Aggravated Felony Bar for LPR cancellation

- Under INA § 240A(a)(3), any applicant convicted of an aggravated felony is ineligible for LPR cancellation of removal
- Burden is on applicant to demonstrate the absence of an aggravated felony conviction. DHS need not raise aggravated felony as a ground of deportability
- If statute is subject to "circumstance-specific" approach, applicant must demonstrate as a factual matter that he/she was not convicted of an aggravated felony—*e.g.*, that loss to the victim(s) did not exceed $10,000 under INA § 101(a)(43)(M)(i)
- If statute is subject to "categorical approach," whether applicant has met burden depends on whether statute is divisible
  - Indivisible—applicant need only demonstrate that it is not categorically an aggravated felony. *Matter of Chairez III*, 26 I&N Dec. 819, 825 (BIA 2016)
  - Divisible—circuit split over whether applicant must demonstrate that conviction was under portion of statute that is *not* an aggravated felony.

Aggravated Felony Bar for LPR cancellation (cont.)

- Circuits with pro-applicant view:
  - *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016)
  - *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008)
  - *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010)
- Circuits with pro-DHS/OIL view:
  - *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011)
  - *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018)
  - *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014)
  - *Pereida v. Barr*, 916 F.3d 1128 (8th Cir. 2019)
  - *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017), *reh'g granted*, 886 F.3d 737 (9th Cir. 2018)
  - *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017)

Aggravated Felony Bar for LPR cancellation (cont.)

- The BIA's own position is unclear.
- In *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), the Board held that applicants bear the burden of establishing that the conviction was under a part of the statute that does not disqualify them from relief
- In *Matter of Chairez III*, 26 I&N Dec. 817 (BIA 2016), the Board purported to leave open the question. *Id*. at 825, n.7 ("[W]e have no present occasion to decide whether an applicant for cancellation of removal can carry his burden of proving the absence of a disqualifying conviction when the statute of conviction is divisible but the record of conviction is inconclusive.").
- In unpublished decisions, the BIA almost always adopts the DHS/OIL view.

Stop-Time Rule for LPR Cancellation

- Applicants must have "resided in the United States continuously for 7 years after having been admitted in any status." INA § 240A(a)(2).
- "[A]ny period of continuous residence … shall be deemed to end … 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)." INA § 240A(d)(1)(B).
- To trigger stop-time rule, offense must
  1. Be "referred to in section 212(a)(2)," and
  2. Render the applicant "inadmissible under section 212(a)(2)" or
  3. Render the applicant "removable under section 237(a)(2)"

Stop-Time Rule for LPR Cancellation (cont.)

- "Referred to in section 212(a)(2)" is the "gatekeeper" provision. But what does it mean?
- *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000), holds that firearm offenses under INA § 237(a)(2)(C) are not "referred to in section 212(a)(2)"
- *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010), holds that a CIMT that qualifies for the petty offense exception is not "referred to in section 212(a)(2)." (Presumably, the same logic would apply to a CIMT that qualifies for the youthful offender exception)

Stop-Time Rule for LPR Cancellation (cont.)

- SCOTUS granted certiorari to resolve split over whether LPRs trigger stop-time rule by committing offenses that do not render them removable under INA § 237(a)(2) but would render them inadmissible under INA § 212(a)(2) if they travelled abroad. Examples:
  - Conviction for single offense involving 30 grams or less of marijuana
  - Conviction for CIMT committed more than 5 years after date of admission
- Case is No. 18-725, *Barton v. Barr*. Will be argued in term starting October 2019
- Circuits taking pro-applicant position:
  - *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018)
- Circuits taking pro-DHS/OIL position:
  - *Heredia v. Sessions,* 865 F.3d 60 (2d Cir. 2017)
  - *Calix v. Lynch*, 784 F.3d 1000 (5th Cir. 2015)
  - *Barton v. U.S. Att'y Gen.*, 904 F.3d 1294 (11th Cir. 2018)

Stop-Time Rule for LPR Cancellation (cont.)

- Stop-time rule is triggered on date of commission of the offense, not date of conviction. *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999)
- Stop-time rule can be triggered by commission of offense even if not listed in the NTA. *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006)
- Applicants cannot start a new 7-year period of residence after committing a crime, *Matter of Mendoza-Sandino*, 22 I&N Dec. 135 (BIA 2000), or by leaving and reentering the country. *Matter of Nelson*, 25 I&N Dec. 410 (BIA 2011)

Criminal Ineligibility for Non-LPR cancellation

- Under INA § 240A(b)(1)(C), any applicant convicted of an "offense under section 212(a)(2), 237(a)(2), or 237(a)(3)" is ineligible for non-LPR cancellation
- What does "offense under" mean? As interpreted by the BIA, it only applies to the "listed generic offense and any corresponding sentencing requirements," but not the general "admission" requirement or any temporal requirement in INA 237(a)(2). *Matter of Ortega-Lopez*, 27 I&N Dec. 382 (BIA 2018); *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010)
- Example: applicant convicted of CIMT punishable by up to one year and receives sentence of less than 180 days. Even though petty offense exception applies, applicant has been convicted of "offense under" INA § 237(a)(2)(A)(i)
- Numerous circuits have deferred to the BIA on this issue. *Hernandez v. Holder*, 783 F.3d 189 (4th Cir. 2015); *Coyomani-Cielo v. Holder*, 758 F.3d 908 (7th Cir. 2014).

Criminal Ineligibility for Non-LPR cancellation (cont.)

- In determining whether an offense falls under INA § 212(a)(2), 237(a)(2), or 237(a)(3), courts apply the categorical approach to the same extent that they would in the removal phase of proceedings
- If statute is divisible, same circuit split discussed in context of LPR cancellation applies to non-LPR cancellation—*i.e.*, whether applicant has burden of showing that conviction was under a part of the statute that is not encompassed within the generic offense

Your client is eligible for LPR Cancellation now how do you win??

Positive factors to be considered include: family ties, long term residency in the US, hardship to the respondent and family, history of employment/armed forces, property or business ties, service to the community, rehabilitation, good moral character

Include country conditions: IJ should consider likelihood of persecution. *Bastanipour v. INS,* 980 F.2d 1129 (7th Cir. 1992)

Existence of minor US citizen is a positive factor. *Matter of Arreguin,* 21 I & N Dec. 38 (BIA 1995)

Balanced with criminal record, nature and circumstances of grounds of removal, and immigration violations

-Can look into circumstances of charge for discretion but "it is impermissible to go behind a record of conviction to reassess

**Do not need to show "unusual or outstanding equities" for a favorable exercise of discretion. *Matter of Sotelo-Sotelo,* 23 I & N Dec. 201 (BIA 2001)

Your client is eligible for Non-LPR Cancellation, is it possible to win??

- Good moral character – the 10 year period is calculated backward from the date on which the application is finally resolved before the IJ or BIA. *Matter of Ortega-Cabrera,* 23 I & N Dec. 793 (BIA 2005)
  - Definition of GMC is defined at INA § 101(f)
  - False claim of US citizenship is not an automatic bar. *Matter of Guardarrama,* 24 I & N Dec. 625 (BIA 2008)
  - Habitual drunkard
    - *Matter of H—,* 6 I&N Dec. 614 (BIA 1955) - he was diagnosed as such by a treating psychiatrist and he repeatedly escaped in-patient case for his alcohol addiction and right after escaping, immediately consumed large quantities of alcohol
    - *Ledezma-Cosina v. Sessions,* 857 F.3d 1042, 1046 (9th Cir. 2017) (*en banc*) – not all alcoholics are habitual drunkards
    - Look to definition of a "habit" - irresistible and involuntary impulse to drink, not merely drinks often
  - Do your taxes – correctly!

Dealing with a bad criminal record

- A long criminal history does not, in itself, preclude a grant of Non LPR Cancellation - *Herminio Robles-Quintano*, A074 351 862 (BIA June 9, 2011)(unpublished); *R-L-R-L-,* AXXX-XXX-540 (BIA Nov. 2, 2018)(unpublished)
  - Good moral character finding upheld even were respondent was convicted of manslaughter in teh second degree. *Matter of Gantus-Bobadilla,* 13 I & N Dec. 777 (BIA 1971).
- Rehabilitation: relevant factors are: lack of commission of additional crimes, attendance at rehabilitation programs, statements of remorse, and letters of good moral character. *Yepes-Prado v. INS,* 10 F.3d 1363 (9th Cir. 1993).
- Cannot conclude that a person is not rehabilitated solely because they refuse to acknowledge guilty. *Guillen-Garcia v. INS,* 999 F.2d 199 (7th Cir. 1993).
- If arguing that client shows remorse/will become rehabilitated after recent arrest then make an actual rehabilitation plan – literally write out a plan with concrete information
  - Important to note that equities that accrue after knowledge of potential deportation are diminished. *Matter of Correa,* 19 I & N Dec. 130 (BIA 1984).
  - Be truthful/sincere but be careful of habitual drunkard finding

Whose hardship matters?

- Must show "exceptional and extremely unusual hardship to LPR/USC parent, spouse, or child
  - A "child" is defined as someone who is under 21 years old and unmarried. Once a child turns 21 or marries they are no longer a qualifying relative. Mendez-Garcia v. Lynch, 840 F.3d 655 (9th Cir. 2016).
  - What about the visa backlog??? Be careful!
  - Step-children and step-parents count as long as married before the child's 18th birthday. *Matter of Portillo-Gutierrez,* 25 I & N Dec. 148 (BIA 2009).
  - Hardship to non-qualifying relative can be considered tangentially. *Matter of Recinas,* 23 I & N Dec. 467 (BIA 2002) (two of the applicants six children were undocumented)

How much hardship is enough?

- Precedent decisions: *Matter of Monreal,* 23 I & N Dec. 56 (BIA 2001); *Matter of Andazola-Rivas,* 23 I & N Dec. 319 (BIA 2002); *Matter of Recinas,* 23 I & N Dec. 467 (BIA 2002)
- Factors relevant in those cases include:
  - Age
  - Health
  - Special needs in school
  - Length of residence in the US
  - Family and community ties in the US
  - Family and community ties in the home country
  - Circumstances in the home country including standard of living, way of life, language spoken, availability of work
  - Alternative methods for immigrating
- Factors should be considered in the aggregate. *Matter of O-J-O,* 21 I & N Dec. 381 (BIA 1996)
- Hardship does not have to be unconscionable. *Figueroa v. Mukasey,* 543 F.3d 487 (9th Cir. 2008).
  - In unpublished decisions, BIA has upheld COR grant where child will suffer psychological harm from separation, is high achieving in school and will not have same opportunities abroad, or where qualifying relative had an abusive childhood

Separation or relocation?

- Some judges force you to chose one so be prepared and speak with the family and decide which is truly going to happen and which is the best strategy?
- Present evidence on both options but if there is a high likelihood that the relative would stay in the US then concentrate more on country conditions affecting the respondent rather than their family member