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IIRIRA at 20 Years: An Overview of the Breadth and Depth of the Stop-Time Rule

By Ilana J. Snyder

Over 20 years ago, on September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. 104–208, 110 Stat. 3009–546 ("IIRIRA"). The historic changes in IIRIRA went into effect on April 1, 1997. *See generally Matter of Saelee*, 22 I&N Dec. 1258, 1261 (BIA 2000). One such historic change was the replacement of the availability of two forms of relief—suspension of deportation under former section 244 of the Immigration and Nationality Act (1996), 8 U.S.C. § 1254, and the waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1152(c)—with a more limited form of relief known as cancellation of removal under section 240A of the Act, 8 U.S.C. § 1229a.[1] *See* IIRIRA § 304; H.R. Rep. No. 104–469, pt. 1, at 231–32 (1996). This article addresses one small aspect of those changes—the "stop time rule"—and the body of case law that has resulted in the ensuing years from that revision.

Background

Cancellation of removal is available to lawful permanent residents and non-lawful permanent residents alike. Aliens in the former category must demonstrate continuous residence in the United States "for 7 years after having been admitted in any status," section 240A(a)(2) of the Act, while aliens in the latter category must demonstrate that they have been "physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of the application." Section 240A(b)(1)(A) of the Act. Most notably, and most relevant here, aliens eligible for former section 212(c) relief and suspension of deportation *continued to accrue* physical presence toward the required 7 or 10 year periods *during the pendency of their immigration proceedings. See generally Cipriano v. INS*, 24 F.3d 763 (5th Cir. 1994) (holding that time continues to toll until entry of an administratively final order). Aliens applying for cancellation of removal, however, are subject to the "stop-time rule"—a statutory invention of IIRIRA which halts the accrual of an alien's

continuous residence or continuous physical presence upon the earlier of the following two events:

> (A). . . when the alien is served a notice to appear under section 239(a), or
>
> (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.
>
> Section 240A(d)(1) of the Act.

Congress enacted this rule to avoid encouraging applicants to delay proceedings while they accrued time to become eligible for relief. *See generally* H.R. Rep. 104–469, pt. 1, 122 (1996) ("Suspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued . . . . Such tactics are possible because some Federal courts permit aliens to continue to accrue time toward the seven year threshold even after they have been placed in deportation proceedings. Similar delay strategies are adopted by aliens in section 212(c) cases."). Cancellation of removal is thus a more restrictive form of relief. Indeed, Congress indicated that its intent in enacting IIRIRA and replacing suspension of deportation with cancellation of removal was "to improve deterrence of illegal immigration." H.R. Conf. Rep. No. 104–828 (1996).

The stop-time rule on its face is narrow; it only applies to the "continuous residence" provision of the Act in section 240A(a)(2) and the "continuous physical presence" clause in section 240A(b)(1)(A). *See Nelson v. Att'y Gen. of U.S.*, 685 F.3d 318, 321 n.1 (3d Cir. 2012); *see also Matter of Bautista Gomez*, 23 I&N Dec. 893, 894 (BIA 2006). It is also the applicant who must *personally* accrue the presence in the United States. *See Holder v. Martinez-Gutierrez*, 566 U.S. 583 (2012) (rejecting the argument that the continuous physical presence of a parent may be imputed to a child while he or she is a minor), *overruling Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009). Although seemingly straightforward, the Board of Immigration Appeals and the circuit courts have had to address complicated statutory interpretation and Congressional intent questions when interpreting this provision and have even encountered byzantine retroactivity questions when determining its applicability.[2] This article probes the breadth of the stop-time rule.

Stopping Time: Service of the Notice to Appear[3]

Service of a Notice to Appear Without a Hearing Date or Time

Generally, under section 240A(d)(1), service of a Notice to Appear ("NTA") ends the alien's continuous physical presence or continuous residence. *See Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011).[4] Significantly, the Board held in *Camarillo* that service of an NTA that does not contain a hearing date or hearing time still operates to break the alien's accrual of time under section 240A(d)(1) of the Act. *Camarillo*, 25 I&N Dec. at 651. Seven circuits have considered *Camarillo* with six expressly affording the Board's decision *Chevron* deference[5] and one expressly declining to afford *Chevron* deference. Despite the circuit split on whether to afford deference, the result in the Second, Third, and Seventh Circuits—that *Camarillo* applies when notice is perfected by a notice of hearing issued *after* the NTA—is the same.

The Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits are in the first category of circuits that have afforded *Chevron* deference to the Board's holding in *Camarillo*, reasoning that the completeness of the NTA is irrelevant in the context of the stop-time rule. *See Moscoso-Castellanos v. Lynch*, 803 F.3d 1079 (9th Cir. 2015); *accord Guzman-Yuqui v. Lynch*, 786 F.3d 235 (2d Cir. 2015); *Urbina v. Holder*, 745 F.3d 736 (4th Cir. 2014); *Gonzalez-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014); *Yi Di Wang v. Holder*, 759 F.3d 670 (7th Cir. 2014); *see also O'Garro v. U.S. Att'y Gen.*, 605 F. App'x 951, 953 (11th Cir. May 22, 2015) (unpublished). There is a caveat to this rule in the Second and Seventh Circuits: where an NTA does not contain a hearing date or time but a notice of hearing is thereafter issued with this information, the stop-time rule is triggered when the circuits consider the service to be perfected—i.e., upon the date of the issuance of the *notice of hearing*. *See Guamanrriga v. Holder*, 670 F.3d 404, 410-11 (2d Cir. 2012) (per curiam); *Dabaneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2006); *accord Popa v. Holder*, 571 F.3d 890, 896–97 (9th Cir. 2009).

The Third Circuit reached the same conclusions, but expressly declined to accord *Chevron* deference to *Camarillo*, holding instead that an NTA that fails to specify the date and time of the hearing —and therefore does not comply with section 239(a)(1)(G)(i) of the Act—"will not stop the continuous residency clock until the combination of notices . . . conveys the *complete* set of information prescribed by § 1229(a)(1)." *Orozco-Velasquez v. Att'y Gen. of U.S.*, 817 F.3d 78, 83–84

(3d Cir. 2016) (emphasis in original). Thus, while the holding on *Chevron* deference differs, the application of the stop-time rule in the Second, Third, and Seventh Circuits is the same—the rule is only triggered when "full notice" to the alien—including the time and date of the hearing—is accomplished. *Id.* at 84.

Unfiled NTAs and Dismissed Charges

In a similar vein, where an NTA is served on an alien, but not filed with the Immigration Court, the stop-time rule is not invoked—this is true even where a new NTA is later served. *See Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015). In *Ordaz* the DHS argued that a 1998 NTA that was never filed with the Immigration Court (the notice listed the hearing date, time and location as "to be determined") triggered the stop-time rule because the statute only requires service of "'a' notice to appear (as opposed to 'the' notice to appear)." *Id.* at 639. In rejecting this argument, the Board first found that the Act's use of the indefinite article "a" is subject to more than one interpretation. *Id.* (citations omitted). Considering that "proceedings ordinarily begin with a *single* notice to appear," *id.* at 640, which may be amended "[a]t any time during the proceeding," 8 C.F.R. § 1240.10(e),[6] "[t]here is generally no need for the DHS to initiate new proceedings on the basis of an additional, superseding notice to appear," *Ordaz*, 26 I&N Dec. at 640; *see also* section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). The Board concluded that in using the indefinite article "a," Congress did not anticipate "the atypical situation" of an NTA not filed with the Immigration Court and therefore did not "intend[] to address it through the use of the indefinite article 'a' before the phrase 'notice to appear.'" *Ordaz*, 26 I&N Dec. at 640. Thus, the Board held that the 1998 unprosecuted NTA did not trigger the stop-time rule and remanded for reconsideration. *Id.* at 643.

As stated above, the Board considered the typical format of removal proceedings and concluded that they ordinarily commence with an NTA, and all additions or withdrawals of charges are achieved by service of a Form I–261 (Additional Charges of Removability). *Ordaz*, 26 I&N Dec. at 640 (citing 8 C.F.R. § 1240.10(e) (service of a Form I–261 may occur "at any time during the proceeding.")). Relatedly, the First, Fourth, and Sixth Circuits have held that even if the initial charge on the NTA is withdrawn and replaced by different charges of removability through service of a Form I–261, the date of service of the original NTA stops the accrual of continuous physical presence because the determinative factor is not whether the original charge "was sustained or sustainable but rather, when [the applicant] was placed into removal proceedings." *Cheung v. Holder*, 678 F.3d 66, 71 (1st Cir. 2012) (internal quotation marks omitted); *accord Gonzalez-Garcia*, 770 F.3d at 435; *Urbina*, 745 F.3d at 740–41.

Stopping Time: Commission of an Offense

Start—and End—Points

The stop-time rule can also be triggered on the date when an alien "commit[s] an offense referred to in section 212(a)(2) . . . " Section 240A(d)(1) of the Act. The Board in *Matter of Perez* confirmed that it is the date of *commission* of the offense and not the date of *conviction* that triggers the rule's application. 22 I&N Dec. 689 (BIA 1999) (en banc). In *Matter of Jurado*, the Board noted in dicta "that an alien need not have been convicted of [the] offense" for it to trigger the stop-time rule. 24 I&N Dec. 29, 31 (BIA 2006) (citing the possibility of an alien who "admits having committed, or who admits committing acts which constitute the essential elements of" an offense in section 212(a)(2)(A) of the Act triggering application of the stop-time rule). No circuit has considered the Board's reading in *Jurado*. Relatedly, however, the Second and Fifth Circuits have held that the stop-time rule is invoked by an offense even where the conviction was subsequently expunged. *See Saleh v. Gonzales*, 495 F.3d 17, 26 (2d Cir. 2007); *Alves v. Keisler*, 253 F. App'x 390 (5th Cir. Nov. 7, 2007) (unpublished) (per curiam).

The Board also held in *Jurado* that the alien need not be "charged with such an offense as a ground of inadmissibility or removability in order for the provision to stop the alien's accrual of continuous residence." *Jurado*, 24 I&N Dec. at 31; *see also Calix v. Lynch*, 784 F.3d 1000, 1008–09 n.6 (5th Cir. 2015) (holding that even if the alien is not seeking admission or charged with inadmissibility, the stop-time rule is still invoked by an offense described in section 212(a)(2) of the Act). Indeed, the Fifth Circuit agreed with *Jurado* and has held that this rule "does not require that an alien be removable *as the offense is categorized under* [section 212(a)(2) of the Act]." *Miresles-Zuniga v. Holder*, 743 F.3d 110, 114 (5th Cir. 2014) (concluding that the stop-time rule was invoked for a lawful permanent resident who was removable for a section 237(a)(2)(E)(i) crime of domestic violence because the offense could also be characterized under section 212(a)(2) as a crime involving moral turpitude).

Which Offenses Qualify?

Although the "commission of an offense" portion of the stop-time rule appears expansive by referencing both sections 212 and 237, the Board has held that it only applies to "offense[s] referred to in section 212(a)(2)" of the Act. *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000) (en banc). This restrictiveness is best highlighted by the facts of *Campos-Torres*, a case in which the alien had been convicted of a single offense for unlawful use of a weapon. *Id.* at 1290. The respondent conceded the sole charge of removability pursuant to section 237(a)(2)(C) of the Act, but argued that since a firearms offense is not an enumerated ground of inadmissibility, the date of commission for his offense could not be used to stop the accrual of his continuous physical presence for cancellation of removal. *See id*. at 1292. In looking to the "plain meaning" of the phrase "referred to" and the overall design of the statute, the Board agreed with the respondent's argument. *See id.* at 1293. The Board noted that "several of the grounds of deportability found in section 237(a)(2) of the Act are referred to in section 212(a)(2), whereas others . . . are not" and ultimately concluded that since the respondent's firearms offense "is not referred to in section 212(a)(2) of the Act, it did not 'stop time' under section 240A(d)(1)." *Id.* at 1293, 1295. The Second, Third, Fifth, and Ninth Circuits have—in both published and unpublished decisions—approved of the proposition announced in *Campos-Torres*. *See Nino v. Holder*, 690 F.3d 691, 697 (5th Cir. 2012) (providing that the offense "must have been committed *and* have rendered the alien inadmissible or removable"); *Saleh v. Mukasey*, 276 F. App'x 704, 705 (9th Cir. May 5, 2008) (unpublished) (relying on *Campos-Torres* to conclude that the Immigration Judge erred in pretermitting cancellation of removal because crimes of domestic violence are not "referred to" in section 212(a)(2) of the Act); *Yepez v. Gonzales*, 242 F. App'x 753, 755 (2d Cir. July 3, 2007) (unpublished) (applying *Campos-Torres* to the "start-time" provision of former section 244(a)(2) of the Act for suspension of deportation); *Dudney v. Att'y Gen. of U.S.*, 129 F. App'x 747 (3d Cir. May 9, 2005) (unpublished) (distinguishing *Campos-Torres* from respondent's case and concluding that petitioner's drug offense was "referred to" in section 212(a)(2) and therefore triggered the stop-time rule).

Relatedly, in *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003), the Board considered whether the stop-time rule is invoked by an offense that falls into the "petty offense exception" contained in the moral turpitude ground of inadmissibility at section 212(a)(2)(A)(ii)(II) of the Act. This exception defines a petty offense as one where the "maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months." The Board concluded that because a conviction for such an offense would not render the alien inadmissible, it likewise does not operate to trigger the stop-time rule. Without citing *Deanda-Romo*, the Ninth Circuit has reached the same conclusion. *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161-62 (9th Cir. 2009) (remanding to the Board for consideration of whether petitioner's conviction for a crime involving moral turpitude fell within the petty offense exception and therefore did not trigger section 240A(d)(1) of the Act); *see also Tamara v. Lynch*, 658 F. App'x 316 (9th Cir. 2016) (remanding under *Castillo-Cruz*). Significantly, the Board has held that a crime that qualifies under the petty offense exception does not trigger the stop-time rule "even if it renders the alien removable under section 237(a)(2)(A)(i) of the Act" as an alien convicted of a crime involving moral turpitude committed within five years after the date of admission. *Matter of Armando Garcia*, 25 I&N Dec. 332 (BIA 2010).

Exceptions

Special Rule Cancellation for Battered Spouses and Children

A special rule for cancellation of removal was added by the Violence Against Women Act ("VAWA") of 1994[7] and is applicable if: (1) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen; (2) the alien is continuously present in the United States for three years immediately preceding the application; (3) the alien has been a person of good moral character during such period; (4) the alien is not inadmissible under paragraph (2) or (3) of section 212(a) or deportable under 237(a)(1)(G), (2)–(4) and has not been convicted of an aggravated felony; and (5) removal would result in extreme hardship to the alien, the alien's child or the alien's parent. *See* section 240A(b)(2)(A).[8] Yet, the stop-time rule is not triggered by the issuance of an NTA. *See* Section 240A(b)(2)(A)(ii). This constitutes an important exception to the "service" portion (although notably not the "criminal offense" portion) of the stop-time rule.

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CIRCUIT COURT DECISIONS FOR APRIL 2017

by John Guendelsberger

The United States courts of appeals issued 141 decisions in April 2017 in cases appealed from the Board. The courts affirmed the Board in 130 cases and reversed or remanded in 11, for an overall reversal rate of 7.8%, compared to last month's 11.8%. There were no reversals from the First, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for April 2017 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	33	31	2	6.1
Third	8	7	1	12.5
Fourth	11	9	2	18.2
Fifth	11	11	0	0.0
Sixth	6	6	0	0.0
Seventh	2	2	0	0.0
Eighth	6	6	0	0.0
Ninth	54	48	6	11.1
Tenth	1	1	0	0.0
Eleventh	6	6	0	0.0
All	141	130	11	7.8

The 141 decisions included 72 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 34 direct appeals from denials of other forms of relief from removal or from findings of removal; and 35 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	72	67	5	6.9
Other Relief	34	30	4	11.8
Motions	35	33	2	5.7

The five reversals or remands in asylum cases involved protection under the Convention Against Torture (two cases), particular social group, credibility, and government inability or unwillingness to protect against persecution. The four reversals or remands in the "other relief" category addressed a crime involving moral turpitude, whether a burglary conviction was an aggravated felony, nunc pro tunc section 212(c) waiver eligibility, and whether an infraction offense qualified as a conviction. The two motions cases involved changed country conditions and ineffective assistance of counsel.

The chart below shows the combined numbers for January through April 2017 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	16	12	4	25.0
Tenth	6	5	1	16.7
Fourth	44	38	6	13.6
Second	110	97	13	11.8
Ninth	228	206	22	9.6
Fifth	42	38	4	9.5
Third	29	27	2	6.9
Sixth	17	16	1	5.9
Eleventh	25	24	1	4.0
First	8	8	0	0.0
Eighth	23	23	0	0.0
All	548	494	54	9.9

Last year's reversal rate at this point (January through April 2016) was 11.0%, with 799 total decisions and 88 reversals or remands.

The numbers by type of case on appeal for the first four months of 2017 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	258	233	25	9.7
Other Relief	156	136	20	12.8
Motions	136	125	9	6.7

CIRCUIT COURT DECISIONS FOR MAY 2017

by John Guendelsberger

The United States courts of appeals issued 120 decisions in May 2017 in cases appealed from the Board. The courts affirmed the Board in 101 cases and reversed or remanded in 19, for an overall reversal rate of 15.8%, compared to last month's 7.8%. There were no reversals from the Fourth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for May 2017 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	2	1	33.3
Second	27	21	6	22.2
Third	3	2	1	33.3
Fourth	6	6	0	0.0
Fifth	11	10	1	9.1
Sixth	3	2	1	33.3
Seventh	2	2	0	0.0
Eighth	3	3	0	0.0
Ninth	50	42	8	16.0
Tenth	2	2	0	0.0
Eleventh	10	9	1	10.0
All	120	101	19	15.8

The 120 decisions included 69 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 32 direct appeals from denials of other forms of relief from removal or from findings of removal; and 19 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	69	54	15	21.7
Other Relief	32	29	3	9.4
Motions	19	18	1	5.3

The 15 reversals or remands in asylum cases involved protection under the Convention Against Torture (3 cases), nexus (3 cases), credibility (2 cases), past persecution (2 cases), well-founded fear (2 cases), relocation (2 cases), and particular social group. The three reversals or remands in the "other relief" category addressed obstruction of justice as an aggravated felony (two cases) and voluntary departure. The motion case involved changed country conditions.

The chart below shows the combined numbers for January through May 2017 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	18	14	4	22.2
Second	137	118	19	13.9
Tenth	8	7	1	12.5
Fourth	50	44	6	12.0
Ninth	278	248	30	10.8
Sixth	20	18	2	10.0
Fifth	53	48	5	9.4
Third	32	29	3	9.4
First	11	10	1	9.1
Eleventh	35	33	2	5.7
Eighth	26	26	0	0.0
All	668	595	73	10.9

Last year's reversal rate at this point (January through May 2016) was 11.1%, with 964 total decisions and 107 reversals or remands.

The numbers by type of case on appeal for the first 5 months of 2017 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	327	287	40	12.2
Other Relief	188	165	23	12.2
Motions	153	143	10	6.5

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Supreme Court

In *Maslenjak v. United States*, No. 16-309, 2017 WL 2674154 (June 22, 2017), the Court vacated the decision of the Sixth Circuit, holding that the Government "must establish that an illegal act by the defendant played some role in her acquisition of citizenship" in order to secure a conviction under 18 U.S.C. § 1425(a) and revoke her citizenship.

In seeking refugee status, which she was granted, the defendant fabricated a claim of persecution in Bosnia. Six years later, the defendant applied for naturalization, answering "no" to two questions asking whether she had ever lied to or given false or misleading information to a government official while applying for a benefit or seeking entry into the United States. Her application was granted. However, she was subsequently charged and convicted under 18 U.S.C. § 1425(a) of knowingly procuring, contrary to law, her naturalization based on the false statements she made on her application. The district court concluded that, as a matter of law, the false statements need not have been material to the naturalization decision to support a conviction, and the Sixth Circuit affirmed.

Looking to the language of 18 U.S.C. § 1425(a), the Court held that, read naturally, the statute requires a causal relation between the illegal act and the acquisition of naturalization. Otherwise, a legal violation that would not justify denying citizenship could nonetheless justify revoking it later. The Court further noted that when the illegal act is a false statement, to determine whether the defendant acquired citizenship by means of a lie, the jury must evaluate how knowledge of the real facts would have affected a reasonable government official properly applying naturalization law. Specifically, the Government must demonstrate that the defendant lied about facts that would have justified denying naturalization or would have predictably led to the discovery of other facts warranting that result.

In *Sessions v. Morales-Santana,* 137 S. Ct. 1678 (2017), a derivative citizenship case, the Court found support for the petitioner's equal protection argument that the citizenship laws in effect at the time of his father's birth were unconstitutional in treating unwed fathers and unwed mothers differently. However, although the Court agreed with the petitioner's argument, the resulting remedy was not the one sought by the petitioner.

The petitioner was born abroad in 1958 to a United States citizen father and alien mother. His parents were unwed. At that time, section 301(a)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1401(a)(7), stated that if a child born outside of the United States to married parents, with one parent a United States citizen and the other an alien, then the child only obtains United States citizenship at birth if the citizen parent was physically present in the United States for at least five years prior to the child's birth, two of which must be after the citizen parent was at least fourteen years old. However, if the child is born out of wedlock, the Act contained an exception that if the citizen parent is the child's *mother*, then the citizen mother need only establish one year of physical presence in the United States prior to the child's birth. This same exception did not apply to a United States citizen father.

The Court concluded that this disparate treatment, which reflected many of the "overbroad generalizations" concerning the role of men and women during the earlier era, did not withstand constitutional scrutiny as no important government interest is recognizable today in treating unwed men and women differently. However, the Court concluded that it did not have the authority to revise the statute as the petitioner suggested to extend the "one year" exception that an unwed mother enjoyed to unwed fathers. Rather, the Court concluded that the exception must be prospectively eliminated, with both unwed mothers and fathers needing to demonstrate two years of presence after the child's fourteenth birthday. Of note, the Court indicated that not all gender-based distinctions in the Act are constitutionally suspect.

In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), the Court addressed the section 101(a)(43)(A) of the Act definition of "sexual abuse of a minor." The alien was convicted of statutory rape in violation of California Penal Code § 261.5(c), an offense defined as "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator." For purposes of the statute, California also defines a "minor" as a person under 18 years of age. The Board found this three-year

age differential meaningful enough for a conviction under § 261.5(c) to qualify as a sexual abuse of a minor aggravated felony, and the Sixth Circuit afforded this interpretation *Chevron* deference.

The Supreme Court reversed, determining that, under the categorical approach, the generic Federal definition of "sexual abuse of a minor" unambiguously requires that the victim be younger than 16 years old, absent a special relationship between the perpetrator and victim. To define the age requirement in the generic Federal definition, the Court relied on: (1) the traditional dictionary definition of "age of consent" being 16 years old; (2) the fact that the Act places sexual abuse of a minor in the same aggravated felony category as rape and murder, indicating that such a conviction must be "especially egregious"; and (3) that a related Federal statute, 18 U.S.C. § 2243, as well as the majority of state criminal codes, use 16 as the age of consent.

The Court was careful to confine its holding to traditional statutory rape offenses that are based solely on an age differential between the participants and not to offenses that include a special relationship between the victim and the perpetrator, such as between family members or teachers and students. The Court also left open whether the generic Federal definition of sexual abuse of a minor also includes a minimum age differential when the victim is under 16 years old.

Note: *Sessions v. Dimaya*, No. 15-1498, and *Jennings v. Rodriguez*, No. 15-1204, were restored to the Court's calendar for reargument.

First Circuit

Garcia v. Sessions, 856 F.3d 27 (1st Cir. 2017): The First Circuit held that the Board's statutory interpretation that an alien subject to a reinstated order of removal is not eligible to apply for asylum is reasonable and entitled to *Chevron* deference. Unlike some other circuit courts that have concluded that the reinstatement of removal statute clearly forecloses eligibility for asylum, the First Circuit did not take a position on the first step of the *Chevron* analysis as to whether Congress clearly and unambiguously spoke on the issue, instead concluding that the alien could not prevail in arguing for his preferred interpretation of the statute.

Garcia-Cruz v. Sessions, 858 F.3d 1 (1st Cir. 2017): The First Circuit held that substantial evidence supported the Board's determinations that the respondent did not establish past persecution and that it was possible for him to safely relocate to another part of Guatemala. However, the court found that the Board did not sufficiently weigh the factors listed in 8 C.F.R. § 1208.13(b)(3) to determine whether it would be *reasonable* to expect the respondent to internally relocate. The First Circuit remanded for further proceedings for the agency to address the regulatory factors.

Third Circuit

Myrie v. Att'y Gen. U.S., 855 F.3d 509 (3d Cir. 2017): The Third Circuit clarified its prior decision in *Kaplun v. Att'y Gen.*, 602 F.3d 260 (3d Cir. 2010), again concluding that "the question of whether likely government conduct equates to acquiescence is a mixed question of law and fact." The court further held that the inquiry into acquiescence requires a two-part analysis. First, there must be a factual finding as to how public officials will likely act in response to harm that the petitioner fears, and second, there must be a legal determination as to whether the likely response from public officials qualifies as acquiescence under the governing regulations.

Cazun v. Att'y Gen. U.S., 856 F.3d 249 (3d Cir. 2017): The Third Circuit held that the Board's statutory interpretation that an alien subject to a reinstated order of removal is not eligible to apply for asylum is reasonable and entitled to *Chevron* deference. The court further noted that it was following the Ninth Circuit by applying the *Chevron* framework to its analysis, as opposed to the Second, Fifth, and Eleventh Circuits which found that the plain language of the statute precluded asylum eligibility for aliens with reinstated removal orders.

Flores v. Att'y Gen. U.S., 856 F.3d 280 (3d Cir. 2017): The Third Circuit held that the petitioner's South Carolina accessory-after-the-fact conviction is not an offense "relating to obstruction of justice" and that it cannot be considered either an "aggravated felony" or a "particularly serious crime" under the Act. Therefore, the petitioner was eligible for withholding of removal. To assess whether an alien's prior offense constitutes an aggravated felony obstruction of justice offense, the court applied the categorical approach to determine if there is a "logical or causal connection" between the alien's offense and an offense specified under Title 18, Chapter 73 of the United States Code. The court rejected the Government's argument that it look beyond the Federal obstruction of justice offenses under Chapter 73 to the Federal accessory-after-the fact offense under 18 U.S.C. § 3.

Fourth Circuit

Jaquez v. Sessions, No. 16-1147, 2017 WL 2467084 (4th Cir. June 8, 2017): The Fourth Circuit concluded that the petitioner's deferred adjudication constituted a "conviction" as that term is defined in section 101(a)(48)(A) of the Act where the petitioner had entered a guilty plea and received probation (with the guilty plea subsequently vacated under a rehabilitative statute). The court distinguished its holding in *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011), where a deferred adjudication was deemed *not* to constitute a conviction. In that case, the defendant who received a deferred adjudication had pled "not guilty," but a judge "found facts that would justify a finding of guilt" though no formal judgment of guilt was entered.

Castendet-Lewis v. Sessions, 855 F.3d 253 (4th Cir. 2017): The Fourth Circuit concluded that the petitioner's Virginia conviction for burglary does not constitute an aggravated felony burglary offense as defined in section 101(a)(43)(G) of the Act. The court held that Virginia's burglary statute is overbroad with respect to the generic definition of burglary because it includes means of entry and locations not consistent with a generic burglary. Further, the statute is not divisible under recent Supreme Court precedent and Virginia state law.

Uribe v. Sessions, 855 F.3d 622 (4th Cir. 2017): The court held that a burglary of a dwelling—even a structure that is temporarily vacant yet still suitable for occupancy—under Maryland law categorically qualifies as a crime involving moral turpitude. The court agreed with the Board that the act of breaking and entering (even if committed constructively) with the intent to commit *any* crime within the dwelling supports a crime involving moral turpitude determination.

Fifth Circuit

United States v. Martinez-Rodriguez, 857 F.3d 282 (5th Cir. 2017): In a sentencing case, the Fifth Circuit concluded that the offense of causing injury to a child in violation of Texas Penal Code § 22.04(a)(3) does not qualify as a crime of violence under section 101(a)(43)(F) of the Act. The court arrived at this determination because the injury may be caused by either an act or omission, and the court concluded that these alternative possibilities are "means" of committing the same offense rather than separate statutory "elements."

United States v. Guillen-Cruz, 853 F.3d 768 (5th Cir. 2017): In this sentencing case, the Fifth Circuit concluded that the "illicit trafficking in firearms" aggravated felony offenses contained at sections 101(a)(43)(C) and 101(a)(43)(E)(ii) of the Act do not include the offense of exporting high caliber rifle magazines in violation of 22 U.S.C. § 2778(b)(2) and (c). The court applied both the categorical and modified categorical approaches during its lengthy analysis and concluded that magazines that hold ammunition do not fall within the definitions of either "firearms" or "ammunition."

Ibanez-Beltran v. Lynch, 858 F.3d 294 (5th Cir. 2017): The Fifth Circuit held that Ariz. Rev. Stat. Ann. § 13-3405(A)(4)—which sets forth, *inter alia*, the offense of offering to transport marijuana for sale—is divisible between alternate sets of elements under *Mathis v. United States*, 136 S. Ct. 2243 (2016). The government conceded that solicitation offenses are not covered by the Controlled Substances Act, 21 U.S.C. § 802, and would not be a categorical match to an aggravated felony. Therefore, the court applied the modified categorical approach and determined that the respondent pled guilty to an offense that constitutes an aggravated felony under section 101(a)(43)(B) of the Act; specifically, attempted transportation of marijuana for sale.

United States v. Rico-Mejia, No. 16-50022, 2017 WL 2371741 (5th Cir. June 1, 2017): After granting a petition for panel rehearing, the Fifth Circuit withdrew the prior panel opinion, *United States v. Rico-Mejia*, 853 F.3d 731 (5th Cir. 2017). However, the holding in the substituted opinion remained the same. The Fifth Circuit held that section 5-13-301(a)(1) of the Arkansas Code (terroristic threatening) is not categorically a "crime of violence" as defined in U.S.S.G. § 2L1.2(b)(1)(A)(ii) because it lacks physical force as an element.

Seventh Circuit

United States v. Jennings, No. 16-2861, 2017 WL 2603349 (7th Cir. June 16, 2017): In this sentencing case, the court concluded that a Minnesota conviction for domestic assault qualifies under the ACCA as a "violent felony" involving the "use, attempted use, or threatened use of physical force." The Seventh Circuit was unpersuaded by the petitioner's argument that a domestic assault offense could be caused where the offender intends to cause bodily harm, but does so through a de minimis use of force. The court reasoned that the intended outcome makes such a volitional act qualify as "violent force."

The court also declined to employ "legal imagination" to find that an offender would realistically be prosecuted for domestic assault if the offender simply withheld food or medicine to cause such harm. In a separate holding, simple robbery under Minnesota law was also found to be a "violent felony."

Tsegmed v. Sessions, No. 16-1036, 2017 WL 2588881 (7th Cir. June 15, 2017): The Seventh Circuit affirmed the Board's determination that the petitioner did not show that it is "more likely than not" he will be tortured if returned to Mongolia. The court did not mention the "substantial, albeit unquantifiable, probability" standard for withholding of removal articulated in *Velasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017), nor did it utilize the "substantial risk" standard for protection under the Convention Against Torture discussed in *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134 (7th Cir. 2015).

Eighth Circuit

Fletcher v. United States, 858 F.3d 501 (8th Cir. 2017): In a sentencing case, the Eighth Circuit held that the petitioner's prior convictions for making terroristic threats under Nebraska law qualified as violent felonies under the ACCA's physical force clause. The Court rejected the petitioner's argument that the Nebraska terroristic threats statute can encompass threats against property, determining that the petitioner had not demonstrated a "realistic probability" that Nebraska would apply the statute to a threat to property alone. The court also distinguished Nebraska's terroristic threats statute from the Minnesota terroristic threats statute at issue in *United States v. Sanchez-Martinez*, 633 F.3d 658 (8th Cir. 2011), which did not qualify under the ACCA physical force clause.

United States v. Sims, 854 F.3d 1037 (8th Cir. 2017): In a sentencing case, the Eighth Circuit held that residential burglary under Ark. Code Ann. § 5-39-201(a)(1) is indivisible and broader than generic burglary because it includes vehicles. Noting a circuit split, the court found that even though the statute was limited to vehicles in which one could live, it was overbroad and therefore did not constitute a predicate violent felony offense under the ACCA.

Ninth Circuit

Diego v. Sessions, 857 F.3d 1005 (9th Cir. 2017): To determine whether the petitioner had been convicted of an aggravated felony sexual abuse of a minor offense, the Ninth Circuit applied the three-step analytical process set forth in *Descamps v. United States*, 133 S. Ct. 2276 (2013). The statute at issue was first degree attempted sexual abuse in violation of Or. Rev. Stat. § 163.427. The court concluded that the age of the victim qualified as an element that could be ascertained by examining the record of conviction. To verify its interpretation of the statute, the Ninth Circuit considered Oregon case law.

Ledezma-Cosino v. Sessions, 857 F.3d 1042 (9th Cir. 2017) (en banc): The Ninth Circuit, sitting en banc, reversed a prior decision in this case and determined that substantial evidence supported the finding that the petitioner was a "habitual drunkard" and that the term "habitual drunkard" is not unconstitutionally vague since it "readily lends itself to an objective factual inquiry." The Ninth Circuit also determined that the statutory "habitual drunkard" provision does not violate equal protection under rational basis review.

Ayala v. Sessions, 855 F.3d 1012 (9th Cir. 2017): The alien in this case was subject to reinstatement of a prior removal order and requested a reasonable fear determination from an asylum officer. She was found not to have a reasonable fear. The alien sought review of this determination from an Immigration Judge, who also concluded that the alien did not have a reasonable fear of persecution on account of a protected ground. As a threshold matter, the Ninth Circuit faced a jurisdictional question because the alien had incorrectly appealed to the Board, which does not have jurisdiction, rather than filing a petition for review. However, under the circumstances of the case, the court found that the petition for review was timely and properly before it. The court remanded the record for further consideration of the alien's claim that a family-based particular social group formed the basis for her mistreatment.

BIA PRECEDENT DECISIONS

In *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017), the Board concluded that in determining whether a statute is divisible under *Mathis v. United States*, 136 S. Ct. 2234 (2016), Immigration Judges may consider or "peek" at an alien's conviction record only to discern whether statutory alternatives define "elements" or "means," provided that state law does not otherwise resolve the question.

The Board denied the Department of Homeland Security's (DHS's) motion to reconsider its prior decision in *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016), which held that the DHS did not prove that the respondent had been convicted of a crime of violence aggravated felony. The DHS argued that the Board should apply the Supreme Court's rationale in *Voisine v. United States*, 136 S. Ct. 2272 (2016), and consequently find that "reckless" discharge of a firearm is a crime of violence. The Board disagreed, noting that *Voisine* held only that reckless assault involves the "use of physical force" within the meaning of the "misdemeanor crime of domestic violence" definition and did not address whether reckless conduct satisfies the "use of physical force" requirement for a crime of violence. Because the Court's *Voisine* holding is not in conflict with the Tenth Circuit's prior decision in *United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008), the Board is obligated to follow the Tenth Circuit precedent.

The Board also disagreed with the DHS's argument that it misapplied *Mathis* when it drew a "reasonable inference" that section 76-10-508.1 of the Utah Code is indivisible with respect to mens rea by looking at analogous Utah case law in the context of second-degree murder. The Board noted that where state case law does not address the distinction between elements and means in the context of a specific criminal statute, it is not impermissible or unreasonable to seek guidance in cases interpreting statutes with similar language and structure.

Finally, the Board concluded that although a "peek" at the respondent's plea agreement indicates that he admitted to "knowingly" discharging a firearm, such an admission is not sufficient to reliably establish that the admitted fact is an "element" as contemplated by *Mathis*. The Board noted that the facts admitted in a plea agreement may shed light on the divisibility of a state statute when those facts are tethered to what is alleged in a charging document, but the respondent's charging document contained no mens rea allegation at all.

In *Matter of J.M. Alvarado*, 27 I&N Dec. 27 (BIA 2017), the Board held that the persecutor bar in section 241(b)(3)(B)(i) of the Act, 8 U.S.C. § 1231(b)(3)(B)(i) (2012), applies to an alien who assists or otherwise participates in the persecution of another individual without regard to the offender's personal motivation for assisting or participating in the persecution.

While serving in the Salvadoran National Guard from 1981 to 1984, the respondent detained an individual whom he delivered to his superiors for questioning. The respondent's superiors ordered him to stand guard away from the immediate area where they interrogated this detainee and to provide a security patrol during the questioning. The respondent knew that his superiors severely mistreated the detainee by actions that included placing needles under his fingernails and that such acts were based on the victim's political opinion.

The Board examined whether the respondent was required to have a persecutory motive to be subject to the persecutor bar when he assisted in the mistreatment of the detainee. The Board disagreed with the Immigration Judge's determination that the respondent's personal motives were relevant to the applicability of the persecutor bar and that the respondent's actions did not qualify as assistance or participation in persecution within the meaning of section 241(b)(3)(B)(i) of the Act. The Board stated that an examination of the respondent's personal motives in applying the persecutor bar contravenes the plain language of section 241(b)(3)(B)(i) of the Act. The Board also noted that the Immigration Judge misapplied its decision in *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988), *abrogated on other grounds by Negusie v. Holder*, 555 U.S. 511 (2009). Furthermore, the Board held that when determining whether an alien has assisted or participated in persecution under section 241(b)(3)(B)(i) of the Act, the proper focus is not on the motive of the alien, but rather on the intent of the perpetrator of the underlying persecution. The Board stated that if the acts of persecution are motivated by the victim's race, nationality, membership in a particular social group, or political opinion, then the alien's assistance invokes the persecutor bar, without regard to the personal motivation of the alien who assisted or otherwise participated in the persecution.

As a result, the Board concluded that the persecutor bar in section 241(b)(3)(B)(i) of the Act applies to the respondent because, regardless of his own motives, the respondent "assisted" or "otherwise participated" in the persecution of an individual because of the individual's political opinion, and that the respondent therefore had not met his burden of establishing eligibility for

special rule cancellation of removal under the NACARA. Accordingly, the Board sustained the DHS's appeal, vacated the Immigration Judge's grant of special rule cancellation of removal, and ordered the respondent removed from the United States to El Salvador.

In *Matter of M-B-C-*, 27 I&N Dec. 31 (BIA 2017), the Board held that where the record contains some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of an application for relief may apply, the alien bears the burden under 8 C.F.R. § 1240.8(d) to prove by a preponderance of the evidence that such grounds do not apply.

The case involved events that occurred during the Bosnian War. A DHS senior historian testified that the respondent served in the Army of the Republic of Srpska ("VRS"), the Bratunac Light Infantry Brigade, the Ministry of Internal Affairs Bratunac police, and the Janja Special Police during various periods between May 1992 and June 1996. The respondent assumed a leadership role as company commander in the Bratunac Light Infantry Brigade. The senior historian also testified that VRS soldiers, the Bratunac Light Infantry Brigade, and the Janja Special Police engaged in summary executions of civilians in and around various locations during the times that the respondent was serving in those units. The respondent testified that he served in the VRS from 1992 to 1993. He denied possessing an "official rank," but confirmed that he was elevated to the position of company commander in the Bratunac Light Infantry Brigade. The respondent claimed to have never had a part in capturing, killing, or forcibly expelling civilians during his service in the VRS.

The Immigration Judge found that the respondent was not credible and denied his application for a section 237(a)(1)(H) waiver after determining that he did not meet his burden of establishing that he is not barred from such relief as an alien who assisted or otherwise participated in genocide or as an alien who committed, ordered, incited, assisted, or otherwise participated in the commission of any extrajudicial killing. The Immigration Judge also denied the respondent's applications for asylum and withholding of removal, concluding that he is subject to the persecutor bar in sections 208(b)(2)(A)(1)(i) and 241(b)(3)(B)(i) of the Act.

The Board was not persuaded of any clear error in the Immigration Judge's adverse credibility determination, which was based on specific and cogent reasons, including inconsistencies in the respondent's testimony, as well as an implausible aspect of his testimony. In discussing the relevant burden of proof, the Board noted that, in using the terms, "indicates" and "may apply" together, 8 C.F.R. § 1240.8(d) does not create an onerous standard and necessarily means a showing less than the preponderance of the evidence standard. Otherwise, the regulation would have simply employed the preponderance standard. Accordingly, the Board held that where the record contains some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of the application may apply, the alien bears the burden under 8 C.F.R. § 1240.8(d) to prove by a preponderance of the evidence that such grounds do not apply.

Noting that the DHS presented extensive evidence showing not only that the respondent was a member of military and police units that engaged in extrajudicial killings and genocide during the Bosnian War, but also that his service in those units corresponded with the times and locations of those killings and genocide, the Board concluded it was reasonable for the Immigration Judge to conclude that the respondent may have committed, ordered, incited, assisted, or otherwise participated in extrajudicial killings and genocide and, consequently, that he might be an alien described in sections 212(a)(3)(E)(ii) and (iii)(II) and 237(a)(4)(D) of the Act. The Board noted that the respondent did not offer sufficient evidence apart from his incredible testimony to meet his burden of proving by a preponderance of the evidence that he is not an alien described in those sections. The Board also determined that it was reasonable for the Immigration Judge to conclude that the respondent may have ordered, incited, assisted, or otherwise participated in persecution and that his incredible testimony does not establish by a preponderance of the evidence that he is not subject to the persecutor bar.

Thus, the Board upheld the Immigration Judge's adverse credibility finding and affirmed her determination that the respondent has not established eligibility for a waiver of removability under section 237(a)(1)(H) of the Act or for asylum or withholding of removal. Accordingly, the Board dismissed the respondent's appeal.

In *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), the Board determined that whether a particular social group based on family membership is cognizable depends on the nature and degree of the relationships involved and how those relationships are regarded by the society in question. Additionally, the Board held that to establish eligibility for asylum on the basis of membership in a particular social group composed of family members, an applicant must not only demonstrate that he or she is a member of the family but also that the family relationship is at least one central reason for the claimed harm.

The respondent voluntarily returned to Mexico in 2011. His father had refused to allow members of La Familia Michoacana to sell illegal drugs from his store. Members of La Familia Michoacana then asked the respondent if he would sell drugs for them at his father's store because they liked the store's location. The respondent declined, and the cartel members indicated that he should reconsider. The following week, the respondent was the subject of an unsuccessful kidnapping attempt by persons apparently associated with the gang. The respondent then left for the border with the United States. The respondent's father still operated the store, but he began paying "rent" to the cartel, which made it no longer profitable.

The Board dismissed the respondent's appeal from the Immigration Judge's denial of his asylum application. The Board agreed with the parties that the members of an immediate family may constitute a particular social group and stated that it had no difficulty identifying the respondent as being a member of the particular social group comprised of his father's immediate family. In addressing nexus, the Board agreed with the Immigration Judge that the respondent was targeted only as a means to achieve the cartel's objective to increase its profits by selling drugs in the store owned by his father. Any motive to harm the respondent because he was a member of his family was, at most, incidental. The Immigration Judge had found that the cartel would have gone after any family who owned a business there and that the cartel's coercion of his father into paying "rent" to them constituted criminal extortion and further indicated that the cartel's motivation was not based on the family relationship. As a result, the Board stated that the Immigration Judge's finding that the gang was not motivated to harm the respondent based on family status was not clearly erroneous. The Board concluded that the respondent did not establish that the respondent's membership in a particular social group comprised of his father's family members was at least one central reason for the events he experienced and the harm he claims to fear in the future.

In *Matter of Alday-Dominguez*, 27 I&N Dec. 48 (BIA 2017), it was concluded that the aggravated felony receipt of stolen property provision in section 101(a)(43)(G) of the Act does not require that unlawfully received property be obtained by means of common law theft or larceny.

The Board disagreed with the Immigration Judge's conclusion that because the phrase "theft offense" precedes the "receipt of stolen property" parenthetical and this parenthetical begins with the word "including," an aggravated felony receipt of stolen property offense must involve the receipt of property that was obtained by common law larceny or theft. Instead, the Board reaffirmed its decision in *Matter of Cardiel*, 25 I&N Dec. 12 (BIA 2009), and noted that receipt of stolen property is not a subset of "theft" within section 101(a)(43)(G) of the Act: rather, receipt of stolen property and theft are distinct and separate offenses. Additionally, the Board noted that the word "stolen" is not a common law term with a fixed meaning that relates to only common law offenses such as theft and larceny. As such, it should be interpreted broadly as including offenses of embezzlement, false pretenses, and any other felonious takings.

In *Matter of Falodun*, 27 I&N Dec. 52 (BIA 2017), the Board held that unlike a Certificate of Naturalization, a certificate of citizenship does not confer United States citizenship, but merely provides evidence that the applicant previously obtained citizenship. As such, judicial proceedings to revoke naturalization are not required to cancel a certificate of citizenship. Rather, the Department of Homeland Security can cancel a certificate of citizenship administratively upon a determination that an applicant is not entitled to the claimed citizenship status.

In coming to its conclusion, the Board discussed the differences between a Certificate of Naturalization and a certificate of citizenship. A Certificate of Naturalization serves to document the grant of United States citizenship and is issued only after an application

for citizenship is approved and an alien takes an oath of allegiance. A certificate of citizenship, however, does not confer citizenship but only furnishes recognition and evidence that the applicant has previously obtained such status derivatively. Thus, a certificate of citizenship is like a passport in that it serves as indicia of citizenship but is not itself a grant of citizenship.

The Board noted that the District Director has the statutory authority to cancel a certificate of citizenship that was illegally or fraudulently obtained. Unlike judicial revocation of naturalization proceedings, administrative proceedings only affect the document sought to be cancelled, not the person's underlying status. However, an alien who obtains a certificate of citizenship illegally or through fraud was never entitled to citizenship. Thus, the Board held that the respondent's reliance on *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000), was misplaced and that proceedings to revoke citizenship were not necessary in this case.

Stop-Time Rule *continued*

Suspension of Deportation and Special Rule Cancellation of Removal Under Section 203 of NACARA

As mentioned above, IIRIRA replaced suspension of deportation with the more stringent cancellation of removal, but those aliens with proceedings *pending* prior to April 1, 1997, remained eligible for suspension of deportation. *See* IIRIRA § 309(c)(1). An alien eligible and applying for suspension continued to accrue physical presence until an administratively final order was issued.[9] *See generally Cipriano*, 24 F.3d at 763. As a result, the question of retroactivity of the stop-time rule to aliens whose proceedings were pending on IIRIRA's effective date arose. Congress was mostly explicit in answering this question in IIRIRA § 309(c)(5):

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause issued before, on or after the enactment date of this Act.

Indeed, the Board and all circuits to address the issue held that the "transitional rule" expressly requires the retroactive application of section 240A(d)(1) to cases that were pending when IIRIRA took effect. Thus, the issuance of an Order to Show Cause ("OSC") stopped the alien's accrual of continuous physical presence even if the OSC was issued prior to, and proceedings remained pending on, April 1, 1997.[10] Notably, Section 203(a) of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. 105–100, tit. II, 111 Stat. 2160, 2196 (1997), *amended by* Pub. L. 105–139, 111 Stat. 2644 (1997), substituted the term "orders to show cause" with the term "notices to appear," as it appears above, to end arguments that IIRIRA § 309(c)(5) was inapplicable to proceedings initiated by notices to appear. *See Peralta v. Gonzales*, 441 F.3d 23, 27 (1st Cir. 2006) (collecting history).

Significantly, Congress exempted certain Salvadorans and Guatemalans, who were *ABC* class members,[11] and certain Eastern Europeans from former Soviet Bloc countries from the retroactive application of the "transitional rule." IIRIRA § 309(c)(5); section 203(a) of NACARA. Thus, nationals or citizens of these countries remain eligible for suspension of deportation, provided they meet other strict criteria, via what is colloquially referred to as NACARA special rule cancellation of removal. *See* 8 C.F.R. §§ 1240.61–.66 (stating the criteria for NACARA special rule cancellation of removal).

Reentry After A "Clock-Stopping" Event: Can the Clock Begin Anew?

Relatedly, the Board has decided that the "clock does not start anew after service of an Order to Show Cause [or an NTA]." *See Matter of Mendoza-Sandino*, 22 I&N Dec. 1236, 1239 (BIA 2000). In making this determination, the Board relied upon the Congressional distinction "between certain actions that 'end' continuous physical presence . . . and certain departures from the country that only temporarily 'break' that presence." *Id.* at 1240. The Board ultimately concluded that service of an NTA or commission of a clock-stopping offense "is deemed to end an alien's presence completely." *Id.*; *see Matter of Nelson*, 25 I&N Dec. 410, 415 (BIA 2011) ("Under our decision in *Matter of Mendoza-Sandino*, the clock could not be reset by the respondent's departure

and return after his conviction."), *aff'd by Nelson v. Att'y Gen. of U.S.*, 685 F.3d 318 (3d Cir. 2012). Specifically, all circuits to consider the issue have accorded these interpretations *Chevron* deference or agreed with the Board without explicit reference to *Chevron*. *See Casillas-Figueroa v. Gonzales*, 419 F.3d 447, 450 (6th Cir. 2005); *accord Torres-Rendon v. Holder*, 656 F.3d 456, 462–63 (7th Cir. 2011); *Briseno-Flores v. Att'y Gen. of U.S.*, 492 F.3d 226, 230-31 (3d Cir. 2007); *Ram v. INS*, 243 F.3d 510, 518 (9th Cir. 2001); *Najjar v. Ashcroft*, 257 F.3d 1262, 1299-1300 (11th Cir. 2001); *McBride v. INS*, 238 F.3d 371, 375-77 (5th Cir. 2001); *Afolayan v. INS*, 219 F.3d 784, 788–89 (8th Cir. 2000).

However, if an alien exits the United States and thereafter reenters and accrues a *new period* of 10 years' continuous physical presence, the date of the prior OSC will not trigger the stop-time rule *provided that* the new proceedings are instituted with the issuance of a *new* NTA. *See Matter of Cisneros*, 23 I&N Dec. 668, 672 (BIA 2004) ("[NTA] referred to in section 240A(d)(1) pertains only to the charging document served in the proceedings in which the alien applies for cancellation of removal, and not to charging documents served on the alien in prior proceedings.").

Extending *Cisneros*, the Third Circuit determined that an alien's reentry into the United States *after* a clock-stopping event begins a new period of continuous physical presence, even without having been issued a new NTA or having new proceedings instituted against him. *Okeke v. Gonzales*, 407 F.3d 585, 590 (3d Cir. 2005). Seemingly in contrast, after *Okeke,* the Third Circuit then held that reentry into the United States after commission of a clock-stopping offense did *not* start the clock anew, *Nelson*, 685 F.3d at 322-24. The Third Circuit later clarified that an alien's reentry into the United States can begin a new period of continuous physical presence provided that the alien is not "charged in his notice to appear with being removable on the basis of his clock-stopping offense." *Singh v. Att'y Gen. U.S.*, 807 F.3d 547, 552–53 (3d Cir. 2015); *compare Nelson,* 685 F.3d at 320 (involving a returning lawful permanent resident charged as an applicant for admission pursuant to section 101(a)(13)(C)(v) of the Act), *with Okeke,* 407 F.3d at 586-87, 590-91 (involving a non-immigrant charged with failing to maintain the conditions of his status). Thus, in the Third Circuit, an alien's exit and subsequent reentry into the United States after a clock-stopping event can begin the accrual of a new continuous physical presence period provided that the alien is not charged with being removable on the basis of his or her clock-stopping offense.

In *Arrozal v. INS*, the Ninth Circuit held that the stop-time rule does not apply to an alien who was in receipt of an administratively final order prior to IIRIRA's effective date even where the alien is seeking a motion to reopen that final order. 159 F.3d 429, 434-35 (9th Cir. 1998); *but see Santos-Quiroa*, 816 F.3d at 170–71. The petitioner in *Arrozal* entered the United States in 1985, overstayed her visa, was issued an OSC, and, on May 8, 1986, the Immigration Judge found that she had committed marriage fraud and ordered her removed. *Arrozal*, 159 F.3d at 435 (Brunetti, J., dissenting). Her appeal to the Board was dismissed on October 24, 1990. Petitioner eluded immigration authorities for six years and was then apprehended by Immigration and Customs Enforcement, whereupon she requested that the Board *sua sponte* reopen her final order to allow her to apply for suspension of deportation. *Id.* at 435-36. The Ninth Circuit relied on both the plain text of the pre-IIRIRA test—concluding that it was silent on reopening administratively final orders—and on *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991)[12]—which held that the law to be applied by the Board is the law existing at the time the final administrative decision is made. The Ninth Circuit concluded that the stop-time rule would not apply to an alien who received an *administratively final order of removal* before April 1, 1997. *Id.* at 434. The Ninth Circuit found that remand was therefore warranted for further consideration of the motion to reopen in light of respondent's eligibility for suspension of deportation.

Yet Another Layer of Stop-Time Complication: Retroactive Application to Offenses Committed Pre-IIRIRA

Retroactivity Generally

"[The] principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place" "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (internal citation omitted).[13] In its landmark *Landgraf* case, the Supreme Court clarified that where a "new provision attaches new legal consequences to events completed before its enactment," a two-part test is employed. *Id.* at 269–70. First, if "Congress has expressly prescribed the statute's proper reach," we assume that "Congress itself has affirmatively

considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," and there is no need to resort to the next inquiry. *Id.* at 272–73, 280. If, "however, the statute contains no such express command," the court must move to the second step and decide whether application of the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. If any of the above are implicated, the court must employ the presumption against retroactive legislation.[14]

Immigration practitioners are no strangers to these vexing retroactivity questions, particularly after the enactment of IIRIRA. *See, e.g.*, *Judulang v. Holder,* 565 U.S. 42 (2011); *INS v. St. Cyr,* 533 U.S. 289 (2001). One of these retroactivity questions is whether offenses committed *prior to the enactment of IIRIRA* trigger the "stop-time rule" added by IIRIRA, section 240A(d)(1)(B), when, at the time of commission of the offense, the alien may have been eligible for discretionary relief.

The Board Holds that the Stop-Time Rule Applies to Offenses Committed Before IIRIRA's Enactment

In *Matter of Perez*, 22 I&N Dec. at 689, the Board found that "[a]n offense described in section 240A(d)(1) is deemed to end continuous residence or continuous physical presence [in the case of a lawful permanent resident] for cancellation of removal purposes as of the date of its commission, even if the offense was committed prior to the enactment of the [IIRIRA]." In this case, the respondent—whose removal proceedings were commenced after April 1, 1997—argued that his 1992 drug offense could not operate to stop the accrual of his continuous physical presence for cancellation of removal under section 240A(a) because he had committed the offense *prior* to IIRIRA's enactment. *Id.* at 690-91.

Applying *Landgraf*, the Board found that in section 304(c)(2) of IIRIRA "Congress ha[d] provided specific direction[s]" to apply section 240A of the Act to all aliens in removal proceedings commenced after April 1, 1997, and there was therefore "no need to resort to the judicial default rules set forth in *Landgraf*." *Id.* at 691. Since proceedings were commenced after IIRIRA's effective date, the Board concluded that the alien was subject to section 240A(d)(1) of the Act. In further rejecting the respondent's argument, the Board noted that cancellation of removal is a discretionary form of prospective relief, and that the enactment of this provision did "not impair a substantive right to relief that was in place prior to its enactment." *Id.* Therefore, the Board reasoned, applying section 240A of the Act to offenses committed prior to its enactment would not have "an impermissible 'retroactive effect' as contemplated in *Landgraf*." *Id.*

Only two years later, the Supreme Court considered a related retroactivity question. In *INS v. St. Cyr*, 533 U.S. at 326, the Supreme Court concluded that relief from removal under former section 212(c) of the Act remains available for aliens who were eligible for such relief at the time, entered into plea agreements while 212(c) was in effect, but who were placed into removal proceedings after the enactment of IIRIRA.[15] Significantly, after applying the two-step *Landgraf* analysis, the Supreme Court determined that Congress did not, with "statutory language . . . so clear that it could sustain only one interpretation," *id.* at 317 (citation omitted), unambiguously indicate its intention that the replacement of section 212(c) relief with cancellation of removal be applied retroactively, *id.* at 317-20. Moving to the second step, the Supreme Court held that elimination of 212(c) relief for aliens "who entered into plea agreements with the expectation that they would be eligible for such relief[16] clearly 'attache[d] a new disability, in respect to transactions or considerations already past.'" *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269). Thus, the Supreme Court concluded, that to deprive these individuals of continuing 212(c) eligibility where they relied upon its availability to their detriment "would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.* at 323 (quoting *Landgraf*, 511 U.S. at 270).

Five years after the Supreme Court's *St. Cyr* decision, the Board affirmed *Matter of Perez* in *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006). The respondent in *Robles* conceded on appeal that the Board had decided the retroactivity issue, but argued that the Board should overrule *Matter of Perez* in light of the Supreme Court's *St. Cyr* decision. The Board first distinguished the respondent's case, finding that the Supreme Court in *St. Cyr* determined that the repeal of section 212(c) of the Act "cannot be retroactively applied against aliens who pled guilty to their crimes *in reliance on the possible availability of that waiver.*" *Id.* at 27 (emphasis added). When the respondent committed his offense, however, "[s]ection 240A was not in existence, or even pending enactment

. . . [and] [i]t is therefore difficult to understand how he might have relied on the future availability of such relief as undergirding a retroactivity claim." *Id.* Citing to a footnote in a Ninth Circuit case, *Sotelo v. Gonzales,* 430 F.3d 968, 972 n.2 (9th Cir. 2005), and noting that the respondent had not cited to any precedent overruling *Matter of Perez*, the Board dismissed the respondent's appeal. *Id.*

A Circuit Survey: Is the Stop-Time Rule Applicable to Offenses Committed Before IIRIRA's Enactment?

Circuits Holding that the Stop-Time Rule is *Not* Impermissibly Retroactive to Offenses Committed Before IIRIRA's Enactment

The Second Circuit in *Martinez v. INS*, 523 F.3d 365, 369-75 (2d Cir. 2008), the Third Circuit in *Guzman v. Att'y Gen. of U.S.*, 770 F.3d 1077, 1083–87 (3d Cir. 2014), and the Fifth Circuit in *Heaven v. Gonzales*, 473 F.3d 167, 172-77 (5th Cir. 2006), have all concluded that application of IIRIRA's stop-time rule is not impermissibly retroactive to offenses committed prior to its enactment. Indeed, the Sixth Circuit joined these circuits in an unpublished decision. *Methasani v. Holder*, 495 F. App'x 677, 679 (6th Cir. 2012) (unpublished) ("Similarly, and in keeping with other circuits, we now hold that the stop-time provision of § 1229b(d) applies retroactively to criminal conduct that occurred before the enactment of the IIRIRA."). In reaching this conclusion, these circuits either applied or relied upon cases that applied the two-step *Landgraf* analysis articulated above.

The Fifth Circuit only reached the first *Landgraf* inquiry, concluding that Congress had directly instructed that the stop-time rule apply retroactively in this scenario. *Heaven*, 473 F.3d at 174-75 (stating that applying the stop-time rule to aliens with *pending* proceedings on IIRIRA's effective date, but not to those placed in proceedings *after* IIRIRA's effective date would be "incongruous"). The Second and Third Circuits, on the other hand, found that Congress did not expressly indicate its intent that section 240A(d)(1)(B) apply retroactively to *crimes* committed prior to its enactment (as opposed to the clause in (1)(A) referring to service of the notice to appear). *Martinez*, 523 F.3d at 370-72; *Guzman*, 770 F.3d at 1084. Both then considered the second *Landgraf* step and concluded, albeit for different reasons, that no "new disability" was imposed by IIRIRA's application, and denied the respective petitions for review. *Martinez*, 523 F.3d at 373-75; *Guzman*, 770 F.3d at 1087. The Second Circuit concluded that no new disability attached because the stop-time rule did not alter the legal consequence of the alien's initial conduct—that he was immediately subject to deportation upon arrest, *Martinez*, 523 F.3d at 375, while the Third Circuit concluded that "[n]either the opportunity to delay deportation proceedings nor the chance to evade the authorities, with the goal of avoiding deportation in order to become eligible for relief," constitute new legal disabilities, *Guzman*, 770 F.3d at 1087.

Notably, the Second and Fifth Circuits, considered whether deference was owed to *Matter of Perez*. Both ultimately concluded that although "statutory silence would ordinarily trigger *Chevron* deference," in the context of retroactivity, statutory silence triggers the presumption against retroactivity, and is therefore, by definition, not ambiguous. *Martinez*, 523 F.3d at 372. Thus, the circuits concluded that they did not need to consider the reasonableness of the Board's interpretation. *Martinez,* 523 F.3d at 372; *Heaven,* 473 F.3d at 175. Lastly, and perhaps most significantly in determining the holdings reached, the aliens in all of these cases had committed offenses rendering them *immediately* deportable and, much like the Board in *Matter of Perez*, these circuits framed the issue in the same manner. *See Martinez*, 532 F.3d at 366 (arrest for possession of heroin); *Guzman*, 770 F.3d at 1078 (criminal possession of a controlled substance); *Heaven*, 473 F.3d at 169 (criminal sale of marijuana in the fourth degree); *Matter of Perez*, 22 I&N Dec. at 690 (possession of cocaine); *see also* former section 241(a)(2)(B) of the Act (1995) (deportability ground for an offense relating to a controlled substance).

Circuits Holding that Application of the Stop-Time Rule to Pre-IIRIRA Offenses *is* Impermissibly Retroactive

The Ninth Circuit in *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9th Cir. 2006), the Seventh Circuit in *Jeudy v. Holder*, 768 F.3d 595 (7th Cir. 2014), and the Fourth Circuit in *Jaghoori v. Holder*, 772 F.3d 764 (4th Cir. 2014), have all held, albeit for different reasons, that application of the stop-time rule to an alien's pre-IIRIRA offense is impermissibly retroactive. In so holding, all of these circuits applied the two-step *Landgraf* analysis with differing results. In applying the first *Landgraf* step, each of these circuits found that Congress "d[id] not clearly indicate that [the transitional rule] is to be applied retroactively to part B of § 1229b(d)(1) *in all*

circumstances." *Sinotes-Cruz*, 468 F.3d at 1200 (emphasis added); *see also Jaghoori*, 772 F.3d at 770; *Jeudy*, 768 F.3d at 602-03. Significantly, the Seventh Circuit reached this conclusion by comparing IIRIRA's definition of "offense" for the purposes of the stop-time rule with the description of consequences for other types of crimes defined in IIRIRA. *Jeudy*, 768 F.3d at 600-01. Although IIRIRA's description of the consequences for aggravated felonies included a clear temporal delineation by including the phrase "regardless of whether the conviction was entered *before*, *on*, *or after September 30*, *1996*," no such temporal language was attached to IIRIRA's definition of an "offense" for the purposes of the stop-time rule. *Id.* The Seventh Circuit relied upon this comparison as well as the language of the transition rule to conclude the language was ambiguous.

In reaching the conclusion that retroactively applying section (B) of the stop-time rule would attach a new consequence to an alien's criminal conduct, the Ninth, Seventh, and Fourth Circuits focused on petitioners' eligibility for discretionary relief *prior to IIRIRA's enactment*, and his or her eligibility for discretionary relief *at the time of conviction or plea*. *Jaghoori*, 772 F.3d at 771; *Jeudy*, 768 F.3d at 603-04; *Sinotes-Cruz*, 468 F.3d at 1202-03. Since retroactive application would not only "imperil" petitioners' opportunities to apply for such relief, but "would render such relief an impossibility," these circuits found that the petitioners were similarly situated to those in *St. Cyr*, and that the stop-time rule would therefore have an impermissibly retroactive impact. *Jaghoori*, 772 F.3d at 771-72;[17] *accord Jeudy*, 768 F.3d at 604.

Notably, the facts and procedural postures of the cases in all the circuits mentioned were similar. Yet, where the Second, Fifth, and Third Circuits framed the issue by asking whether the alien was *immediately deportable* after commission of the offense to conclude that application of the stop-time rule to pre-IIRIRA offenses was not impermissibly retroactive, the Seventh, Ninth and Fourth Circuits framed the issue differently—asking whether the alien had reached the requisite 7 years of continuous physical presence prior to IIRIRA's effective date—and reached the opposite conclusion.

Conclusion

IIRIRA, which constituted our nation's last piece of comprehensive immigration legislation, became effective over twenty years ago. Yet, as evidenced above, debate over only one small provision contained within this law—the stop-time rule—provoked considerable litigation. Indeed, nearly every piece of major immigration legislation before IIRIRA has undergone similar debate. *See, e.g., Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014) (addressing complex retroactivity question in section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214, 1277 ("AEDPA")); *see also*, *e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (interpreting the Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 102); *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003) (addressing retroactivity of the Immigration Act of 1990, Pub. L. 101–649 § 511(a), 104 Stat. 4978); *Matter of Singh*, 21 I&N Dec. 427 (BIA 1996) (interpreting sections of the Immigration Reform and Control Act of 1986, Pub. L. 99–603, 100 Stat. 3359); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (interpreting the Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 102). In this sense, the stop-time rule is but one example of the complexity involved in grafting new provisions onto existing law. The complexity displayed by this body of law foreshadows the intricacy and complexity that may lie ahead in immigration law.

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1. A section 212(c) waiver was available to lawful permanent residents who had continuously resided in the United States for 7 years and was used to waive crimes, even aggravated felonies in some cases, while suspension of deportation was available to non-lawful permanent residents who either: (1) had resided in the United States for 7 years; or (2) had resided in the United States for 10 years and who had committed certain criminal offenses. H.R. Rep. No. 104–469, pt. 1, at 231–32 (1996); *see also Matter of Monreal*, 23 I&N Dec. 56, 60 n.1 (BIA 2001).

2. *See, e.g.*, *Nelson v. Att'y Gen. of U.S.*, 685 F.3d 318, 322 (3d Cir. 2012) (determining that the Board's interpretation of the "stop-time" provision was reasonable and entitled to *Chevron* deference when the Board found that the provision does not provide for the beginning of a new period of continuous residence following reentry); *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000) (noting that the Board's interpretation of section 240A(d)(1) of the Act is consistent with legislative history in holding that service of an Order to Show Cause ends continuous physical presence); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9th Cir. 2006) (holding that the stop-time rule did not apply retroactively to stop accrual of alien's 7 years of continuous residence to be eligible for cancellation of removal).

3. There are additional ways continuous presence or residence can be broken and or severed, but this article only considers the stop-time rule's impact on an alien's accrual of these periods. *See generally* section 240A(d)(2) of the Act ("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.").

4. At least one circuit has held that the 10- or 7-year period *includes the day the NTA is served*. *See Lagandaon v. Ashcroft*, 383 F.3d 983 (9th Cir. 2004).

5. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that where a statute is silent or ambiguous, an agency's permissible construction of that statute should be given deference).

6. This is accomplished by the DHS serving a Form I–261 (Additional Charges of Removability).

7. Violent Crime Control and Law Enforcement Act of 1994, Tit. IV, sec. 40703, Pub. L. 103–322, 108 Stat. 1796 (codified at former 8 U.S.C.A. § 1254 (1994)).

8. An affirmative application for VAWA relief may be filed pursuant to section 204(a)(1)(B) of the Act, 8 U.S.C. § 1154(a)(1)(B).

9. In a vehement dissenting opinion in *Arrozal v. INS*, Judge Melvin Brunetti, sitting in the Ninth Circuit by designation, disagreed with this result, arguing that the Supreme Court in *INS v. Rios-Pineda*, already concluded that the Board does not abuse its discretion when "[t]he Attorney General [], in exercising his discretion, legitimately avoid[s] creating further incentive for stalling by refusing to reopen suspension proceedings for those who bec[ome] eligible for such suspension only because of the passage of time while their meritless appeals dragged on." *See Arrozal v. INS*, 159 F.3d 429, 436-39 (citing *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1985)).

10. Notably, these holdings mostly arose in cases where aliens challenged an Immigration Judge's pretermission of his or her application for suspension of deportation, finding, in part, that the alien could not meet the 7 years of continuous physical presence required for this form of relief because the issuance of the OSC (even if prior to April 1, 1997) stopped the alien from accruing presence. *See Matter of Nolasco-Tofino*, 22 I&N Dec. 632, 641 (BIA 1999); *Tefel v. Reno*, 180 F.3d 1286 (11th Cir. 1999), *cert. denied*, 530 U.S. 1228 (2000); *accord Afful v. Ashcroft*, 380 F.3d 1, 7 (1st Cir. 2004); *Suassuna v. INS*, 342 F.3d 578 (6th Cir. 2003); *Ram v. INS*, 243 F.3d 510 (9th Cir. 2001); *Pinho v. INS*, 249 F.3d 183 (3d Cir. 2001); *Rojas-Reyes v. INS*, 235 F.3d 115, 120 (2d Cir. 2000); *Appiah v. INS*, 202 F.3d 704 (4th Cir. 2000); *Gonzalez-Torres v. INS*, 213 F.3d 899 (5th Cir. 2000); *Angel-Ramos v. Reno*, 227 F.3d 942 (7th Cir. 2000); *Afolayan v. INS*, 219 F.3d 784 (8th Cir. 2000); *Rivera-Jimenez v. INS*, 214 F.3d 1213 (10th Cir. 2000) (per curiam).

11. *ABC* class members are those Salvadorans who entered the United States on or prior to September 19, 1990, or Guatemalans who entered the United States on or before October 31, 1990, and who registered for benefits (or filed an asylum application during ABC registration or applied for TPS during registration) pursuant to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp 796 (N.D. Cal. 1991). *See also* 8 C.F.R. § 1240.61(a).

12. *Matter of U–M–* was superseded by statute on other grounds as noted in *Matter of A–A–*, 20 I&N Dec. 492, 503–04 (BIA 1992).

13. In *Landgraf*, the Supreme Court first articulated a framework for determining whether newly enacted legislation is applicable to conduct that occurred before that piece of legislation's effective date. 511 U.S. at 280. Landgraf sued her former employer for constructive discharge resulting from sexual harassment by a co-worker, Mr. Williams. *Id.* at 248. The Equal Employment Opportunity Commission ("EEOC") found that Landgraf had "likely been the victim of sexual harassment," but that Landgraf's supervisor had adequately remedied the violation by reprimanding Mr. Williams and transferring him to another department. *Id.* at 248–49. Landgraf challenged the EEOC decision in the district court, which found that Landgraf had been sexually harassed and suffered mental anguish as a result of the behavior of her co-worker, but ultimately dismissed the complaint, finding that her voluntarily quitting the position after her supervisor had taken remedial action was not tantamount to constructive discharge. *Id.* at 248. While Ms. Landgraf's petition for review was pending with the circuit court, Congress enacted the Civil Rights Act of 1991, which contained a provision that would have entitled her to monetary relief simply for having been the victim of a hostile work environment even absent a showing of constructive discharge. *See* 42 U.S.C. 1981a(a), (c) (1991). The circuit court rejected her argument for remand, concluding that applying the 1991 Act would be an injustice. *Landgraf*, 511 U.S. at 249.

14. The Supreme Court in *Landgraf* ultimately concluded that 42 U.S.C. § 1981a(c) "create[ed] a new cause of action," which it found insufficient to rebut the presumption against retroactivity. *Id.* at 283.

15. We note that an alien who pled guilty to an offense determined to be an aggravated felony prior to November 29, 1990, is still eligible for a section 212(c) waiver. *See* 8 C.F.R. § 1212.3(f)(4)(ii). Indeed, aliens placed in exclusion proceedings prior to April 1, 1997, and aliens placed into deportation proceedings prior to April 24, 1996, remain eligible for the 212(c) waiver. *See Matter of Fuentes-Campos*, 21 I&N Dec. 905, 907 (BIA 1997); 8 C.F.R. § 1212.3(g); *see also Matter of Abdelghany*, 26 I&N Dec. 254, 260 & n.11 (BIA 2014) (noting special rules for continuing eligibility for the 212(c) waiver for alien who enters a plea between AEDPA effective date (Apr. 24, 1996) and IIRIRA effective date (Apr. 1, 1997)).

16. In so holding, the Supreme Court considered the nature of plea agreements, where defendants often waive their constitutional rights "[i]n exchange for some perceived benefit," and the "frequency with which § 212(c) relief was granted in the years leading up to . . . IIRIRA," indicating that "one of the principal benefits sought by [aliens] deciding whether to accept a plea offer or instead to proceed to trial," was the preservation of the possibility of 212(c) relief. *St. Cyr*, 553 U.S. at 321–23.

17. It is also worth noting that the Fourth Circuit addressed DHS's contention that retroactivity could be permissible where caused by petitioner's own conduct. *Jaghoori*, 772 F.3d at 773 (finding that an alien's subsequent criminal conduct may give "occasion to address

th[e] [retroactivity] question, but it does not change the answer"); *see also Vartelas v. Holder*, 566 U.S. 257, 268 (2012) (addressing the argument that a statute may have an impermissibly retroactive effect on an alien even if the consequences of that statute were avoidable by the alien himself).