

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 method 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 tend 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.

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*, 559 U. S. ____ (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 reflect, 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.

The Attorney’s Duty

Obviously, there are many criminal attorneys who are not well versed in immigration law and *vice versa*. It would therefore be inappropriate and perhaps even malpractice to give advice on an issue on an issue which the attorney is not comfortable with. Nevertheless, Justice Stevens, writing for the majority 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 and confused issue. 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.

Removal Procedure

Assume that the alien is convicted either in Federal or State Court for a deportable offense or offenses. Most courts now have an agreement with the INS to notify the Service if an alien is incarcerated or convicted. Depending on the situation, the INS may request the holding facility to continue to hold the alien in custody until he can be transferred to an INS 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.

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.

Obviously, if the alien does not appear for the hearings despite having been properly served, an Order of Deportation can be entered in absentia.

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 illegible 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.

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 forcible 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 (a copy is attached). 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 the 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 that attract removal is extensive, intricate, and formidable. How does a criminal defense attorney even begin to learn all the intricacies and nuances of immigration law and crimes which even the Supreme Court has acknowledged that “nothing is ever simple with immigration law”? Indeed, even within the universe of immigration attorneys, there are many who choose not to involve themselves in immigration defense.

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--***

“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.

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 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 220 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 about 14 members on the BIA as of May 2009. 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 get placed 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 been 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 on top of that 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.

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 overstay in the United States, you are removable from the United States under § “XYZ” of the Immigration and Nationality Act, 8 U.S.C. §1101 et seq, as amended”.

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:

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 “ The man who defends himself has a fool for an attorney”.

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 they may have a whole series of master hearings depending on the complexity of the case, or administrative difficulty 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 does not need to 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 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 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 was 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 at that initial master hearing as well. Alternatively, if the alien admits to facts regarding removability 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's 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-four-or even five 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) waivers available other than for cases which were filed 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* 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*.

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. 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 any 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.

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.

The record reflects that the respondent is a 30-year-old native and citizen of Mexico who entered the

United States without inspection in August 1985. She has two United States citizen children, aged 11 and 6. The respondent has had the same employment for 4 years with a company that provides health insurance for her and her family, as well as a 401K retirement savings plan. The respondent bought her own house, valued at \$69,000, in 1998. She owns two vehicles, with a combined value of about \$12,000. According to her testimony, she also has savings of about \$7,000.

The respondent testified that she has no relatives in Mexico who could help her with the children, should she be forced to return there. She further stated that her mother takes the children to school and looks after them while she works. All of the respondent's siblings live in this country, without valid immigration status, as do her aunts and uncles. The respondent's older child testified to her very close relationship with her grandmother. She did not indicate that she is close to any other relatives in this country.

Although the respondent is not married, when asked at the hearing about the father of her children, she replied, "We're okay, we just live together." She indicated that he has "some form of temporary permit" in this country. Asked if he contributes to the household, the respondent said, "He's working construction so sometimes he does have a job, sometimes he doesn't."

The respondent described the children's health as "fine." She stated that she has had problems with asthma, which is under control, but that this condition would prevent her from working in the fields in Mexico. She also does not believe she could get an office job in Mexico, as she has only a sixth grade education. She is concerned that she would not be able to obtain any employment in Mexico that would be comparable to the job she has here.

The respondent also stated that the schools are better in this country than in Mexico, with better facilities and supplies, and access to computers. She is afraid that her children would not be able to get much education in Mexico, especially when they get older and reach the point where she would have to pay for it.

The respondent testified that the main focus of the family's social life is the church they attend every week. She also stated that she helps out twice a month at her younger child's Head Start program.

Following the removal hearing, the Immigration Judge entered his decision granting the respondent's application for cancellation of removal. The Immigration Judge concluded, after a lengthy discussion, that the "United States citizen children, particularly Tanya [the 11-year-old], would suffer hardship of an emotional, academic and financial nature." This hardship [page 321] "would be of a daunting level." The Immigration Judge noted that the children would be uprooted from their current "nurturing environment" and from their support system. He also stated that they would face discrimination in Mexico because they are children of a single mother. The Immigration Judge emphasized the fact that Tanya has little knowledge of "academic Spanish" and might therefore be placed in a lower grade in school in Mexico. In addition, he expressed concern that the children may not be able to stay in school, but rather may have to work to help support the family. He noted that the respondent has a steady, full-time job here, with good benefits.

Based on these considerations, the Immigration Judge found that the children "face complete upheaval in their lives and hardship that could conceivably ruin their lives." He concluded that such hardship would be "unconscionable," and he therefore concluded that the respondent had met the exceptional and extremely unusual hardship requirement.

After the Immigration Judge rendered his decision in this case, but before oral argument was held, we issued a precedent decision addressing the meaning of the term "exceptional and extremely unusual" hardship as used in the cancellation of removal statute. In *Matter of Monreal*, 23 I&N Dec.

56, 65 (BIA 2001), we held that an applicant for cancellation under section 240A(b) of the Act must demonstrate that his or her removal would cause hardship to his or her qualifying relatives that is "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here."

In *Matter of Monreal*, supra, the respondent was a 34-year-old man from Mexico who had lived in this country since 1980. He had three United States citizen children. The two older children were 12 and 8 years old, and they lived with the respondent in the United States. His youngest child, an infant, had returned to Mexico with the respondent's undocumented wife shortly before his removal hearing. The respondent's lawful permanent resident parents also lived near him.

We concluded that the respondent in *Matter of Monreal*, supra, had not shown that his children or his lawful permanent resident parents would suffer exceptional and extremely unusual hardship if he was removed from the United States. We recognized that the respondent's children would suffer some hardship if they accompanied their father to Mexico, and that they would likely have fewer opportunities there. However, emphasizing the high bar Congress had imposed in enacting the "exceptional and extremely unusual hardship" requirement, we concluded that the bar had not been reached.

The respondent asserts that her case is "completely distinguishable from *Monreal*." She argues that, unlike the respondent in *Monreal*, she is a single mother who is the sole support of her United States citizen children. She has no family able to help her in Mexico. She claims that single mothers face discrimination in Mexico that will make it even more difficult for her to [page 322] provide a decent life for her children in that country. The respondent argues that women do not enjoy equal rights in Mexico. They are paid less and generally hold lower level jobs. There is "institutionalized discrimination against women," and a single mother returning to this environment would face a particularly difficult time trying to support her children. She also points out that in *Monreal*, the respondent's deportation to Mexico was actually going to reunite him with his family, as his wife and one of his children had already moved there.

The respondent further argues that the Board should not approach this case with the assumption that there are many other Mexicans whose situation is similar to hers, and that the hardship she presents therefore does not rise to the level of "exceptional and extremely unusual." The respondent asserts that her case, like all others, must be decided on its particular facts.

The Service, on the other hand, argues that the instant case is "squarely governed" by *Matter of Monreal*, supra. If anything, the Service claims, this case is weaker than that in *Monreal* because the respondent's United States citizen children are younger and would therefore have an easier time adapting to life in Mexico. The Service also asserts that this respondent's return to Mexico would be somewhat easier because she is not penniless, but has some assets that would enable her to "set up a better life for her children than many returnees."

The Service contends that the hardship presented by the respondent is similar to that of many Mexican nationals who sought suspension of deportation under the previous law, and who were found not to have met even the former "extreme hardship" standard. Finding nothing "unusual, unique, or exceptional" in this case, the Service asserts that the respondent is in the same position as hundreds, if not thousands, of other Mexican nationals who have spent a considerable period of time in this country. According to the Service, the Immigration Judge's decision granting cancellation of removal should therefore be overturned.

We are sympathetic to the respondent's case and to her situation. We have no doubt that she and her children will suffer some hardship upon moving to Mexico. Indeed, as with *Matter of Monreal*, supra,

we believe that, were this a suspension of deportation case, where only "extreme hardship" must be shown, we might well grant relief. In this regard, we note that the cases cited by the respondent at oral argument, and in her brief, address the meaning of "extreme hardship," not "exceptional and extremely unusual hardship." See, e.g., *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998); *Gutierrez-Centeno v. INS*, 99 F.3d 1529 (9th Cir. 1996); *Casem v. INS*, 8 F.3d 700 (9th Cir. 1993). However, Congress has now imposed a standard of hardship that is significantly more burdensome than the former "extreme hardship" standard. We simply cannot find that she has met the very high standard of the current law. [page 323]

We also accept the respondent's contention that her case must be considered on its own individual facts. We note, however, that the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face.

We have considered the evidence in the record regarding the poor economic conditions in Mexico, and the respondent's claim that her deportation would result in drastic economic consequences to her and her children. We do not dispute the fact that economic conditions in Mexico are worse than those in this country. However, it has long been settled that economic detriment alone is insufficient to support even a finding of extreme hardship. See *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), and cases cited therein.

We have also considered the respondent's claims regarding educational opportunities for her children. She stated that until 1995, the Mexican Government did not authorize undocumented aliens to attend their schools, and that even now the availability of education to undocumented aliens varies from state to state. She noted further that although the Mexican Government aspires to provide 9 years of education to every child, it has not actually been able to implement this goal. Again, we recognize that Mexico likely will not provide the respondent's children with an education equal to that which they might obtain in the United States. However, the respondent has not shown that her children would be deprived of all schooling or of an opportunity to obtain any education. 1

We note Board Member Espenosa's comment in her dissenting opinion that our findings regarding educational opportunities in Mexico are "internally inconsistent." We do not find it inconsistent to recognize that educational opportunities are likely to be fewer in Mexico than in the United States, while also stating that there has been no showing that the respondent's children would be unable to obtain any education in Mexico. Further, we are fully aware of the importance of education to any child's future. However, a finding that diminished educational opportunities result in "exceptional and extremely unusual hardship" would mean that cancellation of removal would be granted in virtually all cases involving respondents from developing countries who have young United States citizen or lawful permanent resident children. This view is not consistent with congressional intent.

The fact that the respondent has no family to help her in Mexico will likely make her adjustment to a new life there more difficult. However, we note that, with the exception of her mother, who appears to have temporary resident status under the Special Agricultural Worker program, her siblings are undocumented. In assessing hardship, we should not consider the fact that the respondent's extended family is here illegally, rather than in Mexico, as a factor that weighs in her favor. Further, there is nothing to prevent the respondent's family members from sending financial support to her in Mexico, should it be needed. [page 324]

In addition, the respondent testified that the father of her children lives with her, and that he works in construction and sometimes contributes to the family's support. Although the respondent characterizes herself as a single mother, her testimony reflects that her children's father has not abandoned them, but lives with the family. As it is clear that the father has been a part of the

children's lives, it is also certainly possible that he could provide them some support in Mexico, if necessary.

We also consider it significant that the respondent has accumulated some assets in this country. She owns a home and two vehicles, has participated in a retirement plan, and has savings of about \$7,000. Although the house presumably carries a mortgage, the respondent and her children would not be penniless upon her return to Mexico. The money she does have would surely help her in establishing a new life in Mexico.

Finally, we do not doubt that the respondent and her children may face some special difficulties in Mexico, because she is an unmarried mother. The evidence presented does suggest that women still do not have equal opportunities in Mexico, and it may be that the respondent will encounter some discrimination as an unmarried mother, in addition to the challenges that unmarried parents everywhere face. However, even considering the potential hardship caused by the respondent's status as an unmarried mother, together with the other hardships described above, we must conclude that she has not met her burden of establishing that her children will suffer exceptional and extremely unusual hardship if she is removed to Mexico.

The respondent in this case is young and able to work. Although she reports suffering from asthma, that condition is apparently under control. She has developed some job skills. She does have some financial assets that will aid her in establishing a new life in Mexico. Her children are still relatively young and are in good health. While they certainly will face some problems in adapting to life outside the United States, they will likely be able to make the necessary adjustments.

In sum, we cannot meaningfully distinguish this case from that of *Matter of Monreal*, supra. While almost every case will present some particular hardship, the fact pattern presented here is, in fact, a common one, and the hardships the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country. Although the hardships presented here might have been adequate to meet the former "extreme hardship" standard for suspension of deportation, we find that they are not the types of hardship envisioned by Congress when it enacted the significantly higher "exceptional and extremely unusual hardship" standard. Accordingly, we will sustain the Service's appeal from the Immigration Judge's grant of cancellation of removal. There being no adverse factors present, we will grant the respondent a period of voluntary departure in lieu of an order of removal. [page 325]

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.

Concurring Opinion:

Cecelia M. Espenosa, Board Member, in which Lory Diana Rosenberg, Board Member, joined

I join the dissenting opinion of Board Member Osuna. I write separately to address the reasons why Congress mandate that hardship is to be determined only by looking at the effect on qualifying relatives who are United States citizens or lawful permanent residents reflects Congress' principal concern with the impact on stakeholders in United States society. See section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C §1229b(b)(1) (2000).

Taking the majority opinion to its inevitable conclusion, it appears that no United States citizen child of a Mexican national will be able to demonstrate exceptional and extremely unusual hardship because he or she is deprived of educational opportunities for financial reasons. In fact, under the interpretation announced today, it is more than likely that no respondent from Mexico will qualify for cancellation unless the qualifying relative has severe medical problems. I do not believe that was the directive of Congress. Nor is it consistent with our decision in *Matter of Monreal*, 23 I&N Dec. 56, 60 (BIA 2001), in which we rejected an "unconscionable standard" as higher than required.

At the same time that Congress heightened the hardship standard from "extreme hardship" to "exceptional and extremely unusual hardship," it added additional restrictions. 1

It is beyond dispute that cancellation of removal is governed by a new standard, which requires a showing that the undocumented alien (1) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of application; (2) has been a person of good moral character during such period; (3) has not been convicted of specified criminal offenses; and (4) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. Section 240A(b)(1) of the Act; see also 8 C.F.R. §240.20 (2001). It is also generally accepted that Congress enacted the standard it did in response to *Matter of O-J-O-*, 21 I&N Dec. 381 (BIA 1996); see also H.R. Conf. Rep. No. 104-828 (1996).

In light of these other restrictions, implementing [page 326] Congress' intent need not be accomplished solely by imposing the most narrow reading of the exceptional and extremely unusual hardship standard. Although Congress said that the change was made "to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien's deportation," H.R. Conf. Rep. No. 104-828, at 213 (1996), Congress did not enact provisions to categorically preclude any nationality from this relief. 2

Congress knows how to define relief in ways that advantage or disadvantage certain nationalities. See, e.g., Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2193, amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997) ("NACARA") (providing adjustment of status only for Nicaraguan and Cuban immigrants, and extending eligibility for suspension of deportation only for certain nationalities); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (disadvantaging certain nationalities in the allocation of diversity visas); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (including special provisions for Cuban and Haitian immigrants); cf. Act of Oct. 3, 1965, 79 Stat. 911 (eliminating the national origins quota system, which had precluded immigration from Asia and Latin America).

Thus, our construction of this provision should not result in categorical exclusion of any nationality.

The majority opinion appears to measure the hardship prong as if that were the only way in which Congress restricted eligibility for relief. In doing so, the majority fails to acknowledge the significance of the statutory language that directs us to focus on the hardship to qualifying relatives. The issue is

whose hardship Congress has directed us to examine and under what circumstances that hardship rises to a level substantially beyond that which ordinarily would be expected to result from the alien's deportation.

By eliminating the relevance of hardship to the respondent, Congress directed us to focus on the exceptional and extremely unusual hardship to the United States citizen or lawful permanent resident who would be affected by the removal of the alien. In determining exceptional and extremely unusual hardship, our assessment of the hardship to United States citizen children must take into account both the present and the future impact that ordinarily would be expected to result from their accompanying the respondent upon removal. The repercussions that emerge as a consequence of the deprivation of the opportunity to receive an education in the United States should not be diminished when evaluating the United States citizen children's forcible return to Mexico. [page 327]

To adequately address whether the respondent's United States citizen children will face exceptional and extremely unusual hardship, we must look at both the conditions of the educational opportunities in Mexico and the loss of educational opportunities in the United States. The majority has failed to properly evaluate the differences in educational opportunities.

In *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982), the United States Supreme Court acknowledged the importance of the United States educational process. In *Plyler*, the Court refused to deny public education to undocumented alien children, acknowledging the critical importance of "education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." *Id.* at 221 (distinguishing education as more than merely a public benefit). As the Court recognized, "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)). The Court concluded that

education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Plyler v. Doe, *supra*, at 221.

The Court emphasized that "education prepares individuals to be self-reliant and self-sufficient participants in society." *Id.* at 222 (quoting *Wisconsin v. Yoder*, *supra*, at 221). Nevertheless, under the majority opinion, the loss of such an education is insufficient to constitute exceptional and extremely unusual hardship. The future cost, however, will be a citizen who is permanently handicapped and thus less capable than others of engaging in the political process.

I do not contend that the *Plyler* Court's evaluation of the significance of an American public education in insuring acculturation to the American ideals trumps the language used by Congress in section 240A(b) of the Act and requires a grant of cancellation of removal in the case of every Mexican national having school-age children. However, the critical importance of such an education cannot be ignored. The rationalization that a United States citizen child can always return to the United States when he or she reaches the age of majority begs the question.

In the case before us, the Immigration Judge found explicitly that "[the child's] education would either terminate due to her insufficient knowledge of Spanish or she would struggle academically in a school which is far inferior to that she is currently attending." The Immigration Judge specifically ruled that "either way, this U.S. citizen child would be denied [page 328] significant educational

opportunities which could secure a decent future . . . [and] such a denial would greatly limit [her] employment and educational options if she decided to return to the United States."

Nothing in the majority opinion reflects that the majority properly considered or weighed the detailed factual findings relating to the children's loss of educational opportunities that were made by the Immigration Judge. Rather, without identifying any error in the findings of the Immigration Judge, the majority substituted its own factual findings that the educational opportunities would be diminished but not eliminated altogether.

Moreover, even if it were proper for us to make findings de novo on appeal, the majority opinion is internally inconsistent. On the one hand, the majority states that "the respondent has not shown that her children will be deprived of all schooling or of an opportunity to obtain any education." *Matter of Andazola*, 23 I&N Dec. 319, 323 (BIA 2002). On the other hand, the majority acknowledges that "until 1995, the Mexican Government did not authorize undocumented aliens [such as the respondent's children] to attend their schools" and that "although the Mexican Government aspires to provide 9 years of education to every child, it has not actually been able to implement this goal." *Id.*

In *Plyler v. Doe*, supra, at 222 n.20, the Court recognized that the possibility that only a small proportion of the undocumented children would become citizens "is not decisive, even with respect to the importance of education to participation in core political institutions." As United States citizens, the children in this case have an unquestionable stake in obtaining an education that will allow them to participate meaningfully in their country of citizenship. Thus, the majority's conclusion that the children's loss of educational opportunities is a hardship that is not "substantially different from those that would normally be expected upon removal to a less developed country" blatantly disregards the critical importance of an American education and the future consequences to these children that flow from the deprivation of such an education. *Matter of Andazola*, supra, at 324. In reaching such a conclusion, the majority has overlooked the specific language used by Congress, which zeroes in specifically on the impact of removal on the stakeholders.

The decision to remove these citizen children will undoubtedly diminish their ability to be self-reliant and self-sufficient. Whatever the educational opportunity that might exist in Mexico, it will be substandard to that which would exist here. Indeed, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Plyler v. Doe*, supra, at 223. In short, the removal of the United States citizen children in this case is not merely a return to a country with a lower standard of living and a poor educational system. It is, in essence, a method of depriving the citizen children of the valued education that they currently [page 329] enjoy in the United States. This, in turn, is likely to result in a lifetime hardship that deprives the children of an opportunity to obtain the skills necessary to meaningfully participate "effectively and intelligently in our open political system." *Wisconsin v. Yoder*, supra, at 221.

The Immigration Judge correctly aggregated the economic, educational, and emotional consequences to the United States citizen children to find exceptional and extremely unusual hardship that would be unconscionable in the event of their mother's removal. I agree, and note that hardship that is unconscionable is a greater degree of hardship than we interpreted the statute to require in *Matter of Monreal*, supra. Therefore, I dissent.

Dissenting Opinion:

Juan P. Osuna, Board Member, in which Paul W. Schmidt, Gustavo D. Villageliu, John Guendelsberger, Lory Diana Rosenberg, Anthony C. Moscato, and Noel Ann Brennan, Board Members, joined

I respectfully dissent. While this is a close case, in my view the respondent has shown that her United States citizen children would suffer exceptional and extremely unusual hardship if she is removed from this country. I would dismiss the Immigration and Naturalization Service's appeal and affirm the Immigration Judge's grant of cancellation of removal.

This case requires us to apply the "exceptional and extremely unusual hardship" standard that Congress created as part of section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-594, and codified at section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. §1229b(b)(1) (2000). That provision allows cancellation of removal for an alien who has been physically present in the United States for at least 10 years, has been a person of good moral character, has not been convicted of specific criminal offenses, and who establishes that removal would result in "exceptional and extremely unusual" hardship to the alien's spouse, parent, or child who is a United States citizen or an alien lawfully admitted for permanent residence.

Determining what constitutes "exceptional and extremely unusual hardship" presents a challenge for adjudicators. Reasonable persons can differ on whether a given set of circumstances rises to the requisite hardship. What is clear, however, is that each hardship case, to a large extent, succeeds or fails on its own merits and on whether an applicant for relief is able to present testimony and documentation that is sufficiently compelling to demonstrate exceptional and extremely unusual hardship. For the reasons set forth below, I believe that the respondent in this case has succeeded in doing so. [page 330]

I. Matter of Monreal and the Present Case

In *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), we considered for the first time in a precedent decision the exceptional and extremely unusual hardship standard, by examining the application for cancellation of removal of a 34-year-old Mexican national who was the father of three United States citizen children. In that decision, we held that to establish exceptional and extremely unusual hardship under section 240A(b) of the Act, an alien must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person's departure. We specifically stated, however, that the alien need not show that such hardship would be of such magnitude that his or her deportation would be "unconscionable" in its effect on a qualifying relative. *Matter of Monreal*, supra, at 60. After reviewing the case, we dismissed the respondent's appeal from an Immigration Judge's finding that he had not satisfied the new hardship standard. The majority finds that the present case cannot be meaningfully distinguished from *Matter of Monreal*, supra. I find, to the contrary, that this case is wholly distinguishable from *Matter of Monreal*.

In *Matter of Monreal*, the respondent was the father of three citizen children, the oldest two being 12 and 8 years of age. The respondent had been working for 10 years for his uncle's business, but acknowledged that he had a brother living in Mexico who also worked for the uncle's business. Our decision emphasized that the respondent was in good health, was able to work, and would, in fact, be reunited with family members upon his return to Mexico. Most significantly, we noted that the respondent's wife, the mother of the three children, had already returned to Mexico, and the respondent would be joining her there if removed. *Matter of Monreal*, supra, at 64.

In the present case, by contrast, the respondent is a single mother who has no close relatives remaining in Mexico. 1

The majority casts doubt on whether the respondent truly is a single mother, pointing to an exchange during the testimony indicating that the children's father may at times be a presence in their lives.

However, the Immigration Judge, as the fact finder in this case, determined that the respondent is a single mother. Nowhere in his decision is there any indication that the Immigration Judge found the children's father to be a significant presence in their lives. Moreover, during the hearing the Immigration Judge repeatedly referred to the respondent as a "single mother," and supporting documents in the record confirm that status. In both its pretrial and appellate briefs, the Service makes no mention of a father, and on the Notice of Appeal (Form EOIR-26) it mentions the presence of "many uncles and cousins in the Phoenix area" and a "maternal grandmother," but not the father. In fact, it was only at oral argument that the Service argued that the father is a "continuing and real presence" in the lives of the children. Despite the Immigration Judge's findings, and the factual weight of the record, the majority speculates that the father's presence is such that the respondent is not truly a single mother. In my view, the more appropriate course is to rely on the Immigration Judge's fact finding that the father is not a significant presence and that this respondent is a single mother responsible for two United States citizen children. According to the Immigration Judge, "The Court shares the respondent's concern and finds it unlikely that the respondent, a single mother in Mexico, would be able to adequately provide for her United States citizen children." (Emphasis added.)

In this country, she owns her own [page 331] home and has steady employment with good benefits, including a retirement plan and health insurance for herself and her children. She depends on the help of her mother to look after the children when she works. With only a sixth grade education and a history of asthma, the respondent quite reasonably fears that she will be unable to find employment in Mexico that will enable her to support her children by herself. While I do not minimize the difficulties that the family in Matter of Monreal will face in Mexico, they are in my view vastly different from the difficulties that this respondent and her children will face upon their return there.

I am of course cognizant of the fact that, unlike the former "extreme hardship" standard for suspension of deportation, which was discussed most recently in Matter of Kao and Lin, 23 I&N Dec. 45 (BIA 2001), under the cancellation statute we can consider only the hardship to the respondent's qualifying relatives, and not to the respondent herself. Some factors that we may have considered under the extreme hardship standard as pertaining solely to an applicant for suspension of deportation may not be relevant for cancellation of removal purposes. However, as we recognized in Matter of Monreal, supra, other factors may be considered if they affect the hardship of the qualifying relative, and assessment of which factors are relevant and which are not must be undertaken on a case-by-case basis.

In many cases, it is artificial and defies logic to attempt to consider the relatives' hardship without some consideration of the hardship to the respondent. In a family unit, hardship on a parent essentially translates to hardship on the rest of the family. This is particularly true where the respondent is the parent of minor children. The hardship is further magnified when, as here, the family has only one parent, who must shoulder the burden of caring and providing for the children by herself. In the present case, we would be removing a single mother with no significant job skills to a poor, developing country where she has no family to help her. The hardships she will encounter will most certainly accrue to her children. For example, the respondent's difficulties in finding a place to live and finding the type of employment that will enable her to support her children will greatly add to the hardships the children will already face in adjusting to an unknown country.

I emphasize that, unlike many other cases, we are not talking here about a two-parent family where at least one of the parents has a professional, university, or even secondary level of education. Here, the respondent is a [page 332] single mother who was forced to leave school when she was 13 years of age, and who consequently has only been able to work in relatively low-paying jobs. Such jobs in the United States may provide enough income and benefits to support a family of three. In Mexico, it is much harder or even impossible to do so. It is not a stretch to find that a family placed in that position would face "exceptional and extremely unusual hardship," especially where there is no

evidence that they could rely on a family structure already in place in Mexico.

II. Ninth Circuit Case Law

It is also significant that this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, whereas *Matter of Monreal*, supra, arose in the Fifth Circuit. The Ninth Circuit has made it clear that in assessing hardship, we are required to consider all factors presented, including economic conditions and lack of family ties in the country of return. I recognize that Ninth Circuit case law involves the extreme hardship requirement under the former suspension of deportation statute, not the present exceptional and extremely unusual hardship standard for cancellation of removal. However, because assessments of "hardship" are essentially factual, it is appropriate to look to similar contexts for factors to consider. See generally *Osuchukwu v. INS*, 744 F.2d 1136, 1140 (5th Cir. 1984). 2

Once the hardship factors are identified, a separate assessment must follow as to whether they rise to the required hardship level.

It is therefore proper to look to Ninth Circuit precedent for guidance on how to weigh hardship generally, in cases arising in that circuit.

In *Gutierrez-Centeno v. INS*, 99 F.3d 1529 (9th Cir. 1996), the respondents were a single mother and her two minor children. The court chastised the Board for not adequately considering the fact that the respondents had significant family ties in the United States and no real ties remaining in their native Nicaragua. The court emphasized that the adult respondent was a single mother supporting two children who would be returning to an economically deprived country. The court also held that the Board should have considered the fact that the children (who were also suspension applicants, not United States citizens or lawful permanent residents) would likely face difficulty in adjusting to life in Nicaragua. In facts reminiscent of those in the present case, the court was particularly concerned about the children's education, especially the younger child who could barely read or write Spanish.

In *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995), the court found that the Board failed to consider political unrest in Thailand, again emphasizing that conditions in the country of return are important in assessing hardship. In that case, the court also noted that it was not necessary for the respondent [page 333] to show that she would be completely unemployable in Thailand. It pointed out that with her good job in the United States, the respondent had become the sole support of her parents and other family members in Thailand. It found that her inability to continue to fulfill her duty of supporting her family would be a severe psychological hardship resulting from the economic loss. In so finding, the court noted that "the personal hardships that flow from the economic detriment," *id.* at 463 (quoting *Ramirez-Gonzalez v. INS*, 695 F.2d 1208, 1211 (9th Cir. 1983)), are a factor to consider in assessing hardship, and the Board "should have considered the implications of her economic loss." *Id.* at 464. As in *Tukhowinich*, the respondent in this case would face devastating economic detriment in Mexico, and that factor, because it also affects the citizen children, needs to be carefully considered.

The Ninth Circuit has also consistently held that although the birth of United States citizen children is not sufficient in itself to warrant a finding of extreme hardship, the effect of deportation on citizen children must be very carefully considered. See, e.g., *Casem v. INS*, 8 F.3d 700 (9th Cir. 1993), and cases cited therein. In that case, the court also noted the difference between the adjustments required by very young children accompanying their parents to a new country and the adjustments faced by children already in school. Both of the citizen children in this case are now of school age, and the Immigration Judge noted, as the court did in *Gutierrez-Centeno v. INS*, supra, that they have little

knowledge of "academic Spanish."

III. Congressional Intent

I recognize that, in enacting the cancellation statute, Congress intended to substantially narrow the class of aliens who would qualify for cancellation of removal, as opposed to those who qualified under the prior suspension statute. At oral argument in this case, the Service argued that the term exceptional and extremely unusual hardship should be strictly defined to fulfill Congress' intent in this regard, i.e., to make the class of aliens that would benefit from cancellation of removal much smaller than the class that benefited from suspension of deportation. See H.R. Conf. Rep. No. 104-828 (1996); *Matter of Monreal*, supra, at 59. The Service's argument has merit, and I agree that because the exceptional and extremely unusual hardship standard is more demanding than the old extreme hardship standard, fewer aliens will be able to meet the standard and thereby qualify for cancellation. I do not believe, however, that Congress intended to make the standard so demanding that it becomes a bar to all but the rarest of cases.

In this regard, Congress accomplished its goal of narrowing the class of aliens eligible for nonpermanent resident cancellation of removal in a number of ways, before the hardship standard is even assessed. An applicant for cancellation of removal must have 10 years of physical presence in the [page 334] United States, as opposed to only 7 years under the suspension statute. Section 240A(b)(1) of the Act. He or she must satisfy the physical presence requirement prior to the issuance of a Notice to Appear. Section 240A(d) of the Act. There is an overall cap of 4000 cancellation grants per year. Section 240A(e) of the Act. Further, as already noted, only hardship to qualifying family members of the cancellation applicant can be considered. In all these ways, the number of aliens for whom cancellation of removal can be granted has already been greatly narrowed. We do not need, in addition, a strict and narrow reading of the exceptional and extremely unusual hardship standard to further Congress' goal of reducing the number of aliens eligible for relief. 3

In my view, nonpermanent resident cancellation of removal cases are different from many other cases coming before the Immigration Judges and the Board. This applicant, like many cancellation applicants, entered the United States illegally. While I do not condone this and believe in the strong enforcement of our laws against illegal entry, I also believe that this respondent's case, and those of persons like her, should be considered in a different light from the cases of criminal or other undesirable aliens. This respondent and her family exhibit many of the values that we, as a society, purport to value. They are hardworking, law-abiding people with strong family values. They pay taxes, are active in their schools and churches, own their own homes, and do not depend on public assistance. We have always required extraordinary equities from criminal aliens before allowing them to stay. Within the confines of the cancellation of removal statute that we are bound to apply, we should not require the same when confronted with individuals such as this respondent. See generally Eric Schmitt, U.S.-Mexico Talks Produce Agreement on Immigration Policy, N.Y. Times, Aug. 10, 2001, at A4 (quoting United States Secretary of State Colin L. Powell as stating that Mexicans living in the United States illegally but who have jobs, pay taxes, and are raising United States citizen children would be included in policy initiatives designed to promote legal residency in this country).

In fact, adopting an overly strict reading of the statute carries the danger of rendering cancellation of removal meaningless for all but a very small number of aliens. I do not believe that is what Congress intended.

IV. Immigration Judge's Decision

The determination of whether an alien has satisfied the exceptional and extremely unusual hardship requirement is inherently fact specific and requires substantial and careful weighing of all the hardship

factors presented. For this reason, an Immigration Judge's factual findings are particularly important in a cancellation of removal case, especially a close case like this one. Here, unlike in *Matter of Monreal*, supra, the Immigration Judge found that the respondent had shown the requisite level of hardship. Indeed, the Immigration Judge made this finding even after first concluding that the hardship to the respondent's children had to be "unconscionable" to meet the exceptional and extremely unusual hardship standard. In *Matter of Monreal*, supra, we specifically rejected an unconscionable standard as too high. Now, the majority rejects the Immigration Judge's finding that the hardship the [page 335] respondent's children would face if removed to Mexico would meet that high standard and concludes that the hardship would not even meet the somewhat lower standard we set forth in *Matter of Monreal*.

As the fact finder in this case, the Immigration Judge was meticulous in reviewing the record and in attempting to assess the hardship issue. The Immigration Judge recounted the respondent's testimony about the hardship that her oldest child, 11-year-old Tanya, would face in Mexico. For example, in the United States, Tanya's school classes are conducted in English, and she is performing very well in school. In Mexico, Tanya would suffer academically since she has limited knowledge of "academic" Spanish; she would be unable to keep up with her peers and would probably be forced to enroll at a lower grade level, in addition to being placed in an educational system that is substandard when compared to that in the United States. The Immigration Judge supported his findings with documentary evidence in the record pertaining to Mexico's educational system.

The Immigration Judge concluded that the citizen children would suffer exceptional and extremely unusual hardship if they accompany their mother to Mexico. Again, the Immigration Judge supported this decision with documentary evidence highlighting the difficulties that persons in the respondent's position face in Mexico. In considering all of the factors in this case, the Immigration Judge applied a "totality of the circumstances" test to find it appropriate to grant cancellation of removal. That is a reasonable approach. Indeed, each one of the factors considered by the Immigration Judge individually may not be enough to meet the exceptional and extremely unusual hardship standard. Taking those factors together, however, I agree with the Immigration Judge that with this family's particular set of circumstances, the citizen children would suffer exceptional and extremely unusual hardship if the respondent is removed to Mexico.

The Immigration Judge thoughtfully considered this case, and I find inadequate reasons for reversing his decision. The standard set forth in *Matter of Monreal*, supra, at 65, is that a cancellation applicant must show hardship to qualifying relatives that is "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here." For the reasons discussed above, I believe that the respondent has made such a showing, and that the Immigration Judge's grant of cancellation should be upheld and the Service's appeal dismissed.

Accordingly, I respectfully dissent.

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?

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.

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 22, 1957 as a IMMIGRANT;
- 4) You were, on _____ convicted in the _____ Pleas for the offense of Gross Sexual Imposition, F-3, in violation of 2907.05 (A) (4) of the Ohio Revised Code.

RECEIVED
 DEPARTMENT OF JUSTICE
 EXECUTIVE OFFICE FOR
 IMMIGRATION REVIEW
 OFFICE OF IMMIGRATION SERVICE
 Common

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

STEPHEN C. ADANAY
GROUP SUPERVISOR

(Signature and Title of Issuing Officer)

CLEVELAND, OHIO

(City and State)

Date: _____

See reverse for important information

Falls Church, Virginia 22041

File: A [REDACTED] - Chicago, IL

Date: NOV 25 200

In re: [REDACTED] [REDACTED] [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Carpenter, Esquire

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

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.