CHAPTER SIX

OVERVIEW OF REMOVAL PROCEEDINGS AND DEFENSES TO REMOVAL

I. OVERVIEW OF REMOVAL PROCEEDINGS

A removal proceeding is an immigration court hearing to decide whether a noncitizen will be expelled from the United States. Any person who is not a citizen of the United States, whether without authorization to be present or with legal residency (LPR) status, may be removed if he or she falls within one of the grounds of inadmissibility or deportability found in the Immigration and Nationality Act at INA §§212 and 237. Removal proceedings under INA § 240 begin with the issuance of a document that charges the noncitizen with acts or conduct that violates the immigration law. (*See below)* An individual who was never lawfully admitted to the U. S. is subject to removal based on a charge or charges of inadmissibility, and a person who was lawfully admitted is subject to removal based on a charge of deportability.

> ***Example:*** *Craig, an LPR from Norway, was convicted of selling drugs. In removal proceedings, Craig will be charged with a crime-based ground of deportability.*
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> ***Example:*** *Craig's brother Peter, also from Norway, entered the U.S. from Canada by hiding in the back of a car. Peter was also convicted of selling drugs. In removal proceedings, Peter will be charged with a crime -based ground of inadmissibility as well as for being inadmissible for being present without admission.*

In all immigration court proceedings, the immigration judge must first determine whether the charges may be upheld, i.e. whether the noncitizen is inadmissible or deportable as charged. In some cases, the charges may be successfully contested, and then the immigration judge will terminate proceedings. Where the charge of inadmissibility or deportability is upheld, the noncitizen may then be eligible to seek a remedy in immigration court to avoid removal. Some of the possible remedies that may be sought in immigration court are reviewed at the end of this chapter.

The noncitizen placed in removal proceedings is called the "respondent." The Fifth Amendment of the Constitution guarantees individuals in removal proceedings the right to due process and the opportunity for a full and fair hearing.

In addition to the removal proceedings before an immigration judge under INA § 240, there are circumstances where an order of removal is issued by other government officials. Expedited removal is a process that permits DHS to order certain arriving noncitizens removed without a hearing before the immigration judge. Individuals subject to expedited removal are those who attempt to enter the U.S. with no documents or false documents. (*See below)*

This structure of removal proceedings, and expedited removal proceedings, commenced on April 1, 1997. Prior to that date, immigration court proceedings were referred to as "deportation proceedings" or "exclusion proceedings," depending on whether the individual was charged with a ground of deportability or inadmissibility. The old deportation and exclusion law and procedures continue to exist for noncitizens whose proceedings began prior to April 1, 1997.

II. REMOVAL PROCEEDINGS UNDER SECTION 240

A. NOTICE TO APPEAR

Removal proceedings under INA § 240 are initiated by a charging document called a Notice to Appear (NTA). A sample NTA is found at the appendix to this chapter. The NTA cites the reason DHS believes the person is deportable or inadmissible, and the section of the law the person is charged with violating. The NTA also specifies the time and place of the hearing and the consequences of failing to appear, including the entry of an in absentia removal order. For deportation proceedings commenced before April 1, 1997, the charging document is known as the Order to Show Cause (OSC). A sample OSC is also found at the appendix to this chapter.

B. BURDEN OF PROOF

If charged with a ground of inadmissibility, the noncitizen will bear the burden of proof by showing "clearly and beyond doubt" that he or she is entitled to admission. If an noncitizen is charged with a ground of deportability, the burden of proof remains on DHS to show by "clear and convincing" evidence that the noncitizen is deportable.

C. REPRESENTATION BY COUNSEL/LEGAL SERVICES LISTS

Respondents in proceedings have a right to counsel at their own expense, and they must be given an adequate opportunity to obtain counsel. INA § 239(a). Respondents must also be given a list of available legal services, and these lists are to be updated quarterly.

D. BOND HEARINGS

Some noncitizens in removal proceedings will be released on bond or never taken into custody; others, including noncitizens in summary removal proceedings and many noncitizens convicted of a crime, are not eligible for a bond. Where a bond is set, the minimum amount is now $1,500. Bond reduction may be sought in a bond redetermination hearing before the immigration judge. These hearings are informal and evidence is frequently presented through argument by the legal representatives rather than by direct testimony.

E. VIDEO/TELEPHONIC HEARINGS

The law now allows removal proceedings to go forward by video or telephonic conference. Consent of the noncitizen is needed to proceed by telephone. The noncitizen must be advised of his or her alternative "right to proceed in person or through video conference."

F. IN ABSENTIA ORDER

An immigration judge may uphold the charges against an noncitizen and order the noncitizen removed from the United States when the noncitizen does not appear at his or her scheduled hearing. This is known as an "in absentia" order. There are strict limitations on reopening such an order; unless the individual failed to appear because there was no proper notice of the hearing or the individual was in custody, the in absentia order can only be reopened if the failure to appear was based on "exceptional circumstances," such as serious illness or death of an immediate family member. A motion to reopen an in absentia order based on exceptional circumstances must be filed within 180 days of the order.

> **Practice tip:** Whenever you see someone with an NTA, it is very important to immediately determine where and when the next court date is taking place, to avoid an in absentia order. You can easily check this information by calling the automated EOIR Information line at (800) 898-7180. You will need the noncitizen's A number in order to use this information line.

III. EXPEDITED REMOVAL UNDER SECTION 235(b)

A. "ARRIVING ALIENS"

"Arriving aliens"[1] who attempt to enter the United States with false documents or no documents, are subject to summary procedures. Initially, this type of proceeding only applied to noncitizens arriving at ports of entry who were seeking admission or transit through the U.S. or who are interdicted at sea and brought to the U.S., including noncitizens paroled upon such arrival. Now expedited removal can also be applied to two groups of individuals encountered within the United States: (1) individuals who arrived by sea and were encountered within two years, and (2) individuals who are encountered within 100 miles of an international land border and within 14 days of entering the country. For the present, the DHS has decided not to invoke the expedited removal process for persons who entered without admission.

B. CREDIBLE FEAR

If an noncitizen subject to expedited removal indicates a wish to apply for asylum, or expresses a fear of persecution, he or she must be referred to an asylum officer for an interview. Consultation with counsel is limited to consultations that will not unduly delay the process. An noncitizen found to have a credible fear – that is, who can show that there is a significant possibility that he or she could satisfy the qualifications for asylum – shall be detained for further consideration of his or her claim in removal proceedings under INA § 240. The asylum officer is to keep a written record of the interview.

If it is determined that the noncitizen does not meet the credible fear standard, this may be reviewed, either in person or telephonically, by an immigration judge. Such review shall take place within seven days, and the noncitizen must be detained during the process.

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[1] INA § 101(a)(13). "Arriving aliens" generally include noncitizens who attempted an entry at a port-of-entry but were not admitted, and those who were interdicted at sea.

IV. OVERVIEW OF DEFENSES TO REMOVAL

A. SUSPENSION OF DEPORTATION AND CANCELLATION OF REMOVAL

1. Suspension of Deportation

Suspension of deportation is statutory remedy that permits an immigration judge to grant discretionary relief from deportation to any noncitizen in deportation proceedings who can meet certain eligibility requirements. Following the grant of suspension of deportation, the noncitizen becomes a LPR.

In order to be eligible for suspension of deportation, the noncitizen must be in deportation proceedings initiated prior to April 1, 1997 and satisfy the following requirements:

- Continuous physical presence in U.S. for not less than seven years (note that physical presence is cut off by service of the Order to Show Cause, except for certain NACARA applicants);
- Good moral character for seven years;
- Extreme hardship to applicant, or to his LPR or U.S. citizen spouse, parent, or child; and
- Deserving of the favorable exercise of discretion.

Hardship is often the most difficult element to establish in a suspension case. Generally, extreme hardship to the applicant's spouse, child or parent is the basis for the grant of suspension of deportation. However, one BIA decision found hardship based solely on the suffering that noncitizen himself would experience was sufficient. *Matter of O-J-0*, 21 I&N Dec. 381 (BIA 1996). The BIA case, *Matter of Anderson*, set forth the primary factors that should be evaluating in determining whether hardship exists. *Matter of Anderson*, 16 I&N Dec 596 (BIA 1978). Hardship should be assessed by looking at the following factors as well:

- Family ties and community ties in the U.S.;
- Social adjustment in the U.S.;
- Health-related issues - including psychological and physical problems;
- Age both at the time of entry and at the time of relief;
- Economic and political conditions in the individual's home country - including quality of life factors;
- Ability to raise children if family members not available to help;
- Educational opportunities for children and applicant;
- Separation from family members, especially in single-parent situations;
- Separation from family members when qualifying family member ill or elderly;
- Length of time in the U.S.;
- Financial situation, including business or occupation and economic hardship (generally not sufficient by itself, but severe economic hardship may constitute extreme hardship).

2. Cancellation of Removal for Non-LPRs, INA § 240A(b)

The post-IIRIRA replacement for suspension is called cancellation of removal. Like suspension of deportation, a grant of cancellation of removal results in the termination of removal proceedings and awarding of LPR status. However, the availability of and eligibility requirements for cancellation of removal are much more restrictive than suspension of deportation in several ways. Cancellation of removal for non-LPRs requires:

- Ten years of physical presence immediately preceding the application. Note that physical presence is cut off by service of a Notice to Appear;
- Good moral character during the ten-year period;
- Exceptional and extremely unusual hardship to a U.S. citizen or LPR spouse, parent or child. Hardship to the noncitizen applicant is not relevant in an application for cancellation of removal and may not be considered;
- No conviction for an offense that would make the applicant inadmissible or deportable; and
- Deserving of a favorable exercise of discretion.

The hardship requirement for cancellation of removal is significantly more restrictive than that for suspension of deportation. Instead of extreme hardship, the noncitizen must establish exceptional extremely unusual hardship to the qualifying relative. Interpreting this standard of hardship, the BIA found that an applicant who had lived in the United States for 20 years, had three U.S. citizen children, two of whom were ages 12, and 8, and parents and seven siblings who were LPRs, was unable to establish exceptional and unusual hardship. *See Matter of Monreal*,23 I&N Dec. 56 (BIA 2001).

There is also a numerical cap on the number of non-NACARA suspension and cancellation applications which can be granted each fiscal year (4,000). USCIS is supposed to carefully track these cases because the numbers granted are to be offset against diversity visas and the other worker category (EW3) of immigrants. Immigration judges have been instructed to make only conditional grants of non-NACARA suspension/cancellation cases due to the need to track these numbers. 8 CFR § 240.21(a).

3. Cancellation of Removal for LPRs, INA 240A(a)

The remedy of cancellation of removal for LPRs is also a successor remedy to a pre-IIRIRA form of relief referred to as a 212(c) waiver. Like cancellation for non-LPRs, this form of cancellation for LPRs is also more restrictive than its predecessor remedy in several ways. To be eligible, the LPR must show that he or she:

- Has been an LPR for not less than five years
- Has resided continuously in the U.S. for seven years after having been admitted in any status
- Has not been convicted of an aggravated felony
- Warrants relief as a matter of discretion.

Unlike suspension and cancellation for non-LPRs, neither a showing of hardship nor a United States citizen or LPR qualifying relative is necessary to qualify for this form of relief. However, on the negative side, the very broad range of offenses that fall within the aggravated felony definition, prevent many LPRs from eligibility for this remedy. Even if an applicant is eligible for cancellation of removal, he or she still must convince the immigration judge that he or she merits the relief in the exercise of discretion.

4. Cancellation for Abused Spouses and/or Children

There is a cancellation provision for abused spouses/children of LPR/USCs that only requires three years of physical presence. It also requires good moral character and extreme hardship. INA § 240A(b)(2). This remedy is also described in Chapter 5.

B. NACARA SUSPENSION AND CANCELLATION

The Nicaraguan and Central American Relief Act (NACARA), enacted in December 1997, provides several forms of relief for specific nationalities.. One section of the law provides for adjustment of status for Nicaraguans and Cubans who were continuously present in the U.S. since December 1, 1995. The application period for this relief ended on April 1, 2000. A second provision of the law provides certain Salvadoran, Guatemalan and Eastern Europeans with the opportunity to file for suspension of deportation and cancellation of removal under relaxed rules.

1. Who is Eligible for NACARA Suspension or Cancellation

In order to qualify for NACARA, the person must satisfy the following requirements:

- Guatemalan nationals who first entered the U.S. on or before October 1, 1990 who were not apprehended at the time of entry by INS after December 19, 1990 and either registered for benefits under the *American Baptist Churches v. Thornburgh (ABC)* case before December 31, 1991 or applied for asylum on or before April 1, 1990, or applied for asylum on or before January 3, 1995.

- Salvadoran nationals who first entered the U.S. on or before September 19, 1990 who were not apprehended at the time of entry by INS after December 19, 1990 and either registered for benefits under the *ABC* case before October 31, 1991, applied for TPS on or before October 31, or applied for asylum on or before October 31, 1991, or applied for asylum on or before February 16, 1996.

- Nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czech Republic, Slovokia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia who entered the U.S. on or before December 31, 1990 and applied for asylum on or before December 31, 1990 and applied for asylum before December 31, 1991.

Derivatives of the groups listed above are eligible to apply for NACARA once the principal is granted relief if they are the spouse or child of the principal noncitizen at the time the decision granting suspension/cancellation is made. Unmarried sons or daughters aged 21 or older

at the time of the grant of suspension/cancellation are eligible for relief if they entered the U.S. on or before October 1, 1990.

Eligibility requirements for NACARA include:

- Seven years of continuous physical presence preceding the date of their application (continuous presence is broken by one absence in excess of 90 days, or absences that aggregate to more than 180 days);
- Good moral character during the seven year period;
- Establish that the removal would result in extreme hardship to the noncitizen or to the noncitizen's spouse, parent, or child, who is a citizen of the U.S. or an LPR. Hardship is presumed in the case of Salvadorans and Guatemalans principal applicants
- The DHS may rebut this presumption of hardship provided it can show with clear and convincing evidence that the presumption should not apply.

Aggravated felons are not eligible for NACARA relief.

C. ADJUSTMENT OF STATUS

Noncitizens in removal proceedings may obtain or re-obtain lawful residency by asserting the defense of adjustment of status in removal proceedings. The eligibility requirements are the same as those for adjustment applicants before USCIS. If noncitizen is in removal proceedings and there is no final order from the court, an application can be made to the immigration judge for adjustment. Adjustment is not available in removal proceedings for arriving noncitizens. If there is a final order of removal, a motion to reopen can be made, but the motion will have to comply with the time and number limitations for motions to reopen unless it comes within one of the exceptions allowed. The exceptions are narrow, and include motions that are stipulated to by the DHS.

Eligibility for adjustment may be under INA § 245, on the basis of an approved family or employment-based visa petition, a self-petition under the Violence Against Women Act (VAWA); by applicants for special immigrant juvenile status; and by T and U nonimmigrants seeking to adjust status. Eligibility for adjustment also may be based on refugee and asylee status.

In some situations, although a noncitizen may be eligible to adjustment status before the immigration court, it might be preferable to proceed with adjustment of status before USCIS. In other situations, a noncitizen is only eligible to adjust status before the immigration court or before USCIS. If it is possible to terminate removal proceedings to apply for adjustment before USCIS, a request for termination to proceed with adjustment before USCIS should be made to the immigration judge.

D. VOLUNTARY DEPARTURE

Voluntary departure is a form of relief that allows noncitizens to return voluntarily at their own expense to their home country. The advantage to obtaining voluntary departure is that the

noncitizen would not be subject to the grounds of inadmissibility based on an order of removal. However if the noncitizen obtains voluntary departure and does not depart the United States, he or she is barred for ten years from adjustment of status and many other immigration benefits.

The requirements to qualify for voluntary departure if immigration proceedings were commenced after April 1, 1997 include:

1. Before or at Master Calendar Hearing

An Immigration judge (IJ) may grant a maximum of 120 days voluntary departure before the completion of removal proceedings. The IJ may require a bond of $500 or more. To qualify a respondent must:

- Make a request for voluntary departure at the master calendar hearing;
- Make no additional requests for relief;
- Concede removability; and
- Waive appeal.

2. Voluntary Departure at Conclusion of Merits Hearing

The IJ may only grant a maximum of 60 days voluntary departure at the conclusion of removal proceedings, and only if the applicant satisfies these requirements:

- Has been physically present in the U.S. for at least one year preceding service of the Notice to Appear;
- Has been a person of good moral character for five years;
- Has established that he has the means and intent to depart the U.S.

The IJ must require the noncitizen to post a bond of $500 or more to guarantee departure. The regulations require that the noncitizen present a valid travel document in proceedings as well to qualify, unless the receiving country does not require it, or the DHS already has it.

If a travel document is not immediately available to the noncitizen, the IJ may grant up to 120 days of voluntary departure subject to the condition that the noncitizen secure the document and present it to DHS within 60 days.

E. TEMPORARY PROTECTED STATUS

This remedy was created in 1990 to provide temporary relief for people from countries suffering from natural disasters, e.g., Hurricane Mitch in Central America, or war and violent conflicts, e.g., the civil war in Somalia. TPS is discussed in more detail in Chapter 7.

F. ASYLUM/WITHHOLDING OF REMOVAL

For noncitizens fleeing persecution, asylum and withholding are available as forms of relief in removal proceedings. See INA § 208(a) (asylum); INA § 241(b)(3)(A) (withholding); 8

CFR §§ 208, 235.3(b)(4), 240.11(c). Asylum is covered in this manual in more detail in Chapter Seven.