CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Non-Lawful Permanent Resident Cancellation of Removal Under INA § 240A(b) for DACA Recipients

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 This practice advisory is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction. The authors of this practice advisory are Michelle N. Mendez, Training and Legal Support Managing Attorney, and Reena Arya, Training and Legal Support Senior Attorney. The authors would like to thank the following individuals for their invaluable contributions to this advisory: Ofelia L. Calderón, founding partner at Calderón Seguin PLC; Alison Kamhi, Immigrant Legal Resource Center Supervising Attorney; Katherine M. Lewis; Victoria Neilson, Training and Legal Support Senior Attorney; Rebecca Scholtz, Training and Legal Support Staff Attorney; and Margaret Stock, Cascadia Cross Border Law Group LLC.

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I. INTRODUCTION

Given the uncertain future of the Deferred Action for Childhood Arrivals (DACA) program, DACA recipients fear possible removal from the United States.[2] Following the Trump Administration's rescission of the DACA program and Congress's lack of action to protect DACA recipients, multiple federal courts have issued preliminary injunctions staying the Trump Administration's plan to end DACA.[3] However, since then, seven states opposed to DACA have filed papers in federal court seeking to end the program, further raising the likelihood that the Supreme Court of the United States will eventually decide the issue.[4] If the temporary injunction extending the DACA program is lifted and DACA protection expires, DACA recipients who do not have a prior order of removal could be placed in removal proceedings pursuant to the Immigration and Nationality Act (INA) § 240.[5] Even with the protection of the current injunction, DACA recipients convicted of certain criminal offenses could be detained and placed in removal proceedings.[6] In preparation for potential removal proceedings, DACA recipients should assess their eligibility for cancellation of removal for non-lawful permanent residents (non-LPR cancellation).[7]

Non-LPR cancellation is a form of discretionary relief from removal that provides a path to lawful permanent residency to certain non-citizens placed in removal proceedings on or after April 1, 1997.[8] Non-LPR cancellation, like its predecessor suspension of deportation,[9] is meant to benefit undocumented immigrants

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2 The White House, Fact Sheet: President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law; Memorandum from Elaine C. Duke, Acting Secretary, Department of Homeland Security (DHS), Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

3 *See* National Immigration Law Center, Status of Current DACA Litigation, https://www.nilc.org/issues/daca/status-current-daca-litigation/ (last updated Sept. 6, 2018).

4 *Texas et al. v. United States of America*, No. 18-00068 (S.D. Tex. filed May 1, 2018), https://www.courtlistener.com/recap/gov.uscourts.txsd.1501682/gov.uscourts.txsd.1501682.1.0.pdf.

5 Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. Times, Sept. 5, 2017, https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html.

6 *See* CLINIC, *Bond Related Issues for DACA Recipients* (Mar. 26, 2018), https://cliniclegal.org/sites/default/files/Bond-for-DACA-holders.pdf; *see also* USCIS Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) When Processing a Case Involving Information Submitted by a Deferred Action for Childhood Arrivals (DACA) Requestor in Connection With a DACA Request or a DACA-Related Benefit Request (Past or Pending) or Pursuing Termination of DACA (June 28, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf.

7 In a national survey of 67 immigrant-serving organizations that provide legal services, 14.3 percent of those found to be eligible for DACA were also found to be eligible for some other form of immigration benefit or relief. In other words, 14.3 percent of individuals who were found to be eligible for DACA, which provides temporary relief from deportation, may now be on the path towards lawful permanent residency. Of these 14.3 percent, 9.4 percent were found to be *prima facie* eligible for non-LPR cancellation based on the residency requirement and having a qualifying relative. *See* Tom K. Wong, et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, Volume 2, Number 4 Journal on Migration and Human Security 287 (2014), http://jmhs.cmsny.org/index.php/jmhs/article/view/37. Practitioners could also assess DACA recipients for VAWA cancellation of removal, which is beyond the scope of this practice advisory.

8 It is important for DACA recipients to know that only the immigration judge (IJ) has jurisdiction over non-LPR cancellation because unauthorized practitioners of law, and even unscrupulous lawyers, may try to defraud them by charging money to erroneously file the application with U.S. Citizenship and Immigration Services (USCIS). These unauthorized practitioners commonly call this attempted immigration benefit the "ten-year visa" or "the ten year law." Others may recommend filing for asylum because if the asylum claim is denied, the applicant will be placed in removal proceedings, which would allow the person to file for non-LPR cancellation. However, filing for asylum for the purpose of being placed in removal proceedings and pursuing cancellation has ethical implications. *See* American Immigration Lawyers Association Ethics Practice Advisory, *Ethical Considerations Related to Affirmatively Filing an Application for Asylum for the Purpose of Applying for Cancellation of Removal and Adjustment of Status for a Nonpermanent Resident* (Nov. 1, 2016), AILA Doc. No. 16110105, http://www.aila.org/infonet.

9 Individuals who were issued an "Order to Show Cause" prior to April 1, 1997 may apply for suspension of deportation per former INA § 244(a). Under former INA § 244(a), an IJ could exercise discretion to grant suspension of deportation to an individual who

who have deep roots or "established affiliation"[10] in the United States. Likewise, DACA was intended to benefit "individuals who came to the United States as children"[11] or, in other words, undocumented immigrants who have perhaps the deepest roots in the United States. Indeed, in most cases DACA recipients only have strong ties to the United States and lack such ties to their country of birth. Given the long U.S. residence of DACA recipients, many of them may qualify to apply for non-LPR cancellation of removal if they are placed into removal proceedings.

This practice advisory seeks to assist practitioners working with DACA recipients who could be subject to INA § 240 proceedings in immigration court. Section II provides an explanation of the non-LPR cancellation legal elements and application of these elements to the DACA context. Section III discusses the grounds of ineligibility for non-LPR cancellation. Section IV details country conditions information for the top five countries of origin for DACA recipients for purposes of assessing non-LPR cancellation relief.

II. LEGAL ELEMENTS OF NON-LAWFUL PERMANENT RESIDENT CANCELLATION OF REMOVAL

Non-LPR cancellation allows non-citizens[12] to obtain lawful permanent residence if they establish the following before an immigration judge (IJ):[13]

- Physical presence in the United States for a continuous period of no less than ten years;
- Good moral character during the ten-year period prior to the entry of a final administrative decision in the case;
- No conviction of an offense that would make the applicant inadmissible or deportable under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3);
- Exceptional and extremely unusual hardship to the applicant's U.S. citizen or LPR spouse, parent, or child; and
- Merit of a favorable exercise of discretion.

An applicant for non-LPR cancellation bears the burden of proving all the requisite facts pertinent to

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proved that he or she had both seven years of continuous physical presence in the United States and good moral character during all that time, and also that deportation would cause extreme hardship to the applicant or the applicant's U.S. citizen or LPR spouse, parent, or child. Non-LPR cancellation increased the relevant time period of continuous residence to ten years, eliminated hardship to oneself as a basis for relief, and elevated hardship to one's U.S. citizen or LPR qualifying relative to "exceptional and extremely unusual hardship." *See* Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States*, 22 Geo. Immigr. L.J. 105, 121-25 (2007).

10 Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 80-114 (2006).

11 Memorandum from Janet Napolitano, Secretary, DHS, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (rescinded), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

12 A lawful permanent resident may apply for non-LPR cancellation. *Matter of A-M-*, 25 I&N Dec. 66, 74-76 (BIA 2009). In *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003), the BIA found that the applicant never had LPR status because he had committed fraud in obtaining his residency, however, the BIA determined that he could still apply for non-LPR cancellation, although the fraud would be a factor in the good moral character assessment.

13 *See* Immigrant Legal Resource Center, *Non-LPR Cancellation of Removal: An Overview of Eligibility for Immigration Practitioners* (June 2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf.

eligibility.[14] The IJ will consider any "credible evidence relevant to the application."[15] The IJ has discretion to determine what evidence is credible and the weight to give the evidence.[16]

Respondents wishing to apply for non-LPR cancellation must complete and submit Form EOIR-42B to the IJ.[17] Note that if an applicant for non-LPR cancellation submits other applications for relief from removal, the IJ will adjudicate concurrently the other applications for relief and, if the applicant is granted asylum or adjustment of status, the IJ is required to deny cancellation as a matter of discretion.[18] In practice, IJs adjudicate asylum and adjustment of status applications before the non-LPR cancellation application. For example, if an applicant submits a non-LPR cancellation application and application for asylum under the INA, the IJ will consider the application for asylum first. Only if the IJ denies the application for asylum under the INA will the IJ adjudicate the non-LPR cancellation application. While the non-LPR cancellation application is pending, the applicant can apply for an employment authorization document (EAD) based on the pending application.[19]

4,000 Annual Cap. The date the order granting non-LPR cancellation becomes final is the date on which the individual is recorded as having received lawful permanent residence in the United States. The date the IJ records the individual as receiving lawful permanent residence will depend on the availability of an immigrant visa. Currently, a grant of non-LPR cancellation is subject to an annual cap, which is counted during the U.S. government fiscal year. Per INA § 240A(e)(1), only 4,000 immigrant visas can be granted through non-LPR cancellation during each fiscal year. Note that when Congress enacted this statutory provision as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the number of IJs was significantly lower than the current number.[20] This low number of visas applicable to all IJs, combined with the higher demand for these visas, has led to long backlogs. As of November 2016, the Executive Office for Immigration Review (EOIR) reported that 40,895 cases were awaiting decision.[21] With the cap of 4,000 leading to a backlog, EOIR issued IJs guidelines and procedures for issuing denials based on statutory ineligibility and reserving decisions.[22]

A recent EOIR Operating Policies and Procedures Memorandum and amended regulation states that IJs are not required to reserve decision if the "application is denied or pretermitted for any reason."[23] The amended

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14 INA § 240(c)(4); 8 CFR § 1240.8(d).

15 INA § 240A(b)(2)(D).

16 *Id.*

17 EOIR, Form EOIR-42B, https://www.justice.gov/sites/default/files/pages/attachments/2016/10/20/eoir42b.pdf.

18 8 CFR § 1240.21(c)(2).

19 8 CFR § 274a.12(c).

20 There were 69 IJs in 1990 and 86 IJs in 1994. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999), https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-60707/0-0-0-61450.html. In 1998, there were 202 IJs. Transactional Records Access Clearinghouse (TRAC), Immigration, *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow* (June 18, 2009), http://trac.syr.edu/immigration/reports/208/. Today, there are 351 IJs and EOIR anticipates hiring at least 75 more IJs by the end of 2018. DOJ Office of Public Affairs, Executive Office for Immigration Review Announces Largest Immigration Judge Investiture Since At Least 2010, Hiring Times Reduced by More Than 50% (Aug. 16, 2018), https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-largest-immigration-judge-investiture-least.

21 *See* American Immigration Lawyers Association, EOIR Stakeholder Meeting Agenda: Unofficial AILA Notes, Question No. 10 (Nov. 17, 2016), AILA Doc. No. 17041030, www.aila.org/infonet.

22 In response to a FOIA request, EOIR disclosed training materials from the June 11-13, 2018 Legal Training Program that included "Procedures Due to the Cap on Non-LPR Cancellation," https://www.hoppocklawfirm.com/wp-content/uploads/2018/08/Procedures_Due_Cap_Non_LPR_Cancellation.pdf.

23 Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal, 81 FR. 86291 (Nov. 30, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-11-30/pdf/2016-28590.pdf; Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-04: Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap (Dec. 20, 2017), https://www.justice.gov/eoir/file/oppm17-04/

regulation allows IJs and the BIA to issue final decisions denying cancellation applications, without restriction, regardless of whether the annual limitation has been reached. Under the final rule, after the annual limitation has been reached, only grants would be required to be reserved.

A. Continuous Physical Presence in the United States for At Least Ten Years

Under INA § 240A(b)(1)(A), a non-LPR cancellation applicant must establish that he or she has been continuously physically present in the United States for at least ten years. Whether the respondent has demonstrated that he or she has the requisite continuous physical presence is a factual issue for the IJ to determine. Note that the U.S. Court of Appeals for the Ninth Circuit has held that a parent's physical presence cannot be imputed to a child.[24]

DACA Context. General Continuous Physical Presence Requirement. DACA required that the recipient have entered the United States before age 16, continuously resided in the United States from June 15, 2007 to the present, and was under the age of 31 on June 15, 2012.[25] A grant of DACA therefore means that the recipient has been present in the United States for more than ten years—the amount of continuous physical presence required for non-LPR cancellation[26]—and thus likely has already sufficiently proved this residence to USCIS. DACA recipients can use the same supporting documentation pertaining to continuous residence that they submitted with the initial DACA request to prove continuous physical presence when applying for non-LPR cancellation. If they no longer have this information, they could file a Freedom of Information Act (FOIA) request with USCIS to obtain a copy of their immigration file.

Furthermore, DACA recipients should easily be able to prove continuous physical presence since receiving DACA. Thanks to DACA, recipients have integrated into U.S. society and the economy and, in turn, amassed documentary evidence of this integration. For example, youth approved for DACA were issued an EAD and were able to obtain a Social Security number, which together serve to establish identity and employment eligibility for Form I-9 verification purposes. Based on a 2017 national survey of DACA recipients, 91 percent of survey respondents reported being employed, 5 percent reported having started their own business after receiving DACA,[27] 16 percent reported purchasing their first home after receiving DACA, and 65 percent reported purchasing their first car since obtaining DACA.[28] That same 2017 Center for American Progress study found that 45 percent of DACA recipients reported attending school.[29] Regardless of the fate of the DACA program, practitioners could advise DACA clients (or those who would have been eligible for DACA) to

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download. The rule and OPPM went into effect on January 4, 2018 and applies prospectively. Decisions that were reserved prior to January 4, 2018 are not affected.

24 *Saucedo-Arevalo v. Holder*, 636 F.3d 532 (9th Cir. 2011).

25 The DACA requirements can be found on the USCIS website. USCIS, Consideration of Deferred Action for Childhood Arrivals (DACA), https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca.

26 The term "continuous physical presence" for purposes of cancellation of removal is defined in the INA, and is explained in greater detail below.

27 This rate of business start-ups is higher than that of both the American public as a whole—at 3.1 percent—and the entire immigrant population—at 3.6 percent. *See* Tom K. Wong et al., Center for American Progress, *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes* (Oct. 18, 2016), https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes/.

28 Center for American Progress, *DACA Recipients' Economic and Educational Gains Continue to Grow* (Aug. 28, 2017), https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/; *see also* Migration Policy Institute, *A Profile of Current DACA Recipients by Education, Industry, and Occupation* (Nov. 2017), https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily (providing additional details about DACA population including fields of employment and degree of educational attainment).

29 *See DACA Recipients' Economic and Educational Gains Continue to Grow, supra* note 28.

continue gathering and safeguarding proof of physical presence.

For DACA clients seeking non-LPR cancellation in removal proceedings, practitioners could try to obtain a stipulation from Department of Homeland Security (DHS) attorneys that, based on the records presented in DACA applications, the respondent has met the continuous physical presence requirements. Notwithstanding the evidence previously submitted in support of a DACA application, DACA clients seeking non-LPR cancellation may also want to present additional evidence of continuous residence. This will allow more time to focus testimony on hardship or other contested requirements.

Special Rules Governing Continuous Physical Presence Found at INA § 240A(d). Although INA § 240A(b)(1)(A) indicates that continuous physical presence must accrue prior to the date of the application, INA § 240A(d) lists three special rules on calculating continuous physical presence: (1) termination of continuous presence, (2) treatment of certain breaks in presence, and (3) continuity not being required for those who have served honorably in the Armed Forces.

1. Termination of Continuous Presence

Continuous physical presence begins when the individual physically enters the United States and ends upon the occurrence of one of several specified events, whichever is earliest. Section 240A(d)(1) of the INA provides as follows:

> Termination of Continuous Period.—For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) … when the alien is served a notice to appear under section 239(a), or (B) when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable [(i.e., deportable)] from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest. (emphasis added).

The ten years of physical presence must, therefore, have been accumulated prior to either: (1) service of the charging document, Form I-862, Notice to Appear (NTA), or (2) the individual's committing a criminal offense that makes him or her inadmissible or deportable. Either of these actions stop the accumulation of continuous physical presence, even though the individual continues to be physically present in the United States. This is called the "stop-time" rule.

a. NTA Stop-Time Rule

DHS's service of an NTA on a non-citizen triggers the stop-time rule for cancellation applicants.[30] Although the NTA stop-time rule has been in statutory force since April 1, 1997, the U.S. Supreme Court clarified the application of the NTA stop-time in the June 2018 decision *Pereira v. Sessions*.[31]

To understand the history of the NTA stop-time rule, practitioners should know the interplay between the DHS-issued NTA and the immigration court-issued hearing notice. First, DHS issues and serves the NTA on the non-citizen. Then, DHS files the NTA with the immigration court, which commences removal proceedings.[32] If the NTA lacked a place, date, and/or time of the removal proceedings, the immigration court

30 *See Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004) (a respondent's period of continuous physical presence in the United States is deemed to end when he or she is served with the charging document that is the basis for the current proceeding).

31 *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

32 8 CFR §§ 1003.13, 1003.14(a). Although the language of INA § 240A(d)(1) refers only to "notices to appear," Congress has clarified that continuous physical presence for suspension of deportation purposes may also be terminated by service of an Order

would then send a Notice of Hearing in Removal Proceedings informing the respondent where and when the hearing will be held. The immigration court would also send a Notice of Hearing when it needed to change the hearing date and time. The hearing notice is thus conditioned upon DHS issuing the NTA, properly serving the NTA on the respondent, and filing the NTA with the immigration court.[33] This process is predicated on the proper preparation and service of the NTA.

For many years, DHS has issued and served NTAs that lack the place, date, and/or time of the removal proceedings."[34] Instead, these NTAs included the phrase "To be set" in the space provided for the place, date, and/or time. Although NTAs lacking the place, date, and/or time of the removal proceedings do not comply with INA § 239(a)(1)(G), the BIA held that such NTAs nonetheless stopped the clock for purposes of accruing physical presence in cancellation cases.[35] Some U.S. courts of appeal similarly held that an NTA lacking the INA § 239(a)(1)(G) information stopped the clock.[36] However, a few U.S. courts of appeal held that an NTA without the time and place information did not trigger the stop-time rule, but that the immigration court-issued Notice of Hearing in Removal Proceedings supplying that information cured the issue and triggered the stop-time rule.[37]

On June 21, 2018, the U.S. Supreme Court decided *Pereira v. Sessions*. In an 8-1 decision, the Court concluded that "[a] notice that does not inform a non-citizen when and where to appear for removal proceedings is not a 'notice to appear under [the statute]' and therefore does not trigger the stop-time rule."[38] The Court found that this result was compelled by the plain language of INA § 239(a)(1)(G), which unambiguously defines an NTA as giving notice of where and when the non-citizen must appear for removal proceedings. Thus, the Court concluded that NTAs that do not contain this minimal information do not meet the definition of an NTA for purposes of the stop-time rule.

Pursuant to *Pereira*, NTAs that do not specify the time and place of removal proceedings cannot trigger the stop-time rule under INA § 240A(d)(1). Therefore, unless and until DHS serves an individual with an NTA that meets all the requirements of INA § 239(a), including the specific time and place of the hearing, the individual continues to accrue continuous and physical presence in the United States. Also, respondents in removal proceedings whose accrual of continuous residence was purportedly cut off by the defective NTA should now be eligible to seek cancellation, provided they have been in the United States for at least ten years and satisfy the other statutory elements for cancellation.

Based on the reasoning in *Pereira* on what constitutes an NTA under INA § 239(a), many practitioners moved to terminate removal proceedings based on jurisdictional arguments and many IJs terminated proceedings. Practitioners argued that the immigration court lacked jurisdiction because DHS had not properly initiated

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to Show Cause in deportation proceedings. *See* section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2193, 2196 (1997), amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997) (NACARA); *see also Matter of Nolasco*, 22 I&N Dec. 632 (BIA 1999).

33 *See Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015).

34 During oral argument in *Pereira*, Justice Kennedy asked the Assistant to the Solicitor General Fredrick Liu how many NTAs omit the date and time of the hearing and Liu responded "almost 100 percent." Transcript of Oral Argument at 52, *Pereira*, 138 S. Ct. 2105 (2018), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-459_1bn2.pdf.

35 *See Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011).

36 *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079 (9th Cir. 2015); *accord Guzman-Yuqui v. Lynch*, 786 F.3d 235 (2d Cir. 2015); *O'Garro v. U.S. Att'y Gen.*, 605 F. App'x 951, 953 (11th Cir. 2015) (unpublished); *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014); *Yi Di Wang v. Holder*, 759 F.3d 670 (7th Cir. 2014); *Urbina v. Holder*, 745 F.3d 736 (4th Cir. 2014).

37 *See Orozco-Velasquez v. Att'y Gen. of U.S.,* 817 F.3d 78 (3d Cir. 2016); *Guamanrrigra v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012) (per curiam) (holding that the later notice of hearing date triggered the stop-time rule); *Popa v. Holder*, 571 F.3d 890, 896–97 (9th Cir. 2009); *Dabaneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006).

38 *Pereira*, 138 S. Ct. at 2110.

removal proceedings by filing a charging document that comports with INA § 239(a) and 8 CFR § 1003.14(a), which states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service." However, on August 31, 2018, the BIA issued *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), which distinguished *Pereira* on the jurisdiction question. The BIA held that an NTA that does not specify the time and place of a respondent's initial removal hearing vests an IJ with jurisdiction over the removal proceedings and meets the requirements of INA § 239(a) so long as a notice of hearing specifying this information is later sent to the respondent.[39] Although *Bermudez-Cota* is limited to the narrow and specific question of jurisdiction, DHS has been seeking broad application of the holding to argue that the subsequent immigration court-issued Notice of Hearing in Removal Proceedings triggers the stop-time rule. Practitioners should be prepared to respond to this argument by highlighting that *Pereira* contemplated and overruled the U.S. court of appeals and BIA case law relied on in *Bermudez-Cota* that allowed for this two-step notification procedure to trigger the stop-time rule. Indeed, anecdotes from practitioners suggest that while IJs are less likely to terminate proceedings following *Bermudez-Cota*, IJs are upholding and following *Pereira* on the stop-time rule question by holding that the immigration court-issued Notice of Hearing in Removal Proceedings does not stop the clock. As these issues will continue to be litigated, it is important to review the most current case law.

For an in-depth discussion of the *Pereira v. Sessions* decision and strategies based on this watershed decision, please refer to the American Immigration Council and CLINIC's practice advisory "Strategies and Considerations in the Wake of *Pereira v. Sessions*."[40]

DACA Context. DACA recipients who have never left the country and have never been placed in removal proceedings or had their removal proceedings terminated should have no problem proving continuous physical presence. However, DACA recipients previously placed in removal proceedings face an NTA stop-time rule issue. These DACA recipients likely have an order of removal, an *in absentia* order of removal, or have benefitted from administrative closure. Furthermore, it is also possible that DHS merely served the NTA, but never filed the NTA with the immigration court.

First, practitioners should consider filing a motion to reopen on any basis that exists, including pursuant to *Pereira v. Sessions* for DACA recipients with an order of removal based on an NTA that was missing the time and place of removal proceedings. Practitioners could argue that, pursuant to *Pereira v. Sessions*, the previously served NTA that led to the removal order did not stop the clock and the respondent is therefore now eligible for non-LPR cancellation. A motion to reopen would be appropriate for those DACA recipients who have strong non-LPR cancellation cases and believe it is in their best interests to present the case. A motion to reopen would also be appropriate for those DACA recipients who want to challenge the removal order based on jurisdictional grounds, as discussed in the American Immigration Council and CLINIC's practice advisory "Strategies and Considerations in the Wake of *Pereira v. Sessions*."[41]

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39 FOIA disclosures obtained by Matthew Hoppock suggest that EOIR took this position and issued this decision after initially advising courts to reject NTAs that lacked the time and place of the hearing and restoring the "Interactive Scheduling System" or "ISS" to allow DHS to access hearing schedules. Mr. Hoppock offers the disclosures and his analysis in his blog. *See* Matthew Hoppock, Hoppock Law Firm, *Post-Pereira, the DOJ Chooses Harsh IJ Performance Metrics Over Compliance With Supreme Court Mandate* (Sept. 20, 2018), https://www.hoppocklawfirm.com/post-pereira-the-doj-chooses-harsh-ij-performance-metrics-over-compliance-with-supreme-court-mandate/.

40 American Immigration Council and CLINIC, *Strategies and Considerations in the Wake of* Pereira v. Sessions: *Practice Advisory* (July 20, 2018), https://cliniclegal.org/resources/practice-advisory-strategies-and-considerations-wake-pereira-v-sessions.

41 *Id. See, also,* Dan Kesselbrenner, et al., National Immigration Project and Immigrant Defense Project, *Practice Advisory: Challenging the Validity of Notices to Appear Lacking Time-and-Place Information* (July 5, 2018, updated July 16, 2018), http://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2018_5July_PereiraAdvisory.pdf.

Second, practitioners could consider filing a motion to rescind and reopen removal proceedings pursuant to *Pereira v. Sessions* for DACA recipients with an *in absentia* order of removal based on an NTA that was missing the time and/or place of removal proceedings. Practitioners could argue that, pursuant to the reasoning in *Pereira v. Sessions*, the previously served NTA was deficient because it did not provide notice of the removal proceedings, and the NTA that DHS filed with the court that led to the removal order did not vest the immigration court with jurisdiction. Practitioners should refer to CLINIC's practice advisory on Motions to Reopen for DACA Recipients with Removal Orders for a discussion on challenging *in absentia* removal orders.[42]

Third, following the Attorney General's *Matter of Castro-Tum*, practitioners should be prepared for the possibility of DHS filing a motion to recalendar the previously administratively closed case. Practitioners should refer to CLINIC's practice pointer on *Matter of Castro-Tum* for a discussion on this case and general strategies.[43] One strategy noted in the practice advisory is to submit an opposition to the DHS motion to recalendar. In addition to filing an opposition to recalendar, those DACA recipients with an NTA that was missing the time and place of removal proceedings could consider a motion to terminate notwithstanding *Bermudez-Cota*. Practitioners could highlight that *Bermudez-Cota* ignores that *Pereira* deemed the plain language of INA § 239(a)(1) unambiguous in its requirements of time and place and thus the BIA does not benefit from deference per *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[44] If the IJ recalendars the case and the IJ does not issue a decision, consider renewing the motion to terminate at the master calendar hearing. If the IJ denies termination, the practitioner could submit an application for non-LPR cancellation arguing that the respondent has the required continuous physical presence in light of *Pereira v. Sessions*. If the IJ denies the non-LPR cancellation application, the practitioner can appeal both the denial of the motion to terminate and the non-LPR cancellation.

Fourth, if DHS previously served an NTA on a respondent who now has DACA, but DHS failed to file the NTA with the immigration court, that NTA would not trigger the stop-time rule because proceedings were never actually initiated. Instead, if DHS serves the DACA recipient with another NTA that includes the time and location of the hearing and that is filed with the immigration court, the date of service of the second NTA will stop the clock and the DACA recipient can benefit from the longer time accrual. It is unlikely that a DACA recipient would have accrued ten years of continuous physical presence by the time DHS served the first NTA, if that service occurred soon after the DACA recipient entered the United States. However, by the time DHS serves a second NTA, the DACA recipient would have likely accrued the ten years of continuous physical presence.[45] It is uncommon for an NTA to be served on an individual, but not filed with the immigration court. As such, few DACA recipients will be able to propose this argument.[46]

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42 CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Mar. 13, 2018), https://cliniclegal.org/sites/default/files/Motion-to-Reopen-PA_1.pdf.

43 CLINIC, *Practice Pointer:* Matter of Castro-Tum, *27 I&N Dec. 271 (AG 2018)* (June 5, 2018), https://cliniclegal.org/sites/default/files/Castro-Tum-Practice-Pointer-Final-6-5-2018.pdf.

44 *Pereira*, 138 S. Ct. at 2113–14. Furthermore, Justice Kennedy expressed concern that lower courts were giving a "cursory analysis" to ascertaining congressional intent and "reflexive deference" to the BIA's position when applying *Chevron* deference. *Id.* at 2120 (Kennedy, J., concurring).

45 *Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015).

46 In addition to raising *Pereira* arguments about the stop-time rule, DACA recipients could also request prosecutorial discretion from DHS in the form of "repapering." Repapering in this context means that DHS would be willing to proceed with a new NTA instead of relying on the former NTA. This process is beneficial for the respondent because it would allow for the accrual of the required continuous physical presence. This prosecutorial discretion option should not be confused with IJ repapering set forth in the proposed regulation, 65 Fed. Reg. 71273 (Nov. 30, 2000), that was never finalized. While prosecutorial discretion is rarely being offered under the Trump administration, practitioners could remind DHS that the president himself has voiced his strong support for "Dreamers." *Trump: 'I Have Great Love' for DACA Dreamers*, BBC News, Sep. 6, 2017, https://www.bbc.com/news/av/world-us-canada-41170097/trump-i-have-great-love-for-daca-dreamers.

b. Commission of an Offense Stop-Time Rule

The "commission of an offense" portion of the stop-time rule at INA § 240A(d)(1) references the commission of an "offense referred to in section 212(a)(2) that renders" the non-citizen inadmissible or deportable, therein referencing both sections 212 and 237 of the INA.[47] The BIA has held that the plain language of section 240A(d)(1)(B) states that, as a prerequisite, an offense must be "referred to in section 212(a)(2)" of the INA in order to stop the accrual of time.[48] Therefore, offenses included in section 237(a)(2) that are not referred to in section 212(a)(2) are not considered stop-time offenses. Practitioners could separately evaluate these offenses to determine if these offenses otherwise bar the client from non-LPR cancellation eligibility discussed in section II.B. For example, in the context of non-LPR cancellation, a firearms offense would not stop the clock, but would be a bar to eligibility pursuant to INA § 240A(b)(1)(C).

Under INA § 212(a)(2), the stop-time rule is triggered by the following:

- A crime involving moral turpitude (CIMT)
- Violation of or conspiracy or attempt to violate any law or regulation relating to a controlled substance
- Two or more offenses of any type where the aggregate prison sentence is five years
- Controlled substance traffickers, including those offenses where an immigration officer has reason to believe the non-citizen is a drug trafficker
- Any person who is coming to the United States solely, principally, or incidentally, to engage in prostitution or has engaged in prostitution within ten years of the date of an application for a visa, admission, or adjustment of status
- Any person involved in serious criminal activity who has asserted immunity from prosecution
- Any person who an immigration officer has reason to believe is a significant trafficker in persons, and
- Any person who an immigration officer has reason to believe has engaged in or is engaging in money laundering.

The date of commission of an INA § 212(a)(2) offense and not the later date of conviction of the offense triggers the stop-time rule. This is true even if the offense was committed prior to the enactment of IIRIRA.[49]

A section 212(a)(2) offense can still stop the clock where the offense was not charged in the NTA and the individual was not found inadmissible or removable for it.[50] Further, even if there were no criminal charges or a conviction, the admission of acts constituting the essential elements of such an offense under section 212(a)(2) may trigger the stop-time rule.[51] The BIA has established three requirements that must be met to prove a

47 *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000) (*en banc*) (concluding that because a firearms charge under section 237(a)(2)(C) of the Act was not an enumerated ground of inadmissibility, it therefore did not trigger the stop-time rule).

48 *Id.* at 1292 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)).

49 *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) (reaffirming *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999) (*en banc*)). As a practical matter, since DACA recipients had to be born after June 15, 1981, it is doubtful that many would be affected by this rule.

50 *Matter of Jurado*, 24 I&N Dec. 29, 30-32 (BIA 2006).

51 *Id.* at 31 ("We note that an alien need not have been convicted of an offense under section 212(a)(2) of the Act in order for the 'stop-time' rule to apply. … Congress did not require that the appropriate prosecuting authorities have previously charged an alien with a referenced offense in order to invoke the 'stop-time' provision of section 240A(d)(1)(B) of the Act."). Relatedly, two U.S. courts of appeal have held that the stop-time rule is triggered by the commission of an offense even where the conviction was subsequently expunged. *See Saleh v. Gonzales*, 495 F.3d 17, 26 (2d Cir. 2007); *Alves v. Keisler*, 253 F. App'x 390 (5th Cir. Nov. 7, 2007) (unpublished) (per curiam).

valid admission of a crime for immigration purposes.[52] First, the admitted conduct must constitute the essential elements of a crime in the jurisdiction where it occurred.[53] Second, the respondent must have been provided with the definition and essential elements of the crime prior to the admission.[54] Third, the admission must have been voluntary.[55] Individuals should be aware that a valid admission of a crime could occur during the removal proceedings and should therefore guard against admitting to a section 212(a)(2) offense while in proceedings.

In addition to applying the stop-time rule, the practitioner will need to determine whether the conviction renders the applicant ineligible for cancellation as discussed in section II B.

Exceptions. Commission or conviction of a CIMT will not cut off accrual of continuous residence or physical presence if it falls within one of the INA § 212(a)(2)(A)(ii) exceptions. Under these exceptions, certain offenses committed while the individual is under 18, or considered petty offenses,[56] do not make the individual inadmissible on the basis of a conviction or commission of a CIMT and, therefore, do not cut off the accrual of continuous presence. These two section 212(a)(2)(A)(ii) exceptions allow time to continue to accrue through the commission of one crime, and up until the commission of a second crime that is considered a CIMT.[57] However, some convictions that would not terminate continuous physical presence on account of the petty offense exception may nonetheless render the individual ineligible for non-LPR cancellation as discussed in section II.B below.[58]

DACA Context. DACA recipients may have criminal offense stop-time issues. This is because DACA crime bars do not necessarily overlap with grounds of inadmissibility and deportability. For example, a theft misdemeanor offense with a jail sentence of fewer than 90 days and with a maximum possible sentence of a year or less would not be a disqualifying crime for DACA purposes, but would be a CIMT.[59] Whether or not a CIMT offense stops the clock would depend on the applicability of the petty offense exception.[60] Further, DACA recipients with section 212(a)(2) inadmissibility issues could have received discretionary approvals. For further information on this topic, refer to section II.B of this practice advisory and keep in mind that only offenses listed in section 212(a)(2) will trigger the stop-time rule.

2. Departures That Break Continuous Physical Presence

Certain departures from the United States will "break" rather than "terminate" continuous presence.[61] A "break" differs from "termination" in that the clock can begin to accrue a new ten-year period after the "break."[62] As

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52 *See Matter of K-*, 7 I&N Dec. 594, 598 (BIA 1957); *Matter of J-*, 2 I&N Dec. 285 (BIA 1945).

53 *Matter of J-*, 2 I&N Dec. at 287-288.

54 *Id.*

55 *Id.*

56 *Matter of Garcia,* 25 I&N Dec. 332 (BIA 2010).

57 *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003).

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

59 *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016) (holding that a theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded). Note that the U.S. Courts of Appeal for the Ninth Circuit and the Second Circuit have held that *Matter of Diaz-Lizarraga* is not retroactive. *See Garcia-Martinez v. Sessions*, 886 F.3d 1291 (9th Cir. 2018) and *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018), respectively.

60 Practitioners should remember that a CIMT offense that does not stop the clock may count as conviction under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3) in which case the CIMT would present a bar to non-LPR cancellation. *See* INA § 240A(b)(1)(C).

61 In *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236, 1240 (BIA 2000), the BIA discussed the difference between a "break" in continuous physical presence and the "end" of continuous physical presence stating that "Congress has distinguished between certain actions that 'end' continuous physical presence, i.e., service of a charging document or commission of a specified crime, and certain departures from the country that only temporarily 'break' that presence."

62 *See, e.g.*, *Nelson v. Att'y Gen.*, 685 F.3d 318 (3d Cir. 2012) (applying reasoning in *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236

discussed above, termination of continuous presence via the stop-time rule does not allow the continuous presence period to continue or to re-start following service of the NTA or commission of a certain crime, with some exceptions.[63] Unlawful re-entry following an order of exclusion, deportation, or removal and being placed in new section 240 proceedings is an exception. Reentries following an order of voluntary departure, as discussed in section II.A.2.b *infra*, is another exception.[64] Note that while the statute differentiates between a "break" and "termination," the BIA and the U.S. courts of appeal often use these terms interchangeably.

a. Departures That Lead to Absences from the United States for a Certain Amount of Time

Section 240A(d)(2) of the INA specifies the length of absences that break continuous presence:

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

A period of continuous physical presence is thus cut off or "broken" by a departure for a single period of more than 90 days or by periods of 180 days in the aggregate.[65] Conversely, an individual who departs the United States for a period of fewer than 90 days or for any periods that in the aggregate do not exceed 180 days does not break continuous physical presence.[66]

The "break" in continuous physical presence analysis is only relevant to those individuals who departed the United States at any point following the initial entry.

DACA Context. While it is no longer doing so, DHS had discretion to grant advance parole to DACA recipients traveling outside the United States for educational, employment, or humanitarian purposes.[67] From 2012 to 2015, USCIS approved advance parole for 19,943 DACA recipients.[68]

Most DACA recipients who traveled abroad on advance parole likely departed for fewer than 90 days, given that DACA-based advance parole usually authorized travel for a short period of time.[69] DACA recipients who traveled abroad on advance parole will have concrete proof issued by the U.S. government that his or her absence lasted fewer than 90 days. For example, the DACA recipient could submit plane tickets, a passport stamp, and a date-stamped copy of the advance parole itself, assuming the DACA recipient was provided with a stamped copy upon entry, as concrete proof of the duration of his or her absence.[70] DACA recipients who traveled outside

(BIA 2000) to distinguish between an "end" or "termination" of continuous physical presence and a "break" in continuous physical presence); *see also Ram v. INS*, 243 F.3d 510, 517-18 (9th Cir. 2001) ("Unlike the title of INA section 240A(d)(1), which connotes finality, the term 'breaks' suggests that, under certain circumstances set forth in INA section 240A(d)(2), the clock can stop and then restart.")

63 *Compare Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000), *with Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004).

64 *See Matter of Cisneros*, 23 I&N Dec. 668.

65 INA § 240A(d)(2). There is an exception to this rule for certain Violence Against Women Act (VAWA) cancellation applicants. VAWA 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

66 Note that the *Fleuti* doctrine (*see Rosenberg v. Fleuti*, 374 U.S. 449 (1963)) relating to brief, casual, and innocent departures did not survive the enactment of the IIRIRA as a judicial doctrine. *See Matter of Collado*, 21 I&N Dec. 1061, 1065 (BIA 1998).

67 USCIS, Instructions for Application for Travel Document Form I-131 (Dec. 23, 2016), https://www.uscis.gov/i-131.

68 USCIS, Fiscal Year 2016 Report to Congress: Advance Parole Documents, at 6 (Jan. 6, 2017), https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20USCIS%20Advance%20Parole%20Documents.pdf.

69 *See, e.g.*, Educators for Fair Consideration, *Traveling with Advance Parole Through DACA*, http://www.e4fc.org/images/E4FC_TravelingAbroad.pdf.

70 CBP, Form I-94 Arrival/Departure Record (Apr. 24, 2014), https://www.cbp.gov/document/forms/form-i-94-arrivaldeparture-record. CBP provides records for up to five years back. Parole records include a notation that indicates where the last entry was

the United States without advance parole may not have evidence that the departure lasted fewer than 90 days. In such cases, DACA recipients must think creatively as to how to meet this burden of proof and provide credible testimony to establish that a single departure lasted fewer than 90 days or multiple departures lasted fewer than 180 days in the aggregate. Although at least one U.S. court of appeals has held that a non-citizen's recollection is not required to be exact regarding dates of departures from the United States that were fewer than 180 days in the aggregate, the standard is a preponderance of the evidence.[71] Even if the IJ deems continuous presence broken due to a single departure over 90 days or multiple departures that lasted more than 180 days in the aggregate, the DACA recipient may still be eligible for non-LPR cancellation if ten years have passed since the last return.

DACA recipients who departed on advance parole for more than 90 days in a single period, or for more than 180 days in the aggregate, may argue that travel on advance parole was not a departure contemplated by Congress when enacting INA § 240A(d)(2).[72] What Congress contemplated in enacting INA § 240A(d)(2) requires brief review of its statutory predecessor, suspension of deportation at former section 244(a). Overall, in replacing suspension of deportation provisions at former section 244(a) with non-LPR cancellation, Congress sought to deter unauthorized immigration to the United States by curbing incentives for undocumented individuals to extend their stays in the United States and prolong their deportation cases in order to gain immigration benefits.[73] Specifically, Congress wanted to end the accrual of time for the seven years continuous physical presence requirement for suspension of deportation once deportation proceedings commenced, which Congress addressed in non-LPR cancellation via the NTA stop-time rule.[74]

In light of this legislative background, trips abroad by DACA recipients pursuant to advance parole do not present the concerns of incentivizing unauthorized immigration and encouraging abuses of immigration law. Advance parole is parole that has been requested and authorized in advance based on an expectation that the individual will be presenting himself or herself for inspection without a valid visa in the future.[75] Advance parole can be requested from abroad or at a port of entry, but typically it is sought from within the United States by persons who want to leave temporarily and return to the status they have currently.[76] By granting advance parole, DHS takes a humanitarian measure to assure the individual "that he will be paroled back into the United States upon return, under prescribed conditions, if he cannot establish that he is admissible at that time."[77] As the BIA held in *Matter of Arrabally and Yerrabelly*, "[i]n short, an undocumented [individual's] departure under a grant of advance parole is qualitatively different from other departures, because it presupposes both that he will be permitted to return to the United States thereafter and that he will, upon return, continue to pursue the adjustment of status application he filed before departing."[78]

While DACA recipients did not seek advance parole pursuant to a pending adjustment of status application, as the respondents in *Matter of Arrabally and Yerrabelly* did, the same rationale applies as DACA recipients traveled

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pursuant to parole.

71 *Lopez-Esparza v. Holder*, 770 F.3d 606 (7th Cir. 2014).

72 *Cf. Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) (holding that a departure under advance parole does not trigger the unlawful presence bar under INA § 212(a)(9)(B)(i)(II) and discussing advance parole as a "distinct benefit for which the alien must demonstrate his eligibility and worthiness").

73 *See Matter of Romalez-Alcaide,* 23 I&N Dec. 423 (BIA 2002) (citing H.R. Rep. No. 104-828 (1996) and H.R. Rep. No. 104-469(I) (1996)).

74 *See* H.R. Rep. No. 104-469(I), at 390 (1996) (noting that "[s]uspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued[,] . . . even after they have been placed in deportation proceedings").

75 *See* 8 CFR § 212.5(f) (providing for the advance authorization of parole).

76 *See Matter of G-A-C-*, 22 I&N Dec. 83, 88 (BIA 1998).

77 *Id.*

78 *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 778 (BIA 2012).

on advance parole pursuant to their DACA and would return to the United States to continue to renew DACA. In fact, DACA recipients could only seek advance parole once USCIS approved DACA and not while it was merely pending.[79] Not only were DACA recipients lawfully present[80] when they departed on advance parole, advance parole does not encourage unauthorized immigration. Instead, it encourages those who are already in the United States and have sought or been granted a form of status or protection to seek the U.S. government's permission to enter the United States. Therefore, advance parole is a departure and re-entry approved by DHS rather than unauthorized departure and entry without inspection.[81] Moreover, DACA advance parole required several layers of government approval starting with the DACA approval. In presenting this distinction, practitioners could remind IJs and the BIA that it is within their discretion to determine if advance parole counts as a presence-breaking departure from the United States.[82]

Furthermore, it is unlikely that Congress contemplated DACA advance parole within the meaning of INA § 240A(d)(2) since, at the time of that statute's enactment, DACA did not exist. Instead, a similar temporary protection that did exist at the time was Temporary Protected Status (TPS). Although advance parole was available to those with TPS at the time Congress enacted INA § 240A(d)(2),[83] TPS recipients did not face active removal proceedings or the need to apply for non-LPR cancellation due to TPS protections. Not viewing advance parole as a relevant option for those potentially eligible for non-LPR cancellation, Congress had no reason to include advance parole as an express exception to INA § 240A(d)(2). This provides another rebuttal to DHS arguments or IJ findings that travel pursuant to advance parole constitutes a break in continuous physical presence.

b. Departures Pursuant to a "Formal, Documented Process"[84]

Continuous physical presence breaks when the individual departs the United States under the threat of a formal, documented process, such as a formal exclusion, order of expedited removal, offer and acceptance of the opportunity to withdraw an application for admission, or some other formal, documented process pursuant to which the individual was determined to be inadmissible to the United States.[85] Such a formal, documented process could have taken place inside the United States before an IJ or administered at the border or port-of-entry by DHS.[86] Of course, the IJ removal order or voluntary departure itself would have terminated continuous

79 *See* USCIS, Frequently Asked Questions: DHS DACA FAQs, Question 57, https://www.uscis.gov/archive/frequently-asked-questions (last updated Mar. 8, 2018) ("If USCIS has decided to defer action in your case and you want to travel outside the United States, you must apply for advance parole by filing a Form I-131, Application for Travel Document and paying the applicable fee ($575).").

80 USCIS has stated that those with deferred action, including DACA recipients, are lawfully present. *See* USCIS, Frequently Asked Questions: DHS DACA FAQs, Question 1, https://www.uscis.gov/archive/frequently-asked-questions (last updated Mar. 8, 2018) ("An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect.").

81 *See* 8 CFR § 212.5.

82 *See, e.g.*, *Garcia v. Holder*, 732 F.3d 308, 312 (4th Cir. 2013) (finding that Congress did not intend to eliminate the BIA's discretionary authority to define which departures terminate an alien's presence and citing *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005)).

83 8 CFR § 244.15.

84 Departures of 90 or fewer days during one trip or fewer than 180 days in the aggregate can break continuous physical presence if the trip(s) fall within this category. For example, a departure of 90 or fewer days will break continuous physical presence if it is the result of enforcement of an order of removal, expedited removal, or voluntary departure under current law or an order of deportation under prior law. *See Landin-Zavala v. Gonzales*, 488 F.3d 1150, 1153 (9th Cir. 2007); *Juarez-Ramos v. Gonzales*, 485 F.3d 509, 511 (9th Cir. 2007); *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002); *see also Mrvica v. Esperdy*, 376 U.S. 560, 568 (1964) (stating that the "obvious purpose of deportation is to terminate residence").

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

86 Similarly, a departure following a conviction for illegal entry under INA § 275(a)(1) also breaks continuous physical presence. *Matter of Velasquez-Cruz*, 26 I&N Dec. 458 (BIA 2014).

physical presence pursuant to the NTA stop-time rule earlier than the date of departure from the United States.[87]

Continuous physical presence also breaks when the individual leaves the United States and then faces formal exclusion, an order of expedited removal, or an offer and acceptance to withdraw an application for admission at the border upon attempting to return to the United States. However, continuous physical presence continues to accrue uninterrupted when an individual departs under no threat of removal and is absent for 90 days or fewer, is then stopped at the border without any threat of removal, and the individual subsequently reenters the United States without inspection.[88] Knowing what happened during the attempted reentry into the United States requires careful analysis as the departure could have resulted from a formal, documented process or something short of a formal, documented process assessing inadmissibility. This analysis will be crucial for many seeking non-LPR cancellation of removal because many of those who depart the United States and try to reenter the United States through the border will encounter Customs and Border Protection (CBP).[89]

Procedural due process during the attempted re-entry encounter with CBP also matters for determining if there was a break in physical presence. For example, an administrative voluntary departure does not break continuous physical presence if the individual had the right to a hearing before an IJ and there is no evidence that the individual was informed of and knowingly waived the right to such a hearing, regardless of whether the encounter occurred at or near the border.[90] Evidence that the individual was fingerprinted and/or photographed at the border before being allowed to voluntarily depart is not enough, in itself, to demonstrate a waiver of the right to a hearing or to show a "formal, documented process" during which inadmissibility was assessed.[91] The BIA has emphasized that in cases where the presence-breaking character of a voluntary departure is at issue, IJs should ensure that the record is fully developed regarding: (1) the date and place of the encounter underlying the purported presence-breaking departure; (2) the possibility that the individual was alternatively subject to exclusion, deportation, or removal proceedings in which there was a right to a hearing before an IJ; and (3) the formality of the process used, including how the threat of proceedings was communicated to the individual, what advisals were given, and whether the individual had knowledge that the agreement to depart was in lieu of being placed in proceedings.[92]

Practitioners must engage in a careful analysis for those individuals who departed the United States and encountered CBP upon returning. Only then will the practitioner know if the client was subject to deportation or removal, expedited removal, or administrative voluntary departure proceedings that would have broken continuous physical presence. Although a non-LPR cancellation applicant ultimately bears the burden of

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87 *Id.*

88 *Matter of Avilez-Nava*, 23 I&N Dec. 799 (BIA 2005)*; see also Tapia v. Gonzales*, 430 F.3d 997 (9th Cir. 2005) (reasoning that the exception for brief absences cannot be denied simply because a non-citizen attempted to re-enter illegally or the statute would have no meaning; this is the case even where the person was repeatedly apprehended while attempting to re-enter, and even though photographs and fingerprints were taken, and information about him was entered into the government's database); *Reyes-Vasquez v. Ashcroft,* 395 F.3d 903 (8th Cir. 2005) (being turned around at the border upon attempted re-entry does not break continuity of presence); *Morales-Morales v. Ashcroft*, 384 F.3d 418 (7th Cir. 2004) (holding that a foreign national whom CBP repeatedly turned back at the border did not constitute a return under threat of removal proceedings and entering Mexico voluntarily was not "voluntarily depart[ing] under threat of proceeding" either of which would have constituted a break in continuous physical presence in the United States). Note that in these examples, if the individuals had departed for 90 days or more, continuous physical presence would have been broken as discussed in section II.A.2.

89 Since the 2004 expansion of DHS's expedited removal authority, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004), following the 1996 enactment of section 235(b)(1)(A)(iii) of the INA, more individuals have been subject to expedited removal proceedings in which there is generally no right to a hearing before an IJ.

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

91 *Matter of Avilez-Nava*, 23 I&N Dec. at 805.

92 *Matter of Castrejon-Colino*, 26 I&N Dec. 667, 672 (BIA 2015).

proving continuous physical presence, the BIA has held that DHS is in a better position to fill gaps in the evidence and resolve any disputes by presenting documentation from its own records to show the formality of the process.[93] In an unpublished case, the BIA held that although the respondent testified to being fingerprinted and signing documents for administrative voluntary departure, the record contained no evidence that the respondent knowingly and voluntarily accepted administrative voluntary departure.[94] The BIA concluded that without any evidence of administrative voluntary departure in the record, any returns to Mexico should be deemed as border turnarounds that were insufficient to interrupt the period of continuous presence.

Re-entry Following an Order of Exclusion, Deportation or Removal. If an individual has re-entered the United States unlawfully after the execution of a prior order of exclusion, deportation, or removal, such an individual is subject to the reinstatement of removal procedure, is generally ineligible for removal proceedings before an IJ under INA § 240, and is to be removed expeditiously pursuant to the prior order.[95] However, if DHS does not reinstate the order against a previously removed individual, and instead places the individual in INA § 240 removal proceedings, he or she may apply for non-LPR cancellation by relying on a qualifying period of continuous physical presence accrued after the re-entry.[96] In such a situation, service of an NTA in a prior proceeding does not prevent the accrual of a new period of physical presence following the individual's departure and return.[97] Note, though, that it is rare for DHS to not reinstate an order of removal when reinstatement applies.

Voluntary Departure and Subsequent Entry. An individual who departed pursuant to a voluntary departure order and subsequently re-entered the United States should begin to accrue a new period of continuous physical presence upon re-entry.[98] In *Matter of Cisneros*, the BIA considered the effect of a charging document served in an earlier proceeding relative to the accrual of continuous physical presence in subsequent proceedings.[99] The BIA rejected DHS's over-broad interpretation of INA § 240A(d)(1) that any valid charging document, even one from a prior proceeding, would trigger the stop-time rule against any individual present in the United States.[100] In other words, DHS argued that service of an NTA would forever stop the clock even after subsequent entries into the United States and new removal proceedings. Instead, the BIA held "the 'notice to appear' referred to in section 240A(d)(1) pertains only to the charging document served in the proceedings in which the non-citizen applies for cancellation of removal, and not to charging documents served on the non-citizen in prior proceedings."[101] Therefore, an individual who departs the United States after being served with a valid charging document and being granted and complying with voluntary departure, should, upon a subsequent return to the

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93 *Id.* at 672 n.5; *Matter of Garcia-Ramirez*, 26 I&N Dec. at 677 n.4.

94 *Marcelo Herrera Martinez*, A098-007-723 (BIA Feb. 11, 2011) (unpublished), https://www.scribd.com/document/174127684/Marcelo-Herrera-Martinez-A098-007-723-BIA-Feb-11-2011.

95 INA § 241(a)(5); 8 CFR § 1241.8; *see also Matter of W-C-B,* 24 I&N Dec. 118 (BIA 2017) (holding that a foreign national subject to reinstatement of a prior order of deportation or removal pursuant to section 241(a)(5) has no right to a hearing before an IJ).

96 *Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004) (distinguishing *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000)—a suspension of deportation case involving a respondent who did not subsequently leave and re-enter the United States—and holding that the service of a charging document in a prior proceeding does not end a period of continuous physical presence with respect to an application for cancellation of removal filed in the current proceeding).

97 *Id.*

98 *Id.*; *see also Okeke v. Gonzales*, 407 F.3d 585 (3d. Cir. 2005) (holding that a conviction does not prevent the clock from re-starting to allow accrual of a new ten-year period where the individual left the United States and re-entered lawfully); *but see Nelson v. Att'y Gen. of U.S.*, 685 F.3d 318 (3d Cir. 2012) (finding the BIA did not act unreasonably in distinguishing *Okeke*, and concluding that the petitioner's commission of a controlled substance offense in 1983 triggered the stop-time provision and no further physical presence could accrue, even after a re-entry); *Singh v. Attorney Gen. U.S.*, 807 F.3d 547 (3d Cir. 2015). Note, however, that *Matter of Cisneros* has since been limited by the BIA and some circuits, *see, e.g., Isunza v. Lynch*, 809 F.3d 971 (7th Cir. 2016), and IJs may thus try to distinguish *Matter of Cisneros* in practice.

99 *Matter of Cisneros*, 23 I&N Dec. at 672.

100 *Id.*

101 *Id.*

United States, accrue a period of continuous physical presence—measured from the date of the return.

DACA Context. Instead of attempting to remember aspects of the border encounter(s) or relying on the memory of their relatives, DACA recipients should file a FOIA request with CBP, the Office of Biometric Identity Management (OBIM), and EOIR, and consider an FBI background check. A FOIA request and the FBI background check will help establish what actually occurred at the border and establish if a "formal, documented process" such as deportation or removal, expedited removal, or voluntary departure took place. Furthermore, DHS did not exercise its authority to expand expedited removal to encounters in the 100-mile border zone within 14 days of entry until 2004.[102] Prior to 2004, expedited removal provisions in INA § 235(b)(1) were being applied only to individuals arriving at ports of entry, but not to those apprehended within the United States.[103] Thus, those encountered other than at a port of entry prior to 2004 would not have been subject to expedited removal proceedings and would have had a right to a hearing before an IJ. Furthermore, if the respondent was a minor at the time of the encounter, practitioners could investigate what law applied to minors at the time.[104]

Some DACA recipients may be subject to reinstatement of removal as a result of leaving the United States following an order of deportation, exclusion, or removal and then returning to the United States unlawfully.[105] Once DHS reinstates a prior order, the person is barred from all relief (with some exceptions) and denied an IJ hearing in INA § 240 proceedings.[106] However, non-LPR cancellation is a form of relief only available in INA § 240 proceedings. For this reason, DACA recipients subject to reinstatement of removal will want to carefully review if they are properly being subjected to reinstatement of removal and argue against reinstatement of removal and for placement in INA § 240 proceedings if there is any viable argument to do so. DACA recipients subject to reinstatement of removal pursuant to INA § 241(a)(5) should examine if DHS complied with 8 CFR § 1241.8. Section 1241.8(b) of the regulations states that:

> If an officer determines that an alien is subject to removal under the [reinstatement of removal order] section, he or she *shall* provide the alien with written notice of his or her determination. The officer *shall* advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer *shall* allow the alien to do so and *shall* consider whether the alien's statement warrants reconsideration of the determination.[107] (emphasis added).

Practitioners may thus argue, based on the language of the regulation, that written notice of reinstatement of

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102 Although DHS had the authority to expand the use of expedited removal proceedings following that provision's enactment in 1996, the agency did not exercise this authority until 2004. *See* INA § 235(b)(1)(A)(iii); 8 CFR § 235.3(b)(1)(ii); Designating Aliens For Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004) (providing notice of DHS's exercise of its authority).

103 On March 6, 1997, the Department of Justice issued implementing regulations applying the expedited removal provisions of section 235(b)(1) of the Act to certain non-citizens arriving in the United States on or after April 1, 1997. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312 (Mar. 6, 1997). "At this time, the Department will apply the provisions only to 'arriving aliens,' as defined in §1.1(q). The Department acknowledges that application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage, and therefore wishes to gain insight and experience by initially applying these new provisions on a more limited and controlled basis." *Id.* at 10313.

104 Prior to the enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), P.L. 110-457, 122 Stat. 5044, agency policy guidance counseled against subjecting "unaccompanied minors" to expedited removal, and gave officers discretion to permit accompanied minors to withdraw applications for admission where appropriate. *See* Memorandum from Paul Virtue, Acting Executive Associate Commissioner, INS, Unaccompanied Minors Subject to Expedited Removal (Aug. 21, 1997), AILA Doc. No. 97082191, www.aila.org/infonet.

105 INA §241(a)(5).

106 *Id.*

107 8 CFR § 1241.8(b).

removal is mandatory. DHS reinstates a prior removal order and issues written notice of this reinstatement via Form I-871, Notice of Intent/Decision to Reinstate Prior Order I-870.[108] If DHS has not issued Form I-871, the prior order of removal has not been reinstated in compliance with 8 CFR § 1241.8. If DHS fails to comply with 8 CFR § 1241.8 as indicated by a missing Form I-871, DACA recipients could argue that the removal order has not been reinstated and that DHS's failure to follow the regulation in a timely manner should estop DHS from reinstating the order.

Furthermore, DACA recipients who are subject to reinstatement of removal, but are placed in section 240 proceedings, could argue that DHS waived its opportunity to reinstate the prior order of removal if DHS advocates for withholding-only proceedings or seeks to terminate section 240 proceedings.[109] If an individual with a reinstated order of removal proves a reasonable fear of returning to the country designated in the order, he or she will be placed in "withholding-only" proceedings before an IJ.[110] While a reasonable fear rescues the individual from expedited removal, withholding-only proceedings before an IJ have limitations. In withholding-only proceedings, an IJ may only consider an application for withholding of removal under section 241(b)(3) of the INA and the Convention Against Torture, or deferral of removal under the Convention Against Torture.[111] Conversely, if DHS chooses to place the DACA recipient in section 240 proceedings, the DACA recipient may apply for all available relief available in those proceedings, including non-LPR cancellation.[112]

Moreover, DACA recipients subject to reinstatement may want to explore whether there is a legal means to move to reopen the prior order.[113] If the prior order is successfully reopened, then the individual would be in section 240 proceedings and no longer subject to reinstatement. A full discussion on reinstatement of removal is beyond the scope of this practice advisory and practitioners should refer to the National Immigration Project of the National Lawyers Guild and the American Immigration Council's Practice Advisory on Reinstatement of Removal for further guidance.[114]

A DACA recipient who is successful in rescinding and reopening an *in absentia* removal order based on lack of notice should argue that the date of service listed on the NTA would not trigger the stop-time rule because service was not effected on that date. It would be inconsistent for an IJ to reopen an *in absentia* order of removal because the NTA was not properly served only to then hold that the NTA was properly served for purposes of stopping time for non-LPR cancellation.[115] Instead, service should be effected when the respondent

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108 Florence Immigrant and Refugee Rights Project, *What To Do If You Are in Expedited Removal or Reinstatement of Removal?* (Oct. 2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/01/22/Expedited%20Removal%20-%20English%20%2817%29.pdf.

109 *See Matter of Cisneros*, 23 I&N Dec. 668, 672 (BIA 2004) ("Thus, when the DHS does not or cannot reinstate the order against a previously deported alien, but instead places that alien in removal proceedings, the alien may demonstrate statutory eligibility for cancellation of removal by relying on a qualifying period of continuous physical presence accrued after his re-entry.").

110 8 CFR § 1241.8(e) (emphasis added).

111 8 CFR §§ 1208.31(e); 1208.31(g)(2)(i).

112 For a copy of a written IJ decision accepting this argument and granting asylum in INA § 240 proceedings, please email Michelle Mendez at mmendez@cliniclegal.org.

113 CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Mar. 13, 2018), https://cliniclegal.org/sites/default/files/Motion-to-Reopen-PA_1.pdf.

114 Trina Realmuto, National Immigration Project of the National Lawyers Guild and the American Immigration Council, Practice Advisory: Reinstatement of Removal (Apr. 29, 2013), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstate-removal.pdf.

115 *See generally Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Arguments that the initial NTA was defective under *Pereira* may be particularly effective in the context of *in absentia* orders where the DACA recipient can argue that he or she did not appear in court because the NTA failed to advise him or her of where and when to appear. *See* discussion of *Pereira*, *supra* section II.A.1.a. An NTA that does not contain the time and date of the removal hearing does not comport with paragraph (1) of INA § 239(a). An *in absentia* order may be rescinded upon a motion to reopen filed at any time if the non-citizen demonstrates that he or she "did not receive notice in accordance with paragraph (1) or (2) of section 239(a)." INA § 240(b)(5)(C)(ii).

acknowledges proper service of the NTA through written or oral pleadings following rescission and reopening.[116] Further, for DACA recipients with outstanding *in absentia* orders, DHS likely effected or attempted service on them when they were minors. As such, when pleading following a rescinded and reopened *in absentia* order, practitioners could consider whether there are any arguments that the NTA was not properly served pursuant to the rules applicable to minors.[117] The BIA has held that if the under-14-year-old minor's parent is present in the United States, the regulation requires service on the parent, in addition to any prior service upon, for example, a "near relative" or the Office of Refugee Resettlement (ORR).[118] If such improper service arguments do exist, the practitioner should not concede proper service of the NTA, at which point the pleading ends to allow the IJ to determine if the NTA was properly served. The IJ may request briefing on this issue or request proof from DHS that the DACA recipient was properly served. DHS may seek, or the IJ may order DHS, to properly serve the NTA on the DACA recipient to cure the prior ineffective service.[119] When proper service occurs, this will trigger the NTA stop-time rule.[120]

3. Armed Forces Exception to the Continuous Physical Presence Requirement

The physical presence requirement does not apply to non-LPR cancellation applicants who, while in the United States, enlisted in or were inducted into the U.S. Armed Forces, served at least 24 months in an active-duty status, and, if separated from such service, separated under honorable conditions.[121]

DACA Context. Some DACA recipients might be able to benefit from the U.S. Armed Forces exception to the required continuous physical presence. There are approximately 900 DACA recipients who served in the military or have signed contracts to serve as part of the Military Accessions Vital to the National Interest (MAVNI) Pilot Program, an initiative designed to exchange fast-tracked citizenship for crucial medical and language skills among foreign-born recruits.[122] The program has rotated 10,400 troops into the military since 2009.[123] These DACA recipients should benefit from this provision as DACA MAVNIs are all members of the U.S. Armed Forces or have, at a minimum, signed enlistment contracts.[124]

B. No Convictions Under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3)

Individuals are ineligible for non-LPR cancellation if they have been convicted of an INA § 212(a)(2), INA

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116 *See, e.g., Manuel Victor Lucero*, A074-912-171 (BIA Dec. 27, 2016) (unpublished), https://www.scribd.com/document/337536202/Manuel-Victor-Lucero-A074-912-171-BIA-Dec-27-2016.

117 8 CFR § 103.5a(c)(2)(ii) (requiring that for a non-citizen minor under 14 years of age, "service [of the NTA] shall be made upon the person with whom the ... minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend").

118 *See Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002) (*en banc*) (holding that "the purpose of requiring service of a notice to appear on the person with whom a minor respondent resides [is] to direct service of the charging document 'upon the person or persons who are most likely to be responsible for ensuring that an alien appears before the Immigration Court at the scheduled time.'" (quoting *Matter of Amaya*, 21 I&N Dec. 583, 585 (BIA 1996))).

119 *Matter of W-A-F-C-*, 26 I&N Dec. 880 (BIA 2016) (allowing DHS to re-serve a respondent to effect proper service of an NTA that was defective under the regulatory requirements for serving minors under the age of 14).

120 *See supra* section II.A.1.a on the stop-time rule.

121 INA § 240A(d)(3).

122 USCIS, Immigration Options for Family of Certain Military Members and Veterans M-1138 (Nov. 2016), https://www.uscis.gov/sites/default/files/images/Brochure-Immigration_Options_for_Family_of_Certain_Military_Members_and_Veterans.pdf.

123 Alex Horton, *The Military Looked to "Dreamers" to Use Their Vital Skills. Now the U.S. Might Deport Them*, The Washington Post, Sept. 7, 2017, https://www.washingtonpost.com/news/checkpoint/wp/2017/09/07/the-military-looked-to-dreamers-to-use-their-vital-skills-now-the-u-s-might-deport-them/?utm_term=.b1a9bde7cc23.

124 Kathryn Watson, *Pentagon Says DACA Recipients in Military Number Fewer Than 900*, CBS News, Sept. 6, 2017, https://www.cbsnews.com/news/pentagon-says-daca-recipients-in-military-number-fewer-than-900/.

§ 237(a)(2) or INA § 237(a)(3) offense. A respondent does not need to be inadmissible or deportable for those offenses; merely being convicted of any of the crimes listed under these provisions is sufficient to bar cancellation.[125] The BIA has reasoned that in determining which offenses are "described under" INA § 212(a)(2), INA § 237(a)(2), or INA § 237(a)(3) for purposes of section 240A(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.[126] Thus, the bar for a conviction of an offense under INA § 237(a)(2) or (a)(3) (deportability criminal grounds) could render a respondent who entered without inspection and is thus only subject to the grounds of inadmissibility ineligible for non-LPR cancellation. In assessing criminal bars to non-LPR cancellation, if there is a disqualifying conviction, it will disqualify the applicant, even if it is not the basis for the underlying charge on the NTA.[127]

Convictions for the following crimes listed under INA § 212(a)(2), INA § 237(a)(2), or INA § 237(a)(3) are statutory bars to non-LPR cancellation:

- A crime involving moral turpitude (CIMT) for which a sentence of a year or longer may be imposed (regardless of the actual sentence)
- Violation of or conspiracy or attempt to violate any law or regulation relating to a controlled substance, which includes those who an immigration officer has reason to believe is a drug trafficker
- Two or more offenses of any type where the aggregate prison sentence is five years
- Engaging in prostitution or having engaged in prostitution within ten years of the date of an application for a visa, admission, or adjustment of status
- A serious criminal activity for which immunity from prosecution has been asserted
- Significant trafficking in persons (pursuant to INA § 212(a)(2)(H))
- Aggravated felonies (as defined in INA § 101(a)(43))
- High-speed flight (from an immigration checkpoint)
- Failure to register as a sex offender
- Certain firearm offenses
- Espionage or treason (where a sentence in excess of five years may be imposed), violation of any provision of the Military Selective Service Act or the Trading With the Enemy Act
- Crimes involving domestic violence, stalking, violation of a protection order, and/or crimes of child

125 *See, e.g.*, *Coyomani-Cielo v. Holder*, 758 F.3d 908, 915 (7th Cir. 2014) (deferring to the BIA's interpretation of INA § 240A(b)(1)(C) that a person convicted of an offense described in INA § 237(a)(2) was ineligible for cancellation of removal, irrespective of whether the person was charged with grounds of removal under INA § 212 or § 237); *Nino v. Holder*, 690 F.3d 691, 696-98 (5th Cir. 2012) (petitioner not eligible for cancellation despite the fact that he was not deportable because he had not committed CIMT within five years of entry); *Vasquez-Hernandez v. Holder*, 590 F.3d 1053 (9th Cir. 2010) (petitioner charged as inadmissible could not rely on petty offense exception to cure the domestic violence conviction, which is also a deportability ground under INA § 237(a)(2)).

126 *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010). However, the U.S. Court of Appeals for the Ninth Circuit has declined to defer to Matter of Cortez. *Lozano-Arrendondo v. Sessions*, 866 F.3d 1082 (9th Cir. 2017) (remanding for the BIA to reconsider its interpretation of the phrase "offense under" in the cancellation of removal statute).

127 *Cf. Matter of Jurado-Delgado*, 24 I&N Dec. 29, 31 (BIA 2006) (commission of offense stops the clock for cancellation of removal, by terminating a period of continuous residence pursuant to INA § 240A(d)(1)(B) even though the offense was not charged nor found to be a ground of inadmissibility or deportability).

abuse, child neglect, or child abandonment

- Failure to register and falsification of documents
- False claim to U.S. citizenship, and
- Threatening the president and military expeditions against friendly nations.

While a CIMT conviction presents a non-LPR cancellation bar, the inadmissibility statute contains two exceptions to a CIMT: the "petty offense" exception and the "youthful offender" exception.

The "petty offense" exception says that where the maximum possible penalty for a CIMT offense does not exceed imprisonment for one year and the conviction did not lead to a sentence of over six months, the individual is not inadmissible pursuant to INA § 212(a)(2)(A)(i)(I).[128] However, the BIA has clarified that the "petty offense" exception in the context of non-LPR cancellation of removal is more limited than the statute suggests because the criminal bars to non-LPR cancellation are not based on applicable inadmissibility or deportability grounds, but instead on whether the respondent has a conviction for an offense "described under" sections an INA § 212(a)(2), INA § 237(a)(2) or INA § 237(a)(3).[129] Thus, even those only subject to the INA § 212 inadmissibility grounds and not the INA § 237 deportability grounds may still trigger ineligibility for non-LPR cancellation for being convicted of an offense described under INA § 237(a)(2)(A)(i). This includes a single CIMT conviction where a sentence of *one* year (or more) may be imposed and does not contain a petty offense exception.[130] Therefore, for an individual with a CIMT conviction to benefit from the "petty offense" exception in the cancellation context, the actual sentence must be a term of imprisonment that does not exceed six months and the *maximum possible* criminal sentence must be *under* one year. Otherwise, the conviction would be one "described under" INA § 237(a)(2)(A)(i).

The "youthful offender" exception says that if a CIMT offense was committed when the individual was under 18 years of age, and the individual committed the crime and was released from any confinement to a prison or correctional institution more than five years before the application, the individual is not inadmissible pursuant to INA § 212(a)(2)(A)(i)(I).[131] The "youthful offender" exception, like the "petty offense" exception, will only benefit those whose *maximum possible* criminal sentence was *under* one year as required by INA § 237(a)(2)(A)(i).[132]

A conviction for a second crime following a crime that is subject to the "youthful offender" exception or "petty offense" exception does not trigger ineligibility so long as the second crime is not a CIMT.[133] There is no time limit on the dates of convictions that render an individual statutorily ineligible for non-LPR cancellation.[134]

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128 INA § 212(a)(2)(A)(ii)(II); *see also Matter of Pedroza,* 25 I&N Dec. 312 (BIA 2010).

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

130 *Id.*

131 INA § 212(a)(2)(A)(ii)(I). Note that the "youthful offender" exception differs from a juvenile delinquency adjudication as juvenile delinquency adjudications are not considered convictions for immigration purposes, and therefore are not bars to non-LPR cancellation (or DACA).

132 For example, an individual who was charged with a CIMT under INA § 212(a)(2) that has a possible 364-day sentence, receives an actual 364-day while under the age of 18, and released from custody more than five years before applying for non-LPR cancellation may benefit from the "youthful offender" exception. While DHS may argue that per *Matter of Cortez*, a CIMT that fits within the "youthful offender" exception is an offense "described under" INA § 212(a)(2) barring non-LPR cancellation, a practitioner can argue that the "youthful offender" exception should apply in the non-LPR context because it relates to the nature of the conviction, which is part of the CIMT definition in the inadmissibility context.

133 *Matter of Garcia-Hernandez,* 23 I&N Dec. 590, 594-95 (BIA 2003) (concluding that "only one crime" bar is meant to render one ineligible for non-LPR cancellation of removal, only where the non-citizen is found to have committed another crime involving moral turpitude).

134 *See Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) (holding that there are no temporal limits to convictions

Accordingly, for example, if a disqualifying CIMT was committed outside of the ten-year statutory period for good moral character and/or continuous physical presence, the individual would still be ineligible for non-LPR cancellation. Furthermore, note that the BIA recently held that in determining whether a non-LPR cancellation applicant is barred based on having committed an offense under INA § 237(a)(2)(E)(ii), related to conduct that violations a protection orders, the categorical approach does not apply.[135] However, this issue is ripe for continued litigation before the U.S. courts of appeal so practitioners should argue the categorical approach does apply even for an offense under INA § 237(a)(2)(E)(ii).[136]

INA § 212(h) Waiver. Again, what matters for cancellation eligibility is whether the individual was convicted of a INA §§ 212(a)(2), 237(a)(2), or 237(a)(3) offense.[137] As such, an INA § 212(a)(2) criminal conviction that bars cancellation of removal relief pursuant to INA § 240A(b)(1)(C) may not be overcome by a section 212(h) waiver.[138] In other words, a non-LPR cancellation application and a section 212(h) waiver cannot be combined. Of course, if an individual is otherwise eligible for adjustment of status and eligible for a section 212(h) waiver he or she can and should pursue that form of relief.

DACA Context. Criminal bars to DACA included three or more "non-significant misdemeanors," any significant misdemeanor, and any felony conviction.[139] A significant misdemeanor is a federal, state, or local criminal offense punishable by imprisonment of one year or less but more than five days that involves one of the following:

- Domestic violence
- Sexual abuse or exploitation
- Unlawful possession or use of a firearm
- Drug sales (distribution or trafficking)
- Burglary
- Driving under the influence of alcohol or drugs, or
- Any other misdemeanor not listed for which the person received a jail sentence of more than 90 days, even if the time served is less.

DACA recipients thus may have certain criminal convictions that did not automatically disqualify them from DACA, but those criminal convictions may nonetheless render them ineligible for non-LPR cancellation. These convictions could have been for misdemeanor convictions such as prostitution or other commercialized vice,

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rendering a person ineligible for non-LPR cancellation).

135 *Matter of Medina-Jimenez,* 27 I&N Dec. 399, 404 (BIA 2018) (following *Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017), which held that whether a violation of a protection order renders a non-citizen removable under section INA § 237(a)(2)(E)(ii) is not governed by the categorical approach because this statutory provision does not require a conviction to establish removability). In response to a FOIA request, EOIR disclosed training materials from the June 11-13, 2018 Legal Training Program that included slides from a presentation by BIA Member Roger Pauley entitled "Avoiding the Use or Mitigating the Effect of the Categorical Approach," https://www.hoppocklawfirm.com/wp-content/uploads/2018/08/Slides-Developments-in-Criminal-Immigration-and-Bond-Law.pdf.

136 *See generally* Kathy Brady, Immigrant Legal Resource Center, *Case Update: The Domestic Violence Deportation Ground* (June 2018), https://www.ilrc.org/sites/default/files/resources/case_update_dv_deport_ground-20180627.pdf.

137 *See Guerrero-Roque v. Lynch*, 845 F.3d 940 (9th Cir. 2016).

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

139 For an explanation of the DACA criminal bars, please refer to USCIS, Consideration of Deferred Action for Childhood Arrivals (DACA), https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca.

some theft offenses, or certain minor drug offenses. In some jurisdictions, these convictions could render the applicant inadmissible under section 212(a)(2) or deportable under section 237(a)(2) or (3) and thus bar non-LPR cancellation. Moreover, some DACA recipients may have had expunged convictions that would not have disqualified them from DACA.[140] However, expunged convictions are still considered convictions for non-LPR cancellation.[141] Thus, if the DACA recipient has any criminal conviction, it is important to carefully screen him or her for non-LPR cancellation ineligibility grounds. If criminal conviction bars do apply, practitioners could also consider post-conviction relief.[142]

C. Good Moral Character During the Ten-Year Period Prior to the Entry of a Final Administrative Decision

Section 240A(b)(1)(B) of the INA requires that a non-LPR cancellation applicant demonstrate he or she is a "person of good moral character during such period," referencing the period of "not less than ten years immediately preceding the date of such application" as discussed in section 240A(b)(1)(A). However, the calculation of the ten years for good moral character differs from the continuous physical presence calculation. The ten-year period needed for good moral character is calculated backward from the date on which the application finally is resolved by the IJ or BIA.[143] The requirement that a non-LPR cancellation applicant demonstrate statutory eligibility prior to the service of an NTA[144] applies only to the physical presence requirement and not to other requirements—*e.g.*, good moral character, qualifying relatives, and exceptional and extremely unusual hardship—that can continue to be considered and developed until the time the application finally is decided.[145] This means that unlike physical presence, the individual can continue to accrue good moral character factors after the issuance of the NTA and until the final adjudication of the application. Any negative moral character issues outside of the ten years should not count against the non-LPR cancellation applicant or, at a minimum, should not be determinative of good moral character.[146]

Good moral character is a statutory and a discretionary matter.[147] An applicant cannot establish good moral character if, during the ten-year period, he or she falls into one of the categories listed in INA § 101(f). These INA § 101(f) categories are considered statutory bars to establishing good moral character and include anyone who:

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140 *See* USCIS, Frequently Asked Questions: DHS DACA FAQs, Part V, Criminal Convictions, https://www.uscis.gov/archive/frequently-asked-questions#criminal%20convictions (last updated Mar. 8, 2018).

141 *Matter of Roldan*, 22 I&N Dec. 512, 529 (BIA 1999) (holding that no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute); *see also Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (holding that if a court vacates a foreign national's conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes).

142 For information on post-conviction relief, please refer to the Immigrant Legal Resource Center's Post-Conviction Relief resources, https://www.ilrc.org/immigrant-post-conviction-relief.

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

144 8 CFR § 1003.23(b)(3).

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

146 *See Epifanio Martinez Juarez*, A095-194-852 (BIA Mar. 21, 2011) (unpublished), https://www.scribd.com/document/175148703/Epifanio-Martinez-Juarez-A095-194-852-BIA-March-21-2011 ("Furthermore, the events that led to the arrests on the more serious charges occurred more than 15 years ago and the Immigration Judge found the respondent's explanations for his lack of culpability in these allegations to be credible and persuasive."); *see also Ikenokwalu-White v. INS*, 316 F.3d 798, 805 (8th Cir. 2003) ("We . . . hold that conduct predating the relevant statutory time period may be considered relevant to the moral character determination under 8 USC § 1254(a)(3), but that such conduct cannot be used as the sole basis for an adverse finding on that element.").

147 *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967).

- Is a habitual drunkard[148]
- Was convicted of, or who admitted the elements of, a crime that would make him or her inadmissible (whether or not the individual is found to be inadmissible), pursuant to INA § 212(a)(2)(A) [CIMT or controlled substance violation], (B) [conviction for two or more offenses with an aggregate sentence of five years or more], (C) [controlled substance traffickers], (D) [prostitution and commercialized vice][149]
- Engaged in "alien smuggling" as described in INA § 212(a)(6)(E) (whether or not found to be inadmissible)[150]
- Is a practicing polygamist as described in INA § 212(a)(10)(A)
- Whose income is derived principally from illegal gambling activities
- Has been convicted of two or more gambling offenses committed during the period for which good moral character is required
- Has given false testimony for the purpose of obtaining any benefits under the INA
- During the period for which good moral character is required, has been confined, as a result of a conviction, to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense or offenses for which he or she has been confined were committed within or outside the required period
- At any time has been convicted of an aggravated felony (as defined in subsection INA § 101(a)(43)),[151] or
- At any time has engaged in conduct described in INA § 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or INA § 212(a)(2)(G) (relating to severe violations of religious freedom).

Even if an individual does not fall within one of the bars to establishing good moral character, INA § 101(f) provides that this does not "preclude a finding that for other reasons such person is or was not of good moral character." This provision is commonly referred to as the "catch-all" clause of INA § 101(f). Relying on the catch-all clause, an IJ can exercise broad discretion in assessing good moral character. For this reason, any relevant negative factors that fall outside of INA § 101(f) must be weighed along with all positive factors. Negative factors not specified in INA § 101(f) can include: failing to file income taxes, falsifying tax returns,[152] neglecting family responsibilities, extramarital affairs, marriage fraud, material misrepresentation for immigration benefits, a false claim to U.S. citizenship, or including false information on immigration forms. However, as a discretionary matter, the BIA has "long held that good moral character does not mean moral

148 *See Ledezma-Cosino v. Sessions*, 857 F.3d 1042 (9th Cir. 2017) (en banc) (holding that the term "habitual drunkard" was not unconstitutionally vague because it readily lends itself to an objective factual inquiry and that substantial evidence supported the BIA's finding that Ledezma-Cosino was a "habitual drunkard").

149 There is one exception under INA § 212(a)(2)(A) and that is for a single offense of simple possession of 30 grams or less of marijuana

150 *See, e.g.*, *Benitez-Pineda v. Holder*, 498 Fed. App'x 683 (9th Cir. 2012) (unpublished); *Arellano-Zapien v. Holder*, 438 Fed. App'x 42 (2d Cir. 2011) (unpublished); *Ortiz-Villagomez v. Holder*, 348 Fed. App'x 965 (5th Cir. 2009) (per curiam) (unpublished). *But see Estrada Iniguez v. Holder*, 380 Fed. App'x 718 (9th Cir. 2010) (unpublished) (holding that substantial evidence did not support the IJ's finding that the applicant was a smuggler and therefore lacked the good moral character required for cancellation of removal. The court noted the only evidence in the record that was more than supposition was the applicant's statement that he had lent money to his brother upon his brother's request for money to come to this country without knowing what the brother actually did with the money).

151 If a non-citizen has an aggravated felony conviction, that person would face the criminal bars to non-LPR cancellation.

152 *See Sumbundu v. Holder*, 602 F.3d 47 (2d Cir. 2010).

excellence and that it is not destroyed by a 'single incident.'"[153] Further, while marriage fraud or a false claim to U.S. citizenship may permanently bar applicants from adjustment of status, these issues would not be a bar to good moral character for non-LPR cancellation applicants. Instead, these issues would fall under the catch-all clause mandating balancing the evidence and could also be taken into account in adjudicating the application as a matter of discretion, discussed in section II.E.[154] However, if the applicant gave false testimony[155] in the course of committing marriage fraud or making a false claim to U.S. citizenship, this false testimony could lead to a statutory good moral character bar if committed during the relevant ten-year period. Furthermore, while the false claim to U.S. citizenship or marriage fraud may not present a bar to good moral character, if a conviction ensued, it could prompt a criminal bar to non-LPR cancellation eligibility.

The catch-all clause of INA § 101(f) addresses an exception to false statements or claims to U.S. citizenship as well as "registering to vote in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens."[156] An exception exists if each of the non-citizen's biological or adoptive parents is or was a U.S. citizen, the non-citizen permanently resided in the United States prior to reaching the age of 16, and the non-citizen reasonably believed at the time of such statement, claim, or violation that he or she was a citizen. If all of those requirements are met, no finding that the non-citizen is, or was, not of good moral character may be made based on the statement or voter registration. There may also be other defenses to a possible false claim to citizenship or for voting in an election, and therefore it is important to fully examine the facts and possible defenses before conceding lack of good moral character on this ground.[157]

The BIA's unpublished decisions are instructive for arguing the existence of good moral character. In one case, the BIA dismissed DHS's argument on appeal that the respondent's extensive criminal arrest record precluded a finding of good moral character for non-LPR cancellation purposes.[158] The BIA disposed of DHS's appeal by noting that the "charges were dismissed and the restraining order was later dissolved."[159] The BIA noted the IJ found that the individuals who had filed the complaints against the respondent had notable criminal records, that the events that led to the arrests on the more serious charges occurred more than 15 years ago, and that "the respondent's explanations for his lack of culpability in these allegations [are] credible and persuasive."[160] In a NACARA case,[161] the BIA found the IJ erred in determining that the respondent's submission of applications

153 *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991); *see Matter of K-*, 3 I&N Dec. 180, 182 (BIA 1949) (stating that 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 and the regard in which he or she is held by the community as a whole); *Matter of U-*, 2 I&N Dec. 830, 831 (BIA; A.G. 1947) (stating that good moral character does not require moral excellence but is the measure of a person's natural worth derived from the sum total of all his actions in the community); *see also Posusta v. United States*, 285 F.2d 533, 535 (2d Cir. 1961) (stating that "a person may have a 'good moral character' though he has been delinquent upon occasion in the past; it is enough if he shows that he does not transgress the accepted canons more often than is usual").

154 *Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008) (holding that the "catch-all" provision does not mandate a finding that an applicant who made a false claim of citizenship lacks good moral character).

155 "False testimony" is defined narrowly, including that such false testimony must be oral and must be under oath. *See* 8 CFR § 316.10(b)(vi); *Kungys v. United States*, 485 U.S. 759, 780-81 (1988); *Matter of R-S-J-*, 22 I&N Dec. 863 (BIA 1999).

156 *See* Child Citizenship Act of 2000, Pub. L. No. 106-395, § 201, 114 Stat. 1631, 1633.

157 These defenses include being a minor, unintentional conduct, and timely retraction. *See* ALISON KAMHI, ET AL., IMMIGRANT LEGAL RESOURCE CENTER, HARDSHIP IN IMMIGRATION LAW: HOW TO PREPARE WINNING APPLICATIONS FOR HARDSHIP WAIVERS AND CANCELLATION OF REMOVAL (14th ed. 2017).

158 *Herminio Robles-Quintano*, A074-351-862 (BIA June 9, 2011) (unpublished), https://www.scribd.com/document/199047723/Herminio-Robles-Quintano-A074-351-862-BIA-June-9-2011#.

159 *Id.* at 2.

160 *Id.*

161 NACARA cases, like non-LPR cancellation cases, require proving good moral character and can therefore be instructive for cancellation eligibility analysis. *See* Nicaraguan Adjustment and Central American Relief Act, enacted as title 2 of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997).

for employment authorization in which he falsely claimed to be a citizen of El Salvador mandated a finding that he lacked good moral character under the "catch all" provision of INA § 101(f).[162] The BIA held that conduct triggering the catch-all provision raised a discretionary moral character issue to be analyzed based on the "respondent's conduct during the whole of the relevant statutory period."[163]

DACA Context. DACA recipients only need to show good moral character after the age of 14 because "a child less than 14 years of age is presumed to be a person of good moral character."[164] Of the categories listed in INA § 101(f), most are likely inapplicable to the vast majority of DACA recipients. It is likely that most DACA recipients will easily establish good moral character by virtue of having met the DACA eligibility requirements and having been determined to merit a favorable exercise of discretion via the DACA approval. However, it is important for practitioners to carefully screen DACA recipients for issues that would affect good moral character, including issues like being a "habitual drunkard," conduct sufficient to trigger smuggling grounds, and gambling convictions, since good moral character was not a DACA eligibility requirement. Likewise, it is important to ensure DACA recipients have filed all necessary taxes and, if not, that they retroactively file taxes, if required by law based on their income.[165] Of course, practitioners should ensure that tax filings contain correct information and, if any tax filings contain incorrect information, that those taxes be amended. It is also important to review any arrests or convictions, either before or after the DACA application was granted.

If DHS alleges that a DACA recipient is statutorily barred from proving good moral character due to providing false information on Form I-821D, the DACA recipient may argue that DACA is not a benefit under the INA, but rather an exercise of prosecutorial discretion subject to the whims of the presidential administration in power. If DHS argues additionally that providing false information on Form I-821D qualifies as "giving false testimony for the purpose of obtaining any benefits under the INA," practitioners could remind the IJ that no testimony was required as part of the DACA request process. However, an IJ could still find a lack of good moral character based on the catch-all clause.

It is also possible that some DACA recipients may have made a false statement or claim to U.S. citizenship or registered to vote in a federal, state, or local election. Many DACA holders did not learn about their undocumented status until becoming teenagers. It is thus possible that some DACA recipients made a false statement or claim to U.S. citizenship or registered to vote believing they were U.S. citizens. Those DACA recipients who were adopted by U.S. citizen parents, but who remain undocumented due to an oversight and were permanently residing in the United States prior to the age of 16 can benefit from the catch-all clause exception to false U.S. citizenship statements or claims.[166] Furthermore, DACA recipients could also argue a broader exception for minors who did not know they were not U.S. citizens, based on a 2012 DHS Deputy General Counsel Memo discussing false citizenship claims by children.[167]

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162 *Francisco Hernandez Pina*, A073-976-639 (BIA Jan. 19, 2012) (unpublished), https://www.scribd.com/document/202216334/Francisco-Hernandez-Pina-A073-976-639-BIA-Jan-19-2012.

163 *Id.*

164 USCIS, Battered Spouse, Children & Parents, https://www.uscis.gov/humanitarian/battered-spouse-children-parents (last updated Feb. 16, 2016).

165 IRS, Do I Need to File a Tax Return?, https://www.irs.gov/help/ita/do-i-need-to-file-a-tax-return.

166 *See, e.g.,* Camila Domonoske, *South Korean Adopted At Age 3 Is To Be Deported Nearly 40 Years Later*, NPR, Oct. 27, 2016, https://www.npr.org/sections/thetwo-way/2016/10/27/499573378/south-korean-adopted-at-age-3-is-to-be-deported-37-years-later; Choe Sang-Hun, *Deportation a 'Death Sentence' to Adoptees After a Lifetime in the U.S.*, N.Y. Times, July 2, 2017, https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html; Aline Barros, *Without Papers, Vietnamese Adoptee Faces Deportation*, VOA News, June 15, 2017, https://www.voanews.com/a/without-papers-vietnamese-adoptee-faces-deportation/4009392.html.

167 Department of Homeland Security, False Citizenship Claims by Children: Knowledge and Legal Capacity Elements (Dec. 6, 2012), https://cliniclegal.org/sites/default/files/newsletter/DHS-Memo-2012.pdf. Note that while INA §101(f) does not specifically include a false claim to citizenship as a statutory bar to good moral character, this section of the INA does describe the

D. Exceptional and Extremely Unusual Hardship to the Applicant's U.S. Citizen or LPR Spouse, Parent, or Child

Non-LPR cancellation applicants must establish that their removal would result in exceptional and extremely unusual hardship to a qualifying relative. A qualifying relative is a U.S. citizen or LPR spouse, parent, or child.[168] To be a qualifying relative, the relationship to the qualifying relative must have existed prior to the IJ's adjudication of the Form EOIR-42B and must continue to exist at the time of the adjudication.[169]

1. U.S. Citizen or LPR Spouse,[170] Parent,[171] or Child[172] Qualifying Relatives

While the definitions of spouse, parent, and child seem straightforward, situations of children in the womb, steprelationships, children who turn 21 during the pendency of the non-LPR cancellation application, and same-sex spouses warrant discussion.

a. Qualifying Child-Parent Relationship

For non-LPR cancellation purposes, a qualifying child is one who is unmarried and under twenty-one years of age and otherwise meets the definition of a "child" at INA § 101(b).[173] The U.S. Court of Appeals for the Ninth Circuit has held that an unborn child is not a "child" for purposes of acting as a qualifying relative for non-LPR cancellation.[174]

The issue of whether a relative constitutes a "qualifying relative" for purposes of non-LPR cancellation is considered at the time of the final adjudication of the application by the IJ.[175] Thus, a biological child born during the removal proceedings and before the IJ adjudicates the EOIR-42B would be a qualifying relative. The BIA addressed the timing of the definition of child for hardship purposes involving a U.S. citizen child who was under 21 years of age when the removal proceeding began but turned 21 in the course of the proceedings.[176] The BIA held that after the child turned 21, he no longer met the definition of child and therefore was no longer considered a qualifying relative for non-LPR cancellation.[177] However, in an unpublished decision, the BIA rejected DHS's argument that the respondent's son could no longer be considered a qualifying relative because

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exception to a finding that a false claim to citizenship would be bar, implying that it can be a reason to find a lack of good moral character under INA §101(f).

168 INA § 240A(b)(1)(D).

169 *Matter of Bautista Gomez*, 23 I&N Dec. 893 (BIA 2006) ("[W]e find that the issue of qualifying relatives should properly be considered as of the time an application for cancellation of removal is finally decided. Otherwise, such factors as the birth of a United States citizen child, marriage to a lawful permanent resident or citizen, or a serious accident or illness involving a qualifying relative could not be used as the basis for a motion to reopen to file, or to seek further consideration of, an application for cancellation of removal.").

170 *See id.*; *see also Matter of Isidro*, 25 I&N Dec. 829 (BIA 2012); *Mendez-Garcia v. Lynch*, 840 F.3d 655 (9th Cir. 2016). If a new qualifying relative relationship comes into existence after the IJ's decision, that new, previously unavailable evidence of the new relationship may be a basis for a motion to reopen. *See* CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Mar. 13, 2018), https://cliniclegal.org/sites/default/files/Motion-to-Reopen-PA_1.pdf.

171 INA § 101(b)(2).

172 INA § 101(b)(1).

173 *Matter of Isidro*, 25 I&N Dec. 829 (BIA 2012); *cf. Moreno-Morante v. Gonzales*, 490 F.3d 1172 (9th Cir. 2007) (holding that a granddaughter, even when the grandparent has legal custody and guardianship, is not a qualifying child).

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

175 *See Matter of Isidro*, 25 I&N Dec. at 830-31; *Matter of Bautista Gomez*, 23 I&N Dec. 893, 894 (BIA 2006); *see also Mendez-Garcia v. Lynch*, 840 F.3d 655, 664 (9th Cir. 2016) (holding that the BIA reasonably concluded that INA § 240A(b)(1)(D) "requires an alien seeking cancellation to establish hardship to a qualifying relative as of the time the IJ adjudicates the alien's application").

176 *Matter of Isidro*, 25 I&N Dec. 829.

177 *Id.*; *see also Partap v. Holder*, 603 F.3d 1173 (9th Cir. 2010).

he had turned 21 by the time of the appeal.[178]

A stepchild who meets the definition of a "child" under INA § 101(b)(1)(B) is a qualifying relative for non-LPR cancellation.[179] Section 101(b)(1)(B) of the INA requires that the stepchild be under the age of eighteen when the biological parent and stepparent marry in order for the stepchild to qualify as a "child" for immigration purposes.[180]

A stepchild can also rely on hardship to his or her U.S. citizen or LPR stepparent, so long as "at the time of the proceedings [the stepparent or stepchild] is a qualifying relative."[181] Once the stepparent relationship has been established, a stepparent remains a qualifying relative parent, even if the child has married or is over 21 years of age.[182] While the BIA has not issued a published decision on whether the marriage between the biological parent and the stepparent has to continue for purposes of maintaining a qualifying relationship for non-LPR cancellation, the BIA has held in the context of adjudicating visa petitions "that once the required steprelationship has been established, a stepparent remains a parent, even if the 'child' has married or is over 21 years of age, provided the marriage creating the steprelationship continues to exist."[183]

DACA Context. Some DACA recipients will have U.S. citizen or LPR parents or stepparents. Since DACA recipients entered the United States as children, some DACA recipients will have an established stepchild and stepparent relationship prior to their 18th birthday. If the stepparent is a U.S. citizen or LPR "at the time of the proceedings"[184] and before the IJ adjudicates the non-LPR cancellation application and the stepparent remains married to the applicant's biological parent,[185] this would be a qualifying relationship for non-LPR cancellation purposes. However, if the DACA recipient's stepparent is not still married to the biological parent, yet the DACA recipient continues to maintain a family relationship with the stepparent, he or she should argue that this is nonetheless a qualifying parent-child relationship for non-LPR cancellation purposes.[186]

Many DACA recipients may have a qualifying U.S. citizen or LPR child or stepchild. DACA recipients may also establish a qualifying parent-child relationship through adopted children, provided they meet the requirements of INA § 101(b)(1)(B). In the event that the DACA recipient's qualifying child is nearing the age of 21, the practitioner should ensure that the IJ adjudicates the case before the child reaches the age of 21.[187]

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178 *Epifanio Martinez Juarez*, A095-194-852 (BIA Mar. 21, 2011) (unpublished), www.scribd.com/doc/175148703/Epifanio-Martinez-Juarez-A095-194-852-BIA-March-21-2011 (holding that the respondent's eligibility should be based on the son's age when the matter was before the immigration court).

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

180 To determine this, practitioners must determine whether the parent's marriage is valid in the state or foreign jurisdiction where it occurred as discussed in section II.D.1.b.

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

182 *Id.*at 187 (citing *Matter of Citino*, 12 I&N Dec. 427, 428 (BIA 1967) (stating that where a valid steprelationship has been created, a stepparent remains a stepparent despite the marriage of the "child").

183 *Id.*; *see also Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981) (highlighting that stepchild relationship can exist even after divorce in visa petition context).

184 *Supra* note 181

185 *Id.*

186 *See Matter of Mowrer*, 17 I&N Dec. at 615 ("We believe that the appropriate inquiry in cases where there has been a legal separation or where the marriage has been terminated by divorce or death is whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild."); *see also Matter of Mourillon*, 18 I&N Dec. 122, 125 (BIA 1981) ("In the context of stepparent and stepchild, we recently held that where the parties to the marriage which created that step-relationship have legally separated or where the marriage has been terminated by divorce or death, the appropriate inquiry is whether a family relationship has continued to exist as a matter of fact between the stepparent and stepchild.").

187 *See Mendez-Garcia v. Lynch*, 840 F.3d 655, 667 (9th Cir. 2016) (rejecting a procedural due process argument that the petitioners were prevented from reasonably presenting their cases at a meaningful time because the petitioners postponed the adjudication of the non-LPR cancellation applications rather than doing anything to expedite adjudication of the applications).

This may require that the practitioner submit a "motion to advance the individual hearing" or take other steps to expedite the adjudication of the application. Doing so will best preserve a procedural due process argument on appeal to the U.S. court of appeals in the event the IJ does not hear the case before the qualifying relative ages out.

Similarly, if the DACA recipient is expecting a child who could serve as a qualifying relative or an additional qualifying relative, the practitioner will want to consider the timing of the individual hearing as it relates to the due date of the child.

b. Qualifying Spousal Relationship

Domestic partnerships are not considered marriage for immigration purposes. However, a common law marriage can qualify as a marriage for immigration purposes in states that recognize common law marriages, assuming the couple lives in that jurisdiction and meets the qualifications for common law marriage.[188]

Married same-sex couples can also benefit from non-LPR cancellation just as they can all forms of immigration benefits and relief. In *Matter of Dorman*,[189] former Attorney General Eric Holder vacated a BIA decision on the Defense of Marriage Act (DOMA) and directed that the case be remanded to the BIA for review. The BIA held in a subsequent case that a same-sex marriage valid in the place it was performed would be considered a marriage for the purposes of immigration law.[190] Then, on February 10, 2014, former Attorney General Eric Holder issued a memorandum titled "Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples" and addressed to all Department of Justice employees stating:

> Consistent with the Supreme Court's Windsor decision and the Department's policy of treating all individuals equally, regardless of sexual orientation, the Department will interpret the terms "spouse," "marriage," "widow," "widower," "husband," "wife," and any other term related to family or marital status in statutes, regulations, and policies administered, enforced, or interpreted by the Department, to include married same-sex spouses whenever allowable. The Department will take the same position in litigation, to the extent consistent with the lawful statutes, regulations, and policies over which other agencies bear primary administrative, enforcement, or interpretive responsibility. The Department will recognize all marriages, including same-sex marriages, valid in the jurisdiction where the marriage was celebrated to the extent consistent with law.[191]

In 2015, the U.S. Supreme Court held that gay and lesbian individuals have a fundamental right to marry under the Due Process and Equal Protection Clauses of the Constitution, thus extending the ability for same-sex couples to enter into federally recognized marriages in all states.[192]

DACA Context. Many DACA recipients may have a qualifying spouse relationship with a U.S. citizen or LPR. Practitioners should ensure that when a client uses the term "husband" or "wife" that this actually denotes a legal marriage that would qualify for non-LPR cancellation purposes. In some countries with a high number of DACA recipients, such as Mexico, Honduras, Guatemala, and El Salvador, long-term partners frequently refer to their partner as "husband" or "wife" without having legally married. Practitioners should not take these labels

188 *See Matter of Megalogenis*, 10 I&N Dec. 609 (BIA 1964); *United States v. Gomez-Orozco*, 28 F. Supp. 2d 1092, 1095–98 (C.D. Ill. 1998), *rev'd on other grounds*, 188 F.3d 422 (7th Cir. 1999).

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

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

191 Memorandum from Eric Holder, Attorney General, Department Policy on Ensuring Equal Treatment of Same-Sex Married Couples to Department Employees (Feb. 10, 2014), www.justice.gov/iso/opa/resources/ss-married-couples-ag-memo.pdf.

192 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

for granted and should ensure that the label "husband" or "wife" means being legally married. It is advisable for the practitioner to ask for a copy of the marriage certificate from the couple during the screening phase of the case. If the DACA recipient cannot produce a marriage certificate, he or she should consider marrying, or remarrying, in the United States to have the required documentation of the marriage.

2. Exceptional and Extremely Unusual Hardship

Exceptional and extremely unusual hardship is a significantly more restrictive—but not impossible—standard than extreme hardship, which is the more common standard in immigration law.[193] Exceptional and extremely unusual hardship should be argued from both possible situations of the qualifying relative(s) staying in the United States or following the respondent to his or her country of designated removal. To understand the exceptional and extremely unusual hardship standard, practitioners must be familiar with BIA precedent. The BIA has issued three published decisions on what constitutes exceptional and extremely unusual hardship.

Matter of Monreal was the first published BIA case evaluating the meaning of the term "exceptional and extremely unusual hardship" after Congress replaced the suspension of deportation provisions of the INA with non-LPR cancellation.[194] The BIA stated that in replacing suspension of deportation with non-LPR cancellation, Congress *narrowed* the class of respondents who could qualify for relief.[195] It was obvious, said the BIA, that the hardship standard for non-LPR cancellation is a higher one than the extreme hardship standard required for suspension of deportation.[196] The BIA concluded that Congress intended non-LPR cancellation to be available only in compelling and truly exceptional cases involving harm substantially beyond that which ordinarily would be expected to result from the respondent's deportation.

The BIA listed various factors to consider in determining whether exceptional and extremely unusual hardship had been demonstrated.[197] Many of those factors are the same ones considered in determining extreme hardship for purposes of suspension of deportation, but they must be weighed according to the higher standard required for non-LPR cancellation.[198] The non-exhaustive factors identified by the BIA to determine exceptional and extremely unusual hardship include: the qualifying relative's age, health, circumstances including any special needs, length of residence in the United States, family and community ties in the United States, family and community ties in the home country, circumstances in the home country, and alternative methods for immigrating.[199] A lower standard of living or adverse country conditions in the country of return are factors to consider, but generally will be insufficient by themselves to support a finding of exceptional and extremely unusual hardship.[200] An applicant who has elderly U.S. citizen or LPR parents in this country—parents who are dependent entirely on the applicant for support—may have a strong non-LPR cancellation case. Another strong case might involve an applicant who has a qualifying child with very serious health issues, or compelling special needs in school.[201]

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193 *See generally* Alison Kamhi, et al., Immigrant legal resource center, Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal (14th ed. 2017) (for an in-depth review of the hardship standard in non-LPR cancellation); Immigrant Legal Resource Center, *Non-LPR Cancellation of Removal: An Overview of Eligibility for Immigration Practitioners* (June 2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf (providing a brief overview of the hardship elements for non-LPR cancellation).

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

195 *Id.* at 58.

196 *Id.* at 59.

197 *Id.* at 63–64.

198 *Id.* at 66–68.

199 *Id.* at 93. *Matter of Monreal*, 23 I&N Dec. at 63; *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323-324 (BIA 2002).

200 *Matter of Monreal*, 23 I&N Dec. at 66-68.

201 *Id.* at 63.

In *Matter of Monreal*, the respondent was a 34-year-old citizen of Mexico who had entered the United States when he was 14.[202] His wife, who was not a citizen or resident of the United States, had returned to Mexico with the couple's infant child shortly before the respondent's individual hearing.[203] The couple's other two children, 12 and 8 years old, lived with Mr. Monreal.[204] All three children were U.S. citizens. Mr. Monreal had worked in the United States continuously since 1991 and was the sole support of his family.[205] His parents and seven of his siblings were LPRs, and he had one brother living in Mexico.[206] The BIA found that Mr. Monreal had not established that his removal would cause exceptional and extremely unusual hardship to a qualifying relative because the respondent's oldest child was fully bilingual in English and Spanish and the record was otherwise devoid of facts relating to the hardship on his LPR parents. The BIA also noted that hardship to the respondent cannot be considered in an application for non-LPR cancellation.[207] The BIA commented, however, that had this been an application for suspension, Mr. Monreal might well have been found eligible for the relief, thereby underscoring the harsh changes brought about by IIRIRA.

The BIA then decided *Matter of Andazola* and held that a 30-year-old unmarried mother from Mexico did not establish that her removal would cause exceptional and extremely unusual hardship to her U.S. citizen children who were ages 6 and 11.[208] In fact, the BIA compared *Andazola* with *Monreal* by noting that the facts presented in *Andazola* were "common" and the "hardships that the Respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country."[209] The BIA reasoned that because Ms. Andazola still lived with the father of her children, who sometimes provided support to the family and who had only temporary permission to be in the United States, the father would be able to help support her and the children if she were to return to Mexico.[210] Although Ms. Andazola had lived in the United States for almost 17 years, the BIA determined that she was still young and able to work and that she would be able to use the job skills that she had developed in the United States to help her establish herself back in Mexico.[211] Moreover, the BIA found it "significant" that Ms. Andazola had many assets in the United States that also could help establish her life in Mexico.[212] The BIA viewed negatively that, even though all of Ms. Andaloza's siblings lived in the United States, none of them had lawful status. Although Ms. Andazola argued that her children would have diminished educational opportunities in Mexico, the BIA determined that there was no showing that her children would be completely deprived of education in Mexico. Moreover, the BIA noted that "a finding that diminished educational opportunities result in 'exceptional and extremely unusual hardship' would mean that non-LPR cancellation would be granted in virtually all cases involving Respondents from developing countries who have young U.S. citizen or LPR children. This view is not consistent with congressional intent."[213]

Finally, the BIA decided *Matter of Recinas,* which held that non-LPR cancellation cases before IJs and the BIA must be examined under the standards set forth in *Matter of Monreal* and *Matter of Andazola* because those "cases remain our seminal interpretations of the meaning of exceptional and extremely unusual hardship."[214]

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202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.*
207 *Id.* at 58.
208 *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).
209 *Id.* at 324.
210 *Id.*
211 *Id.*
212 *Id.*
213 *Id.* at 320.
214 *Matter of Recinas*, 23 I&N Dec. 467, 472 (BIA 2002).

Notably, the BIA articulated clearly that an exceptional and extremely unusual hardship analysis "requires the assessment of hardship factors in their totality, often termed a 'cumulative' analysis."[215] Perhaps most notably, the BIA stated that the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief.[216]

Ms. Recinas was a 39-year-old Mexican national and single mother of six children. Four of the children—ages 12, 11, 8, and 5—were U.S. citizens. The two non-U.S. citizen children, aged 15 and 16, were co-respondents in the case. The three respondents had lived in the United States for 14 years. Ms. Recinas also had two LPR parents and five U.S. citizen siblings living in the United States. She had no immediate relatives living in Mexico. Ms. Recinas's mother lived nearby and cared for her children while Ms. Recinas managed her own vehicle inspection business. Ms. Recinas's mother had a close relationship with the children. The father of the children was not involved in their lives and was in immigration proceedings at the same time that Ms. Recinas was in proceedings.

In reviewing all the factors in this case, the BIA determined that this case was different from *Monreal* and *Andazola* in the degree of hardship that would be suffered by the qualifying family members. In particular, the BIA relied on seven factors to find that Ms. Recinas demonstrated that exceptional and extremely unusual hardship would occur to her four U.S. citizen children.

First, the BIA noted that Ms. Recinas and her family had lived in the United States for approximately 14 years, and that her children did not know any other life.[217] Second, the children did not speak Spanish well, nor could they read or write it.[218] Third, the BIA noted that the four U.S. citizen children were entirely dependent on Ms. Recinas for support because the father was not involved in their lives.[219] Fourth, as a single mother in Mexico, Ms. Recinas would not only have to find employment, but also support the children's emotional needs, which would be very difficult on her own without family help.[220] Fifth, Ms. Recinas's LPR mother took care of Ms. Recinas's children and created a stable environment while Ms. Recinas formed a business.[221] By contrast, in Mexico, without family support, Ms. Recinas would have difficulty finding work and creating a supportive environment for her children.[222] Sixth, the U.S. citizen children also would suffer significant hardship from the mother's loss of her job in the United States, coupled with the difficulty she would have in establishing any comparable economic stability in Mexico.[223] In conjunction with this, the BIA emphasized that Ms. Recinas was a single mother of six children *and* had no family in Mexico.[224] Finally, the BIA noted that Ms. Recinas's prospects for immigration through her U.S. citizen siblings or LPR parents were unrealistic because of the backlog in the visa availability preference system for Mexico, and there were no other apparent methods for her to adjust status.[225]

The BIA also has established evidentiary requirements for certain cases in which the U.S. citizen child would suffer hardship. When a respondent knows the qualifying relative child will stay in the United States and will thus only argue hardship based on family separation, the BIA held in *Matter of Ige* that the respondent

215 *Id.* at 472.
216 *Id.* at 470.
217 *Id.* at 468.
218 *Id.* at 470.
219 *Id.* at 471.
220 *Id.*
221 *Id.* at 470.
222 *Id.* at 471.
223 *Id.*
224 *Id.*
225 *Id.* at 472.

parent must execute an affidavit stating that the child will remain in the United States and provide evidence demonstrating that "reasonable provisions will be made for the child's care and support."[226] The BIA then modified this requirement in *Matter of Calderon-Hernandez*,[227] holding that the affidavit mandated in *Matter of Ige* would not be required if the child were to remain in the United States with another parent, even if the other parent is in this country unlawfully.[228]

Practitioners should also be familiar with the BIA's unpublished decisions analyzing the exceptional and extremely unusual hardship standard as these decisions provide recent insight into the BIA's assessment of this legal element. The following unpublished BIA decisions were selected from the Immigration & Refugee Appellate Center LLC's (IRAC) Index of Unpublished Decisions of the BIA, which is updated on a monthly basis:[229]

- The BIA sustained the respondent's appeal agreeing that his removal would cause exceptional and extremely unusual hardship to his U.S. citizen spouse and stepdaughter in light of the high cost of living in Hawaii where the qualifying relatives lived and his spouse's need to maintain her nursing certification and vest her state retirement pension there.[230]
- The BIA sustained the respondent's appeal finding that two of her U.S. citizen children who were born with heart defects would suffer exceptional and extremely unusual hardship in Mexico.[231] The BIA noted that, while the respondent had family in Mexico, her situation was nevertheless analogous to that in *Matter of Recinas*; she was a single mother of limited economic means supporting her five children, including four U.S. citizens, two of whom had heart defects.
- The BIA found that the likelihood that the respondent's U.S. citizen daughters would be subject to female genital mutilation (FGM) in Senegal amounted to exceptional and extremely unusual hardship.[232] The BIA subsequently upheld two appeals on behalf of respondents from Mali[233] and the Gambia,[234] respectively, who proposed similar FGM arguments. In the case of the respondent from the Gambia, the BIA noted that the IJ should not have substituted personal judgment for what was in the daughters' best interest.
- The BIA reversed the IJ noting that the respondent's U.S. citizen husband, who suffers from hepatitis, U.S. citizen daughter, who suffers from excessive tearing in her left eye, and U.S. citizen son, who suffers from hyperactivity, excessive vomiting, fevers, and speech delays, present factors that in the aggregate qualify as exceptional and extremely unusual hardship if they would be removed to China.[235]

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

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

228 *Id.* at 886.

229 IRAC's Index of Unpublished Decisions of the Board of Immigration Appeals (2018 edition) is available for a small fee, http://www.irac.net/unpublished/index/.

230 *Herminio Robles-Quintano*, A074-351-862 (BIA June 9, 2011) (unpublished), https://www.scribd.com/document/199047723/Herminio-Robles-Quintano-A074-351-862-BIA-June-9-2011#.

231 *B-V-C-J-*, AXXX-XXX-939 (BIA Aug. 30, 2013) (unpublished), https://www.scribd.com/document/237868986/B-V-C-J-AXXX-XXX-939-BIA-Aug-30-2013.

232 *K-C-*, AXXX-XXX-101 (BIA June 23, 2014) (unpublished), https://www.scribd.com/document/237870289/K-C-AXX-XXX-101-BIA-June-23-2014.

233 *B-D-*, AXXX-XXX-395 (BIA Dec. 21, 2017) (unpublished), https://www.scribd.com/document/369893393/B-D-AXXX-XXX-395-BIA-Dec-21-2017?secret_password=qmANDo08zulZLu9yGW04.

234 *M-S-*, AXXX-XXX-653 (BIA Feb. 12, 2018) (unpublished), https://www.scribd.com/document/374333633/M-S-AXXX-XXX-653-BIA-Feb-12-2018?secret_password=QeYVjkH6FSkqsQoYX15y.

235 *Y-Y-C-*, AXXX-XXX-786 (BIA Aug. 4, 2015) (unpublished), https://www.scribd.com/document/274518776/Y-Y-C-AXXX-XXX-786-BIA-Aug-4-2015#.

- The BIA sustained the respondent's appeal finding that the respondent had established that removal to Mexico would cause the requisite hardship. The respondent's 15-year-old U.S. citizen child was diagnosed with major depressive disorder and had experienced suicidal ideations, and his younger son was referred for psychological services and both children have cognitive abilities that are below average. The BIA noted that "[t]he children are in their formative years, are very dependent on the respondent, and if the respondent were removed from the United States, these children would lose a father during a critical time in their lives."[236]
- The BIA sustained the respondent's appeal holding that that the respondent's removal to Mexico would result in exceptional and extremely unusual hardship to his two U.S. citizen children, one of whom had cranial surgery as a toddler and one of whom has severe asthma.[237]
- The BIA denied the DHS appeal and upheld the IJ's determination that the respondent established that his removal would result in exceptional and extremely unusual hardship to his wife, a lawful permanent resident, and his two U.S. citizen children because the respondent's children each received therapy for speech and language delays and the respondent's wife would be forced to abandon a professional occupation if she had to relocate.[238]

Many respondents are denied non-LPR cancellation because of the high hardship standard. And while respondents can and do appeal all the way up to the U.S. courts of appeal, these appeals are usually dismissed because hardship determinations are deemed to be discretionary instead of legal questions and therefore not subject to judicial review.[239] As such, practitioners must establish the best hardship record possible before the IJ and, if appealing to a U.S. court of appeals, offer legal arguments, such as failure by the IJ or BIA to apply the correct legal standard, to avoid dismissal.

DACA Context. USCIS data show that as of March 31, 2018, there are 693,850 DACA recipients, of whom 0.2 percent were under 16 years old; 26 percent were between the ages of 16 and 20; 37 percent were between the ages of 21 and 25; 25 percent were between the ages of 26 and 30; and 12 percent were between the ages of 31 and 36.[240] Given these statistics and that DACA recipients entered the United States as children, many DACA recipients likely have a U.S. citizen child, U.S. citizen or LPR spouse, or U.S. citizen or LPR stepparent or parent. DACA recipients who have a U.S. or LPR citizen child, spouse, or parent with serious health issues or compelling special needs will be strong candidates for non-LPR cancellation.[241]

As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.[242] DACA recipients should argue that the hardship factors in the aggregate amount to exceptional and extremely unusual hardship. Remind the IJ that the BIA emphasized that each case

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236 *L-V-S-*, AXXX-XXX-285 (BIA Jan. 3, 2018) (unpublished), https://www.scribd.com/document/369894268/L-V-S-AXXX-XXX-285-BIA-Jan-3-2018?secret_password=4Cf15TIbK3acwM5TDMzy.

237 *V-G-C-H-*, AXXX-XXX-792 (BIA Apr. 26, 2018) (unpublished), https://www.scribd.com/document/380077276/V-G-C-H-AXXX-XXX-792-BIA-April-26-2018?secret_password=wjHUxxnPWrRGNqqsogBz.

238 *H-C-A-*, AXXX-XXX-557 (BIA Feb. 16, 2018) (unpublished), https://www.scribd.com/document/374336050/H-C-A-AXXX-XXX-557-BIA-Feb-16-2018?secret_password=jphrX9FHn5lI9bhaf84c.

239 INA § 242(a)(2)(B)(i)-(ii); *see, e.g.*, *De La Vega v. Gonzales*, 436 F.3d 141, 145-46 (2d Cir. 2006); *Rueda v. Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 888 (9th Cir. 2003); *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332-33 (11th Cir. 2003). *But see Matter of V-K-*, 24 I&N Dec. 500, 501-02 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493, 497 (BIA 2008).

240 USCIS, Approximate Active DACA Recipients: Country of Birth as of Mar. 31, 2018, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Population_Data_Mar_31_2018.pdf [hereinafter "USCIS DACA Data"].

241 *See Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001).

242 *Id.* at 64 (*citing Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001)).

must be assessed and decided on its own facts. Practitioners could highlight similarities between the client's facts and those in the *Matter of Recinas* case and argue that the cumulative hardship factors are greater than those in *Matter of Monreal* and *Matter of Andazola*.

3. Merits Favorable Discretion

Non-LPR cancellation is discretionary. The statute specifies that an IJ "may" grant relief to an individual who otherwise qualifies for non-LPR cancellation.[243] This means that even if the respondent is statutorily eligible for non-LPR cancellation, the IJ may deny relief as a matter of discretion.[244] As with the other elements of non-LPR cancellation, the respondent bears the ultimate burden of showing that he or she merits a favorable exercise of discretion.[245]

The three published BIA decisions on exceptional and extremely unusual hardship *Matter of Recinas*, *Matter of Andazola*, and *Matter of Monreal* discussed above offer no explanation of what the discretionary standard entails. *Matter of Andazola* and *Matter of Monreal* were denied for failure to meet the statutory element of "exceptional and extremely unusual hardship," so neither the IJ nor the BIA reached the discretion analysis in these cases. Unlike the VAWA cancellation context,[246] the authors are not aware of any published BIA decisions addressing the discretionary analysis in the non-LPR cancellation context. However, at least one unpublished BIA case explained that "the overall balancing of positive and negative factors [] is required in any application for cancellation of removal" while citing to *Matter of Marin*.[247] In *Matter of Marin*, the BIA analyzed discretionary relief under former INA § 212(c), the predecessor to INA § 240A(a) LPR cancellation.[248] Non-LPR cancellation and LPR cancellation were IIRIRA[249] creations and each requires that the applicant merit relief as a matter of discretion. As such, reviewing LPR cancellation decisions that reach the discretion analysis is helpful to understanding this standard, although it is important to note that the vast majority of LPR cancellation cases will include a criminal factor in the discretion analysis.[250]

In the LPR cancellation case of *Matter of C–V–T–*, the IJ denied LPR cancellation of removal on discretionary grounds.[251] The BIA reversed the IJ's decision, stating that the numerous favorable factors in the respondent's case outweighed the negative factors.[252] According to the BIA, there are positive and negative factors to consider in all cases.

Positive factors to consider include:

- Family ties in the United States
- Employment history
- Service in the U.S. Armed Forces

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243 INA § 240A(b)(1).

244 *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998); *see also Kalaw v. INS*, 133 F.3d 1147 (9th Cir. 1997).

245 INA § 240(c)(4)(A)(ii).

246 *See Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009).

247 *Pjeter Mustafaj*, A012-279-428, 2006 WL 3088896, at *2 (BIA Sept. 18, 2006) (unpublished).

248 *Matter of Marin*, 16 I&N Dec. 581, 589 (BIA 1978).

249 IIRIRA replaced suspension of deportation with non-LPR cancellation. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

250 *Matter of C-V-T-*, 22 I&N Dec. at 12 ("As a general rule, we find it best not to apply case law regarding applications for suspension of deportation under section 244(a) of the Act when considering a request for cancellation of removal under section 240A(a) of the Act."); *see also Matter of Marin*, 16 I&N Dec. at 586 (finding "it prudent to avoid cross-application, as between different types of relief from deportation, of particular principles or standards for the exercise of discretion").

251 *Matter of C-V-T-*, 22 I&N Dec. at 14.

252 *Id.*

- Hardship to family in the United States and to the LPR if deported
- Value and service to the community
- Rehabilitation, and
- Other evidence of good moral character.

Adverse factors to consider include:

- Nature and circumstances of the ground of removal
- Additional violations of the immigration laws
- Nature, recency, and seriousness of the criminal record, and
- Other evidence of bad moral character.

Generally, in cases where "negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities."[253] When a respondent has a criminal record that does not bar the respondent from non-LPR cancellation, any rehabilitation or lack of rehabilitation may be deemed a relevant factor in the analysis, depending on the evidence presented.[254]

For example, in one unpublished decision on file with the authors, the BIA reversed an IJ's grant of non-LPR cancellation because the respondent had two driving while intoxicated convictions and charges for driving on a suspended license and contributing to the delinquency of a minor convictions for having his children in the car.[255] The BIA reversed the grant despite a long list of favorable equities, including Alcoholics Anonymous group attendance and lengthy residence in the United States since the age of 14. In another unpublished decision, the BIA reversed the IJ's denial of non-LPR cancellation that was based, in part, on the ill-founded determination that the respondent was "doing very little to become a productive member of society."[256] Thus, discretionary factors can often tip the balance in either direction: strong cases can lose if negative discretionary factors are not addressed, and borderline cases can turn into approvable ones by stressing the positive factors. Finally, it is very important to put forth the best evidence and not rely on the prospect of U.S. court of appeals review to "fix" discretionary issues because the BIA will often have the final say in both the discretionary and the hardship findings. U.S. court of appeals do not have appellate review jurisdiction over these issues.[257] However, federal courts can review constitutional claims or questions of law.[258]

DACA Context. DACA recipients applying for non-LPR cancellation of removal are strong candidates for a favorable exercise of discretion.[259] DACA recipients have significant ties to the community by virtue of their long time residence in the United States and should lack or have few criminal adverse factors because of the

253 *Id.* at 11-12; *see also Matter of Sotelo*, 23 I&N Dec. 201, 203 (BIA 2001) (LPR cancellation case); *Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970) (adjustment of status case).

254 *See Matter of C-V-T-*, 22 I&N Dec. at 12.

255 *John Doe*, AXXX-XXX-XXX (Arlington Immigr. Ct. Jan. 11, 2018) (unpublished IJ decision) [on file with the authors].

256 *See B-V-C-J-*, AXXX-XXX-939 (BIA Aug. 30, 2013) (unpublished), https://www.scribd.com/document/237868986/B-V-C-J-AXXX-XXX-939-BIA-Aug-30-2013.

257 *See* INA § 242(a)(2)(B).

258 *See* INA § 242(a)(2)(D).

259 *See, e.g.,* Daniel Arkin, *First Harvey, Now DACA in Peril: Houston-Area 'Dreamers' Face Another Storm,* NBC News, Sept. 1, 2017, https://www.nbcnews.com/storyline/hurricane-harvey/first-harvey-now-daca-peril-houston-area-dreamers-face-another-n798256.

strict DACA eligibility factors.[260] DACA recipients should be able to prove their significant community ties through letters of support from teachers, counselors, administrators, coaches and classmates given the DACA educational requirement and many should be able to present letters of support from the employer and co-workers thanks to the EAD benefits of DACA. An educational institution or an employer may have issued the DACA recipients certificates, plaques, or other awards that the practitioner may copy or photograph to include with the non-LPR cancellation application. Of course, practitioners should include in the filing color copies of photographs of the DACA recipient interacting in or serving the community. Furthermore, some DACA recipients have been highlighted by the media and practitioners should include copies of the newspaper articles or seek to present video footage during the merits hearing.[261]

III. INELIGIBILITY FACTORS

Pursuant to INA § 240A(c), an individual is ineligible for non-LPR cancellation if any of the following apply:

- He or she entered the United States as a crewman after June 30, 1964[262]
- He or she was admitted as an exchange alien (via a J visa) or acquired such status in order to receive graduate medical education or training
- He or she was admitted or acquired exchange alien status for purposes other than graduate medical education or training, but was subject to the two-year foreign residence requirement and failed to fulfill that requirement (or have it waived)
- He or she is inadmissible or deportable under security and related grounds
- He or she ordered, incited, assisted, or otherwise participated in the persecution of others, or
- He or she previously was granted cancellation of removal, suspension of deportation, or an INA § 212(c) waiver.

A visa waiver program entrant is not an enumerated category under INA § 240A(c). However, at least two U.S. courts of appeal found visa waiver program entrants ineligible for former suspension of deportation because the nonimmigrant agrees to waive the right to contest a removal order, other than asking for asylum.[263] Neither the BIA nor the U.S. courts of appeal have addressed the question of whether a visa waiver program entrant is

260 Nonetheless, practitioners could warn DACA recipient clients that certain social media activity could jeopardize a favorable exercise of discretion. DACA recipients should thus ensure that they undertake social media activity carefully and that they consider the effects of the particular social media activity on non-LPR cancellation relief should DHS wish to introduce social media activity as evidence that the applicant does not merit favorable discretion.

261 Practitioners should work with the court administrator well in advance to the merits hearing to set up the required technology to show the video. In one unpublished BIA decision, the BIA considered whether and how video evidence should be considered and if such evidence is to be admitted into the record, or whether the contents of the video recording should be presented in another format or by other means to facilitate its inclusion in the Certified Administrative Record. In an unpublished decision, the BIA remanded the case to the IJ for consideration of the electronic media evidence, but noted that the respondent had not submitted evidence to show that the information on the flash drive was in a format or program that would be safely accessible on government property. This decision suggests that safe accessibility is the main issue for practitioners to discuss with the court administrator and the IJ in seeking to arrange for video evidence viewing. *See J-N-F*, AXXX-XXX-126, 2014 WL 6882901 (BIA Oct. 28, 2014) (unpublished). If practitioners are denied this option, they should object on the grounds that this interferes with respondent's right to present evidence on his or her own behalf so as to preserve the issue for appeal. *See* INA § 240(b)(4)(B); 8 CFR § 1240.1(c).

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

263 *Wigglesworth v. INS*, 319 F.3d 951 (7th Cir. 2003); *Itaeva v. INS*, 314 F.3d 1238, 1241-43 (10th Cir. 2003).

eligible for non-LPR cancellation. For this potential non-statutory ground of ineligibility, DACA recipients who entered under the visa waiver program may argue that when they entered as young children, they lacked the ability and mental capacity to waive the right to contest a removal order.[264]

DACA Context. Any DACA recipient who entered as a crewman or was admitted as an "exchange alien" would not be eligible for non-LPR cancellation. It is unlikely that a DACA recipient was working as a crewman while under the age of 16. It is also unlikely that a DACA recipient entered as an "exchange alien" because that would have required an entry after the age of 16 given the education and training requirements of J visas. Due to the DACA eligibility requirements, it is very unlikely that a DACA recipient would be inadmissible under security and related grounds unless those grounds arose after the expiration of DACA or were the reason that the DACA recipient lost DACA. The requirement that a DACA recipient has entered the United States prior to the age of 16 makes it highly unlikely that a DACA recipient ordered, incited, assisted, or otherwise participated in the persecution of others prior to coming to the United States when he or she was 15 years old or younger.[265] However, practitioners could screen for all issues, including evaluating issues that may have arisen prior to or after being granted DACA.

IV. RELEVANT COUNTRY CONDITIONS FOR THE TOP FIVE COUNTRIES OF ORIGIN FOR DACA RECIPIENTS

As discussed in section II.D above, applicants for non-LPR cancellation must show that they would suffer exceptional and extremely unusual hardship if removed from the United States. While evidence of their deep roots and ties to the United States are relevant, so are the conditions in their country of origin. While not sufficient standing alone, a lower standard of living or adverse country conditions in the country of return are factors that the IJ should consider when assessing exceptional and extremely unusual hardship in the aggregate.[266]

Below is a brief description of country conditions relevant to establishing the hardship requirement for the qualifying relative(s) should they be forced to relocate to the top five countries from which DACA recipients come. According to USCIS, the top five countries represented by DACA recipients as of September 4, 2017 are: Mexico (79.4%), El Salvador (3.7%), Guatemala (2.6%), Honduras (2.3%), and Peru (1.1%).[267] Most of these countries suffer from high rates of violent crime, which can disproportionately affect individuals who have lived in the United States because they might be perceived as having money. Failing educational and health systems in each of these countries will bolster the hardship claims for those U.S. citizen or LPR relatives with health issues or learning disabilities who would be unable to access the same level of health care or education they had in the United States. For example, a very common health care concern for the children of DACA recipients could be asthma, and children who are used to a level of treatment in the United States will find this care starkly different in the native country of their parents. Practitioners should also consider the different kinds of hardship a qualifying relative could face if he or she were either to stay in the United States or to return to the home country. Such country conditions evidence should be filed as part of the evidence packet pursuant to the Immigration Court Practice Manual.

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264 M. Aryah Somers, Vera Institute of Justice's Unaccompanied Children Program, *Practice Advisory: Children in Immigration Proceedings: Child Capacities and Mental Competency in Immigration Law and Policy* (May 2015), https://cliniclegal.org/sites/default/files/children_in_immigration_proceedings_-_child_capacities_and_mental_competency_in_immigration_law_and_policy.pdf.

265 *Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017).

266 *Matter of Monreal*, 23 I&N Dec. 56, 63 (BIA 2001).

267 *See* USCIS DACA Data, *supra* note 240.

One argument DACA recipients can make to satisfy the exceptional and extremely unusual hardship requirement is that if the qualifying relative relocates to the country of origin he or she would experience a lower standard of living. This factor alone most likely will not meet the exceptional and extremely unusual hardship standard, but could be one factor taken in the aggregate. As of the date of this advisory, 12.7 percent of the population in the United States live under the poverty threshold, which is very different from the top five countries of origin of DACA recipients.[268] Below is an explanation of the chief concerns in the top five countries DACA recipients come from, including the poverty rates. This practice advisory only provides basic background information relating to common hardship factors in non-LPR cancellation applications and is not a substitute for independent research. Practitioners should begin this research by reading the Department of State (DOS) Human Rights Report for the country in question,[269] but their research should go beyond these reports and focus on country conditions that are relevant to the particular hardship in the case.

A. Mexico

Violence and Human Rights. Mexico has been plagued by violence for decades. However, from 2015 to 2016, the crime rate in Mexico increased significantly.[270] The prime reason for the increase has been blamed on cartel violence, rival criminal gangs, and drug trafficking.[271] As of the date of this advisory, there is a State Department travel warning issued for half of the states of Mexico.[272] These warnings discuss the violence that has plagued several states in Mexico, including 11 states that are considered "level 3," meaning people should reconsider any travel to those areas. Some of these states include Jalisco, Chihuahua, Coahuila, Nuevo Leon, Sonora, Durango, Zacatecas, San Luis Potosi, and the state of Mexico.[273] In five other states—Michoacán, Guerrero, Coahuila, Sinaloa, and Tamaulipas—the travel warnings are even stricter, as they are given a "level 4" (no travel), which places these states on par with war-torn nations such as Syria, Yemen, and Somalia.[274] Because of the cartel violence throughout Mexico, murder rates have hit a record high. Over the first four months of 2017, three murders took place every hour reaching a total of 8,705 killings, about half of which can be attributed to organized crime.[275]

In addition to rampant violence caused by cartels and organized criminal groups, the Mexican government is also responsible for extrajudicial killings, poor prison conditions, and the failure to protect vulnerable groups such as children, battered women, and members of the Lesbian Gay Bisexual Transgender and Intersex (LGBTI) community.[276] Furthermore, journalists have been targets of violence and persecution throughout

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268 Jessica L. Semega, et al., United States Census Bureau, Income and Poverty in the United States: 2016 Current Population Report (Sept. 2017), https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf. As discussed below, the poverty rate in El Salvador is 41 percent, in Guatemala is 59 percent, and in Honduras is 66 percent.

269 U.S. Department of State Country Reports on Human Rights Practices are available at: https://www.state.gov/j/drl/rls/hrrpt/. Note that some practitioners have found that the 2017 reports contain less detail than those from previous years. It may therefore be helpful to look at earlier reports as well.

270 Canada: Immigration and Refugee Board of Canada, *Mexico: Criminality, Including Organized Crime; State Response, Including Effectiveness; Protection Available to Victims, Including Witness Protection (2015-July 2017)* (Aug. 21, 2017), http://www.refworld.org/docid/59c117d44.html.

271 U.S. Department of State, Mexico Travel Advisory (Aug. 22, 2018), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

272 *Id.*

273 *Id.*

274 *US Raises Travel Warning to Mexico to Highest Level,* ABC News, Mar. 11, 2018, http://abc13.com/travel/5-mexican-states-get-us-do-not-travel-warning/3201324/.

275 Froylán Enciso, International Crises Group, *Mexico's Worsening War Without a Name* (June 2017), https://www.crisisgroup.org/latin-america-caribbean/mexico/mexicos-worsening-war-without-name.

276 U.S. Department of State, 2017 Country Reports on Human Rights Practices – Mexico, https://www.state.gov/documents/organization/277589.pdf.

Mexico.[277] DACA recipients, some of whom are active in journalism, blogging, and political activism that has captured U.S. media attention, could easily become at risk of harm if forced to return to Mexico.

Education. The educational system in Mexico varies by state. As of 2014, fewer than 50 percent of teenagers from 14 to 19 were enrolled in school.[278] Furthermore, many schools in rural Mexico, particularly in southern Mexico, lack basic necessities such as school supplies, electricity, and accessible roads.[279] In fact, the student to teacher ratio is very high in poorer municipalities where there is only one teacher for several grades. In essence, educational inequality is more the rule than the exception in poorer and indigenous communities.[280]

Health Care. While Mexico currently purports to have universal health care, there are serious gaps in care that have led to inequality of access due to inefficiencies and fragmentations in the system.[281] Areas that are more rural, such as in Oaxaca, Guerrero, and Chiapas, have much lower life expectancy than in the urban areas of Baja California, Nuevo Leon, and the Federal District.[282] These poorer regions have a larger prevalence of preventable diseases, such as heart disease, diabetes, and stroke, and higher mortality rates for those diseases.[283] Of all developed countries, Mexico actually spends the least amount of money on health care, which in turn means fewer health care providers and worse health care delivery.[284]

B. El Salvador

Violence and Human Rights. Threats from transnational criminal organizations are prevalent with El Salvador having hundreds of well-armed gang "cliques."[285] Gang violence has plagued most of the urban centers in El Salvador, and nearly 65 percent of the country's population is considered urban.[286] The violence, in part, stems from a failed truce between two gangs, Barrio 18 and the Mara Salvatrucha (MS) 13.[287] The truce, brokered by the Salvadoran government and the Catholic Church, failed in 2012 and since then violence has taken over the country. [288] As a result, El Salvador has one of the highest murder rates in the world, just behind Honduras and Guatemala.[289] The violence, intimidation, and threats average citizens face take the form of extortion, forced drug trafficking, femicides, rape, and forced gang recruitment.[290] One of the most vulnerable groups is children

277 Committee to Protect Journalists, *No Excuse: Mexico Must Break Cycle of Impunity in Journalists' Murders* (May 12, 2017), https://cpj.org/reports/2017/05/no-excuse-mexico-impunity-journalist-murder.php.

278 Luis Urrieta, *Mexico's Education System Not Up for the Challenge That Energy Reform Brings*, UT News, July 28, 2014, https://news.utexas.edu/2014/07/28/mexico%E2%80%99s-education-system-not-up-for-the-challenge-that-energy-reform-brings.

279 Ana Canedo, *Mexico's Education Reform: What Went Wrong?* Georgetown Public Policy Review (Mar. 10, 2016), http://gppreview.com/2016/03/10/mexicos-education-reform-what-went-wrong/.

280 *Id.*

281 Organisation for Economic Co-operation and Development, *OECD Reviews of Health Systems: Mexico 2016*, (2016), http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/oecd-reviews-of-health-systems-mexico-2016_9789264230491-en#.WjqWg02Wmw#page40.

282 *Id.*

283 *Id.*

284 *Id.*

285 Overseas Security Advisory Council, Department of State, Bureau of Diplomatic Security, El Salvador 2018 Crime & Safety Report (May 11, 2018), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=24052.

286 World Health Organization, Noncommunicable Diseases Country Profiles: El Salvador (2014), http://www.who.int/nmh/countries/slv_en.pdf.

287 Also known as "Calle 18" or 18th Street.

288 InSight Crime, *El Salvador Profile*, https://www.insightcrime.org/el-salvador-organized-crime-news/el-salvador/ (last updated Sept. 15, 2017).

289 *Id.*

290 *Id.*

who are at risk of gang recruitment and extortion.[291] On average, children as young as 12 are recruited by gangs. [292] In addition to the harsh violence perpetrated by the gangs, Salvadoran government entities have been complicit in fueling the gang culture through their corruption.[293] Violence against women and girls (including by gangs), gender discrimination, and commercial sexual exploitation of women and children were all discussed in the 2017 DOS Human Rights report for El Salvador.[294] Furthermore, children have fallen prey to smuggling networks, trafficking, and gang recruitment.[295] Members of the LGBTI community and those living with HIV/AIDS continue to face discrimination and violence.[296]

Poverty. In addition to suffering from rampant violence, the people of El Salvador suffer from poverty, poor nutrition, and limited access to health care and education.[297] According to the World Bank, 31 percent of households lived below the poverty line in 2016, including ten percent that lived below the extreme poverty line.[298] One factor adding to this rising rate of poverty throughout El Salvador is the deteriorating security situation caused by the gang violence.[299] For example, the World Bank states that "crime and violence make doing business more expensive, negatively affect investment decisions and hinder job creation."[300]

Education. In addition to living in poverty, Salvadoran children in particular face obstacles in receiving an education beyond primary school.[301] Only 50 percent of children actually complete ninth grade and only half of those finish high school.[302] A lack of educational opportunities coupled with rampant gang recruitment have kept children out of school.[303] A very compelling hardship argument can be made that U.S. citizen or LPR children who would have to return with their parent or parents to El Salvador would not be able to access specialized education, if they have either a learning disability or were part of a gifted and talented program and require a more advanced educational environment.

Health Care. Lack of available health care has also been a pervasive problem in El Salvador.[304] One of the most significant issues is the lack of trained health care workers.[305] The most common causes of death—most of them preventable—are heart disease, interpersonal violence, diabetes, and lower respiratory infections.[306] Asthma is also extremely prevalent in El Salvador, where approximately 24 to 30 percent of children suffer from the condition.[307] Thus, a non-LPR cancellation applicant with a qualifying relative who suffers from a preventable

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291 United Nations Children's Fund, *Stolen Childhood: Gang Violence in El Salvador* (Nov. 27, 2017), https://www.unicef.org/education/elsalvador_101032.html [hereinafter "Stolen Childhood"].

292 Magally Zelaya, *El Salvador's Gangs Have Something to Say*, Al Jazeera, Sept. 1, 2015, http://america.aljazeera.com/opinions/2015/9/el-salvadors-gangs-have-something-to-say.html.

293 See Stolen Childhood, *supra* note 290.

294 U.S. Department of State, 2017 Country Reports on Human Rights Practices – El Salvador https://www.state.gov/documents/organization/277575.pdf.

295 *Id.*

296 *Id.*

297 World Food Programme, El Salvador, http://www1.wfp.org/countries/el-salvador.

298 The World Bank, The World Bank in El Salvador: Overview, http://www.worldbank.org/en/country/elsalvador/overview (last updated Oct. 5, 2017).

299 *Id.*

300 *Id.*

301 United States Agency for International Development, El Salvador/Education, https://www.usaid.gov/el-salvador/education (last updated Jan. 2, 2018).

302 *Id.*

303 *Id.*

304 World Health Organization, Annex 11: El Salvador, http://www.who.int/workforcealliance/knowledge/resources/MLHWCountryCaseStudies_annex11_ElSalvador.pdf.

305 *Id.*

306 Institute for Health Metrics and Evaluation, El Salvador (2016), http://www.healthdata.org/el-salvador.

307 Dirceu Sole, et al., *Asthma: Epidemiology of Disease Control in Latin America – Short Review*, 3:4 Asthma Research and

disease could likely establish a lack of treatment options in El Salvador.

C. Guatemala

Violence and Human Rights. Guatemala, like El Salvador and Honduras, has been plagued by gang violence.[308] Guatemala has one of the highest violent crime rates and murder rates in the world.[309] For example, a rate above ten intentional homicides per 100,000 people per year is classified as "epidemic," and in Guatemala, homicide rates have reached between 30 and 40 per 100,000 in recent years.[310] The high homicide rate is caused by drug trafficking, illegal guns, gang violence, and weak government entities such as law enforcement.[311] Perpetrators of such violence act with impunity because of the lack of effective policing.[312] Just as in El Salvador, rival gangs—such as the MS 13 and Barrio 18—are the reason for most of the violence.[313] Former and active members of the security forces and police, as well as long-time smugglers, human traffickers, and transnational narco-trafficking organizations also contribute to the violence. In fact, Guatemala has been considered a transit point for drug cartels such as the Zetas, which had effectively taken control of the country until they were rooted out.[314] Since the leveling of the Zetas cartel in Guatemala, other drug smuggling organizations such as the Sinaloa cartel have taken over areas of Guatemala.[315] It is reported that many of these organizations work with the Guatemalan government, which allows them to act with impunity, resulting in little trust in law enforcement and civil society in general.[316] In addition to organized crime, Guatemala continues to have a dismal human rights record. Women, children, indigenous persons, and human rights defenders continue to be targets for violence by society and the Guatemalan government.[317] Likewise, LGBTI Guatemalans and people living with HIV receive few legal protections and regularly face mistreatment.[318]

Poverty. In addition to high rates of murder and violent crime, Guatemala has a high rate of persons living in poverty, with one of the highest inequality rates in Latin America, and 51 percent of its citizens living in

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Practice (May 11, 2017), https://asthmarp.biomedcentral.com/articles/10.1186/s40733-017-0032-3; Erick Forno, et al., *Asthma in Latin America*, 70(9) Thorax 898-905 (June 23, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4593416/ [hereinafter "Asthma Articles"].

308 See Rocio Cara Labrador and Danielle Renwick, Council on Foreign Relations, *Central America's Violent Northern Triangle*, (June 26, 2018), https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle; *see generally* U.S. Department of Justice, EOIR, Republic of Guatemala: Citizenship and Country Documents, https://www.justice.gov/eoir/country/guatemala-contents.

309 United Nations Office on Drugs and Crime (UNODC), *Global Study on Homicide 2013: Trends, Contexts, Data*, 126 (Apr. 10, 2014), https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf [hereinafter "UNODC Global Study on Homicide 2013"].

310 *Id.*

311 Overseas Security Advisory Council, Department of State, Bureau of Diplomatic Security, Guatemala 2017 Crime & Safety Report (Apr. 10, 2017), https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=21628.

312 *Id.*

313 United Nations High Commissioner for Refugees (UNHCR), *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala* (Jan. 2018), HCR/EG/GTM/18/01, http://www.refworld.org/docid/5a5e03e96.html [hereinafter "UNHCR Eligibility Guidelines - Guatemala"].

314 Steven Dudley, InSight Crime, *The Zetas in Guatemala* (Sept. 8, 2011), http://www.insightcrime.org/images/PDFs/2016/InSight_Crime_The_Zetas_in_Guatemala.pdf.

315 UNHCR Eligibility Guidelines - Guatemala, *supra* note 313.

316 InSight Crime, *Guatemala Profile*, https://www.insightcrime.org/guatemala-organized-crime-news/guatemala/# (last updated Nov. 29, 2017).

317 Amnesty International, *Guatemala: Major Human Rights Challenges Still Pending. Amnesty International Submission for the UN Universal Periodic Review, 28th Session of the UPR Working Group, November 2017* (June 28, 2017), http://www.refworld.org/docid/595363f34.html.

318 U.S. Department of State, 2017 Country Reports on Human Rights Practices – Guatemala, https://www.state.gov/documents/organization/277579.pdf.

poverty.[319] In fact, it has some of the worst poverty, malnutrition, and maternal-child mortality rates in the region, especially in rural and indigenous areas. Additionally, the current poverty rate is around 59 percent and over half of those living in poverty are members of Guatemala's indigenous population.[320]

Education. Connected to the high rates of poverty in Guatemala is a very unequal educational system.[321] The current state of the education system has been labeled "substandard," with many classrooms lacking adequate teaching materials.[322] Some of the reasons for this substandard level are the frequent school closures prompted by civil unrest, poor assessment of student performance, advancing students who are not ready for the next grade level, and poor teacher and instructional quality.[323] Furthermore, since most of the population lives in poverty, children feel pressured to drop out of school to support their families or because of lack of funds to continue.[324] There is also a gender disparity among indigenous girls because many are forced to marry at very young ages in rural areas and thus do not attend school.[325] In many poor communities, school fees for tuition, textbooks, uniforms, and supplies easily consume a substantial percentage of a poor family's income and result in high dropout rates from school.[326]

Health Care. The health care system in Guatemala is mostly deficient, especially for the rural poor.[327] For example, almost half of children under five experience stunted growth due to chronic malnutrition.[328] One of the top five killers is diarrhea, which is largely preventable.[329] Guatemala has the second highest rate of maternal mortality in the Americas, behind only Haiti, with 159 deaths per every 100,000 live births.[330] The statistics are far worse for the indigenous population in Guatemala.[331] In the western highlands, where many indigenous people reside, the health care system is hindered by low quality equipment, lack of staff, cost barriers, and failed organizational structure.[332] Aside from lack of access to adequate health care, there are major deficiencies in the organization and management of public sector health care affected by lack of financing and health service delivery.[333] Furthermore, the health system in Guatemala lacks a formal structure; many people rely on precariously funded non-governmental organizations (NGOs) for health care.[334] Non-LPR cancellation applicants from Guatemala who have qualifying relatives with health issues, many that could be prevented, should have reliable evidence that there would be a lack of treatment options for them in Guatemala.

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319 World Bank, Overview of Guatemala, http://www.worldbank.org/en/country/guatemala/overview/ (last updated Oct. 4, 2018).
320 *Id.*
321 The Global Fund, The State of Education in Guatemala, http://www.globaleducationfund.org/guatemala/.
322 *Id.*
323 Council on Hispanic Affairs, I*mproving the Education System in Guatemala Is the Only Answer to Violent Crime* (Feb. 15, 2012), http://www.coha.org/improving-the-education-system-in-guatemala-is-the-only-answer-to-violent-crime/.
324 *Id.*
325 *Id.*
326 *Id.*
327 Colleen Kimmett, *In Guatemala, Shifts in Health Care Strand Communities*, Al Jazeera, Feb. 25, 2016, http://america.aljazeera.com/articles/2016/2/25/in-guatemala-shifts-in-health-care-strand-communities.html.
328 *Id.*
329 *Id.*
330 *Id.*
331 Sunil Bhatt, *Health Care Issues Facing the Maya People of the Guatemalan Highlands: The Current State of Care and Recommendations for Improvement*, Journal of Global Health Perspective (Aug. 1, 2012), http://jglobalhealth.org/article/health-care-issues-facing-the-maya-people-of-the-guatemalan-highlands-the-current-state-of-care-and-recommendations-for-improvement-2/.
332 *Id.*
333 *Id.*
334 *Id.*

D. Honduras

Violence and Human Rights. Honduras is an extremely dangerous country, and currently has the highest homicide rate in the world.[335] As of the date of this practice advisory, the crime rate in Honduras has reached a critical level.[336] In fact since 2014, Honduras has been considered the most violent country in the world that was not at war.[337] At the heart of the violence is gang warfare between the Barrio 18 and the MS 13 gangs. In addition to high violence rates, Honduras is plagued by high impunity levels and large areas where the gangs have complete control and have effectively replaced the government.[338] These gangs use violence such as murder-for-hire, carjacking, extortion, and other street crime.[339] Both the economic (San Pedro Sula) and political (Tegucigalpa) capitals of Honduras suffer from high murder rates.[340] Gangs are also known to control some of the taxi services.[341] In addition to gangs, violent transnational criminal organizations traffic drugs through Honduras and add to the already high level of violence.[342] Gangs have focused their violence against women and children, who also suffer from high rates of domestic violence.[343] In addition to targeting women and children, gangs target members of the LGBTI community.[344]

Poverty. Honduras is the second poorest country in Central America.[345] As of 2017, nearly 65 percent of the population was living in poverty.[346] Furthermore, in rural areas, approximately 20 percent live in extreme poverty, or earn less than $1.90 per day.[347]

Education. Education inequality is also a significant problem in Honduras.[348] Public education in Honduras suffers from high dropout and/or repetition rates, low test scores, insufficient alternative education opportunities, and a highly politicized teachers' union.[349] Furthermore, over ten percent of the population has no access to any education, particularly in the rural areas.[350] The percentages are worse for secondary school with close to 20 percent of the population living without access to education.[351] One of the main reasons why children are not continuing their education is fear of gangs and gang recruitment, which often happens at or near schools.[352]

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335 UNODC Global Study on Homicide 2013, *supra* note 309, at 126.

336 *Id.*

337 Ashley Miller & Harold Trinkunas, InSight Crime, *Why Is Honduras So Violent* (Oct. 19, 2015), https://www.insightcrime.org/news/analysis/why-is-honduras-so-violent/.

338 Overseas Security Advisory Council, Department of State, Bureau of Diplomatic Security, Honduras 2018 Crime & Safety Report (Apr. 3, 2018), https://www.osac.gov/pages/ContentReportDetails.aspx?cid=23798.

339 *Id.*

340 *Id.*

341 *Id.*

342 *Id.*

343 United Nations High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras* (July 27, 2016), HCR/EG/HND/16/03, http://www.refworld.org/docid/579767434.html.

344 *Id.*

345 Central Intelligence Agency, World Factbook, Honduras: Economy, https://www.cia.gov/library/publications/the-world-factbook/geos/ho.html (last updated June 4, 2018).

346 *Id.*

347 The World Bank, The World Bank in Honduras, http://www.worldbank.org/en/country/honduras/overview#1 (last updated Apr. 16, 2018).

348 USAID, Honduras - Education, https://www.usaid.gov/honduras/our-work/education (last updated Nov. 20, 2017).

349 *Id.*

350 Lorena Cotza, *Improving Education Standards in Honduras: A Long Road Ahead,* The Guardian, June 10, 2013, https://www.theguardian.com/global-development-professionals-network/2013/jun/06/education-standards-honduras.

351 *Id.*

352 Marcos González, United Nations Children's Fund, *UNICEF-Supported Study Sheds Light on Gangs in Honduras* (July 2, 2012), https://www.unicef.org/infobycountry/honduras_65204.html.

Health Care. Access to health care is severely hampered by violence.[353] Health care workers fear going into gang-held territories and thus many people do not receive basic services.[354] People succumb to preventable diseases, such as diabetes, influenza, HIV/AIDs, lower respiratory illnesses, and stroke because of lack of health care access.[355]

E. Peru

Violence and Human Rights. While the safety situation in Peru is markedly less dangerous than that of Central America, violent narco-trafficking and Central American gang offshoots control parts of the country.[356] Because Peru has been the largest producer of coca plants in Latin America, Peruvian trafficking groups share their territory with foreign drug trafficking organizations from Colombia and Mexico, and they traffic drugs north to the United States and to Europe.[357] Violent narco-trafficking organizations continue to find routes through Peru, thus increasing violence throughout the country.[358] Peru is also still recovering from devastating floods that occurred in March 2017.[359]

Furthermore, there has been hostility toward women in domestic violence situations and women in general, persons with disabilities, the LGBTI community, and persons living with HIV/AIDS.[360] Women suffer the worst forms of gender violence with ten dying every month and another 20 suffering from attempted femicide.[361]

Education. One of the most significant hurdles for education access in Peru is child labor.[362] School attendance is high (up to 80 percent), but school completion rates for rural and female populations are much lower (less than 50 percent).[363] While nearly 97 percent of children in Peru attend school, about one quarter of children between the ages of 7 and 14 engage in what are considered the worst forms of child labor.[364] Furthermore, the quality of education tends to be lower in the rural areas, especially in the highlands and the Amazon regions.[365]

Health Care. There are serious health care disparities throughout Peru.[366] This inequality is found in impeded

353 Katey Peck, The Center for Strategic and International Studies, Task Force on Women's and Family Health, *The Price of Conflict in Honduras; The Impact of Violence on Health*, http://vision2017.csis.org/violence-and-health-in-honduras/.

354 *Id.*

355 The Borgen Project, *Fighting Common Diseases in Honduras* (Aug. 15, 2017), https://borgenproject.org/common-diseases-in-honduras/.

356 James Bargent, InSight Crime, *Organized Crime Bounces Back in Extortion-Plagued North Peru* (June 17, 2017), https://www.insightcrime.org/news/brief/organized-crime-bounces-back-extortion-plagued-north-peru/.

357 InSight Crime, *Peru Profile*, https://www.insightcrime.org/peru-organized-crime-news/peru/ (last updated Apr. 6, 2018).

358 Leonardo Goi, InSight Crime, *Peru Crime Groups Using "Ant Plan" to Traffic Cocaine: Authorities* (June 7, 2017), https://www.insightcrime.org/news/brief/peru-crime-groups-ant-method-cocaine-authorities/.

359 Around 1,000 schools and 380 health facilities in the northern part of the country were damaged, and many of them have collapsed. *See* United Nations Children's Fund, *Hundreds of Thousands Affected by Devastating Floods in Peru* (Mar. 25, 2017), https://www.unicef.org/infobycountry/peru_95467.html.

360 United States Department of State, Country Reports on Human Rights Practices for 2017 – Peru, https://www.state.gov/documents/organization/277597.pdf.

361 Dan Collyns, *Women in Peru Protest Against Rising Tide of Murder and Sexual Crime*, The Guardian, Aug. 13, 2016, https://www.theguardian.com/global-development/2016/aug/13/women-peru-protest-rising-tide-murder-sexual-crime.

362 United States Department of Labor, 2016 Findings on the Worst Forms of Child Labor – Peru (Sept. 30, 2017), http://www.refworld.org/docid/5a0022420.html.

363 *Id.*

364 *Id.*

365 Milagros Salazar, PERU: Rural Education Reflects Ethnic, Socioeconomic Inequalities, Inter Press Service News Agency, Jan. 31, 2011, http://www.ipsnews.net/2011/01/peru-rural-education-reflects-ethnic-socioeconomic-inequalities/.

366 World Health Organization, Peru, http://www.who.int/workforcealliance/countries/per/en/.

access to health care for the rural poor, especially women. Poor, rural, and indigenous pregnant women in Peru are dying because they cannot access basic health services that other women receive.[367] Additionally, Peru has the worst rates of childhood asthma (over 33 percent) and the highest rates of asthma-related deaths (28 percent) in all of Latin America.[368]

V. CONCLUSION

Non-LPR cancellation is a difficult but viable and valuable path to lawful permanent residence for those who meet the strict eligibility requirements. Generally, DACA recipients will be ideal candidates for non-LPR cancellation. In fact, President Trump said, "[DACA recipients] got brought here at a very young age, they've worked here, they've gone to school here. Some were good students. Some have wonderful jobs. And they're in never-never land because they don't know what's going to happen."[369] Therefore, in the absence of congressional action, continuing federal judicial intervention to protect DACA recipients, or the Trump Administration reinstating DACA,[370] those recipients placed in INA § 240 removal proceedings should consider non-LPR cancellation and should be encouraged to gather and retain documentation that would help them present their non-LPR cancellation claims.

367 Amnesty International, *Peru: Unequal Access to Health Services Costs Poor and Indigenous Women's Lives* (July 9, 2009), https://www.amnesty.org/en/press-releases/2009/07/peru-unequal-access-health-services-costs-poor-and-indigenous-womene28099s-li/.

368 Asthma Articles, *supra* note 307.

369 Katie Reilly, *Here's What President Trump Has Said About DACA in the Past*, Time, Sept. 5, 2017, http://time.com/4927100/donald-trump-daca-past-statements/.

370 Practitioners should note that this practice advisory may not incorporate the current state of the DACA program. Significant events affecting the program may have occurred since the date of publication. Practitioners should check www.uscis.gov and https://www.nilc.org/issues/daca/ for the latest DACA program updates.

The Catholic Legal Immigration Network's commitment to defending the vulnerable

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—more than 330 organizations in 47 states and the District of Columbia—is the largest in the nation.

In response to growing anti-immigrant sentiment and to prepare for policy measures that will hurt immigrant families, CLINIC launched the Defending Vulnerable Populations Project. The project's primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, the Defending Vulnerable Populations Project conducts court skills training for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against retrogressive policy changes; and expands public awareness on issues faced by vulnerable immigrants.

By increasing access to competent, affordable representation, the project's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

The DVP Project offers a variety of written resources including timely practice advisories and guides on removal defense tactics, amicus briefs before the BIA and U.S. courts of appeal, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice pointer on *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), a guide on how to obtain a client's release from immigration detention, amicus briefs on the "serious nonpolitical crime" bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution."

Get free resources to help you defend immigrants at cliniclegal.org/defending-vulnerable-populations!