUL PERMANENT RESIDENTS

updated by John P. Pratt\*

## INTRODUCTION

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),<sup>1</sup> many changes were made to the immigration laws as they relate to the form of relief from deportation previously known as "suspension of deportation." IIRAIRA replaced suspension of deportation with "Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents," now Immigration and Nationality Act (INA) §240A(b). This relief requires *10 years of continuous physical presence* in the United States and *good moral character*. This type of cancellation is barred for those aliens convicted at any time of certain deportable or excludable crimes. It also requires a showing that deportation would result in "*exceptional and extremely unusual*" hardship to a qualifying U.S. citizen (USC) or lawful permanent resident (LPR) spouse, parent, or child (hardship to the applicant does not count). The 10-year period of continuous physical presence is deemed to end when the respondent is served with a Notice to Appear (NTA) or when the respondent commits certain offenses that render him or her inadmissible or removable, whichever date is earlier.<sup>2</sup>

\* Updated from an article published at 1 *Immigration & Nationality Law Handbook* 106 (2003-04 ed.).

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*Note:* An 8 CFR cite with a bracketed "1" (e.g., §[1]274a.1) indicates a section duplicated in both DHS's Chapter I (§274a.1) and EOIR's Chapter V (§1274a.1):

<sup>1</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (IIRAIRA).

<sup>2</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 et seq.) (INA), §240A(d)(1) (the "stop-time rule").

This article highlights the most dramatic issues raised by the new cancellation provisions as they relate to non-permanent residents. Because of all these changes, the task of ensuring that a client's case is filed properly and documented to the fullest extent possible has become all the more important.

Finally, there exists more definitive case law on several key components of this form of relief. The Board of Immigration Appeals (BIA) issued several precedent decisions that provide guidance on establishing "exceptional and extremely unusual hardship" and also on establishing initial eligibility for relief. These and other cases will be examined below.

## AUTHORITIES

INA §240A(b) provides for cancellation of removal and adjustment of status to that of lawful permanent resident for those aliens who can establish the following:

- *Physical presence* in the United States for a continuous period of not less than 10 years preceding the date of such application;
- *Good moral character* during the 10-year period, plus: no conviction for any offense designated under INA §212(a)(2) (criminal and related grounds), §237(a)(2) (criminal offenses), or §237(a)(3) (failure to register and falsification of documents); not inadmissible under INA §212(a)(3) (security grounds); and not deportable under INA §237(a)(4) (security and related grounds); and
- Removal from the United States would result in *exceptional and extremely unusual hardship* to the alien's USC or LPR spouse, parent, or child.

Various commentators have noted that, although its title mentions "Certain Nonpermanent Residents," the statute nowhere restricts relief to such individuals, and arguably it should therefore apply to LPRs equally. This would be useful where, for example, a person can show hardship and 10 years' residence and good character, but has been an LPR for less than five years for purposes of cancellation under INA §240A(a) (or did not obtain LPR status lawfully).

## KEY CONSIDERATIONS

### Continuous Residence or Physical Presence<sup>3</sup>

**Requirements**—To meet the requirement of continuous presence an alien must not have:

- Departed the United States for any one period in excess of 90 days; or
- Departed the United States for any periods in the aggregate exceeding 180 days.<sup>4</sup>

**Termination**—Continuous presence is terminated upon the earlier of the following (*i.e.*, application of the “stop-time rule”):

- The service of an NTA (replacing the old “Order to Show Cause” (OSC)) under INA §239(a); or
- The *commission* by the alien of an offense referred to in INA §212(a)(2) (criminal and related grounds), that renders the alien inadmissible under INA §212(a)(2) or removable under §237(a)(2) (criminal offenses) or §237(a)(4) (security grounds).<sup>5</sup>

**Armed Forces Personnel**—Aliens who have served for a minimum period of 24 months on active duty status in the U.S. Armed Forces, and if separated from service were separated under honorable conditions, and at the time of the alien’s enlistment or induction were physically in the United States, are exempted from the continuous physical presence provisions.<sup>6</sup>

<sup>3</sup> INA §240A(d).

<sup>4</sup> INA §240A(d)(2). Under *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002), the BIA held that an applicant who left the United States under a grant of Voluntary Departure (VD), even if for less than 90 days, did not satisfy the physical presence requirement. The BIA’s holding that leaving under a grant of VD cuts off the 10 year physical presence period has been upheld under *Chevron* deference. *Vasquez-Lopez v. Ashcroft*, 315 F.3d 1201 (9th Cir. 2003), *reh’g denied* 343 F.3d 961 (9th Cir. 2003). *Accord Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 217–19 (5th Cir. 2003) (adopting *Matter of Romalez*).

<sup>5</sup> INA §240A(d)(1). A conviction for a petty offense involving a Crime Involving Moral Turpitude (CIMT) does not render an applicant ineligible for cancellation. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 592–93 (BIA 2003). Additionally, the conviction of a second crime along with a conviction that is classifiable as a “petty offense,” if the second crime is not a CIMT, does not render the applicant ineligible for cancellation either. *Id.* at 594–95.

<sup>6</sup> INA §240A(d)(3).

### Good Moral Character<sup>7</sup>

To establish a showing of good moral character:

The alien must demonstrate that he or she has been a person of *good moral character* during the qualifying 10-year period of presence in the United States, which includes showing that he or she is not barred under INA §101(f).<sup>8</sup>

### No Convictions for Certain Crimes<sup>9</sup>

As previously noted, an applicant is barred by a conviction for any non-petty offense designated under INA §212(a)(2) (criminal and related grounds), §237(a)(2) (criminal offenses), or §237(a)(3) (failure to register and falsification of documents).

The “stop-time rule” has been interpreted to mean that the 10-year period to qualify for cancellation is cut off by the *commission* of the crime not the conviction.<sup>10</sup>

### Exceptional and Extremely Unusual Hardship<sup>11</sup>

The alien must establish that his or her removal would result in *exceptional and extremely unusual hardship* to the alien’s USC or LPR spouse, parent, or child.

This standard is *substantially* more restrictive than the standard imposed under former INA §244(a)(1), which allowed an alien who had been in the United States for at least seven years and was of good moral character to qualify for Suspension of Deportation upon a showing of extreme hardship personally or to a qualifying family member. The current law not only increases the threshold level of hardships, but also bars consideration of hardship to the applicant himself or herself.<sup>12</sup>

<sup>7</sup> INA §§240A(b)(1)(B), (C).

<sup>8</sup> See *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 592–93 (BIA 2003) (holding that conviction of a crime involving moral turpitude that falls under the petty offense exception in INA §212(a)(2)(A)(ii)(II) does not bar finding of good moral character and thus does not bar eligibility for cancellation).

<sup>9</sup> INA §240A(d)(1).

<sup>10</sup> *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).

<sup>11</sup> INA §240A(b)(1)(D).

<sup>12</sup> For definitive discussion of the “exceptional and extremely unusual hardship” standard, see *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

**Cancellation for Battered Spouse or Child<sup>13</sup>**

Cancellation of removal may be granted to a battered alien spouse or child if he or she can establish:

- The alien has been battered or subjected to extreme cruelty<sup>14</sup> in the United States by a spouse or parent who is a USC or LPR; or the alien is the parent of a child of a USC or LPR and the child has been battered or subjected to extreme cruelty in the United States by such citizen or LPR; or the alien has been battered or subjected to extreme cruelty by a USC or LPR whom the alien intended to marry, where the marriage is not legitimate because of the USC or LPR's bigamy;
- The alien has been physically present in the United States for a continuous period of not less than three years immediately preceding the date of such application (regardless of whether a charging document was issued during such period);
- The alien has been a person of good moral character during such period (not counting otherwise disqualifying acts or offenses if same were "connected" to battery or cruelty against the alien);
- The alien is not inadmissible under paragraphs (2) or (3) of INA §212(a) (criminal and security related grounds), is not deportable under paragraphs (1)(G) or (2) through (4) of INA §237(a) (marriage fraud, crimes, false documents, security related grounds, and domestic violence and stalking (except, as to the last two categories, where the battered alien was "not the primary perpetrator of violence in the relationship")), and has not been convicted of an aggravated felony; and
- The removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.<sup>15</sup>

Any credible evidence relevant to the application is to be considered. The determination of what evidence is credible and what weight is to be given that evidence are within the sole discretion of the Attorney General.<sup>16</sup>

<sup>13</sup> INA §240A(b)(2).

<sup>14</sup> The extreme cruelty standard is entitled to judicial review. *Hernandez v. Ashcroft*, 345 F.3d 824, 833-35 (9th Cir. 2003).

<sup>15</sup> Special extreme hardship factors tailored to domestic violence apply. 8 CFR §§1240.20, 1240.58(c).

<sup>16</sup> INA §240A(b)(2).

**Aliens Ineligible to Seek Cancellation of Removal<sup>17</sup>**

(Applies also to cancellation for LPR under INA §240A(a), but not to battered aliens applying under INA §240A(b)(2).)<sup>18</sup>

**Crewmembers**—An alien who entered the United States as a crewmember subsequent to June 30, 1964;

**Exchange Visitors (i.e., admitted in J status)**

**Medical**—An alien who entered as a J-1 nonimmigrant exchange visitor or acquired this status in order to receive graduate medical education or training, regardless of whether the alien is subject to the two-year foreign residence requirement of INA §212(e) or whether the alien has fulfilled the two-year requirement;

**Nonmedical**—An alien (nonmedical) who entered the United States on a J visa or acquired J status and is subject to the two-year foreign residence requirement, and either has not fulfilled the foreign residence requirement or has not received a waiver of the requirement;

**Security**—An alien inadmissible under INA §212(a)(3) (security and related grounds) or deportable under INA §237(a)(4) (security and related grounds);

**Persecutors**—An alien described in INA §241(b)(3)(B)(i) (ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion); or

**Prior Relief**—An alien whose removal has been canceled previously under this section or whose deportation was suspended under former INA §244(a), or who has been granted relief under former INA §212(c).

**Limitation on Adjustment of Status<sup>19</sup>**

An annual cap of 4,000 visas has been set for the grant of cancellation of removal and adjustment of status in any fiscal year. This cap includes aliens who applied for suspension under former INA §244(a).<sup>20</sup>

<sup>17</sup> INA §240A(c)(1)-(6).

<sup>18</sup> INA §240A(c).

<sup>19</sup> INA §240A(e).

<sup>20</sup> See 8 CFR §[1]240.21.

Persons granted conditional suspension or cancellation previously maintain their conditional status until the numerical limitation is reached and they may travel during the conditional period.<sup>21</sup>

## PROBLEM AREAS AND PROCEDURAL CONSIDERATIONS

### Effective Date of INA §240A

**Generally**—IIRAIRA §309(a) and (c) state the effective date for INA §240A to be the first day of the first month beginning more than 180 days after the date of the enactment of the 1996 Act, *i.e.*, April 1, 1997. The amendments do not apply to aliens who were already in exclusion or deportation proceedings on that date, including judicial review thereof.

### Repapering

Section 309(c)(3) gives the Attorney General the option to terminate and re-initiate proceedings under the new provisions where there has not been a final administrative decision (meaning a final order from the BIA under the new provisions).

The BIA has established a procedure to agree to administratively close cases and recharge someone in removal proceedings so that the respondent would get the benefit of cancellation of removal. The process, called “repapering” will be used where the respondent: (1) is not a lawful permanent resident; (2) would have been eligible for suspension of deportation under the seven- or ten-year provisions but for the *stop-time rule* under INA §240A(d)(1); and (3) is eligible for cancellation of removal and is not otherwise barred by INA §240A(d)(1). Legacy INS/USCIS will not agree to reopen a case on this basis but once reopened, it is generally required to agree to administratively close the case absent unusual circumstances.<sup>22</sup>

Without “repapering,” IIRAIRA §309(c)(5) may bar suspension. Under this section, as a result of amendments made under the Nicaraguan Adjustment and Central American Relief Act

(NACARA),<sup>23</sup> the cancellation provision relating to the cut-off date for physical presence by service of an NTA or by the commission of a crime, INA §240A(d)(1) shall apply to NTAs or OSCs issued before, on, or after the date of the enactment of this Act.

The BIA, prior to the NACARA amendments, had determined that this provision applied retroactively to all cases that were not resolved on September 30, 1996.<sup>24</sup> However, the Attorney General vacated that decision on July 10, 1997.<sup>25</sup>

Congress, thereafter, passed NACARA to clarify that the statute would be applied retroactively to anyone who had an OSC served before the seven to ten years for suspension accrued. As such, even if a person filed for suspension before April 1, 1997, his or her suspension application would be pretermitted if respondent was served with an OSC at any time before the seven/ten years needed for suspension accrued.<sup>26</sup> Similarly, a person is precluded from seeking suspension even if the seven years accrued after the service of the OSC.<sup>27</sup>

### Changes to Definition of Physical Presence and Continuous Presence

IIRAIRA made a substantial change to the physical presence test. Prior to the 1996 Act, the alien had to show continuous presence in the United States for seven years. Under IIRAIRA, this has been increased to 10 years, with stricter cut-off dates for establishing continuous residence. The law now provides that more than 90 days at one time or an aggregate of 180 days outside of the United States will break the period of continuous presence. The previous law provided that an alien shall not be con-

<sup>23</sup> NACARA, enacted as Title II of the District of Columbia Appropriations Act for fiscal year 1998, Pub. L. No. 105-100, 111 Stat. 2160 (Nov. 19, 1997).

<sup>24</sup> *Matter of N-J-B*, 22 I&N Dec. 1057 (BIA 1997).

<sup>25</sup> *Id.* (A.G. July 10, 1997).

<sup>26</sup> *Matter of Nolasco*, 22 I&N Dec. 632 (BIA 1999) (NACARA clarified retroactive application of INA §240A(d) to persons served with OSCs); *see also Lockett v. INS*, 245 F.3d 1126 (10th Cir. 2001).

<sup>27</sup> *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000) (pursuant to INA 240A(d)(1), a person may not accrue the seven years of continuous physical presence after the service of the OSC); *Najjar v. Ashcroft*, 257 F.3d 1262, 1299-1300 (11th Cir. 2001) (finding BIA view that seven years may not accrue subsequent to service of OSC is supported by the statute).

<sup>21</sup> 8 CFR §[1]240.21(b)(5).

<sup>22</sup> Memo, Copper, G.C. (HQCOU 90/16.1-P) (Dec. 7, 1999), reprinted in 77 No. 2 *Interpreter Releases* 39, 55-56 (Jan. 10, 2000). *See Rojas-Reyes v. INS*, 235 F.3d 115, 125-26 (2d Cir. 2000) (failure to promulgate repapering regulations to permit cancellation of removal did not create due process, equal protection, or estoppel claims).

sidered to have failed to maintain continuous physical presence in the United States if the absence from the United States was brief, casual, and innocent, and did not meaningfully interrupt the continuous physical presence.<sup>28</sup> *Rosenberg v. Fleuti*<sup>29</sup> had long been regarded as the controlling case on how to define "brief, casual, and innocent." With the specific language defining continuous physical presence in the law, practitioners can no longer rely on the *Fleuti* doctrine as it once related to suspension of deportation. Now, proof of physical presence is an affirmative element of the applicant's case, and the practitioner will have to carefully count the total number of days the applicant has been outside the United States.

### Exceptional and Extremely Unusual Hardship: New Developments

The BIA first gave in-depth treatment to the "exceptional and extremely unusual" hardship standard in the case of *Matter of Monreal*.<sup>30</sup> The BIA held that this standard obviously must be read more restrictively than the former "extreme" hardship standard, but it refused to adopt portions of the legislative history suggesting that relief "should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable." It further identified the following hardship factors that are to be considered: (1) age of respondent, both at the time of entry and when the relief application is filed; (2) family ties in this country and abroad; (3) length of U.S. residence; (4) health of applicant and qualifying relatives; (5) political and economic conditions in the home country; (6) possibility of other means of adjustment; (7) community ties; and (8) immigration history.<sup>31</sup> *Matter of Monreal* also set forth various hypothetical fact patterns that give some guidance on just what level of hardship should suffice:

For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or

adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves....

As to *Monreal*, the BIA concluded that his 20 years of U.S. residence (having entered at the age of 14), two school-aged USC children, and LPR parents, all of which would "likely" have cumulatively sufficed under former suspension provisions, did not qualify him for cancellation of removal under INA §240A(b).

The BIA has further developed its view of "exceptional and extremely unusual hardship" in two more recent cases<sup>32</sup>—finding in one that the respondent did not meet the necessary level of hardship and in the other finding that she did. The importance of these two cases in clarifying the *Monreal* hardship standard cannot be overstated in that they appear to provide the opposite sides of the borderline in determining the requisite hardship to meet the standard. In other words, *Matter of Andazola* might be said to describe the highest amount of hardship that *does not* rise to the level of "exceptional and extremely unusual," while *Matter of Recinas* describes the least amount of hardship that *does*.

The BIA in both cases reviewed the cancellation claims made by single mothers of young children who themselves were Mexican nationals. In both cases it upheld the appropriateness of the *Monreal* analysis of hardship. Yet the respondent in *Andazola* did not meet the hardship standard but the respondent in *Recinas* did. Discerning the difference in circumstances between the respondents in these cases is not easy. The BIA attached importance in the *Recinas* case to the fact that the children could not read or write Spanish, the fact that the respondent had no close family in Mexico to help with care of the children, and that the children relied solely upon the support of the respondent, with little involvement from their father. Furthermore, the BIA noted the bleak prospects for respondent's lawful immigration should she be removed. The problematic issue for the advocate is that these factors were substantially present in *Andazola* as well. That both cases were close calls for the BIA is evidenced by the eight dissenting Board Members in *Andazola* and by its outright admission in *Recinas* that "We consider this case to be on the outer limit of the nar-

<sup>28</sup> INA §244, amended by IIRAIRA.

<sup>29</sup> 374 U.S. 449, 83 S.Ct. 1804 (1963).

<sup>30</sup> 23 I&N Dec. 56 (BIA 2001).

<sup>31</sup> See also *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

<sup>32</sup> *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

row spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.”<sup>33</sup>

Because of the similarity of the cases, it is imperative that the practitioner become familiar with *Monreal*, *Andazola*, and *Recinas* prior to presenting his or her client’s case.

The practitioner should review all possible factors that may strengthen a hardship argument: e.g., whether the applicant is an only child; whether one parent is dead; whether one parent has abandoned the child; the fear of the USC parent related to the survival of their child, spouse, or parent in a country that they have not lived in for over 10 years; the ability to make enough money in the home country to support the USC relative both now and in the future; the inability of the applicant to go to school, thereby restricting him or her to lower-paying jobs; the fear of the USC relative related to the “Americanization” of the applicant and how he or she would be treated going back to the home country; knowledge of the native language or lack thereof; the use of testimony on behalf of the USC relative from friends, neighbors, and employers as to the closeness and importance of the applicant to the USC relative; and the use of experts such as therapists to provide testimony.

For example, some of the criteria the BIA considered in granting relief in *Recinas* included: (1) USC children did not know any other way of life than in the United States, could not read or write in language of respondent’s country of removal, and did not speak the language well; (2) USC children entirely dependent on mother for financial and emotional support because parents divorced and father not involved in children’s lives; (3) respondent’s ability to care for children if removed will be substantially hampered where she has LPR mother assisting her in United States and no family in country of removal; (4) strong family support system in United States that has provided financial and emotional support without which respondent’s hardship would increase and would effect hardship of USC children; and (5) respondent’s prospects of immigrating are unrealistic due to backlog of visa availability (from Mexico).<sup>34</sup> Furthermore, in *Matter of Recinas*, the BIA held that “factors that relate only to the respondent may also be considered to the ex-

tent that they affect the potential level of hardship to her qualifying relatives.”<sup>35</sup>

Please note, however, that the respondent’s hardship is generally not relevant, including a son or daughter’s hardship, or hardship to other non-USC/LPR relatives (e.g., non-LPR mother).<sup>36</sup> Nevertheless, the existence of nonqualifying relatives may increase the hardship to qualifying relatives so they “cannot be ignored.”<sup>37</sup>

The BIA’s interpretation of the hardship requirement standard has been upheld in the face of a due process challenge.<sup>38</sup>

### Other Differences Between the Old Suspension of Deportation and the Current Cancellation of Removal

The current cancellation provisions, as they relate to non-permanent residents, require 10 years of residence and good moral character, rather than the seven-year period under the former suspension scheme. Also, in addition to retaining the requirement of good moral character during the qualifying time period, the current law precludes an alien from seeking cancellation of removal if he or she has been convicted for an offense under §212(a)(2) (criminal and related grounds); §237(a)(2) (criminal grounds); or §237(a)(3) (failure to register and falsification of documents) of the INA. This requirement is set forth separately from the good character component, and appears to apply to convictions at any time, not just within the 10-year residence period. Previously, convictions outside the qualifying period were only discretionary negative equities.

Curiously, the current law apparently does not bar cancellation for an individual who was previously ineligible for suspension under former INA §244 as an “alien described in [former] INA §241(a)(4)(D)” (assisted in Nazi persecution or engaged in genocide).

One improvement in the current law, from the advocate’s standpoint, is the availability of cancella-

<sup>35</sup> *Id.* at 471.

<sup>36</sup> *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144–45 (9th Cir. 2002) (finding that definition of child does not include son/daughter who is 21 years old or older for purposes of INA §240A(b)(1)(D)); see also *Molina-Estrada v. INS*, 293 F.3d 1089, 1093–94 (9th Cir. 2002).

<sup>37</sup> *Matter of Recinas*, 23 I&N Dec. at 472.

<sup>38</sup> *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1005–07 (9th Cir. 2003).

<sup>33</sup> 23 I&N Dec. at 470.

<sup>34</sup> *Matter of Recinas*, 23 I&N Dec. at 469–72.

tion as a remedy to inadmissibility as well as to removability. Suspension, by contrast, was available only in deportation, not exclusion proceedings. Congress has also commendably given special consideration to victims of domestic abuse.

For non-permanent residents generally, however, cancellation is a much more restricted form of relief than suspension. Obviously, the degree of hardship that must be proven is significantly higher, and the fact that the cancellation claimant's own hardship no longer counts will mean far fewer grants. Also, any but the most innocuous criminal offenses (with some exceptions for battered applicants) are now disqualifying; by contrast, former INA §244(a)(2) forgave many convictions provided they were more than 10 years old.

### Strategies for Dealing With Limitations on Adjustment of Status

Practitioners should be prepared to request that the immigration judge adjust hearing dates or final determinations for the purpose of having a visa number available under the annual cap of 4,000. The practitioner should determine prior to both the Master Calendar and merit hearing how many visa numbers remain available for the fiscal year, and plan his or her strategy accordingly. If the case arises in the early months of the fiscal year and numbers remain available when the Master Calendar date arrives, the practitioner may wish to seek a merits hearing date as soon as possible to ensure visa numbers remain available. However, do not do so at the expense of preparing and documenting the case to the fullest extent possible.

The regulations address the cap issue and should be carefully reviewed.<sup>39</sup>

Finally, practitioners should be aware of possibilities for suspension of deportation under the *old* rules afforded to certain Central Americans and Eastern Europeans under NACARA.<sup>40</sup>

### Procedures to Apply for Cancellation

Application for cancellation must be made at the removal hearing.<sup>41</sup> Additionally, where the respondent

is apparently eligible, the immigration judge must inform respondent of the right to apply for relief.<sup>42</sup>

### CONCLUSION

The new cancellation of removal provisions impose strict standards for eligibility and severely limit the availability of judicial review. In light of the restrictions on this relief and the elevated standards defined by the BIA for proving hardship, the practitioner must prepare the case exhaustively in order to have any chance of success. Despite the difficulties inherent in any cancellation case, this form of relief is a key battleground in the fight to ameliorate the harsh consequences of recent immigration legislation and is often the only resort for a client facing the most heart-rending types of situations.

<sup>39</sup> 8 CFR §[1]240.21.

<sup>40</sup> See NACARA, Pub. L. No. 105-100, 111 Stat. 2160; see also 8 CFR §[1]240.21.

<sup>41</sup> 8 CFR §§1240.11(a)(1), 1240.20; application is made on Form EOIR-42 with a fee in accordance with 8 CFR §240.20(a) (citing to 8 CFR §103.7(b)(1)).

<sup>42</sup> *Duran v. INS*, 756 F.2d 1338 (9th Cir. 1985).