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CANCELLATION OF REMOVAL-ADJUSTMENT OF STATUS (Sec. 1229b.)

(a) Cancellation of removal for certain permanent residents:

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien -

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien -

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title; and (D) 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.

(2) Special rule for battered spouse or child The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that - (A) the alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); (B) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application; (C) the alien has been a person of good moral character during such period; (D) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraph (1)(G) or (2) through (4) of section 1227(a) of this title, and has not been convicted of an aggravated felony; and (E) the removal would result in extreme hardship to the alien, the alien's child, or (in the case of an alien who is a child) to the alien's parent. In

acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General. (3) Recordation of date With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(c) Aliens ineligible for relief:

The provisions of subsections (a) and (b)(1) of this section shall not apply to any of the following aliens: (1) An alien who entered the United States as a crewman subsequent to June 30, 1964. (2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title. (3) An alien who - (A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training, (B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and (C) has not fulfilled that requirement or received a waiver thereof. (4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title. (5) An alien who is described in section 1231(b)(3)(B)(i) of this title. (6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(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 when the alien is served a notice to appear under section 1229(a) of this title or when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(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) of this section 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. (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) of this section shall not apply to an alien who - (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 (B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996),

of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997 For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens:

Paragraph (1) shall not apply to the following: (A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act). (B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

CRIMINAL ALIENS, AGGRAVATED FELONS AND REMOVAL FROM THE UNITED STATES

On April 24, 1996, the anniversary of the Oklahoma Bombing in 1995, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The catalyzing event behind AEDPA was the 1995 Oklahoma City bombing. Congress and the President reacted to the bombing by quickly introducing and passing AEDPA. The legislation was thus ostensibly directed at combating terrorism but revolutionized immigration law in ways that went far beyond any such goal.

For many years the basic statutory deportation scheme was this: a "crime involving moral turpitude" rendered a person deportable, if it was committed less than five years after the person's entry and resulted in a sentence of one year or more confinement. A later-committed crime or one that drew a lighter sentence did not result in deportation. These distinctions reflected Congress's judgment that crimes committed more than five years after entry were outweighed by the ties the alien had developed to the United States in the meantime, and so should not result in deportation. If the person committed two such crimes, however, which were not part of a single criminal scheme, they could render the person deportable no matter when they were committed. And a drug offense or a firearms possession offense ordinarily made a person deportable whenever it was committed.

The most important forms of relief, for those who had been convicted of crimes, were (1) political asylum and a closely related form of nonrefoulement protection called "withholding of removal," and (2) a waiver, then called "212(c) relief" and now called "cancellation of removal," which was and is available only to persons who had been lawful residents for at least seven years. With regard to the first, U.S. law precluded asylum and withholding in the case of persons guilty of "particularly serious crimes" (which is consistent with the UN Convention relating to the Status of Refugees), but in the 1980s the exact application of that term was still uncertain. Many convicted criminals were able at least to obtain a lengthy hearing regarding the circumstances of the crime and the claimed risk of persecution if deported. "Cancellation" could be provided in the discretion of the immigration judge, based

on a consideration of many factors, including the seriousness of the offense, length of residence, the ties of the alien to the community (including resident family members), and evidence of rehabilitation. Even if the individual had a very weak case for relief from deportation, the claim might consume several years of litigation after a hearing before the immigration judge and after administrative and judicial appeals were exhausted.

The Anti-Drug Abuse Act of 1988 added a new concept to the immigration laws, the notion of an "aggravated felony." INA ? 101(a)(43). A person found guilty of an aggravated felony committed at any time would be deportable. At the time the practical effect of this change was modest, for until 1994, the definition included only murder, drug trafficking, and firearms trafficking, plus conspiracy or attempt to commit those offenses. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 7342, 102 Stat. 4181, 4469 (codified as amended at 8 U.S.C. 1101(a)(43) (1994 & Supp. III 1997)). Although subsequently amended to include additional crimes, it continued to confine itself to what are arguably more serious offenses than many of the offenses included after the 1996 amendments. (adding money laundering, crimes of violence with sentence of at least five years, and foreign convictions with term of imprisonment completed within previous 15 years); (adding various firearms offenses, monetary transactions from illegally derived funds, theft or burglary with sentence of at least five years, alien smuggling for commercial gain, and trafficking in false documents).

In 1990, Congress decided to use the "aggravated felony" concept to limit the discretion of the immigration judges. An amendment that year provided that aggravated felons sentenced to five years or more incarceration were ineligible to receive cancellation-type relief. The definition of an aggravated felony was amended to include, inter alia , a "crime of violence" for which the term of imprisonment imposed is at least 5 years.

This change carried a limited impact initially because of the narrow definition of aggravated felony. Moreover, section 501(b) of the 1990 Act, 104 Stat. at 5048, applied that definition only to offenses committed on or after enactment of the 1990 Act. (See Matter of A-A- , 20 I&N Dec. 492 (BIA 1992).

Similarly, other amendments to the aggravated felony definition have specified that the amendments applied only prospectively. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, ?? 222(a), (b), 108 Stat. 4305, 4320-22 (enacted Oct. 25, 1994); AEDPA ? ? 440(e), (f), 110 Stat. at 1276-78. Prior to IIRIRA, statutes adding to the list of "aggravated felonies" excluded pre-enactment convictions -- and, in one case, pre-enactment conduct -- from their reach. See IMMACT @ 501(b), 104 Stat. at 5048 ("The amendments . . . shall apply to offenses committed on or after the date of the enactment of this Act, except that the amendments made by paragraphs (2) and (5) of subsection (a) shall be effective as if included in . . . the Anti-Drug Abuse Act of 1988." (emphasis added)); INTCA @ 222(b), 108 Stat. at 4322 ("The amendments made by this section shall apply to convictions entered on or after the date of enactment of this Act (emphasis added)); AEDPA @ 440(f), 110 Stat. at 1278 ("The amendments made by subsection (e) shall apply to convictions entered on or after the date of the enactment of this Act, except that the amendment made by subsection (e)(3) shall take effect as if included in the enactment of section 222 of the Immigration and Nationality Technical Corrections Act of 1994." (emphasis added)).

But the impact widened considerably with legislative changes in 1994 and 1996. Congress greatly expanded the definition on several occasions, signaling its growing concern with criminal aliens.

In 1994, an election year, Congress greatly expanded the definition of aggravated felony. Added to the three offenses previously listed were 14 additional paragraphs with elaborate designations of additional serious offenses, including, for example, racketeering, alien

smuggling for commercial advantage, child pornography, peonage, fraud offenses involving losses of over $200,000, and crimes of violence or theft offenses drawing a 5-year sentence. The basic effect of the aggravated felony designation remained the same even as the list grew: a conviction of one of these offenses would render the person deportable whenever it was committed, and cancellation relief would be barred if the sentence was greater than five years.

In 1996 -- another election year, and one in which immigration enforcement issues figured prominently -- the aggravated felony definition was again greatly expanded, and this time its impact was made even more sweeping. New offenses were added to the list, and minimum thresholds required were substantially reduced. For example, fraud offenses involving only a $10,000 loss (rather than $200,000) now fit the definition, and a sentence of one year, rather than five years, is the threshold for theft offenses and crimes of violence. The 1996 Act also clarified that sentences count even if they are suspended. Therefore a person could serve no actual time in jail or prison for a theft offense, but if his/her stated sentence was one year, suspended, he/she would count as a person convicted of an aggravated felony.

The 1996 Acts also made the full list of offenses in the definition wholly retroactive, whereas most earlier expansions of the list had been applied only to criminal acts or convictions after the date of enactment. These changes are sweeping enough, but they were made more severe by changes in the provisions for relief from deportation. Cancellation relief is now wholly unavailable to anyone with an aggravated felony conviction. INA ? 240A(a)(3). And a separate change further narrowed its availability to those permanent resident aliens whose criminal offense still falls below the aggravated felony threshold, because the required seven years' residence must be acquired before commission of the offense. INA ? 240A(d).

AEDPA added additional crimes to the aggravated felony list, while IIRIRA both added crimes and lowered the sentencing threshold from five years to just one for those aggravated felonies whose definition hinges on this factor. (adding, inter alia, alien smuggling not for commercial gain, failure to appear for service, obstruction of justice, and perjury); Section 440(d) of AEDPA amended section 212(c) to exclude from eligibility for relief any person who is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(iii)(A), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i). AEDPA @ 440(d), 110 Stat. at 1277. No specific language of retroactive applicability was included. Section 440(d) contains no language indicating an intent retroactively to eliminate a long term lawful permanent resident's eligibility for relief from deportation.

Throughout the rest of Title IV of AEDPA, in contrast, Congress used precise language when it chose to apply new rules to prior conduct, describing the degree of retroactivity with great specificity. In addition to section 440(d), there are two provisions that eliminate statutory eligibility for relief from deportation. Section 413 provides that persons excludable or deportable due to their engagement in terrorist activity are no longer eligible for withholding of deportation, suspension of deportation, voluntary departure, adjustment of status or registry. See AEDPA @@ 413(a)-(e), 110 Stat. at 1269. Section 421(a) makes such persons ineligible for asylum. See Id. @ 421(a), 110 Stat. at 1270. All three of these relief-restricting provisions recognize that the central action that makes a person deportable is the conduct in which he or she engaged.

AEDPA has been largely superceded by IIRAIRA. Unfortunately, IIRAIRA is equally punitive Vis-a-vis aliens. IIRAIRA abolishes the distinction between exclusion and deportation and provides for a unified removal proceeding for all alien expulsion proceeding initiated after April 1, 1997. IIRAIRA abolishes Sec. 212 (c) Waivers of Deportation entirely, just as AEDPA abolished Sec. 212 (c) waivers for "aggravated felons" sentenced to five or more years, regardless of

what amount of time was actually served or suspended, and regardless of whether the five years aggregate sentence involved several minor convictions over several years.

On September 30, 1996, the President signed IIRIRA into law. IIRIRA, Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) 321, 8 U.S.C. 1101(a)(43) (1994 & Supp. III 1997) added inter alia, rape, sexual abuse of minor, and lowered the sentencing threshold for, inter alia, crimes of violence, theft [including attempt]offenses, obstruction of justice, and perjury.. . . for which the term of imprisonment [is] at least one year." IIRIRA @ 321, 110 Stat. at 3009-627 (codified at 8 U.S.C. @ 1101(a)(43)(G) (Supp. II 1996). While the terms "petty theft" and "misdemeanor assault and battery" do not appear within INA 101(a)(43), these crimes appear to fall within the "theft," 101(a)(43)(G), and "crime of violence," 101(a)(43)(S), provisions when the relevant state law allows for a sentence of one year.

The amendments accomplish this dramatic expansion not only by increasing the substantive categories of crimes and lowering the sentencing threshold, where applicable, but also by deeming any order of incarceration or confinement by the sentencing court, whether or not imposed or executed, a "sentence" for purposes of the provision. See INA 101(a)(48)(B), 8 U.S.C. 1101(a)(48)(B) (Supp. III 1997) (reflecting changes made by section 322 of IIRIRA). Thus, a sentence of one year probation may be deemed a sentence of imprisonment of at least one year for purposes of the INA, rendering the individual deportable even though she never served a day in jail.

With the IIRIRA Congress made clear its intention to do away with the different effective dates and to establish an aggravated felony definition that would be universally applied, regardless of the date of conviction. Section 321(b) of the IIRIRA states in its entirety:

EFFECTIVE DATE OF DEFINITION----Section 101(a)(43) (8 U.S.C. 1101(a)(43)) is amended by adding at the end the following new sentence: "Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." (September 30, 1996) IIRIRA ? 321(b), 110 Stat. at 3009-628.

Relying on section 321(b), the BIA has, on at least five occasions, applied the 1996 revised aggravated felony definition to cases pending on the date of enactment of the IIRIRA, with little or no discussion. See Matter of L-S-J- , 21 I&N Dec. 973 (BIA 1997); Matter of Batista-Hernandez , 21 I&N Dec. 955 (BIA 1997); Matter of Noble , 21 I&N Dec. 672 (BIA 1997); Matter of Yeung , 21 I&N Dec. 610 (BIA 1996); In Re Phat Dinh Troung (BIA October 20, 1999) Interim Decision 3416.

This bars immigrants with aggravated felony convictions from applying for discretionary relief pursuant to former INA 212(c), eliminated by IIRIRA, Pub. L. No. 104-208, 304(b), 110 Stat. 3009, 3009-597 (1996), which permitted immigration judges to waive deportation based on equities such as immigrant's length of residence, rehabilitation, and family/community ties); INA 240A, 8 U.S.C. 1229b (Supp. III 1997)

Prior to 1996, discretionary relief was critical in alleviating the dire effects of deportation provisions: Between 1989 and 1994, over half of all immigrants who petitioned under former INA 212(c) demonstrated sufficient equities to be permitted to stay in this country. See Mojica v. Reno, 970 F. Supp. 130, 178 (E.D.N.Y. 1997).

Instead IIRAIRA provides for "cancellation of removal" for criminal and other aliens who have physically lived in the U.S. for at least seven years and held a Green Card for at least five years. IIRAIRA eliminates the eligibility of alien convicts who could qualify for waivers of deportation based upon status as a Temporary Resident, based upon their parent's domicile,

or based upon seven years residence with no time limit on when they actually received their Green Card. Any alien convicted of an offense which carries a sentence of one year or more in prison is more likely than not an aggravated felon and has virtually no statutory removal relief. An alien does not actually have to serve one year in jail---the crime simply has to carry a penalty of one year or more.

To qualify for what used to be known as "Suspension of Deportation" (now Cancellation of Removal"), an alien must have lived here TEN years, and must establish that repatriation and 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". Judicial review of deportation orders is nearly abolished. For most aliens, this means the Board of Immigration Appeals (BIA) is the final tribunal.

IIRAIRA's elimination of "Exclusion" versus "Deportation" proceedings means that any alien who leaves the United States and returns, whether or not that alien has had a Green Card for decades, is considered to be applying for admission and, if placed in removal proceedings for some unforeseen reason (such as improper documentation, possession of contraband, or infection with a contagious disease) is subject to summary expulsion by an immigration officer without ever appearing before an immigration court.

Aliens who commit, get convicted of, or admit to the commission of, any crime involving domestic abuse (simple assaults, simple "slaps" or "shoves") towards a parent, spouse, child or other person ("girl- or boyfriend") are inadmissible and face removal.

These Draconian changes made it very easy to deport criminal aliens, including those who have been lawfully present as Permanent Residents in the United States for many years.

In addition, the impact of the aggravated felony provisions is compounded by other changes in the law pertaining to "aggravated felons," such as mandatory detention during deportation or removal proceedings, and a permanent bar against reentry into the United States. Moreover, a number of consequences attaching to aggravated felonies under prior law, such as the bar to naturalization or the dramatic sentencing enhancement faced by an individual convicted of illegal reentry after deportation, will now apply to a much greater range of persons. Finally, the Immigration and Naturalization Service (INS) contends that the expanded "aggravated felony" definition and its consequences operate retroactively, meaning that an individual with an old conviction may be subject to automatic deportation without possibility of relief. In all, the changes wrought by the amended aggravated felony and related statutory provisions are notable both for their harshness and for the fact that they apply to individuals who many would argue deserve more humane treatment.

Under current regulatory enforcement practice this law allows for the mandatory detention without bail of all aggravated felons released after October 9, 1998 regardless of whether they actually pose a danger to the community or whether they are a flight risk. There is no administrative or judicial review of the INS detention. However, any immigrant who completed his or her criminal sentence prior to October 9, 1998 can be considered for release from detention. If the INS does not release the immigrant, he or she can apply for a bond redetermination hearing before an immigration judge, and can appeal any negative determination to the Board of Immigration Appeals (BIA).

AEDPA, which severely eroded constitutional and statutory rights that aliens enjoyed for decades, and which abrogated the paramount goal of U.S. immigration policy---family reunification---has faced several legal challenges. Recent decisions by several federal court judges at the district level have reversed some deportations.

On February 8, 2000, U.S. District Judge John Gleeson of the Eastern District of New York issued a 36-page published decision ruling in favor of five aliens on retroactivity, 212(c), and jurisdiction issues. Here, the federal district court case judge found impermissible "retroactive effect" for criminal conduct occurring before enactment-- regardless of whether or not the alien was in proceedings at the time of the enactment and effective date. Jose Francisco Pena-Rosario v. INS, Retroactivity, 212(c)