Federal Bar Association

Immigration Law Section

&

Tahirih Justice Center

Present

PRO BONO IMMIGRATION COURT TRAINING

Protecting Immigrant Women and Girls Fleeing Violence

Friday, October 26, 2018
8:00 a.m. – 4:00 p.m.
Columbus School of Law
The Catholic University of America

Adjustment of Status in Removal Proceedings

Eligibility

- INA § 245(a)
  - Must have been inspected, admitted, or paroled into the U.S. or VAWA self-petitioner.
  - Must be eligible to receive an immigrant visa and be admissible.
  - An immigrant visa must be immediately available.
- If USCIS denies AOS, can renew in immigration court
- Applicant has the burden to show both statutory eligibility and that he/she merits a favorable exercise of discretion
- INA § 245(i)
- INA § 245(k)
- Can apply for any necessary waivers in conjunction with AOS application

Exception to AOS Eligibility Before an IJ

- Arriving Aliens
  - Definition of “arriving alien” – 8 C.F.R. § 1.1(q)
  - Exception where IJ maintains jurisdiction – 8 C.F.R. § 1245.2(a)(1)(ii)
    - May only seek AOS before the IJ if they returned on AP, USCIS denied their AOS, they are placed in proceedings, and they are renewing the previously filed AOS.

Adjustment of Status under §249 (Registry)

- Application is usually filed with USCIS and if denied, renewed before the IJ
- Eligibility criteria:
  - Entry into the U.S. prior to January 1, 1972
  - Continuous residence in the U.S. since that time
  - Good moral character
  - Eligible for citizenship but for the 5-year permanent residence requirement and not inadmissible for participation in terrorist activities, certain criminal and security grounds, or noncitizen smuggling, and
  - No participation in Nazi persecution or genocide

WAIVERS IN REMOVAL PROCEEDINGS

212(i) – Fraud or Misrepresentation Waiver

- Filed in conjunction with an AOS application on Form I-601
- Waives the ground of inadmissibility at INA § 212(a)(6)(C)(i)
- Must show extreme hardship to a USC or LPR spouse or parent (a child is not a qualifying relative)

212(i) Waiver (cont.)

- Extreme hardship factors include:
  - The presence of USC/LPR family ties in the US; the qualifying relative's family ties outside the U.S.; country conditions in the country of relocation and the qualifying relative's ties to that country; the financial impact of departure; significant health conditions, especially when tied to unavailability of suitable medical care in the country of relocation. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 566 (BIA 1999).
  - Applicant must prove extreme hardship if the qualifying relative stays in the U.S. and the applicant departs **or** if the qualifying relative had to accompany the applicant back to the home country
    - No need to argue both prongs, but still helpful to do so.

INA § 212(h) Waiver

May be used to waive the following criminal grounds of inadmissibility:

- CIMT
- A single offense of simple possession of 30 grams or less of marijuana
- Multiple criminal convictions where the aggregate sentence was 5 years or more
- Prostitution
- Diplomats who assert immunity

INA § 212(h) Waiver (cont.)

An immigrant inadmissible for prostitution must show:

- This is the sole ground of inadmissibility;
- Admission would not be contrary to the national welfare, safety, or security; and
- The person has been rehabilitated.

For other grounds of inadmissibility:

- If the criminal activities resulting in the inadmissibility occurred more than 15 years before the date of application, must show admission would not be contrary to the national welfare, safety, or security; the person has been rehabilitated; and merits a favorable exercise of discretion.
- If the criminal activities necessitating the waiver did not occur more than 15 years prior to the application, the applicant must show extreme hardship to his/her USC or LPR spouse, parent, or child.

INA § 212(h) Waiver (cont.)

Other considerations:

- Not available to certain LPRs
  - By statute, the waiver is unavailable if the applicant has previously been admitted to the U.S. as an LPR and since the date of admission has been convicted of an aggravated felony or has not lawfully resided continuously in the U.S. for 7 years immediately preceding the date of initiation of proceedings.
  - This provision only bars applicants who were admitted (i.e., made an entry) as LPRs and may not apply to bar LPRs who gained residency through AOS.
  - This bar does not apply to persons with aggravated felony convictions who seek the waiver in conjunction with an AOS application and who were never LPRs.
- In some circumstances can apply for a stand-alone waiver without an adjustment application

INA § 237(a)(1)(H) Waiver

- Waives removal of immigrants who were inadmissible at the time of entry because of fraud or misrepresentation, whether willful or innocent, in the procurement of a visa, other documentation or admission in the U.S. under INA §212(a)(6)(C)(i)
- Must have a USC or LPR parent, spouse, or child
- Must have been in possession of an immigrant visa or equivalent document and otherwise admissible to the United States at the time of such admission except for the grounds of inadmissibility set forth in INA §212(a)(5)(A) and (7)(A)
- No showing of hardship required

Other Waivers in Removal Proceedings

- 212(k) – not in possession of a labor certification or valid immigrant visa or whose visa was not issued in compliance with the law and who did not know and could not have known by the exercise of reasonable diligence, that he/she was inadmissible at the time of entry
- INA §212(a)(9)(B)(v)—unlawful presence
- INA §209(c)—refugee/asylee adjustment
- INA §212(g)—health-related grounds
- INA §237(a)(1)(E)(iii)—smuggling

Cancellation of Removal in Immigration Court

- Legal Permanent Resident – INA section 240A(a)
- Nonpermanent Resident – INA section 240A(b)
- NACARA

Permanent Resident – 240A(a)

- Lawfully admitted for permanent residence for not less than 5 years
- 7 years continuous residence, admitted in any status
- No aggravated felony convictions

Nonpermanent Resident – INA Section 240A(b)(1)

- 10 years continuous physical presence, immediately preceding the date of the application
- Good moral character during such period
- Not convicted of an offense under 212(a)(2), 237(a)(2), or 237(a)(3)
- Exceptional and extremely unusual hardship to USC or LPR spouse, parent, or child

Continuous Residence/Physical Presence

Stop-time rule – INA section 240A(d)(1)

- Upon service of NTA (Pereira v. Sessions, 585 U.S. __, 138 S.Ct. 2105 (2018))
- Commit an offense referred to in section 212(a)(2) that renders applicant inadmissible under 212(a)(2) or removable under 237(a)(2) or 237(a)(4), whichever is earliest.

Breaks in continuous physical presence – INA section 240A(d)(2)

- Absences in excess of 90 days/ 180 days (aggregate).

Battered Spouse/Child – INA Section 240A(b)(2)

- Battered or subjected to extreme cruelty by USC/LPR spouse or parent.
  - Or, is parent of a child battered or subjected to extreme cruelty by USC/LPR spouse or parent.
  - Or, has been battered or subjected to extreme cruelty by USC/LPR whom applicant intended to marry but bigamous.
- 3 years continuous physical presence immediately preceding date of application.
  - NTA does not stop time; absence okay if connected to battery/cruelty

Battered Spouse/Child – INA Section 240A(b)(2) (cont.)

- Good moral character during such period.
- Not inadmissible under 212(a)(2) or 212(a)(3), not deportable under 237(a)(1)(G), 237(a)(2)-(4).
- No aggravated felony convictions.
- Extreme hardship to applicant, child, or parent.

NACARA Special Rule Cancellation of Removal

- **Guatemalan** – first entry by October 1, 1990 (ABC class member); registered for ABC benefits on or before December 31, 1991; applied for asylum by January 3, 1995; and was not apprehended at time of entry after December 19, 1990.
- **Salvadoran** – first entry by September 19, 1990 (ABC class member); registered for ABC benefits on or before October 31, 1991 (directly or by applying for TPS); applied for asylum by February 16, 1996; and was not apprehended at time of entry after December 19, 1990.

NACARA Special Rule Cancellation of Removal (cont.)

- Guatemalan/Salvadoran -- filed an application for asylum by April 1, 1990.
- Former Soviet bloc national – entered by December 31, 1990; applied for asylum by December 31, 1991.
- Spouse and unmarried children under 21 – at time of grant of cancellation to principal. (If unmarried son/daughter over 21 must have entered by October 1, 1990).

NACARA Special Rule Cancellation of Removal (cont.)

- Applicant not inadmissible or deportable under INA sections -

  212(a)(2), 212(a)(3)

  237(a)(2), 237(a)(3), 237(a)(4)

  and, not described under INA 241(b)(3)(B)(i).

- 7 years continuous physical presence immediately preceding the date of the application.
- Good moral character during such period.
- Extreme hardship to applicant or USC/LPR spouse, parent, or child.

NACARA Special Rule Cancellation of Removal (cont.)

- Applicant is inadmissible or deportable under INA sections-

212(a)(2), 237(a)(2) (other than 237(a)(2)(A)(iii)), or 237(a)(3)

and, not described under INA 241(b)(3)(B)(i) or 101(a)(43).

- 10 years continuous physical presence immediately following the commission of an act or assumption of status constituting a ground of removal.
- Good moral character during such period.
- Exceptional and extremely unusual hardship to applicant or USC/LPR spouse, parent or child.

What do you do with Immigration Court proceedings when your client's relief is premised upon a "collateral" matter pending before U.S. Citizenship and Immigration Services (USCIS)?

- Visa petitions - I-130s / I-140s
- Special Immigration Juvenile Status (SIJS) – I-360s
- Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA)
- U-visas
- Provisional waivers of unlawful presence – I-601As

Motions to Continue

- *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018)
  - Standard:
    - "good cause shown"
  - Primary factor to be consider by the IJ:
    - The "likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings"
  - Other relevant factors:
    - Diligence in seeking collateral relief
    - DHS's position
    - Administrative efficiency
    - Length of requested continuance
    - Number of hearings held and continuances granted
    - Timing of the continuance request

Administrative Closure

- Admin closure is a docket management tool used by IJs and the BIA for decades
  - Collateral relief
  - Prosecutorial discretion
  - Provisional waivers of unlawful presence (I-601A)
  - Competency
- *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018)
  - IJs and the BIA have no inherent authority to admin close cases
  - IJs and the BIA may only admin close where expressly authorized by regulation of judicially approved settlement
    - For a full list and discussion of which clients may still benefit from admin closure post-*Castro-Tum* see American Immigration Counsel's Practice advisory:
      - *https://americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf*

Termination and Dismissal of Proceedings

- Previously, IJs and the BIA would frequently "terminate" proceedings in cases where, i.e.:
  - Visa petition approved, and client is eligible to adjust status
  - Client is pursuing a provisional waiver of unlawful presence
- *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018)
  - IJs and the BIA have no inherent authority to terminate or dismiss cases
  - IJs may only dismiss or terminate cases where expressly authorized by regulation or where DHS fails to meet its burden of establishing removability by clear and convincing evidence
  - Termination:
    - For a pending natz application where client has established *prima facie* eligibility and "exceptional appealing or humanitarian factors" or
    - Where DHS has failed to meet its burden of establishing removability
  - Dismissal
    - Only upon DHS motion where NTA was improvidently issued or
    - Where circumstances of the case have changed

Continue? Admin Close? Terminate?

- Visa petitions - I-130s / I-140s?
- Special Immigration Juvenile Status (SIJS) – I-360s?
- Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA)?
- U-visas?
- Provisional waivers of unlawful presence – I-601As?

When all else fails: Voluntary Departure

- VD is a form of “relief” from removal – it does not result in a removal order, unless the client does not depart during the VD period
- Pre-conclusion VD
  - Eligibility (discretionary)
    - Client has the means and intent to depart on his/her own
    - Client is not removable under 237(a)(2)(A)(iii) (aggravated felony)
    - Client is not removable under 237(a)(4)(B) (terrorist)
    - 120 days max

Voluntary Departure (cont.)

- Post-conclusion VD
  - Eligibility (discretionary)
    - Client has the means and intent to depart on his/her own
    - Client has been physically present in the United States for a period of at least one year immediately preceding the date of the NTA
    - Client is, and has been, a person of good moral character for at least 5 years
    - Client is not removable under 237(a)(2)(A)(iii) (aggravated felony)
    - Client is not removable under 237(a)(4)(B) (terrorist)
    - 60 days max