NON-LPR CANCELLATION OF REMOVAL

An Overview of Eligibility for Immigration Practitioners

I. Introduction

Cancellation of removal for Non Permanent Residents under INA § 240A(b)(1) ("non-LPR cancellation of removal") is a critical defense to deportation available to certain noncitizens with family in the United States. A person who is granted non-LPR cancellation of removal receives a green card. Cancellation is a "defensive" application, meaning that it is only available to someone facing removal in immigration court. This means that, unlike many other applications for a green card, or lawful permanent residence, a person cannot apply for cancellation of removal by affirmatively submitting an application to the U.S. Citizenship and Immigration Services (USCIS).

The eligibility requirements for non-LPR cancellation are distinct from other means of applying for a green card, and also from other types of cancellation of removal. It is imperative for immigration practitioners to be familiar with non-LPR cancellation, as it may be the only form of immigration relief available for many people in removal proceedings who entered the United States without inspection. This practice advisory will walk through the basic requirements to help practitioners screen for cancellation eligibility. The law is complicated, however; and by definition, all cancellation applicants are in removal proceedings, so the stakes are high. For a thorough analysis of cancellation of removal, see ILRC, *Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal*.

II. Cancellation of Removal Requirements

A person qualifies for non-LPR cancellation of removal if she is in removal proceedings because she is inadmissible or deportable and meets the following criteria. Each of these requirements will be discussed in more detail below:

1. she has been physically present in the United States continuously for at least ten years;
2. she has had good moral character for ten years;
3. she has not been convicted of certain offenses [crimes listed in INA sections 212(a)(2), 237(a)(2), or 237(a)(3)];
4. to deport her would cause exceptional and extremely unusual hardship to her LPR or U.S. citizen spouse, child, or parent.[1]

[1] INA § 240A(b)(1).

Under INA § 240A(c), non-LPR cancellation of removal is not available to the following people:

a. people who already have received cancellation of removal, suspension of deportation, or INA § 212(c) relief;[2]
b. people who persecuted others, or are inadmissible or deportable under the anti-terrorist grounds; and
c. crewmen who entered after June 30, 1964, and certain "J" visa exchange visitors.

WARNING! It Is Risky to Place Your Client in Removal Proceedings in Order to Apply for Cancellation of Removal. It can be difficult to win a non-LPR cancellation case, especially because of the *"exceptional and extremely unusual"* hardship requirement. Practitioners should not take steps to place their clients in removal proceedings in order to apply for non-LPR cancellation—except in extremely strong cases. For the most part, practitioners should pursue cancellation of removal cases only when their clients are *already* in removal proceedings.

A. Continuous Physical Presence

To meet the first requirement for non-LPR cancellation of removal, the applicant must show that she has ten years of continuous physical presence in the United States.[3] This brings up two important questions. First, when does the ten-year period end (or, as it is sometimes described, what "stops the clock")? Second, what effect do absences from the United States have?

1. The Ten-Year Clock Stops with Service of the Notice to Appear

Under INA § 240A(d)(1), the applicant must acquire ten years of continuous presence before the Notice to Appear ("NTA") is served on her. An NTA is the charging document that initiates removal proceedings against a person. In it, ICE must state why it believes the person is removable (indicating whether the person is deportable or inadmissible), and must give several warnings. Once the applicant has been served an NTA, the clock "stops," and she cannot count any more time in the United States towards the ten-year requirement.

> **Example:** Jose Morales lived in the United States without leaving from April 1, 2008 until the present. Jose was served a Notice to Appear in removal proceedings in 2017. He does not qualify for cancellation of removal, even though he is still currently in court proceedings. Although now he has lived in the United States for more than ten years, he only has nine years of continuous residence because the clock stopped when he was served the Notice to Appear in 2017.

The BIA and many courts have held that once a person has been served with a charging document, time is generally stopped for good. In other words, the clock cannot be restarted by an additional ten-year period after service of the charging document. See *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000).[4] Note that in

---

[2] Relief pursuant to former INA § 212(c) is a cancellation-type remedy for lawful permanent residents.
[3] INA § 240A(b)(1).
[4] *Ram v. INS*, 243 F.3d 510, 517-18 (9th Cir. 2001); *Najjar v. Ashcroft*, 257 F.3d 1262, 1299-1300 (11th Cir. 2001); *McBride v. INS*, 238 F.3d 371, 377 (5th Cir. 2001); *Afolayan v. INS*, 219 F.3d 784, 789 (8th Cir. 2000).

Matter of Cisneros, 23 I&N Dec. 668 (BIA 2004), the BIA carved out an exception to this rule for people who were in deportation proceedings before IIRIRA.[5]

2. Continuous Physical Presence Also Ends When the Immigrant Commits Certain Offenses

The ten-year physical presence clock also stops when the person commits an offense that is "referred to" in INA § 212(a)(2) and that makes the person inadmissible under INA § 212(a)(2) or deportable under INA § 237(a)(2) or INA § 237(a)(4) (grounds regarding crimes and terrorism). This is essentially a moot point for non-LPR cancellation, however, because any crime that would stop the clock would also entirely bar the person from applying because it would come within the criminal bars to non-LPR cancellation.[6]

3. The Effect of Absences on Continuous Physical Presence

The continuous physical presence requirement does not mean the client cannot ever have left the United States. Continuous physical presence stops only if any one absence during the ten-year period is more than 90 days, or if all absences in the aggregate total more than 180 days.[7]

> **Example:** Yen has lived in the United States since 2005. She was recently picked up by immigration authorities and placed in removal proceedings. Since coming to the United States, Yen has left the United States several times. Four years ago, she left the United States for 75 days to care for her sick mother; two years ago, she left for 80 days to visit family; and last year she left for 50 days. Although none of Yen's absences individually were more than 90 days, together they totaled 205 days. Yen is ineligible for cancellation of removal because her absences total more than 180 days and therefore broke her continuous presence in the United States.

4. Absences or departures under threat of deportation

Leaving the United States "under threat of deportation" will also interrupt continuous physical presence, regardless of how long the absence is. If the person has been ordered removed and then leaves the United States, even for just a few days, she will have interrupted her continuous physical presence. Leaving after a removal order breaks continuous physical presence even if the person did not know about the order, such as if the person never received her NTA and was ordered removed *in absentia*. Leaving after a removal order breaks continuous physical presence even if the person was ordered removed without a court hearing, as in an expedited order of removal

---

[5] 23 I&N Dec. at 672. In a fractured opinion, the Third Circuit also held that someone who had a criminal conviction that stopped time for cancellation purposes but re-entered the United States legally thereafter, accrued a new period of physical presence for cancellation eligibility. *Okeke v. Gonzales*, 407 F.3d, 585 (3d Cir. 2005). However, the Third Circuit has since declined to extend *Okeke* and held that a clock cannot restart. See *Nelson v. Attorney General of U.S.*, 685 F.3d 318 (3d Cir. 2012) (finding that a re-entry subsequent to commission of a crime does not restart the continuous physical presence).

[6] INA § 240A(b)(1)(C).

[7] See INA § 240A(d)(2). Note that one absence of 90 days or multiple absences that total more than 180 days in the aggregate will not constitute a break in continuous physical presence if the applicant 1) has served for at least 24 months in an active duty status in the U.S. Armed Services, and if she stopped serving, it was under honorable conditions; and 2) at the time of enlistment, she was in the United States. See INA § 240A(d)(3).

(which usually takes place at the border). A person in this situation who is apprehended after an expedited removal is subject to reinstatement of removal; in practice, this person would likely be removed again without the chance to see an immigration judge and apply for cancellation of removal.

Leaving under voluntary departure in lieu of being removed by an immigration judge has also been found to interrupt the continuous physical presence necessary for cancellation of removal.[8] However, if the acceptance of voluntary departure was not "knowing and voluntary," it might not break continuous physical presence. For example, the BIA recently confirmed that a voluntary departure order does not break continuous physical presence if the person was not informed of her right to an immigration court hearing.[9]

B. Criminal Bars in Non-LPR Cancellation

One of the requirements for non-LPR cancellation is that the applicant was not *convicted* of any offense listed in INA sections 212(a)(2), 237(a)(2), or 237(a)(3). A conviction is required to be barred from non-LPR cancellation of removal. Disqualifying convictions include:

- crime involving moral turpitude (see below for exception);
- offense relating to controlled substances;
- two or more offenses that brought a total sentence imposed of five years or more;
- engaging in the business of being a prostitute;
- aggravated felony;
- high speed flight from an immigration checkpoint;
- firearms offense;
- crime of domestic violence or stalking; crime of child abuse, neglect or abandonment; or violation of certain portions of a domestic violence protection order (only for convictions on or after September 30, 1996);
- espionage, treason, sedition, Selective Service Act or Trading with the Enemy violation;
- failure to register or document fraud under the listed federal acts;
- false claim to U.S. citizenship;
- failure to register as a sex offender under a federal law;
- entry/departure permit fraud;
- importation of immigrants for immoral purposes; or
- threats against the president and military expeditions against friendly nations.

1. Narrow exception for certain crimes involving moral turpitude

Conviction of even one crime involving moral turpitude ("CIMT") is a bar to non-LPR cancellation, with one exception. The exception applies if (a) the person has committed only one CIMT, (b) a sentence of six months or less was imposed, and (c) the offense carries a maximum possible sentence of *less than* one year.[10]

[8] See *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002); *Gutierrez v. Mukasey*, 521 F.3d 1114 (9th Cir. 2008); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003).
[9] *Matter of Castrejon-Colino*, 26 I&N Dec. 667 (BIA 2015); *Matter of Garcia-Ramirez*, 26 I&N Dec. 674 (BIA 2015).
[10] *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010). This exception comes from looking at both the CIMT ground of inadmissibility, AND the CIMT ground of deportability. This is because a noncitizen

This is distinct from the petty offense exception: To avoid the crime bar for non-LPR cancellation of removal, the offense must have a potential sentence of *less than one year* while the petty offense exception includes an offense with a potential sentence of *one year or less.* [11] The requirement that the offense have a potential sentence of "less than one year" will bar many applicants who have been convicted of just one misdemeanor CIMT.

> **Example:** Carrie and Harry both were convicted of misdemeanor shoplifting offenses that are CIMTs. Carrie was convicted under a theft statute that carries a maximum possible sentence of one year. Harry was convicted under a different theft statute, which carries a maximum possible sentence of six months. Both Carrie and Harry received probation with no jail, and for both of them this is the only CIMT that they have committed.
>
> This no-jail misdemeanor will bar Carrie from applying for non-LPR cancellation, while Harry still is eligible. They key is that Harry's offense had a maximum possible sentence of less than one year, while Carrie's offense had a maximum possible sentence of one year.

WARNING! Criminal convictions can be fatal to a cancellation of removal case, and the law on the intersection between criminal and immigration law is ever-evolving. If you conclude that you should not handle the case, refer it out or consult with a resource center or other advocate that has expertise in immigration and crimes to request a thorough review. It is important not to guess or make assumptions without research: Even a minor conviction might bar relief, and even a case that looks hopeless might turn out to have a solution.

C. GOOD MORAL CHARACTER

The applicant must establish "good moral character" ("GMC") for the ten years counting backwards from the immigration court decision, or the BIA decision if the case is appealed.[12] The GMC requirement has two parts. First, the person must prove that she is not automatically disqualified by a statutory bar from demonstrating GMC. The statutory bars for GMC are found at INA § 101(f) and described below. Even though the GMC period for non-LPR cancellation is ten years, there are few issues that will bar your client permanently, regardless of when they took place. A person is permanently barred from establishing GMC if she has been convicted of murder or an aggravated felony after November 29, 1990, or if she has engaged in persecution, genocide, torture, or severe violations of religious freedom. The remaining statutory bars apply only if the triggering act happened during the

---

applying for non-LPR cancellation must not have a conviction described in either the inadmissibility ground or the deportability ground. To avoid the CIMT *inadmissibility* ground, a crime that fits the petty offense exception would be sufficient. The petty offense exception covers a single CIMT, with a maximum possible sentence of one year or less, and an actual sentence of six months or less. Unfortunately, to be eligible for cancellation of removal, the person must also avoid a CIMT as described in the deportability ground. The *deportability* ground describes a CIMT with a one-year sentence or more. Thus, combining both of these, the maximum possible sentence must be under one year (to avoid the deportability description) and the actual sentence must be six months or less (to fit within the petty offense exception for the inadmissibility ground).

[11] *Id*.

[12] See INA § 240A(b)(1)(B).

ten years during which GMC is required. A bad act that happened prior to the ten-year period will not bar the person from showing GMC.

Second, because a GMC finding is a **discretionary** decision of the judge, once the applicant demonstrates that she is not barred by statute, the person still must convince the judge that she has GMC.

WARNING! This ten-year period for good moral character is quite different from the ten-year period for continuous physical presence. Remember that continuous physical presence stops running the moment the NTA is served, among other things. In contrast, the period of time for good moral character continues until the final decision and is the ten years immediately preceding the decision of the immigration judge, or BIA if the case is appealed. An immigration judge will make her decision based on all information up until the time of decision. If that decision is appealed to the BIA, the period for good moral character continues to run until the BIA's final decision. Thus, your client can continue to take actions to bolster her good moral character until the BIA has made its final decision. Be careful, however, because the flip side is true as well. The adjudicator could determine that any negative acts during the time the case is pending can show the applicant *lacks* good moral character.

---

1. Statutory (automatic) bars to establishing good moral character

Under INA § 101(f), certain people are statutorily barred from showing that they have GMC. Many of the grounds overlap with the statutory bars to cancellation of removal. The list includes:

Ground	**Criminal Bar to non-LPR Cancellation**	**GMC Bar if Within Prior Ten Years**
Conviction or admission of a drug offense, except a single conviction of possession of less than 30 grams of marijuana	Yes, if conviction	Yes, if conviction or admission
Conviction or admission of a CIMT (see above for exceptions)	Yes, if conviction	Yes, if conviction or admission
Having a total sentence of five years or more for two or more convictions	Yes	Yes
Engaging in prostitution or other commercialized vice	Yes, if conviction	Yes, if conviction or admission
Immigration authorities having "reason to believe" she is or was a drug trafficker	No	Yes
Alien smuggling, regardless of who is smuggled	Yes, if conviction	Yes, if conviction or admission

Being a habitual drunkard[13]	No	Yes
Living off of, or having had two or more convictions for, illegal gambling	No	Yes
Giving false testimony to get or keep immigration benefits	No	Yes
Coming to the United States to practice polygamy	No	Yes
Spending 180 days or more in jail/prison for a conviction or convictions	No	Yes
Murder conviction at any time	Yes	Yes
Aggravated felony conviction on or after November 29, 1990	Yes	Yes

2. Good Moral Character as a Matter of Discretion

Once an applicant has shown that she is eligible to establish GMC, i.e., not statutorily barred, the next step begins. The applicant must present evidence to try to convince the judge that she really does have GMC. The immigration judge may still deny the cancellation application for GMC reasons even if the applicant has not committed any of the offenses listed above. Even though INA § 101(f) lists acts that bar a person from showing GMC, the immigration judge may consider other negative factors as well in reaching her decision. If anything in your client's past could be viewed negatively, ask your client to explain the circumstances and help your client show the situation in the best light, and why it will not happen again. You should also research the law of your circuit to see if there is any precedent for denying cancellation based on the bad act in question.

In addition to considering negative factors, an immigration judge should also consider any positive factors indicating the applicant has GMC. Judges must engage in a "balancing test"[14] and weigh positive factors as well as negative ones. A person may present any kind of evidence to show GMC.

> **Example:** Over the last ten years Bernard has been convicted three times for drunk driving and one time for being a public nuisance. He spent three days in jail for being a public nuisance and, in total, 115 days in jail for his drunk driving convictions. Can he qualify for non-LPR cancellation?
>
> None of Bernard's convictions is for one of the offenses listed in INA § 212(a) or INA § 237(a) that would automatically bar him from cancellation of removal. Therefore, Bernard only has to focus on the GMC requirement. Bernard is not barred from establishing GMC based on spending 180 days in jail as a result of a conviction, because he spent only 118 days in total. He could be found to have been a habitual drunkard at some time over the last ten years based on these offenses. However, the term "habitual

[13] This ground was previously held unconstitutional in the Ninth Circuit. *Ledezma-Cosino v. Lynch*, 819 F.3d 1070 (9th Cir. 2016). However, this case was reversed en banc, and thus being a habitual drunkard currently remains a bar to good moral character. *Ledezma-Cosino v. Lynch*, 857 F.3d 1042 (9th Cir. 2017).

[14] See *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991); *Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986); *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943).

drunkard" is not clear and is difficult to apply. He should argue that he is not a "habitual drunkard" because the term is vague, and bring evidence that no doctor has declared him a habitual drunkard.

But Bernard may still have a GMC problem even if he is not barred under INA § 101(f). The immigration judge could still determine in her discretion that Bernard is lacking in GMC. Practitioners report that recent drunk driving convictions often lead to a discretionary denial of GMC for cancellation of removal. Most immigration judges would want to see mitigating circumstances and rehabilitation before granting Bernard's case. Bernard should provide evidence that he is rehabilitated and no longer drinking. Any evidence that he has to show that he has a support system and a plan to stay sober would help him, in addition to evidence of positive character factors, such as community service.

D. EXCEPTIONAL AND EXTREMELY UNUSUAL HARDSHIP

Exceptional and extremely unusual hardship is often the most difficult requirement to prove for people applying for cancellation of removal cases. The applicant must show that deportation will cause exceptional and extremely unusual hardship to a qualifying relative. For a comprehensive discussion of the hardship requirement, see ILRC, *Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal*.

1. Who Is a Qualifying Relative?

Only hardship to U.S. citizen or LPR children, spouse, or parents qualifies under this requirement. Hardship to the applicant does not technically count. Thus, if your client does not have a qualifying relative, she is not eligible for non-LPR cancellation. The law is also very specific as to who constitutes a child, spouse, or parent. These commonplace terms have special legal meanings in immigration law.

A. *Who is a child?*

A "**child**" is defined as someone who is under 21 years old and unmarried.[15] Once a child turns 21 years old or marries, that person is no longer a qualifying relative for non-LPR cancellation of removal.[16] Therefore, hardship to a 22-year old son or a married 19-year old daughter would not be a factor for the court in examining a hardship claim. A "child" includes certain stepchildren and adopted children as well. See INA § 101(b)(1). The most common way to prove that someone qualifies as the client's "child" is to submit a birth certificate to prove the person's age and, if the person is of an age where marriage would be legal, a declaration or testimony to prove that the person is not married.

B. *Who is a spouse?*

A spouse must show that the marriage is legally valid, and also bona fide (e.g., not fraudulent). After the Supreme Court's decision in *United States v. Windsor*,[17] same-sex marriages are entitled to the same rights and benefits

[15] See INA § 101(b)(1).
[16] See, e.g., *Mendez-Garcia v. Lynch*, 840 F.3d 655 (9th Cir. 2016).
[17] 570 U.S. __, 133 S. Ct. 2675 (2013).

under federal immigration law as opposite-sex marriages. The most common way to prove that someone is a spouse is to submit a marriage certificate.

C. *Who is a parent?*

A parent includes a natural parent as well as a stepparent. The most common way to prove a parental relationship is to submit a birth certificate. If the parent is a stepparent, you will have to file a copy of the marriage certificate proving the relationship to the other parent.

2. Hardship to Non-Qualifying Relatives

The immigration judge is authorized by statute only to consider hardship to statutory qualifying relatives. This means that hardship for many family members, like married children, grandparents, or siblings, technically does not qualify for consideration. Similarly, hardship to the applicant is not a factor in non-LPR cancellation of removal. Nevertheless, case law makes clear that judges can consider hardship to non-qualifying relatives as it affects qualifying relatives. In *Matter of Recinas*, the applicant had six children, two of whom were undocumented. The BIA considered the hardship of the two undocumented children as it affected the four U.S. citizen children.[18]

If a non-qualifying family member in your case would suffer hardship, you will need to frame that hardship to a non-qualifying relative as hardship to a qualifying relative. In other words, think about how the qualifying relative(s) would suffer, directly and indirectly, as a result of the hardship that deportation would cause to the applicant or non-qualifying relative. How you frame hardship is often the most important strategic decision in a cancellation case and could make or break a case.

> **Example:** Andres, who has a U.S. citizen wife and two U.S. citizen daughters, was applying for non-LPR cancellation. Andres's wife and daughters were all healthy, and the girls were doing well in school. Andres, however, suffered from kidney disease and could not survive without receiving dialysis several times a week. Here in the United States, his treatments were covered by his health insurance.
>
> Andres's attorney successfully argued to the immigration judge that his deportation would cause exceptional and extremely unusual hardship to his wife and daughters because whether or not they accompanied him to Mexico, he would almost certainly die within a fairly short time. The attorney presented her argument in three steps: (1) Andres would not be able to afford dialysis in Mexico; (2) he would die without dialysis; and (3) if he died, his wife and daughters would suffer exceptional and extremely unusual hardship.

WARNING! Remember that the qualifying relative must exist at the time of the non-LPR cancellation *adjudication*. If the applicant's qualifying relative is a child who turns 22 before the cancellation hearing, the applicant will no longer be eligible for cancellation of removal because she will no longer have a qualifying relative.

---

[18] *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

3. What Is Sufficient Hardship?

The BIA has issued a handful of seminal cases that have come to define what does or does not constitute exceptional and extremely unusual hardship for purposes of non-LPR cancellation of removal. The BIA has consistently held that the standard requires a showing of hardship that is "substantially" beyond the ordinary hardship that would be expected when a close family member leaves the country and is limited to "truly exceptional" situations.[19] Yet, this standard does not need to be so high that cancellation be granted only if one's deportation would be "unconscionable."[20]

There are no regulations establishing which factors the court should look to for determining hardship for non-LPR cancellation of removal. Instead, the BIA has provided guidance through its case law. The three primary non-LPR cancellation decisions that should guide any non-LPR cancellation hardship analysis are: *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002); and *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). Practitioners should consider all of the factors potentially relevant in their cases, as well as paying particular attention to factors that have been examined in the three cases mentioned above. These include the qualifying relative's:

1. age;
2. health;
3. special needs in school;
4. length of residence in the United States;
5. family and community ties in the United States;
6. family and community ties in the home country;
7. circumstances in the home country, including standard of living, way of life, languages spoken, work opportunities; and
8. alternative methods for immigrating the cancellation applicant.

In non-LPR cancellation of removal, you and your client must present to the court all of the different types of hardship to the qualifying relative(s) that may apply. The BIA has made clear that courts should not base their decision on any one of the factors listed above, but on the cumulative effect of all the facts when viewed together.[21] Courts are required to use a "totality of circumstances" approach, which means that they must make a determination by looking at whether all of the factors, combined, demonstrate that the qualifying relatives would suffer exceptional and extremely unusual hardship if the applicant were deported.

4. Qualifying Relatives: Stay or Go?

One of the biggest decisions when preparing a cancellation case is whether to argue that your client's qualifying relative(s) would suffer hardship on account of staying in the United States without your client OR on account of accompanying your client to her native country if she were deported. The application form for non-LPR

[19] See *Matter of N-J-B-*, Int. Dec. 3415 (BIA 1999); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).
[20] See *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).
[21] *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

cancellation specifically asks whether your client's qualifying relative(s) would accompany the applicant if she were deported.[22] There is no right answer, but you should work with your client to think strategically about how to answer this question. Some practitioners choose not to check the box at all to leave the option open of arguing either or both scenarios. Many judges, however, require clients to pick one scenario and argue hardship based only on that situation.

The choice of whether your client's relatives will stay or go plays a crucial role in the ultimate hardship determination.[23] It is very important to explore which option each qualifying relative might realistically choose as well as to strategize which option would make the strongest hardship case. In addition, remember that the evidence presented must support the position expressed by your client. For example, evidence that conditions in the country of removal are harsh or severe has little weight if the applicant indicates the qualifying relative(s) will remain in the United States.

Generally, the courts, and perhaps applicants, presume that the hardship in a case is the hardship that the qualifying relatives would face should they accompany the applicant back to the applicant's home country. Recent cases have begun to chip away at this presumption and offer more flexibility to the applicant in arguing hardship. Nevertheless, courts still generally need to see some evidence that the possibility of the qualifying relatives staying in the United States is reasonable. This evidence could be showing that the child has another parent living here; or testimony that the deported parent could not care for the child in the home country.

> **Example:** Manu's LPR father has cancer and receives daily chemotherapy. Manu is his father's only relative in the United States and he relies on him for transportation to chemotherapy and daily care. Manu's father is not well enough to travel with Manu, should Manu be deported.
>
> There is no realistic option of his father coming with him to his country of deportability, so Manu will present to the court the hardship his father will face being left here in the United States if Manu is deported.
>
> **Example:** Sonya has a U.S. citizen teenager who suffers from anxiety and depression. Sonya is from a small town in Guatemala. If she takes her daughter with her, the move might exacerbate her daughter's anxiety and depression. The small town she will go to does not have comparable mental health services to the ones that her daughter receives now. However, if she leaves her daughter behind to live with the daughter's aunt, the daughter's condition will likely deteriorate without the support of her mom. Furthermore, the aunt has five children of her own, and it is unclear whether the aunt has the time or resources to take the daughter to her mental health appointments. Sonya has not decided whether she will take her daughter with her to Guatemala or not.
>
> Sonya will work with the legal worker to think through whether it is more likely that she will bring her daughter with her or leave her here. She will also strategize with her legal worker which hardship case is strongest. Because her daughter will suffer hardship under either scenario, this might be a case where the

[22] See Form EOIR-42B, available at https://www.justice.gov/sites/default/files/pages/attachments/2016/10/20/eoir42b.pdf.
[23] *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987); *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983); *Luna v. INS*, 709 F.2d 126, 128 (1st Cir. 1983).

legal worker would choose not to check the box and preserve both arguments, if the immigration judge will allow it.

D. DISCRETION

Two of the statutory eligibility requirements, hardship and good moral character, are discretionary determinations and hinge on the facts of the case, not just the law. This means that the judge has the freedom to find that someone has not met the hardship requirement, or does not have good moral character, in their discretion. The other requirements for cancellation of removal, such as establishing ten years of continuous physical presence, or not having any disqualifying crimes, are not discretionary determinations. The law is set, and the judge must apply the statutes and case law to the facts of the case at hand. But the judge has much more freedom in deciding whether your client has met the good moral character or hardship requirements. The final decision to grant cancellation of removal is also left to the discretion of the judge.

It can be helpful to think of discretion as involving a judgment as to whether the applicant is the "sort of person" that should be allowed to stay in the United States. Because the judge has the authority to grant or deny a non-LPR cancellation application in his or her discretion, the best practice is to try to use all the evidence you have to show that your client is an upstanding, productive, and likeable person. Because it is hard to predict exactly what discretionary factors a judge might care most about, the best strategy is to put forward a wide range of evidence showing that your client is an upstanding member of society, such as letters from co-workers, landlords, neighbors; proof of paying taxes; proof of paying child support, if applicable; or educational records. In using her discretion, the judge must carefully weigh and balance all factors, both negative and positive, to determine whether the applicant should be allowed to stay in the United States.

San Francisco
1663 Mission Street, Suite 602
San Francisco, CA 94103
t: 415.255.9499 f: 415.255.9792

Washington D.C.
1016 16th Street, NW, Suite 100
Washington, DC 20036
t: 202.777.8999 f: 202.293.2849

ilrc@ilrc.org www.ilrc.org

About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.