

Practice Pointer¹

Matter of Castillo-Perez, 27 I&N Dec. 664 (A.G. 2019)

March 25, 2020

I. Introduction

In *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), the attorney general held that two or more convictions for driving under the influence (DUI)² during the qualifying time period presumptively bar an applicant for non-lawful permanent resident cancellation of removal (“non-LPR cancellation”) from proving good moral character under section § 101(f) of the Immigration and Nationality Act (INA). Applicants with such convictions now face a rebuttable presumption that they lack good moral character. This is the first time since 2005 that the Board of Immigration Appeals (BIA) or the attorney general has issued a precedential decision on the good moral character requirement of non-LPR cancellation of removal.³

This practice pointer provides a background on *Castillo-Perez*, explains the good moral character requirement of non-LPR cancellation, and clarifies the practical implications of the decision. The practice pointer also suggests arguments limiting the decision’s scope and highlights some pitfalls in the attorney general’s reasoning that could be raised on appeal.

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² Per footnote 1 of the decision, *Castillo-Perez* also pertains to other, similar types of convictions under state law like operating under the influence and driving while impaired, but does not apply to lesser included offenses that do not require proof of impairment, such as negligent driving.

³ See *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005).

II. *Matter of Castillo-Perez*

On December 3, 2018, then Acting Attorney General Matthew Whitaker directed the Board of Immigration Appeals (BIA) to refer to him for review an unpublished BIA decision that had found the respondent ineligible for non-LPR cancellation based in part on failure to show good moral character.⁴

On October 25, 2019, Attorney General William Barr issued *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019), holding as follows:

1. The INA’s “good moral character” standard requires adherence to the generally accepted moral conventions of the community, and criminal activity is probative of non-adherence to those conventions.
2. Evidence of two or more convictions for driving under the influence during the relevant period establishes a rebuttable presumption that a noncitizen lacks good moral character under INA § 101(f).
3. Because only noncitizens who possessed good moral character for a ten-year period are eligible for cancellation of removal under section 240A(b) of the INA, such evidence also presumptively establishes that the noncitizen’s application for that discretionary relief should be denied.

III. Good Moral Character Requirement for Non-LPR Cancellation of Removal

Section 240A(b)(1) of the INA requires that an applicant for non-LPR cancellation demonstrate that he or she is a “person of good moral character” during the period “not less than ten years immediately preceding the date of such application.”⁵ The ten-year period needed for good moral character is calculated backward from the date on which the application finally is resolved by the immigration judge (IJ) or BIA.⁶

The INA does not define good moral character. Instead, it describes conduct or convictions that establish a lack of good moral character. An applicant for non-LPR cancellation cannot establish good moral character if he or she falls into one of the categories listed in INA § 101(f). Most of the categories refer to conduct or convictions that occurred during the ten-year period while a couple of categories refer to conduct or offenses that have happened at any time in the non-LPR cancellation applicant’s history.

⁴ *Matter of Castillo-Perez*, 27 I&N Dec. 495 (A.G. 2018).

⁵ INA § 240A(b)(1).

⁶ *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 798 (BIA 2005). Note that the calculation of the ten years for good moral character differs from the continuous physical presence calculation. For more information on non-LPR cancellation generally see ILRC, *Non-LPR Cancellation of Removal* (2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf; CLINIC, *Practice Advisory: Non-Lawful Permanent Resident Cancellation of Removal Under INA § 240A(b) for DACA Recipients* (2018), <https://cliniclegal.org/resources/removal-proceedings/practice-advisory-non-lawful-permanent-resident-cancellation-removal>.

The INA § 101(f) bars to establishing good moral character within the ten-year period include anyone who is or was within that period:

- a habitual drunkard (INA § 101(f)(1)),
- convicted of, or admitted to committing the elements of,⁷ a crime that would make him or her inadmissible (whether or not the individual is found to be inadmissible), pursuant to INA § 212(a)(2)(A) [crime involving moral turpitude (CIMT)⁸ or controlled substance violation⁹], (B) [conviction for two or more offenses with an aggregate sentence of five years or more], (C) [controlled substance traffickers and certain family members thereof], (D) [prostitution and unlawful commercialized vice] (INA § 101(f)(3)),
- engaged in “alien smuggling” as described in INA § 212(a)(6)(E) (whether or not found to be inadmissible) (INA § 101(f)(3)),
- coming to the United States to practice polygamy as described in INA § 212(a)(10)(A) (INA § 101(f)(3)),
- an individual whose income is derived principally from illegal gambling activities (INA § 101(f)(4)),

⁷ To determine whether there must be conviction or the exact evidentiary standard, practitioners should consult the statute. For example, an individual who admits to having committed a crime of moral turpitude is inadmissible for conviction of a crime of moral turpitude under section 212(a)(2)(A), but there are rigid evidentiary requirements for such a finding. *See Matter of K-*, 7 I&N Dec. 594, 597-98 (BIA 1957) (stating that to sustain a ground of deportation under section 241(a)(1) of the INA, based on excludability under section 212(a)(9) as one who admits acts constituting the essential elements of a crime involving moral turpitude, the noncitizen must have admitted all the elements of the crime involved and must have been furnished a definition of the offense in understandable terms, and similarly, where the charge is based on admission of the commission of a crime involving moral turpitude, an adequate definition must be provided and all the elements of the offense, in addition to the legal conclusion, must be admitted); *Matter of G-M-*, 7 I&N Dec. 40 (BIA 1955) (holding that to sustain a finding of inadmissibility as one who has admitted acts constituting the essential elements of a crime involving moral turpitude, the noncitizen must have admitted all the elements of the crime involved and must have been furnished with a definition of the crime in comprehensible terms); *see also* 9 FAM 302.3-2(B)(4)(U) (explaining what constitutes a legally valid admission for purposes of INA § 212(a)(2)(A)); USCIS, *Policy Manual*, vol. 12, Part F, Ch. 2 § E, <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2#S-E>.

⁸ Individuals who fall within the CIMT petty offense or juvenile offender exception found at INA § 212(a)(2)(A)(ii) would not be inadmissible and thus would not have a good moral character bar. However, while individuals with these convictions may not have a good moral character bar, they are likely to be barred from non-LPR cancellation eligibility if their conviction is a CIMT offense with a maximum potential sentence of 365 days or more. *See* INA § 240A(b)(1)(C) (providing that non-LPR cancellation of removal is available only if the applicant “has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3)”; *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Ortega-Lopez*, 27 I&N Dec. 382, 397 (BIA 2018).

⁹ For good moral character purposes, there is one exception to the controlled substance offense ground found at INA § 212(a)(2)(A) for a single offense of simple possession of 30 grams or less of marijuana. However, a non-LPR cancellation applicant would likely still be barred even for a conviction for simple possession of 30 grams or less of marijuana pursuant to the criminal convictions bar of INA § 240A(b)(1)(C).

- an individual who has been convicted of two or more gambling offenses (INA § 101(f)(5)),
- an individual who has given false testimony for the purpose of obtaining any benefits under the INA (INA § 101(f)(6)), or
- an individual who has been confined, as a result of a conviction, to a penal institution for an aggregate period of 180 days or more, regardless of whether the offense or offenses for which they have been confined were committed within or outside the required period (INA § 101(f)(7)).

The following INA § 101(f) categories bar individuals from establishing good moral character if they have *ever*, at any time in their past:

- Been convicted of an aggravated felony (as defined at INA § 101(a)(43)) (INA § 101(f)(8)),¹⁰ or
- Engaged in conduct described in INA § 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or INA § 212(a)(2)(G) (relating to severe violations of religious freedom) (INA § 101(f)(9)).

In addition to the bars explicitly enumerated in the statute, the statute also contains a provision allowing IJs to take other discretionary factors into account in determining whether the applicant has demonstrated good moral character. Even if an applicant does not fall within one of the bars to establishing good moral character, INA § 101(f) provides that this does not “preclude a finding that for other reasons such person is or was not of good moral character.” This provision is commonly referred to as the “catch-all” clause of INA § 101(f) and allows IJs to exercise broad discretion in assessing if the record in evidence demonstrates non-adherence to the “generally accepted moral conventions of the community.”¹¹ Some IJs have even exercised broader discretion under this provision – including considering evidence of hardship – in their good moral character analysis.¹²

¹⁰ If someone has an aggravated felony conviction, that person would also face the criminal bars to non-LPR cancellation. *See* INA § 240A(b)(1)(C).

¹¹ *See Jimenez-Galicia v. United States AG*, 690 F.3d 1207, 1210 (11th Cir. 2012) (“The way Congress worded the definition of good moral character in section 1101(f) shows that this BIA decision about Petitioner’s character made pursuant to the catchall provision -- is discretionary”); *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (“Apart from the per se categories, however, whether an alien has good moral character is an inquiry appropriate for the Attorney General’s discretion.”); *Bernal-Vallejo v. INS*, 195 F.3d 56, 62-63 (1st Cir. 1999). *But see Ikenokwalu-White v. INS*, 316 F.3d 798, 802-04 (8th Cir. 2003) (“[T]he determination that an alien has failed to establish good moral character under the catchall provision of Section 1101(f) is, like the per se categories, a question of applying the law to the facts and results in a nondiscretionary, reviewable determination.”)

¹² *See, e.g., R-P-L-S-*, AXXX XXX 262 (BIA Aug. 28, 2019) (unpublished) (IJ failed to consider hardship to qualifying relatives in finding that respondent lacked good moral character under catchall provision of INA § 101(f)), https://www.scribd.com/document/427092299/R-P-L-S-AXXX-XXX-262-BIA-Aug-28-2019?secret_password=M3nfVKVYn6fEg3RaByxR.

Moreover, even if the IJ does not find that the applicant lacks good moral character as defined in INA § 101(f), an IJ may still deny non-LPR cancellation in the exercise of discretion overall.

IV. Practical Implications of *Castillo-Perez*

The attorney general's decision in *Castillo-Perez* has serious consequences for those with two or more DUI convictions. First, non-LPR cancellation applicants with multiple DUIs during the statutory period now face a rebuttable presumption against a finding of good moral character. Second, the broad language of the decision means that even if non-LPR cancellation applicants do not have multiple DUI convictions, arrest records of DUIs may lead to a denial under the INA § 101(f) "catch-all" provision or as a matter of discretion. Third, the decision suggests that multiple alcohol-related DUI convictions during the relevant ten-year period may be sufficient to support a "habitual drunkard" finding—a statutory bar to good moral character. Fourth, USCIS has already begun to apply *Castillo-Perez*'s good moral character analysis to contexts beyond non-LPR cancellation.

a. Rebuttable Presumption Based on Two or More DUI-Related Convictions

In *Castillo-Perez*, the attorney general established a rebuttable presumption that applicants for non-LPR cancellation lack good moral character if they have two or more DUI convictions during the ten-year period.¹³ The decision defines the term "DUI" to mean "all state and federal impaired-driving offenses, including 'driving while intoxicated,' 'operating under the influence,' and the like, that make it unlawful for an individual to operate a motor vehicle while impaired."¹⁴ Because this presumption applies to convictions for DUIs, it is important for practitioners to first assess whether a client's arrests actually resulted in a final conviction.¹⁵

The attorney general notes that multiple DUI convictions do not foreclose non-LPR cancellation eligibility entirely, and that there may exist an "unusual case" in which "multiple convictions were an aberration."¹⁶ Moreover, the attorney general indicates that evidence of rehabilitation is insufficient, by itself, to establish good moral character at the time the DUIs occurred. Instead, the attorney general notes that rehabilitation evidence shows only that the applicant may have "reformed himself after those convictions."¹⁷ Although "commendable," such evidence does not establish the requisite good moral character during the ten-year period.¹⁸

¹³ *Matter of Castillo-Perez*, 27 I&N Dec. 664, 664 (AG 2019).

¹⁴ *Id.* at 664 n.1.

¹⁵ The term "conviction" is defined in INA § 101(a)(48)(A). For more information on the definition of a conviction under immigration law, see ILRC, *What Qualifies as a Conviction for Immigration Purposes?* (2019), https://www.ilrc.org/sites/default/files/resources/definition_conviction_april_2019.pdf. However, an IJ may still consider dispositions other than convictions in the discretionary analysis.

¹⁶ *Castillo-Perez*, 27 I&N Dec. at 671. By labeling these cases as "unusual," the attorney general dictates to IJs that few applicants, if any, with more than one DUI conviction could merit non-LPR cancellation. While practitioners should attempt to rebut the presumption established by *Castillo-Perez*, they should also consider arguing in the alternative that the decision strips IJs of discretion and impermissibly interprets INA § 101(f) as establishing a de facto statutory bar to good moral character.

¹⁷ *Id.*

¹⁸ *Id.*

Thus, to rebut the *Castillo-Perez* presumption, non-LPR cancellation applicants must do more than demonstrate that they reformed after their DUI convictions.¹⁹ Part of an IJ’s discretionary good moral character analysis traditionally has included evidence of rehabilitation.²⁰ After *Castillo-Perez*, an applicant with multiple DUI convictions must show “substantial relevant and contrary evidence” of good moral character during the period when the DUI convictions occurred, in addition to evidence of rehabilitation.

Practitioners should therefore present, and the IJ should accept, both rehabilitation evidence and other evidence that demonstrates that the DUI convictions were an aberration and not demonstrative of a lack of good moral character. Practitioners could introduce evidence showing that the non-LPR cancellation applicant had difficult but rare personal or family circumstances at the time of the DUI incident that suggest it was an “unusual case” or “aberration.” For example, if the second conviction was based on impairment caused by over-prescription of pain medications. Alternatively, practitioners could present evidence proving that the DUI incidents occurred during a time of significant trauma for the applicant. Or, practitioners could present evidence proving that at the time of the DUI convictions the applicant faced challenges that triggered his or her underlying and untreated past trauma. Evidence of the applicant’s desire to seek professional mental health support to address the trauma that is at the root of the DUI incidents and an explanation as to why the applicant did not seek this support sooner may also prove that the DUI convictions were an aberration.

In addition, practitioners should continue to include positive general evidence of good moral character during the ten-year period. Such evidence may demonstrate adherence to religion, volunteerism, attentive and supportive parenting, hard work, and other community and familial ties tending to show that the person was leading a “moral” life during even the same period of their arrest and conviction. This type of evidence can also help show that any DUI convictions were aberrations.

Practitioners should consider labeling the non-rehabilitative documentary evidence separately, in order to bolster the record and distinguish their case from that of the respondent in *Castillo-Perez*. If an IJ prevents the practitioner from developing this testimony on direct examination, practitioners should argue that it is required to overcome the presumption that the respondent

¹⁹ *Id.*

²⁰ See *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1058 (9th Cir. 2017) (“the statutory construct of “good moral character” has also embraced the concept of redemption”); *Yuen Jung v. Barber*, 184 F.2d 491 (9th Cir. 1950) (noting that if the court held that any past action precluded one from establishing good moral character in the naturalization context, this “would require a holding that Congress had enacted a legislative doctrine of predestination and eternal damnation.”); *Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 (9th Cir. 1996) (noting in the naturalization context, that “[w]hether the petitioner can establish that he has reformed and rehabilitated from this prior conduct is germane to the determination of whether he has established good moral character from the beginning of the one-year period to the present.”). See also, e.g., H-H-R-, AXXX XXX 822 (BIA June 18, 2019) (unpublished) (reversing finding that respondent lacked good moral character where IJ relied on incidents falling outside of the ten-year period and failed to consider evidence of rehabilitation since the DUI conviction), https://www.scribd.com/document/419388558/H-H-R-AXXX-XXX-822-BIA-June-18-2019?secret_password=ofX92KP3yBggwqO8kjD5; see also *Matter of C-V-T-*, 22 I&N Dec. 7, 11-12 (BIA 1998) (“With respect to the issue of rehabilitation, a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion.”).

lacks good moral character, as the presumption may be rebutted by a preponderance of the evidence that the bar does not apply.²¹ Furthermore, practitioners should note that INA § 240(b)(4)(B) requires that respondents “shall have a reasonable opportunity to present evidence on [their] own behalf.” Practitioners should be ready to present an offer of proof for appeal as a last resort.

b. DUI-Related Arrests That Do Not Result in a Conviction

While DUIs arrests that do not result in a conviction during the ten-year period do not trigger the *Castillo-Perez* negative presumption, DUI arrests may still lead to denials of relief pursuant to the INA § 101(f) “catch-all” provision or as a matter of discretion.

With regard to the good moral character catch-all provision, the BIA has “long held that good moral character does not mean moral excellence and [] it is not destroyed by a ‘single incident.’”²² “[R]ather, it is a concept of a person’s natural worth derived from the sum total of all his activities, measured by reference to the conduct of the average person in the community.”²³

In exercising discretion generally, an IJ must assess the totality of the evidence, balancing the positive factors against the negative factors.²⁴ “In any balancing test, various factors, whether positive or negative, are accorded more weight than others according to the specific facts of the individual case.”²⁵ As such, practitioners should consider including additional evidence of favorable factors or equities to counterbalance a negative factor like a DUI arrest. For example, an applicant with DUI arrests who belongs to a church may wish to address parishioners at the church about the lapse in judgment that led to driving while intoxicated and submit letters from parishioners that discuss this as part of the evidentiary filing.

c. Habitual Drunkard

The attorney general also suggests, in dicta, that a non-LPR cancellation applicant with multiple alcohol-related DUI arrests may be statutorily barred from demonstrating good moral character as a “habitual drunkard” under INA § 101(f). In a footnote, the attorney general suggests that IJs assess whether an applicant with multiple DUI arrests involving alcohol is or was a habitual

²¹ 8 CFR § 1240.8(d) (“If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”)

²² *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 366 (BIA 1991) (quoting *Matter of B-*, 1 I&N Dec. 611 (BIA 1943)); see also *Posusta v. United States*, 285 F.2d 533, 535 (2d Cir. 1961) (stating that “a person may have a ‘good moral character’ though he has been delinquent upon occasion in the past; it is enough if he shows that he does not transgress the accepted canons more often than is usual.”); *Matter of K-*, 3 I&N Dec. 180, 182 (BIA 1949) (stating that an individual’s good moral character is not destroyed by a single lapse and that it should be determined by considering the person’s actions generally and the regard in which he or she is held by the community as a whole); *Matter of U-*, 2 I&N Dec. 830, 831 (BIA, A.G. 1947) (stating that good moral character does not require moral excellence but is the measure of a person’s natural worth derived from the sum total of all his actions in the community).

²³ *Matter of G-*, 6 I&N Dec. 208, 209 (BIA 1954).

²⁴ See *Matter of Sotelo*, 23 I&N Dec. 201, 203-04 (BIA 2001).

²⁵ *Id.* at 203.

drunkard, which would bar them from establishing good moral character.²⁶ Although not part of the holding, this dicta is a strong indication that practitioners should be ready to consider the meaning of this term for clients with multiple DUI arrests, even if the arrests did not result in convictions. The INA does not define “habitual drunkard,” but the BIA and U.S. courts of appeal have interpreted the term.²⁷

When the Court of Appeals for the Ninth Circuit considered the term “habitual drunkard” in *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1047 (9th Cir. 2017) (en banc), the court cited Black’s Law Dictionary 587 (4th ed. 1951) to conclude that in its ordinary meaning, the term refers to a person who regularly drinks alcoholic beverages to excess.²⁸ Yet, the court ruled, the term habitual drunkard “is not synonymous with alcoholic.”²⁹ Rather, the court adopted a conduct-based approach noting that “the statute asks whether a person’s *conduct* during the relevant time period meets the definition; the person’s *status* as an alcoholic, or not, is irrelevant.”³⁰ Because the term habitual drunkard “readily lends itself to an objective factual inquiry,” the court, ruling en banc, held that it was not unconstitutionally vague.³¹

In *Castillo-Perez*, the attorney general suggests that two or more DUI alcohol-related convictions during the relevant ten-year period may be sufficient to support a habitual drunkard finding.³² Practitioners should argue that the correct analysis is the conduct-based approach adopted by the Ninth Circuit, and that multiple DUI convictions during the ten-year period, without more, do not render an individual a “habitual drunkard.” In other words, practitioners should argue that when IJs apply the conduct-based approach to determine if someone is a habitual drunkard, the threshold is higher than two DUIs in a 10-year period. Practitioners should ensure that IJs know the accepted definition of habitual drunkard and that they employ the correct conduct-based approach rather than follow the dicta in *Castillo-Perez*.

Moreover, IJs should not rely on the presumption adopted in *Castillo-Perez* to analyze whether an individual is a “habitual drunkard.” To do so would be at odds with the objective factual inquiry required by the conduct-based approach set forth in *Ledezma-Cosino*. The *Castillo-Perez* presumption requires a lower threshold of conduct – two DUI convictions within a ten year period – to be triggered, and may be overcome by compelling evidence of rehabilitation and good moral character. In *Ledezma-Cosino*, the Ninth Circuit held that Congress intended the inclusion of “habitual drunkard” as an absolute statutory bar to good moral character, and required an inquiry into conduct surpassing “alcoholism” before applying the bar. Although the attorney general, at footnote two of *Castillo-Perez*, cites to three studies that “further support the

²⁶ *Matter of Castillo-Perez*, 27 I&N Dec. 664, 670 n.2 (A.G. 2019).

²⁷ *See, e.g., Matter of H-*, 6 I&N Dec. 614 (BIA 1955); *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1047 (9th Cir. 2017) (en banc); *Tomaszczuk v. Whitaker*, 909 F.3d 159, 165 (6th Cir. 2018); *Manning v. Caldwell*, 930 F.3d 264, 277 (4th Cir. 2019) (en banc).

²⁸ *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1046 (9th Cir. 2017) (en banc) (holding that the term “habitual drunkard” was not unconstitutionally vague because it readily lends itself to an objective factual inquiry and that substantial evidence supported the BIA’s finding that Ledezma-Cosino was a “habitual drunkard”).

²⁹ *Id.* at 1058.

³⁰ *Id.* at 1046.

³¹ *Id.* at 1047.

³² *Matter of Castillo-Perez*, 27 I&N Dec. 664, 670 n.2 (A.G. 2019).

conclusion that a typical person with multiple DUI convictions drinks to excess with regularity,” practitioners should remind the adjudicator that the “habitual drunkard” bar requires a different, and separate, assessment.³³ Practitioners should argue therefore that multiple DUI convictions during the ten-year period alone do not render an individual a “habitual drunkard.”

Practitioners should nevertheless prepare to address the category of “habitual drunkard” for the individual hearing. Practitioners should discuss alcohol use with all non-LPR cancellation clients and their supporting witnesses to ensure that there is no potential habitual drunkard bar should DHS or IJ ask questions related to excessive alcohol consumption. For clients with DUI and other alcohol-related arrests, practitioners should prepare the client and supporting witnesses for DHS or IJ questions that may seek to establish the respondent as a habitual drunkard.³⁴

d. USCIS Implementation of *Castillo-Perez*

On December 10, 2019, USCIS issued a policy alert applying *Castillo-Perez* to the analysis of good moral character in the affirmative immigration benefit context, including naturalization and Violence Against Women Act (VAWA) self-petitions.³⁵ USCIS reiterates the language of the decision that evidence of two or more DUI convictions during the relevant statutory period establishes a rebuttable presumption of a lack of good moral character. The policy applies to “any cases filed or pending on or after October 25, 2019 (date of the AG’s decisions).”³⁶

V. Limiting the Scope of *Castillo-Perez*

While *Castillo-Perez* is expansive, practitioners can make a number of arguments to mitigate the challenges imposed by the decision. First, the decision suggests that multiple DUI convictions from a *single* incident should not trigger the presumption against good moral character. Second, practitioners should be aware that the ten-year clock for good moral character runs backwards from the date of a final decision by an IJ or the BIA. Third, practitioners should argue that *Castillo-Perez* does not apply retroactively to DUI convictions preceding the date of the decision’s publication.

³³ *Matter of Castillo-Perez*, 27 I&N Dec. at 670. See also E-G-T-L-, AXXX XXX 765 (BIA Feb. 24, 2020) (unpublished) (finding that respondent’s consumption of one or two drinks per month does not render him a habitual drunkard and noting in a footnote that respondent’s habitual drunkard question “involves a different provision” than the one at issue in *Matter of Castillo-Perez*), https://www.scribd.com/document/452084910/E-G-T-L-AXXX-XXX-765-BIA-Feb-14-2020?secret_password=wNL5sMLPHrRTqwoKbhA.

³⁴ Proper supporting witness preparation will avoid testimony similar to that in *Ledezma-Cosino* where the respondent’s daughter’s testimony included admissions that her father had a “drinking problem” and that his liver had failed because of “[t]oo much alcohol,” “[t]oo much drinking.” *Ledezma-Cosino*, 857 F.3d at 1047.

³⁵ USCIS, *Policy Alert: Implementing the Decisions on Driving Under the Influence Convictions on Good Moral Character Determinations and Post-Sentencing Changes* (Dec. 10, 2019), <https://www.uscis.gov/sites/default/files/policymanual/updates/20191210-AGOnDUIAndSentencing.pdf>; see also USCIS Policy Manual, vol. 12, Part F, Ch. 5 § K, <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5>.

³⁶ USCIS’ policy alert references multiple decisions because it addresses both *Matter of Castillo Perez* and *Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019).

a. Inapplicable to Multiple DUI Convictions from a Single Incident

Even though *Castillo-Perez*'s rebuttable presumption against good moral character is triggered by two or more DUI convictions, the decision is worded in a way that allows for argument that a single incident leading to multiple convictions would not trigger the presumption.

The attorney general reasons that “[m]ultiple DUI convictions represent a repeated failure to meet the community’s moral standards, rather than a ‘single lapse’ that would be less probative of moral character,” citing to *Matter of B-*.³⁷ In *Matter of B-*, the BIA held that “good moral character does not mean moral excellence and . . . it is not destroyed by a single lapse.”³⁸ Therefore, practitioners should argue that the presumption adopted in *Castillo-Perez* is not triggered by a single incident (“single lapse”) that led to multiple DUI charges and convictions.

b. Good Moral Character Ten-Year Clock

Because the ten-year period for evaluating good moral character is “calculated backward from the date on which the application is finally resolved by an IJ or the Board,”³⁹ a non-LPR cancellation applicant can continue to accrue evidence of good moral character after immigration court proceedings begin and until a final administrative decision on the application.⁴⁰ Any negative moral character issues outside of the ten-year period would not trigger time-limited INA § 101(f) bars or the *Castillo-Perez* presumption. At a minimum, conduct that falls outside of the INA § 101(f) list should not be determinative of good moral character “because with the passage of time, an individual’s bad act may fade in significance.”⁴¹

Given the unprecedented backlog in immigration courts and the BIA,⁴² some DUI convictions may fall outside the ten-year good moral character period by the time a final BIA or IJ decision is rendered.⁴³ Practitioners should assess if delayed scheduling of the individual hearing caused by the backlogs may cause DUI conviction(s) to fall outside the ten-year good moral character period or if delayed scheduling will impact other non-LPR cancellation eligibility factors.⁴⁴

c. *Castillo-Perez* Should Not Apply Retroactively

Practitioners with clients who have DUI convictions preceding the date of the publication of *Castillo-Perez* should argue that the decision cannot retroactively apply to their clients’ cases.

³⁷ *Castillo-Perez*, 27 I&N Dec. at 670.

³⁸ *Matter of B-*, 1 I&N Dec. 611, 612 (BIA 1943).

³⁹ *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 797-98 (BIA 2005).

⁴⁰ *Id.* at 793.

⁴¹ *Id.* at 797.

⁴² See *Immigration Court’s Active Backlog Surpasses One Million*, TRAC (Sept. 18, 2019), <https://perma.cc/BR54-KQS7>.

⁴³ *Ortega-Cabrera*, 23 I&N Dec. at 797; see also *N-M-C-*, AXXX XXX 756 (BIA Aug. 31, 2018) (unpublished) (remanding for further consideration because more than ten years had elapsed while the case was on appeal from the event barring good moral character).

⁴⁴ For example, practitioners should calculate if the applicant’s qualifying relative(s) will be at risk of aging out.

While courts sometimes allow agencies to apply rules announced through adjudication retroactively, to decide whether this is permissible they must first balance the advantages gained by the retroactive application of the rule against the harms of its application.⁴⁵ Such harms include results that would be contrary to equitable principles.⁴⁶ Courts have regularly applied these principles to limit the retroactive application of BIA decisions. For example, multiple U.S. courts of appeals have held that the BIA’s definition of a crime of moral turpitude in *Matter of Diaz-Lizaraga* cannot be applied retroactively to guilty pleas taken before its publication.⁴⁷ Similarly, the Ninth Circuit held that *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002), where the attorney general established a rebuttable presumption that drug trafficking offenses are per se particularly serious crimes, cannot be applied retroactively to pleas preceding the publication of the decision.⁴⁸

Practitioners should take the position that EOIR and USCIS cannot apply *Castillo-Perez* retroactively to DUI convictions preceding the date of the decision. Many applicants were likely advised, based on immigration law at the time, to take a plea deal on a second DUI before *Castillo-Perez*. Applicants entered pleas believing that the pleas would not cause ineligibility for relief. Given the extremely harsh consequences of deportation or denial of adjustment of status or naturalization,⁴⁹ the BIA and USCIS should only apply the *Castillo-Perez* presumption prospectively.

VI. Additional Issues to Raise on Appeal

Finally, the attorney general’s decision includes a number of assertions that are a departure from past practice and conflict with BIA precedent. In addition to the strategies already covered, below is a discussion of a number of these issues that practitioners may consider raising before the IJ and preserving for appeal.

a. Dicta Encourages IJs to Limit Grants of Non-LPR Cancellation of Removal

Referencing the 4,000 per year statutory cap, the attorney general devotes over half a page to establishing that non-LPR cancellation “is a coveted and scarce form of relief” intended for the “most deserving of candidates.”⁵⁰ Pursuant to INA § 240A(e)(1), only 4,000 immigrant visas can be granted through non-LPR cancellation during each fiscal year. Each year that the quota has been in effect since in 1997, IJs have reached this cap leading them to “reserve” decisions until subsequent fiscal years when more visas would be made available. Now, the 2017 EOIR Operating Policies and Procedures Memorandum instructs IJs that in cases that can be denied or

⁴⁵ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

⁴⁶ *Id.* Circuit courts address different factors when applying this balancing test. Practitioners should review the case law in their circuit if they seek to pursue this argument.

⁴⁷ See *Monteon-Camargo v. Barr*, 918 F.3d 423, 431 (5th Cir. 2019); *Obeya v. Sessions*, 884 F.3d 442, 449 (2d Cir. 2018); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1296 (9th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 578 (10th Cir. 2017).

⁴⁸ *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007).

⁴⁹ See *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss of all that makes life worth living.” (internal quotation marks omitted)); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“[Deportation] may result also in loss of both property and life; or of all that makes life worth living.”).

⁵⁰ *Matter of Castillo-Perez*, 27 I&N Dec. at 670.

pretermitted for any reason, the IJs must issue a decision and may only reserve decisions for grants.⁵¹

The attorney general suggests that the demand for non-LPR cancellation should not outstrip the supply, seemingly assuming that it is impossible for more than 4,000 noncitizens a year to qualify for and deserve a grant of non-LPR cancellation. The attorney general intimates that IJs have contributed to the current 4,000-visa backlog by liberally granting noncitizens non-LPR cancellation and urges them to grant relief in an “evenhanded way.”⁵² This warning from the attorney general that non-LPR cancellation is for the most deserving candidates, coupled with pressures deriving from the “IJ Performance Metrics,”⁵³ may signal to IJs that they should limit the number of non-LPR cancellation grants. Therefore, in cases where an applicant arguably meets the exceptional and extremely unusual hardship standard, which is usually the hardest hurdle to overcome upon establishing *prima facie* eligibility, an IJ may feel pressure to deny the case on good moral character or discretion grounds. Practitioners should thus highlight the favorable discretionary facts of all non-LPR applicants to limit the likelihood of the IJ denying the case as a matter of discretion and emphasize that relief can be granted notwithstanding the availability of a visa. Practitioners should remind IJs that *Castillo-Perez* does not bar them from granting relief if a visa is not currently available for the applicant.

b. Limited Applicability to Other Discretionary Decisions

In dicta in footnote 3, the attorney general instructs IJs to “include a careful analysis of whether an applicant with multiple DUI convictions merits” adjustment of status as a matter of discretion. The attorney general justifies this instruction by noting that adjustment of status “is similarly a discretionary benefit that may be granted to an applicant who meets general statutory qualifications.” However, adjustment of status under INA § 245(a) was not at issue in *Castillo-Perez*. While the attorney general attempts to extend the holding in *Castillo-Perez* to adjustment of status via a footnote, this conclusory footnote is devoid of reasoning and is therefore non-controlling dicta.

Furthermore, through this footnote instruction, the attorney general overlooks that the BIA has historically found “it prudent to avoid cross-application, as between different types of relief from deportation, of particular principles or standards for the exercise of discretion.”⁵⁴ In *Castillo-Perez* the attorney general engages in this very cross-application of principles or standards for the exercise of discretion. Practitioners should distinguish *Castillo-Perez* from cases involving discretion that do not require a finding of good moral character under INA § 101(f).

⁵¹ Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 17-04: Applications for Cancellation of Removal or Suspension of Deportation that are Subject to the Cap (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-04/download>. The rule and OPPM went into effect on January 4, 2018 and applies prospectively. Decisions reserved prior to January 4, 2018 are not affected.

⁵² *Matter of Castillo-Perez*, 27 I&N Dec. at 669.

⁵³ Under these metrics, IJs must have a remand rate of less than 15 percent. See EOIR Issues Guidance Implementing Immigration Judge Performance Metrics, AILA Doc. No. 18040301 (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>.

⁵⁴ *Matter of Marin*, 16 I&N Dec. 581, 586 (BIA 1978).

VII. Conclusion

Castillo-Perez may include many individuals with two or more DUIs from obtaining non-LPR cancellation of removal. While the number of noncitizens whom this decision will impact is unknown, this is yet another precedential decision issued during the Trump administration that seeks to limit the discretion of adjudicators in removal proceedings,⁵⁵ procedural safeguards⁵⁶ and immigration benefits.⁵⁷ This time, the noncitizens precluded from relief are those who have been in the United States for at least ten years and have likely established deep roots and family ties. However, in response to *Castillo-Perez*, practitioners representing non-LPR cancellation applicants with two or more DUIs should seek to overcome the rebuttable presumption, argue to limit the holding and impact of dicta on the independent exercise of discretion, and appeal all possible issues.

⁵⁵ *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

⁵⁶ See, e.g., *Matter of L-A-B-R-*, 27 I&N Dec. 405, 413 (A.G. 2018); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

⁵⁷ See, e.g., *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019); *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).