Chapter 6

Crimes and Removal

As you will recall from the chapter on entry, there were two legal theories - deportation and exclusion - used to turn away aliens who had no right to be in the United States. For aliens who had never really effected an entry, that process was called exclusion. For aliens who had or were deemed to have effected an entry, that process was called deportation. With the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 however, that changed. There is now only one process to "eject" any unwanted alien, and that procedure is called "removal."

This is especially important, because this procedure removes and changes some of the protections that used to exist for deportable and excludable aliens. It also places a higher burden on deportable or excludable aliens to prove why they should be granted relief from removal.

There are a number of reasons why an alien may be removed. For example, he or she may have entered the country illegally. He or she may have not even effected an entry or, he or she may have entered in valid student status or business status or any other non-immigrant status but may have overstayed that status and may be out of status. The alien may have applied for asylum and had that application denied, resulting in the government's wish to have that alien returned to his or her home country.

Or the alien may have committed a crime which is punishable by removal. The thrust of this chapter is to examine the plethora of crimes which are considered removable offenses and to alert you all, as practitioners to the immigration consequences of a criminal conviction.

Obviously, since any individual can be convicted for crimes under local, state, and federal statutes, the immigration law provides for removal for violations of federal as well as state statutes., as well as for petty offenses including misdemeanors. Included in the criminal grounds for removal are:

- Commission of an aggravated felony.
- Firearm offenses.
- Crimes of violence.
- Theft or burglary offenses.
- Child pornography.
- Prostitution.
- Spying, sabotage, or treason.
- Fraud or deceit.
- Alien smuggling.
- Document fraud including alteration or counterfeiting of a passport.
- Vehicle fraud.

•Obstruction of justice.

•An attempt or conspiracy to commit an offense described above

In addition, the law imposes the same stringent removal procedure upon aliens who are guilty of "crimes involving moral turpitude." An alien who is convicted of a crime involving moral turpitude committed within five years (ten years if admitted under INA 245(i)) from the date of entry and for which a sentence of one year or longer may be imposed is deportable. Similarly, an alien who is convicted of multiple criminal convictions not arising out of a single scheme of criminal misconduct is deportable regardless of the length of confinement. Finally, and perhaps the most sweeping removal basis, any alien who is convicted of an aggravated felony at any time after entry is deportable.

Please note that the above issues apply both to non-immigrant aliens as well as permanent resident aliens. Therefore, having a "green card" is not a protection against deportation.

Getting on the DHS' radar: Federal-Local Cooperation

Over the last few years, the USICE has used INA § 287(g) to establish agreements with local law enforcement to enforce immigration law, in effect deputizing local police officers to execute immigration functions. This has given rise to its own unique set of issues and debate on whether law enforcement peace officers, whose primary purpose is to prevent crime is appropriately suited to become immigration agents. The Police Foundation (www.policefoundation.org) issued a detailed report in April 2009 examining the use local police for immigration enforcement: "The Role of Local Police: Striking A Balance between Immigration Enforcement and Civil Liberties."

The DHS policy of entering into these "287(g)" agreements has been widely criticized.

Note: It is important, if you will be practicing criminal defense in the future that you verify that your client is a U.S. Citizen before entering a plea on your client's behalf. If your client is an alien, entering a plea in some instances may be tantamount to destroying everything that your client has worked for. It is also important to note that in the State of Ohio, an alien must be given a warning (ORC § 2943.031 - "Court to advise defendant as to possible deportation, exclusion or denial of naturalization upon guilty or no contest plea") that entering a guilty plea could potentially result in deportation or denial of naturalization prior to the admission of a plea. Failure to do so could cause the plea to be invalidated.

What is a conviction?

INA Section 101(a)(48)

101(a)(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--

101(a)(48)(A)(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

101(a)(48)(A)(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

101(a)(48)(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Important: new case law - Padilla v. Kentucky

In a 7-2 vote, the United States Supreme Court held on March 31, 2010, that aliens who had not received information regarding the immigration consequences of a criminal conviction or had received incorrect information about such consequences could seek to have their prior convictions reopened and vacated. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the court held that the criminal defense counsel had a duty to competently represent a client, and that failure to warn or properly inform the client of the immigration consequences of a criminal conviction or a plea amounted to ineffective assistance of counsel. This would also impact, one would assume, on the advice given by immigration counsel to clients with criminal convictions with regard to filing of applications, waivers, or any other benefits under the immigration laws.

The court went on to further refine that requirement as follows:

1. If the underlying criminal conviction would clearly result in a immigration consequence such as deportation, then the attorney should advise the client as such.

2. If the situation is not clear or the immigration law is too complex on that particular issue, then the criminal attorney should refer the client to an attorney competent in immigration issues to resolve the question.

The rules of professional responsibility of every state as well as the ABA Model Rules of Professional Conduct require that every attorney may be competent in a given area of law before providing advice in that area. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model Rule 1.1.

Padilla update: The Supreme Court heard and decided *Chaidez v. US* as to whether Padilla should be applied retroactively: the Supreme Court decided it should not. Only convictions that became final on or after March 31, 2010 would benefit from the protections afforded by *Padilla*.

***Chaidez v. U.S.*, 133 S.Ct. 1103 (2013)**: In *Chaidez*, the Supreme Court decided that *Padilla* had indeed created a new rule, by requiring that counsel must advise their clients of the immigration consequences of a plea or conviction. The Court held that *Padilla* imposed a new obligation on counsel and thus created a new rule.

- That being said however, *Chaidez* limited *Padilla* to any cases that became final convictions on or after the *Padilla* decision was issued which would be March 31, 2010. Therefore, for those aliens who had immigration consequences arising out of criminal convictions that became final before March 31, 2010, *Padilla* does not apply. They cannot attack the criminal conviction on the basis of ineffective assistance of counsel - at least under the *Padilla-Chaidez* reasoning. If however, their conviction became final after March 31, 2010, they may attack their underlying conviction using *Padilla-Chaidez*.

- Implications and complications of the *Chaidez* decision:

A conviction is typically treated as "final" when either: (1) all available avenues for appeal have been exhausted; or (2) the time for appeal has lapsed and no appeal has been filed. *Chaidez* therefore becomes a last hope for an alien who faces removal especially if the alien can prove that his or her counsel did not provide any advice about the immigration consequences of the conviction, and that the conviction became final after on or after March 31, 2010.

But here's another problem - even if the client is successful in having his or her plea vacated and the conviction overturned, the underlying charges have not been dismissed. It's only the plea or the conviction that was vacated. The alien still stands accused of the crime. The original indictment is still active. The case returns to the prosecutor. Now a criminal defense attorney has to consider what the prosecutor may do in that circumstance - negotiate a lower plea that would not have any immigration consequences or insist on retrying the client on all the initial charges with no plea agreement. Therefore, before filing for relief under *Padilla* and *Chaidez*, or filing any motions with the respective state or local courts, it would be prudent for defense counsel to seek the prosecutor's position on negotiating a new plea for the client.

The Attorney's Duty to the Non-Citizen client

Obviously, there are many criminal attorneys who are not well versed in immigration law and *vice versa.* It would therefore be ineffective assistance of counsel and perhaps even malpractice to give advice on an issue on an issue in which the attorney is not competent. Nevertheless, Justice Stevens, writing for the majority in *Padilla* appears to require attorneys to give advice on immigration consequences when the answer is "clear". However, what appears clear in immigration law can quickly become unclear. Indeed, the Supreme Court recognized that immigration law is a very complex area of the law. Justice Alito's concurring opinion, joined by Chief Justice Roberts provided several illustrative examples of this lack of clarity. For instance, a non-citizen is deportable for either one or two "crimes involving moral turpitude"(CIMT). However, nowhere in the statute is a definition of what constitutes a CIMT. Therefore, the decisions of the immigration judges, the Board of Immigration judges, and the federal circuits are all over the place when it comes to what is a CIMT and what is not. The same is true for definitions of crimes that are aggravated felonies. Adding to these inconsistencies is a glaring error in the Immigration and Nationality Act (INA) which confuses the definitions of exactly what sentences constitute aggravated felonies. Even two experienced immigration attorneys may provide differing opinions on the same set of facts. So what is a non-immigration attorney to do?

It seems advisable that a non-immigration attorney should give his or her client a notice - in

writing, preferably signed by the client acknowledging receipt - that the attorney advises the client to consult with an immigration attorney, and perhaps even referring the client to such an attorney. An even more prudent attorney will advise the client - again, in writing - that the attorney will be seeking the advice of an immigration attorney, and that the client will be responsible for any fees for such expert advice. That way, the attorney is insulated from any claim of ineffective assistance of counsel or even malpractice.

Removal Procedure

Assume that the alien is convicted either in Federal or State Court for a deportable offense or offenses. Most courts now notify the DHS or ICE if an alien is incarcerated or convicted. Depending on the situation, ICE may request the holding facility to continue to hold the alien in custody until he can be transferred to an ICE detention facility. In some instances, the alien would serve out his or her state or federal prison term and then be placed in the holding facility pending deportation. Therefore, criminal aliens are still required to serve their sentence in U.S. prisons before they are deported. Aliens arrested by local police or Sheriff's offices may be detained for upto 48 hours on an ICE detainer even though those aliens may be eligible for bond under normal (non-immigration) circumstances.

The order to show cause is the basic charging document for removal purposes. Attached you will find a sample of an actual "Order to Show Cause." Following the service of the Order to Show Cause, there will be a notice setting the matter for hearing before an immigration Judge. The initial hearing is generally a Pre-Trial-type proceeding where the alien either pleads guilty or pleads not guilty and the matter is then either set for further proceeding or taken under advisement for judgment by the Immigration Judge.

If the alien does not appear for the hearings despite having been properly served, an Order of Deportation can be entered in absentia (in the alien's absence). There are very limited grounds to open an "in absentia" removal order.

Cancellation of Removal

Relief from removal - there are certain, limited exceptions for relief from an order of removal for which an application must be filed before the Immigration Judge. Pursuant to IIRIRA, these exceptions for removal were curtailed somewhat.

I. Under IIRIRA §248, permanent resident aliens may be eligible for "cancellation of removal" if the alien:

1. Has been a permanent resident for at least five years.
2. Has resided in the United States continuously for seven years.
3. Has not been convicted of any aggravated felony.

II. Aliens who are not permanent residents may apply for cancellation of removal if:

1. The alien has been present in the United States for at least ten years.
2. Has been a person of good moral character.
3. Has not been convicted of certain offenses.
4. The removal would result in exceptional and extremely unusual hardship to the alien's permanent resident or citizen spouse, parent or child.

In addition, IIRIRA added a special ground for cancellation of removal for battered spouses and children.

"Stop-Time" Rule

To accrue the requisite time for cancellation of removal is not quite as easy as one would think! The time is counted from the events defined in the statute (entry to the US and acquisition of LPR status), but is broken by certain events - in other words, the clock stops! If the clock stops, the alien stops accruing time for purposes of the law and may not qualify for cancellation of removal.

240A(d) Special rules relating to continuous residence or physical presence.--

> 240A(d)(1) Termination of continuous period.--For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end
>
> > 240A(d)(1)(A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 239(a), or
> >
> > 240A(d)(1)(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 from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.
>
> 240A(d)(2) Treatment of certain breaks in presence.--An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.
>
> 240A(d)(3) Continuity not required because of honorable service in armed forces and presence upon entry into service.--The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who--
>
> > 240A(d)(3)(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and
> >
> > 240A(d)(3)(B) at the time of the alien's enlistment or induction was in the United States.

See case: Pereira v. U.S. - on the inapplicability of the stop-time rule to aliens who were served with an NTA which did not provide a date or place for their initial master hearing before the EOIR (Immigation Court). The BIA has tried to "work around" the Supreme Court by viewing the Pereira decision as applying only to that narrow class of aliens who mirror the facts in Pereira.

Voluntary Departure

An alien may also be permitted by the Attorney General to voluntarily depart the United States within, at maximum, a 120 day period. Aliens who do not leave as required either under

voluntary departure or pursuant to a deportation order are subject to detention and removal.

Illegal Employment

In addition to the criminal offenses discussed above, there are also criminal penalties in the INA related to illegal employment. The INA establishes a procedure where all employers are required to complete certain paperwork for any alien hired on or after November 29, 1986. This provision was made into law under the "Immigration Reform and Control Act" of 1986. Under IRCA, employers must fill out and verify Form I-9 (check out the latest version of the form at http://www.uscis.gov/i-9). Failure to do so, if found to be willful, is subject to criminal and civil penalties. The IIRIRA reduces the criminal burden on employers somewhat by providing for a "good faith exception" for employers who had made a diligent attempt to verify the employment authorization of their new employees.

The Law

As you recall, we reviewed the law relating to exclusion and deportation (removal) in the preceding chapters. Let us review the law in summary fashion once again.

Removable Offenses under the INA

The following is an overview (not an exhaustive or complete list) of the various grounds for removal under federal, state or local criminal statutes as set forth under § 237 of the INA:

- A single crime involving moral turpitude carrying a maximum possible sentence of more than one year and is committed within 5 years of entry to the USA, or two or more crimes of moral turpitude committed at any time after entry regardless of the duration of the sentence. (ie, two petty theft offenses combine to make the alien removable)
- Conviction of an aggravated felony (see INA § 101(a)(43) and discussion below)
- High speed flight from a US-immigration checkpoint
- Failure to register as a sex-offender
- Controlled substance violations - except for a one-time possession of 30 grams or less of marijuana for personal use
- Firearms offenses
- Crimes of Domestic Violence, Stalking, Violation of a Protective order, or Crimes against children
- False claim to US Citizenship or unlawful voters - even voters who registered believing they were US Citizens.
- National security crimes - Espionage, Sabotage or treason; overthrow of the US government; terrorist activities; genocide; crimes against humanity; serious violations of religious freedom; threats against the President; conspiracy against a friendly nation.
- Public charge - an alien who falls on public assistance within five years of legal entry to the United States.

Excludable Offenses

We will now consider the numerous grounds for exclusion of an alien attempting entry to the United States under INA § 212. For most of the grounds of removal, there is a corresponding ground of exclusion. While § 237 is applied to aliens within the USA, to "remove" or deport them from the USA, § 212 is applied to aliens seeking admission or readmission to the USA.

Permanent resident or non-immigrant aliens reentering the USA after a trip abroad may be subject to exclusion if they committed a crime that falls within the exclusionary grounds of INA § 212 (a)(2) which include multiple criminal convictions, prostitution, drug offenses, and human trafficking. The national security and terrorist equivalents of INA § 237 are set forth under INA § 212(c)(3).

Thus, the excludable offenses in INA § 212 include many of the offenses listed in INA § 237 as discussed above and add other grounds for exclusion such as convictions in other countries. In addition, aliens may also be excluded for a variety of other reasons, such as intent to permanently immigrate to the USA, health related grounds, failure to support themselves, or lack of employment opportunities in the USA.

"Aggravated Felonies" under immigration law

INA §101(a)(43), subsections (a)-(u) define what constitutes an aggravated felony under immigration law. Please note that in many of these cases, an aggravated felony under immigration law may not be considered such under a state law. Therefore, even if the conviction is not considered an aggravated felony under state or federal criminal law, it may very well rise to the level of an aggravated felony under federal immigration law. Here are some of the crimes which constitute aggravated felonies under the immigration law:

- Murder, rape or sexual abuse of a minor;
- Illicit trafficking in a controlled substance including a drug trafficking crime;
- Illicit trafficking in firearms or destructive devices or explosive materials;
- Money laundering, or monetary transactions in property derived unlawfully, where the amount exceeds $10,000;
- Explosive materials offense or firearms offenses including under the Internal Revenue code;
- A crime of violence for which the term of imprisonment is at least one-year;
- A theft offense or burglary offense for which the term of imprisonment is at least one-year;
- Ransom;
- Child pornography;
- RICO offenses or gambling;
- Prostitution and human trafficking;
- National security, sabotage or treason, protection of the identity of undercover intelligence agents;
- Fraud or deceit in which the loss to the victim exceeds $10,000 or the revenue loss to the government exceeds $10,000;
- Alien smuggling;
- Reentry to the United States after previously being removed;
- Mutilation or altering of a passport or other such entry or immigration document;
- Failure to appear for service of sentence of a term of five years or more;
- Commercial bribery, counterfeiting, forgery or trafficking in vehicles after altering the VIN numbers for which the term of imprisonment is at least one-year;

- Obstruction of justice, perjury, or subornation of perjury or bribery of a witness for which the term of imprisonment is at least one-year;
- Failure to appear before a court to answer to a felony charge with a minimum two-year sentence;
- Any attempt or conspiracy to commit any offense described as an aggravated felony above.

As you can see, the list of offenses - both aggravated felonies and non-aggravated crimes and misdemeanors - that attract removal is extensive, intricate, and formidable. How does a criminal defense attorney presented with the rare non-citizen client begin to learn all the intricacies and nuances of immigration law and crimes (when even the Supreme Court has acknowledged that "nothing is ever simple with immigration law"?) Indeed, even within the subset of immigration attorneys, the majority choose not to involve themselves in removal defense.

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Since employment verification and workforce employment has become a hot-button issue in recent years, it will also be helpful to be aware of the employment-verification and penalties in the INA.

Sec. 274A Unlawful Employment of Aliens
[8 U.S.C. 1324a]

274A(a) Making employment of unauthorized aliens unlawful.--

274A(a)(1) In general.--It is unlawful for a person or other entity--

274A(a)(1)(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

274A(a)(1)(B)

274A(a)(1)(B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) ***

274A(b) Employment verification system.--The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

274A(b)(1) Attestation after examination of documentation.--

274A(b)(1)(A) In general.--The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining--

274A(b)(1)(A)(i) a document described in subparagraph (B), or

274A(b)(1)(A)(ii) a document described in subparagraph (C) and a document described in subparagraph (D).***

274A(b)(1)(B) Documents establishing both employment authorization and identity.--A document described in this

subparagraph is an individual's–***

274A(b)(1)(c) Documents evidencing employment authorization.--A document described in this subparagraph is an individual's–***

274A(b)(1)(D) Documents establishing identity of individual.--A document described in this subparagraph is an individual's–***

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Explanation of Immigration Court Procedures

-Immigration Court Explained: Part I-
The Court and the NTA

This is part I of a series of three articles on Immigration Court processes that I had initially posted on my website. I am going to try to explain some of the workings of immigration court, the mysteries of the "removal" process and the potential for relief from removal (a fancy term for defending a deportation case).

Let's start by understanding what "Immigration Court" is.

Immigration courts are administrative courts. That is, they are manned by judges who are actually also employees of the United States Department of Justice (as opposed to US Federal Court judges who are employees of the judicial branch under Article 3 of the U.S Constitution). The immigration courts are part of the "executive office for immigration review" and the EOIR is a division of the United States Department of Justice. Decisions of immigration judges on the EOIR can be appealed to the Board of Immigration Appeals. There is only one Board of Immigration Appeals for the entire country, and it is headquartered in Falls Church, Virginia.

As of the time of this writing, there were approximately 246 immigration judges (IJs) stationed at various courts throughout the country. The EOIR courts and their immigration judges are primarily in large metropolitan urban areas. Some larger cities have several judges while smaller cities may have just one or two. In addition, there are also EOIR courts at various federal detention centers, or state or county jails where large numbers of immigrants are detained. For example, there is an EOIR court at the County Jail in York, Pennsylvania and EOIR courts at ICE Detention Centers in Florence (Arizona), Batavia (New York) and Oakdale (Louisiana). These courts are all at detention facilities in order to speed up the processing and removal of detained aliens. There were 14 members and an additional 5 "temporary" members on the BIA as of the time of this writing (May 2014). The Board is allowed to make "single-member" decisions and also summary affirmances of underlying IJ opinions in order to process the huge volume of cases before it. This has resulted in a massive overflow of cases to the Federal appeals system.

So how exactly does an alien end up in the immigration court system?

There are several ways in which an immigrant may face removal proceedings. First of all, the alien may have committed a crime. If that crime, is a removable offense as defined under the immigration statutes, it will place the alien in "removal proceedings". (Please be aware that "removal" is a new name for "deportation and exclusion" that was created by the Immigration Reform Act of 1996. For more on that Act and the extremely harsh laws that were passed in 1996, please see the other articles on my website). Once an alien is convicted of a crime in local, state, or federal court, the court

usually notifies the DHS (Department of Homeland Security) of the alien's conviction. That triggers the issuance of an NTA (" Notice to Appear"-see below) and sometimes the alien's arrest.

The second way in which an alien may be placed in removal proceedings is that his or her application for benefits through the USCIS (United States Citizenship and Immigration Services) may be denied. For example, an alien may file for "adjustment of status" (" Green Card") through his or her United States citizen spouse. Suppose halfway through the marriage, the spouses have a problem and get divorced. Then the US citizen spouse withdraws his or her support for the application. The alien spouse, having no qualifying relationship would obviously have the application for Green Card denied. Thereupon, the alien may be "out of status" and will then be placed in removal proceedings to remove him or her from the United States.

Another way that aliens find themselves in immigration court is related in some fashion to the earlier paragraph. The alien may enter the United States legally, but then may overstay his or her visa or fall out of status, attempt to change statuses illegally, work illegally, or otherwise violate immigration laws. This will also place the alien in removal proceedings.

Asylum seekers also face removal charges in immigration court if their asylum application is denied. In such a case, the asylum applicant would have filed his or her application for asylum with the USCIS, and that application would have been denied. Thereupon, the USCIS would place the applicant in removal proceedings.

Referrals from the naturalization process: Many aliens file for naturalization, even though they may have a criminal record or some other ineligibility . They do so in most cases without seeking the advice of a competent immigration attorney. Even though they may have had a criminal violation many years in the past and even possibly if that violation has bee expunged, there is still an immigration consequence of that criminal violation. What this means is that the USCIS not only denies the naturalization application on the basis of the prior criminal conviction, but then also places the applicant in removal proceedings! Therefore not only is the application denied, now the applicant faces the very real risk of being removed from the USA.

Finally, immigration court proceedings include aliens who have entered the United States illegally, or without inspection and who are subsequently apprehended by the USICE or federal, state or local law enforcement agencies.

Charges in Immigration Court

So now that you understand how a case can end up in immigration court, what happens once the case is on the immigration court docket? Well first, any alien whose case is placed before the EOIR must be served with a "Notice to Appear". The NTA as it is called in short form, is essentially a charging document which makes certain allegations about the alien and ends with a series of paragraphs that attempt to conclude why the alien should be removed from the United States. Therefore, in essence, the NTA has two main parts. The first part is a series of assertions about the alien. The second part is the various allegations under the law that would make the alien removable.

As an example, the first part of the NTA would have paragraphs which read as follows:

- You are a citizen of country "X"
- You were born on "such and such date" at " place"
- You entered the United States on "X" date at "Y" place

- You entered the United States as a immigrant/non immigrant; example: “non immigrant B-1 business visitor” or
- You entered the United States without inspection at an unknown place on an unknown date
- Your stay in the United States was granted until “such and such date”
- You remained in the United States beyond that date without extension or authorization of the USCIS or
- On “X” date you were convicted of the crime of “Y” for which a sentence of one year or more may be imposed. (for aggravated felonies under the INA) or
- On “X” date you were convicted of “Y”, a M-4, for which a sentence of upto 180 days may be imposed; and
- On “X” date you were convicted in ABC court of the offense of “Y”, a M-1, for which a sentence of upto 30 days may be imposed (for 2 or more crimes involving moral turpitude) [note- this is only an example - it is obviously not an exhaustive list of chargeable offenses]

That’s an example of the first part of the NTA. The second part, continuing with that example might read as follows:

“As a result of your conviction in the United States, you are removable from the United States under INA § 101 (a) (43) of the Immigration and Nationality Act, 8 U.S.C. §1101 et seq, as amended”. or

“As a result of the violation of the terms of your status, you are removable from the United States under INA §....”

There-you have it. Most NTAs are fairly straightforward like the one I have described above. However, when cases get complicated or there are issues involving criminal charges, various counts and reasons for removal, then the NTA can get fairly long and complicated as well, listing multiple charges and multiple counts for removal.

Practice Pointer:

Often clients pose a typical question:
Do I need an Immigration Attorney to defend my removal case?

I am going to answer that question with a well known quotation (though couched in more diplomatic terms!) "The man who defends himself has a fool for an attorney".

Rather, I explain to the client:

Removal proceedings are complex issues. Your stay in the USA hangs in the balance. Everything that you have worked for, lived for in the United States- perhaps with a spouse and children and a home a job or a business, are at stake. This is a serious matter, Unless you have nothing to lose you really should consider hiring a qualified and competent attorney to defend you in removal proceedings. This is not my "plug" for hiring an attorney. Rather, this is my honest observation based on many years of immigration court practice. Notice that I also said "qualified and competent" attorney. This is very important. Meet and discuss your case with any prospective attorney or attorneys, get a second opinion or even a third opinion if necessary, and then retain the attorney who you think will best serve you. This is not a time to be fainthearted. You need dedicated, competent, strong, and honest representation.

-Immigration Court Part II-
Master hearing and Individual hearing

In part I of this series, we talked about how a case gets to immigration court and the charging document called the "Notice to Appear"(NTA). Now, we'll continue to explore the basics of immigration court including what to expect at an immigration court hearing, responding to the Notice to Appear, and a discussion of the procedures at the master calendar hearing and the individual hearing for removal cases.

Service and filing of the Notice to Appear

I mention this issue because simply having been served with the NTA by the immigration service or the Department of Homeland Security does not mean that your case is now in the immigration court. For that to happen, the Department of Homeland Security must now also send a copy of the NTA to the immigration court. Once the court receives the NTA and enters it into their system your case is " filed" with the immigration court. I mention this because I have encountered many instances where the Department of Homeland Security ("DHS") may have issued a NTA to an individual, but never filed that NTA with the court. On other occasions, the DHS may have issued the NTA to the alien, and may have also sent a copy to the court. However, due to a backlog of work or administrative convenience, or for some other reason, the immigration court may never have entered the NTA into their system. Therefore, technically the alien is not yet in immigration court proceedings because the court has no record of the alien's case. Therefore, if you sent a letter to the

clerk or you called the clerk's office to inquire about the case, or you tried to obtain case information on the immigration court's case status toll free case system, you would not be able to obtain any information about your case. The telephone system would simply give you a short answer " your case was not found in the system".

Here is another little tid bit of information: for those individuals who have been served with an NTA and want to find out the status of their case with immigration court, etc they can dial the toll free number 1-800-898-7180. Following the series of prompts, they will be asked to enter their "alien number". Upon entering the alien number, the system will give you several choices including the date and time of your next hearing, case status information, case appeal information, and other current information as applicable to that particular case.

Assume though that the case is now filed with the immigration court and that the immigration court has placed the case on its docket. The immigration court will now issue the alien with a notice of the date, place and time of their next immigration court hearing. This first hearing in an immigration case is usually called a "master hearing".

The Master Hearing

The master hearing is the name given to a hearing that is not a trial of the immigration case, but rather is one or more of a series of hearings prior to the actual immigration court trial of the removal case. A case may have just one master hearing prior to the trial (also called the "individual" hearing, explained below), or a case may have a series of master hearings depending on the complexity of the case, or administrative issues encountered with the case.

What happens at the initial master hearing?

At the initial master hearing, the immigration judge will usually ask the alien, or if the alien has representation, ask the alien's attorney a series of questions. These questions typically include the following:

- Alien's name
- Alien's address
- Whether the alien wants the attorney next to him or her to represent the alien in these proceedings
- Whether the alien understands the language of the proceedings or requires a translator
- If the alien requires a translator, in what language would the translation be needed

Depending on whether a translator might be needed and the court cannot provide one at that time, the court may continue the master hearing until such time that a translator can be obtained. Note that the translators are provided by the immigration court. The alien cannot provide the official translator.

(As a practical matter, it may be very useful for the alien to have a friend or relative who is fluent in his or her native language and in English to be present during all immigration court proceedings involving the translator and the alien. This is because the friend or relative can listen to the translation being provided by the official translator, and advise the attorney immediately if the

translations are inaccurate especially on critical facts or issues. The attorney can then object to the translation, make the correction on the record, and then potentially even request that the hearing be continued until a translator who is more competent or accurate can be obtained).

Once these preliminary matters are concluded, the court will the ask the alien how he or she pleads to the charges in the notice to appear. Many times, the alien will have no defense to those charges. For example, if the alien entered illegally, then there is very little doubt that the alien is indeed removable. However, there may be defenses to the removability, as we will discuss in the next article in this series.

However, there may be instances in which the charges in the notice to appear may be defensible. They may be defensible either because the DHS has misstated the facts, or because the facts do not apply to the alien. For example, in a recent case, the DHS argued that the alien was removable because he or she had not appeared for an interview at the USCIS. However, I able to prove that not only had the alien appeared for the interview, but indeed, the benefit requested by the alien had been approved, and the USCIS had also issued a "green card" to the alien! This clearly laid to rest any allegation that the alien had failed to appear for a USCIS interview, and was therefore now out of status and should be removed from the country.

Additionally, there may be legal issues which can be contested as far as the factual allegations in the NTA. Therefore, it would be very wise if an alien did seek competent counsel, to carefully analyze the NTA, and to make the appropriate pleas to the various charges set forth on the NTA. Note that this is a critical aspect of the case, Failure to raise objections and denials at this point and time may later on prejudice that alien if the immigration judge does not permit the alien to change his plea at a later date.

Sadly enough, the initial master hearing is sometimes the final hearing for an alien as well. This is because if the alien admits sufficient facts to allow the court to make a finding of removability, then the court can indeed order removal if the alien has no avenue for possible relief. Alternatively, if the alien admits to facts regarding removabilty and requests voluntary departure, then the court can grant voluntary departure at the initial master hearing as well. In such a case, there will be no need for any future master or individual hearings.

Future master hearings may be set after the initial master hearing if the court requires the parties to perform certain additional administrative issues, or if either the alien's attorney or the DHS attorney requests a future hearing date in order to secure additional documents, prepare evidence, conduct discovery, or await the status of the pending application with the USCIS. In most instances, the immigration judge will grant a continuance if both the alien's attorney and the DHS' attorney agree.

The individual hearing

As stated earlier, the individual hearing is the trial on the DHS' deportation case. This is the opportunity for the DHS to prove that the alien be removed from the USA. The "burden of proof" in removal cases is on the DHS. The DHS must prove that the alien is removable by " clear, convincing, and unequivocal evidence". This is a fairly high standard for the DHS to meet.

On the other hand, if the alien is affirmatively defending his or her removal case, then the burden is on the alien to prove his or her case. For example, the alien may clearly be removable, but may be asserting asylum or cancellation of removal-(these are forms of relief which we will discuss in the next article)-and then the burden shifts from the DHS to the alien to prove that the alien indeed does meet the standard for a grant of asylum or a grant of cancellation of removal, or for some other relief.

The individual hearing is therefore like a trial, with the immigration court requiring submission of exhibits, witness lists, a pretrial statement, or any other motions or discovery prior to the hearing. Likewise, the attorney should be prepared to make opening statements, examine witnesses, produce exhibits, and be prepared to make the case to support their respective client's position. This is why it is important to have an attorney who is well versed in immigration law and is also a skilled litigator who is not afraid to make objections, introduce evidence for the record, and preserve his client's rights, both for the individual hearing as well as for any potential appeal.

Some courts do not have an immigration judge at the court location. Rather, the case is heard by an immigration judge at the remote location usually by tele-video (telephone and video camera connected to a television set) or by speakerphone. In those cases, it may be useful to make an objection to the tele-video hookup on the basis of the fact the evidence cannot be presented appropriately and the judge has no real way to view the demeanor and character of the witness in person. Alternatively, the alien in proceedings may want to incur the additional expense of traveling to the scene of the hearing with his or her attorney in order to have the hearing in person before the immigration judge. This is especially useful in asylum cases, where sometimes it is very hard to have a three way conversation between the judge, the translator, and the witness, in addition to having the attorney for the alien and the attorney for the government cross examining the witness. This three-way conversation is very hard to follow by tele-video hookup.

In conclusion, immigration court is a serious matter. The right of the alien to remain in the United States perhaps with his or her family, loved ones, business, investments, etc hang in the balance. It is critical therefore to have competent legal representation throughout the immigration court stage. Competent representation might cause the DHS to terminate the case voluntarily right at the outset, or at least preserve and protect issues for the alien that can be raised at trial and if necessary brought up again on appeal.

In the next article, we will explore some of the types of relief available to aliens in removal proceedings as well as immigration court strategies and defense procedures.

-IMMIGRATION COURT EXPLAINED: PART III-
Avenues for Relief from Removal

In Parts I and II of this series, we have talked how a case gets to immigration court and subsequently the basics of immigration court including what to expect at an immigration hearing. In Part III of this series, I would like to discuss the avenues for "relief from removal" when your case is in immigration court.

What does relief from removal mean?

Simply put, in layman's terms relief from removal is an application you make to the court to prevent you from being removed (deported) from the USA. For example, the US may have claimed that you have committed a crime which is deportable. Or the government may have claimed that you overstayed your visa. Or, the government may have claimed that you entered with fraudulent documents or without inspection. In all of these cases, there may be some form of relief from removal which may allow you to remain in the United States and potentially petition for permanent residency (green card). In addition, some of these avenues for relief may have to be paired with an application for a waiver. Certain grounds of removability in certain offenses are eligible for waivers, while others are not.

Simply because the scope from removal is so incredibly vast, it is not going to be possible to cover each and every reason for removal and pair that with an analysis of relief from removal for that particular charge. However, the goal of this article is to present you with some of the main avenues under which relief from removal may be available on your particular case. As always, please do consult a qualified, competent immigration attorney in order to determine what the best course of action may be in your particular case.

1. §212(c):

Having said this, let me now get directly to the point and list for you some of the "relief" available under the Immigration Act. Prior to 1996 there was considerably more relief available. However, in 1996, with the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the much used "§ 212 (c)" waiver was abolished. Sadly enough, this waiver was a most useful waiver because it stopped the removal of deserving aliens who had been in the United States for at least seven years or more including those who may have committed certain aggravated felonies! However, we now live in a world where there is no 212 (c) waiver available other than for cases in which the plea was made and the conviction issued prior to the enactment of the IIRIRA.

Therefore, the first avenue of relief from removal is whether you qualify for a § 212 (c) waiver. In order to qualify for such a waiver, your crime must have been committed prior to September 30, 1996. Additionally, you must have pled to this crime rather than have been tried and found guilty by a judge or a jury. Finally, you must have accrued at least seven years of residence in this country (not necessarily in lawful state, but you must show seven years of residence) in order to qualify for a § 212 (c) waiver. Even though the IIRIRA removed the § 212 (c) waiver, the Supreme Court held in *INS v. St.Cyr*, 121 S.Ct. 2271(2001) that the IIRIRA could not do so retroactively. Therefore, criminal pleas prior to September 30, 1996 may still be eligible for § 212 (c) relief.

However, in another interesting development, the Board of Immigration Appeals is attempting to limit the Supreme Court's validation of § 212 (c) relief by claiming that only certain types of offenses are eligible for § 212 (c) relief. These include certain drug offenses or crimes involving moral turpitude. The leading case on this matter is *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). However, in a recent decision, the Supreme Court overturned the BIA and a majority of the circuits, and sided with the minority, holding that for § 212 (c) to apply, there need not be an exactly comparable ground of removal to correspond to a waivable ground of excludability (*Judulang v. Holder*, 131 S.Ct. 2949 (2011).

2. Marriage to a U.S. Citizen:

Another avenue for relief may be marriage to a US citizen. If the alien has entered the United States legally and the alien's only fault has been overstaying or minor criminal offenses, then a genuine marriage to a US citizen may provide the court with the basis to allow the alien to obtain a green card (a process called "adjustment of status").

3. LIFE Act:

Another way to adjust status is by proving the existence of a validly filed application which was filed prior to April 30, 2001. Under the "LIFE Act", an alien who had an application filed on his or her behalf prior to April 30, 2001 may be eligible to claim that application to "grandfather"in a future application for adjustment. Such an application would have had to be filed by either an employer prior to April 30, 2001 or by a US citizen or legal permanent resident spouse, parent or adult son or

daughter. Please note-adult sons or daughters can only file for their parent if the son or daughter is a US citizen. Sons and daughters who are legal permanent residents cannot file for their parents.

In any event, what this all means is that an alien who had a valid application filed on or before April 30, 2001 could subsequently use that application as proof to support a new application for adjustment of status that may be filed before the immigration court. However, please note that asylum applications do not count as a validly filed application for purposes of the LIFE Act adjustment. Only family based or employment based applications will count provided of course the application was filed on or before April 30, 2001. For example, many thousands of "Labor Certification" cases were filed on or before April 30, 2001 in order to give the beneficiary alien the chance to adjust status based on the LIFE Act. Aliens taking advantage of the LIFE Act will have to also file a supplementary adjustment of status application and pay a penalty of $1000.00 per applicant.

4. Waivers for criminal offenses:

Under INA § 212 (h), a waiver may also be available for an alien whose removal would cause extreme and exceptional hardship to a US citizen spouse, parent or child provided that the alien has been in the United States for a minimum of seven years prior to service of the Notice to Appear. The § 212 (i) waiver is also available in cases of fraud or misrepresentation as grounds for removal.

5. Cancellation of removal-for permanent residents:

Legal permanent residents who have been in the United States for at least seven years prior to the service of the Notice to Appear and have not committed an aggravated felony are eligible for cancellation of removal for permanent residence. A removable offense must not have been committed prior to the applicant completing seven years in permanent resident status. Else the "stop-time" rule applies. Cancellation of removal is filed with the immigration court and the hearing will be held at which time the equities of the alien's application for cancellation of removal will be considered. The court will evaluate the application for cancellation based on the one hand the seriousness of the offense and on the other the alien's equities such as family ties in the USA, good moral character, employment, payment of taxes, support from family members and friends from the community, etc. Some of the factors that the court may consider were set forth in the Board of Immigration Appeals case "*Matter of Marin*".

6. Cancellation of removal for non-permanent residents:

In many cases, an alien may be unlawfully present in the United States for many years prior to being apprehended for one reason or another by the USICE. Such aliens may be eligible for cancellation of removal for "non-permanent residence" if they meet the following criteria:

- Must prove unlawful presence in the United States for a minimum of ten years prior to the service of the Notice to Appear.
- Must not have committed certain crimes including aggravated felonies; and
- Must show exceptional and extremely unusual hardship to a US citizen spouse, parent or child.

The third prong is typically the hardest to meet for long-term non-permanent residents. The courts have held in numerous cases that a mere removal from the United States and breaking up of a family is not "exceptional and extremely unusual hardship". Therefore, claiming such a hardship waiver

requires a significant investment in time and resources in developing a strong argument for why the alien merits such a waiver.

7. Asylum/withholding of removal and withholding of removal under the United Nations' Convention Against Torture (CAT):

An asylum application can be filed with the immigration court even if the asylum application has previously been filed with the asylum office and has been denied. Asylum refers to the process whereby an alien can claim refugee status in the United States because an alien has a record of past persecution or a "well founded fear of future persecution" on the basis of the alien's race, religion, nationality, membership in a particular social group, or political opinion. Withholding of removal hinges on the same issues except that the alien's burden of proof is much higher. The alien must show that more likely than not (ie, 50% plus), the alien will be persecuted if returned to his or her home country. Finally, with regard with the "United Nations' Convention Against Torture", the alien must show that there is a strong possibility that he or she will be subject to torture if returned to his or her home country. Absent strong evidence, asylum cases are hard to prove and hard to win. Aliens who assert such claims must try to develop them as much as possible with as much documentation as available including letters from their home country, expert opinions, and other supporting documentation about the general condition in their home countries.

This concludes the examination of the major forms of relief from removal. Please note that this is not an exposition by any means of each and every avenue of relief, only a broad brush of some of the more familiar and more frequently employed applications for relief. Once again, for specific assistance regarding your particular case, please consult a qualified immigration attorney.

8. Federal Appeals:

If the Immigration Court denies your application, then you must appeal to the BIA (Board of Immigration Appeals) within 30 days of the decision. If the BIA agrees with the Immigration Court, you can appeal in some cases to the United States Court of Appeals for the Federal Circuit which has jurisdiction over the case. During the appeal, the USICE cannot deport an alien if the alien has applied for and the Circuit Court has granted a stay of removal.

Emerging Issues:

- Enforcement is a high priority under the current administration
- Reopening administratively closed cases
- Denials of Administrative Closure
- Denials of continuances
- Pressure on IJ's to deliver results quickly. Case completion goals.
- "No Dark Courtrooms"
- Decertifying the Immigration Judge's union
- Significant increase in number of cases chosen by AG to review, reopen, and issue new decision (typically limiting relief to the alien)

Conclusion:

Immigration removal defense is a difficult area - intellectually, procedurally, and emotionally. Especially since the enactment of IIRIRA and subsequent immigration law, the window through which a relief application can be filed has become smaller and smaller. This has made it very difficult for aliens to seek adjustment of status or cancellation of removal. Likewise, it has also posed significant logistical difficulties both to the immigration court, the Board of Immigration Appeals, and the Federal Appeals court, because more and more immigration cases are being appealed due to the unavailability of relief either through the immigration court or the Board of Immigration Appeals. Therefore, my only advise to you as the reader is to seek qualified legal immigration advice in order to prepare and present the best defense or defenses as possible in your case. Please note that you are not limited to just one defense. You may be able to raise multiple defenses, thereby enabling you to qualify for relief from removal through at least one of these avenues.

Cases

Matter of Andazola-Rivas

23 I & N Dec. 319

File A91 431 733 - Phoenix

Decided April 3, 2002

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) The respondent, an unmarried mother, did not establish eligibility for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. §1229b(b) (2000), because she failed to demonstrate that her 6- and 11-year-old United States citizen children will suffer exceptional and extremely unusual hardship upon her removal to Mexico.

(2) The factors considered in assessing the hardship to the respondent's children include the poor economic conditions and diminished educational opportunities in Mexico and the fact that the respondent is unmarried and has no family in that country to assist in their adjustment upon her return.

FOR RESPONDENT: Christopher J. Stender, Esquire, Phoenix, Arizona

FOR THE IMMIGRATION AND NATURALIZATION SERVICE: Barry O'Melinn, Appellate Counsel

BEFORE: Board En Banc: SCIALABBA, Acting Chairman; DUNNE, Vice Chairman; HOLMES,

HURWITZ, FILPPU, COLE, GRANT, MILLER, OHLSON, HESS, and PAULEY, Board Members. Dissenting Opinions: ESPENOZA, Board Member, joined by ROSENBERG, Board Member; OSUNA, Board Member, joined by SCHMIDT, VILLAGELIU, GUENDELSBERGER, ROSENBERG, MOSCATO, and BRENNAN, Board Members.

HURWITZ, Board Member:

In a decision dated March 16, 2000, an Immigration Judge granted the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. §1229b(b) (2000), and certified his decision to us for review. In addition, the Immigration and Naturalization Service filed an appeal from the Immigration Judge's grant of relief. Oral argument was heard before a panel of the Board on June 22, 2001. The Service's appeal will be sustained and the respondent will be granted voluntary departure in lieu of removal.

The parties in this case agree that the respondent has both the continuous physical presence and the good moral character required for cancellation of removal under section 240A(b) of the Act. The only issue on appeal is [page 320] whether her removal from the United States would result in "exceptional and extremely unusual hardship" to her two United States citizen children, which is also required for relief under that section. The Immigration Judge found that the necessary hardship had been shown, but the Service disagrees.

*****

Order:

The appeal of the Immigration and Naturalization Service is sustained.

Further Opinion: The decision of the Immigration Judge is vacated.

Further Opinion: In lieu of an order of removal, the respondent is allowed to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. In the event the respondent fails to so depart, the respondent shall be ordered removed from the United States.

Notice: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the district director, the respondent shall be subject to a civil penalty of not less than $1,000, and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

A softening of the "Exceptional and Extremely Unusual Hardship" standard?

In 2002, in Matter of Recinas, 23 I&N Dec. 467 (BIA 2002), the BIA granted Cancellation to an applicant with four US Citizen children.

In re Ariadna Angelica Gonzalez RECINAS, et al., Respondent
File A75 696 573 - Los Angeles
Decided September 19, 2002
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) The respondent, a single mother who has no immediate family remaining in Mexico, provides the sole support for her six children, and has limited financial resources, established eligibility for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2002), because she demonstrated that her United States citizen children, who are 12, 11, 8, and 5 years old, will suffer exceptional and extremely unusual hardship upon her removal to her native country.

(2) The factors considered in assessing the hardship to the respondent's children include the heavy burden imposed on the respondent to provide the sole financial and familial support for her six children if she is deported to Mexico, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country.

FOR RESPONDENTS: German T. Flores, Esquire, Orem, Utah
BEFORE: Board En Banc: SCIALABBA, Chairman; DUNNE, Vice Chairman; SCHMIDT, HOLMES, HURWITZ, VILLAGELIU, FILPPU, COLE, GUENDELSBERGER, ROSENBERG, GRANT, MOSCATO, MILLER, BRENNAN, ESPENOZA, OSUNA, OHLSON, HESS, and PAULEY, Board Members.
VILLAGELIU, Board Member:

The respondents have appealed from the decision of an Immigration Judge dated December 18, 2000, denying their application for cancellation of removal pursuant to section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2000). The appeal will be sustained.

Problems

It's your first month in practice. You've signed up with the criminal defense counsel appointment service at the local county courthouse. You sit idly at your expensive desk (on lease from an office supply company), drumming your fingers on the wooden desktop, looking intelligent and thoughtful. The phone rings. It's your first criminal appointment! Ignacio Rodriguez was picked up last night on a drug related crime. "Would you represent him", the assignment clerk asks. Seeing next month's rent in the cards, you jump at the opportunity. "Sure", you say. She also says that he speaks only halting English and if you need an interpreter, you will have to make arrangements for one.

Let's walk through this scenario now. What are you, as the attorney, going to do in this case.

Where should you initially turn? What should you be researching? Should you enter a plea? What sort of a plea?

Cancellation of Removal - contrast the Andazola case with the Recinas case. What could you do to better prepare a winning case for your client's cancellation claim?

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

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

File No:
Case No:

In the Matter of:

Respondent: _____ currently residing at:

_____ _____
(Number, street, city state and ZIP code) (Area code and phone number)

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

RECEIVED
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFF OF IMMIG. LITIGATION

The Service alleges that you:

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

2) You are a native of citizen of

3) You were admitted to the United States at BOSTON, MASS. on or about January 22, 1957 as a IMMIGRANT;

4) You were, on convicted in the Common Pleas for the offense of Gross Sexual Imposition, F-3, in violation of 2907.05(A)(4) of the Ohio Revised Code.

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

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act, a law relating to sexual abuse of a minor.

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

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

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: _____
1240 E. 9th Street Room 521A Cleveland OHIO US 44199
(Complete Address of Immigration Court, including Room Number, if any)

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

STEPHEN C. ADAMAY
GROUP SUPERVISOR
Stephen C. Adamay
(Signature and Title of Issuing Officer)

Date: _____

CLEVELAND, OHIO
(City and State)

See reverse for important information

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

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted] - Chicago, IL

Date: NOV 2 5 200

In re: J[redacted] L[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Carpenter, Esquire

ON BEHALF OF DHS: William C. Padish
[redacted] Assistant Chief Counsel [redacted]

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal; voluntary departure

The respondent's appeal of the Immigration Judge's June 14, 2007, decision denying his applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and voluntary departure will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

In his June 14, 2007, decision, the Immigration Judge denied the respondent's application for cancellation of removal under section 240A(b) of the Act based upon his finding that the respondent failed to establish exceptional and extremely unusual hardship to his United States citizen son and/or his United States citizen parents (I.J. at 5-10). The Immigration Judge also denied the respondent's application for voluntary departure finding him statutorily ineligible based upon his testimony that he does not have sufficient funds to procure his own departure from the United States (I.J. at 11). The respondent raises two issues on appeal. First, the respondent contends that the Immigration Judge erred in failing to fully develop the record on the issue of exceptional and extremely unusual hardship where the respondent appeared *pro se*. *See* Respondent's Brief at 8-17. Second, the respondent contends that the Immigration Judge erred in failing to notify him of his eligibility for voluntary departure. *See id.* at 8-12.

The Immigration Judge has a role in introducing evidence into the record. *See Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). Under the Act, the Immigration Judge conducting the proceedings normally determines the removability of an alien, and resolves applications for relief, and shall "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." Section 240(b)(1) of the Act, 8 U.S.C. § 1229a(b)(1). Hence, the Immigration Judge has the duty of developing the record on which the decision must be based. In the present case, we

A[redacted]

find that the record has not been fully developed regarding the potential hardship to the respondent's son, his qualifying relative (Tr. at 37-54). Moreover, we agree that it is the Immigration Judge's duty during the removal proceedings to alert an alien about all the avenues of relief available and that he failed to do so in regard to the respondent's potential eligibility for voluntary departure. *See* section 240B(b)(1) of the Act, 8 U.S.C. § 1229c(b)(1); *see also* 8 C.F.R. § 1240.11(a)(2) (regarding Immigration Judge's duty to inform aliens of avenues of relief available) (2008); *Asani v. INS*, 154 F.3d 719, 727 (7th Cir.1998) (holding that the Immigration Judge must inform alien of rights even where alien is represented by counsel). Therefore, we find it necessary to remand the record for further consideration of the respondent's applications for relief.

Accordingly, the appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

ORDER: The appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

FOR THE BOARD

Board Member Filppu concurs in the remand for voluntary departure issues and would allow the respondent to further develop any "hardship" evidence as to cancellation of removal, as a remand is otherwise warranted.

IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID: Event #:	File No: Date:
TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (Department of Homeland Security Office Address)

MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS

Name of Alien: _____

Date of Birth: _____ Nationality: _____ Sex: _____

THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:

☐ Initiated an investigation to determine whether this person is subject to removal from the United States.

☐ Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____.
(Date)

☐ Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____.
(Date)

☐ Obtained an order of deportation or removal from the United States for this person.

This action does not limit your discretion to make decisions related to this person's custody classification, work, quarter assignments, or other matters. DHS discourages dismissing criminal charges based on the existence of a detainer.

IT IS REQUESTED THAT YOU:

☐ Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency "shall maintain custody of an alien" once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department by calling _____ during business hours or _____ after hours or in an emergency. If you cannot reach a Department Official at these numbers, please contact the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020.

☐ Provide a copy to the subject of this detainer.

☐ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☐ Notify this office in the event of the inmate's death, hospitalization or transfer to another institution.

☐ Consider this request for a detainer operative only upon the subject's conviction.

☐ Cancel the detainer previously placed by this Office on _____.
(Date)

_____ _____
(Name and title of Immigration Officer) (Signature of Immigration Officer)

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to the Department using the envelope enclosed for your convenience or by faxing a copy to _____. You should maintain a copy for your own records so you may track the case and not hold the subject beyond the 48-hour period.

Local Booking or Inmate # _____ Date of latest criminal charge/conviction: _____

Last criminal charge/conviction: _____

Estimated release date: _____

Notice: Once in our custody, the subject of this detainer may be removed from the United States. If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020.

_____ _____
(Name and title of Officer) (Signature of Officer)