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I. Interest of Amicus Curiae

The American Immigration Law Foundation (AILF) was established in 1987 as a tax-exempt, not-for-profit educational and service organization. AILF's mission is to promote public understanding of immigration law and policy through education, policy analysis, and support to litigators. AILF frequently serves as an amicus curiae in cases involving immigration issues of first impression, in an effort to ensure that the deciding Court has a full exposition of the issue. This case presents a critical issue of national first impression, upon which there is substantial ground for a difference of opinion: Does the "stop-time" rule of 8 U.S.C. § 1229b(d) not only "end" continuous physical presence for purposes of cancellation of removal under 8 U.S.C. § 1229b and suspension of deportation under former 8 U.S.C. § 1254, but does it also prevent the alien from starting to build up a sufficient number of years afterwards?

This issue is of critical importance to hundreds if not thousands of immigration cases pending throughout the nation. It has been the subject of a lively debate among the members of the Board of Immigration Appeals ("BIA"), who are sharply divided on the subject. Compare Matter of Nolasco-Tofino, Int. Dec. 3385 (BIA 1999) (majority opinion) with *id.* (Rosenberg, J., concurring); see also Matter of Mendoza-Sandino, Int. Dec. 3426 (BIA 2000) (Guendelsberger, J., dissenting). One panel of this Court has likewise suggested that the "stop-time" rule only ends continuous presence, but does not prevent it from beginning to accrue anew later. *Arrozal v. INS*, 159 F.3d 429, 434 n.2 (9th Cir. 1998).

As this is a matter of first impression, AILF has been asked by counsel for Mr. Arreola to provide a full exposition of this important issue for the benefit of the Court. AILF appears as an amicus curiae in support of Mr. Arreola.

II. Argument:

The "stop-time" rule does not prevent an alien from beginning to again accrue continuous physical presence after the interrupting event.

Both prior to and after the sweeping changes made to the immigration laws in 1996, aliens with long residence in the United States could receive a waiver of deportation. Prior to April 1, 1997, former 8 U.S.C. § 1254(a) permitted aliens to receive a waiver of deportation and admission to lawful permanent resident status known as "suspension of deportation." One requirement was that the alien have a specified number of years of "continuous physical presence" in the United States preceding the application for relief. Depending upon the circumstances, the alien was required to have either:

“been physically present in the United States for a continuous period of not less than seven years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation...”; or

“been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation...”; or

“been physically present in the United States for a continuous period of not less than 3 years....”

Former 8 U.S.C. § 1254(a)(1)-(3). Under long-settled precedent, this period of continuous physical presence continued during deportation proceedings and during the pendency of good-faith appeals to this Court. E.g., *Sida v. INS*, 764 F.2d 1319, 1321 (9th Cir. 1985).

Certain 1996-1997 amendments to the immigration laws altered this regime. See section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627 (“IIRAIRA”); 8 U.S.C. § 1229b(d) (Supp. II 1996). Under section 309(c)(5) of IIRAIRA, the newly enacted provisions of 8 U.S.C. § 1229b(d) were made applicable to “notices to appear” issued “on, before, or after” the effective date of the act. 8 U.S.C. § 1229b itself replaced the waiver of deportation available under former 8 U.S.C. § 1254(a) with a parallel remedy referred to as “cancellation of removal.”

8 U.S.C. § 1229b(d), unlike the parallel pre-1996 provision for “suspension of deportation,” includes a “stop-time” rule. Under the “stop-time” rule, “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....” *Id.* In short, the accruing period of continuous presence now needed for suspension of deportation under the post-1996 regime “shall be deemed to end” when administrative proceedings to remove the alien are commenced.

The issue in this case is whether simply because one period of time is “deemed to end” upon commencement of removal proceedings, is the alien precluded from starting over and subsequently accumulating the requisite residence in the United States? The facts of Mr. Arreola’s case illustrate how the issue can (and often does) arise. In a nutshell, the BIA took so long to adjudicate Mr. Arreola’s appeal that he accrued a whole new seven years (indeed, nearly nine years now) after deportation proceedings were commenced against him. [AR 1-3] Nor was Mr. Arreola’s appeal frivolous; this Court granted his appeal in 1996 and remanded the case with instructions to the BIA to consider the merits. [AR 1-3] The BIA refused to comply with the Court’s instructions, instead asserting that the “stop-time” rule enacted in the interim meant that Mr. Arreola was ineligible anyway. [AR 1-3]¹

To reach its result, the BIA held in this case that 8 U.S.C. § 1229b(d)(1) not only “ends” the period of physical presence acquired up to that point (if less than 7 years), but also precludes the accrual of any subsequent period of physical presence, no matter what. [AR 1-3] Such a broad reading of that 8 U.S.C. § 1229b(d)(1) is not supported by either the wording or the legislative history of the statute.

¹ This raises an important “real world” point of which the Court needs to be aware. The BIA, by its own admission, is grossly behind on processing its cases. This has resulted in a several-years long backlog on certain low-priority appeals, notably those non-criminal offenders like Mr. Arreola whom the Service is not in a sufficient hurry to deport to justify efforts at expedition. See Matter of Mendoza-Sandino, Int. Dec. 3426 (BIA 2000) (Schmidt, BIA Chairman, dissenting). Their cases routinely sit at the BIA for years while the BIA deals with higher priorities. Amicus curiae submits that the INS is “stretching” with its argument in this case in an effort to avoid a consequence of the BIA’s unconscionable backlog. Amicus curiae further submits that it is not an appropriate way of dealing with a backlog by “stretching” the law to dispose of cases on the assumption that some persons will not appeal. For example, the BIA’s choice of the Mendoza-Sandino case to announce its precedential position on this issue is noteworthy as the aliens in question were pro se in that case.

The starting point in resolving this issue is the language of the statute, which provides:

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 239(a) or 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.

The statement that "any period of continuous physical presence . . . shall be deemed to end" strongly suggests that there may be more than one period of continuous physical presence to be considered. Although 8 U.S.C. § 1229b(d) clearly cuts off the accrual of a period of time prior to a specified event, it does not speak to periods of time after the event in question. The reference to ending "any period" of physical presence suggests that another period of physical presence ensues. See *Arrozal v. INS*, 159 F.3d 429, 434 n.2 (9th Cir. 1998) (recognizing that an alien "might satisfy the continuous physical presence requirement by virtue of the fact that she has accrued twelve years of continuous physical presence since the INS issued her an order to show cause").

Had Congress intended the occurrence of a "stop-time" event to preclude the possibility of alien's subsequently beginning to reaccrete time toward continuous physical presence, it could simply have stated that the occurrence of such an event renders an alien ineligible for relief. Yet Congress did not. The language "any period of continuous physical presence shall be deemed to end" does not necessarily mean that all periods, including those that have not started, can never start. The word "any" in section 8 U.S.C. § 1229b(d)(1) does not mean "all" or "every." "All" means the whole number, amount or quantity, the total extent, the whole possible. Webster's II New Riverside University Dictionary 93 (1984) [hereinafter Webster's]. "Every" means "all," without exception. *Id.* at 448. "Any" instead merely means "one or some, regardless of sort, quantity or number, one or another selected at random." *Id.* at 115. It is an axiom of statutory construction that words in a statute should be given their ordinary meaning whenever possible. 2A Norman J. Singer, Sutherland Statutory Construction §§ 46.01, 46.04, at 73, 86 (4th ed. 1985).

The word "period" means "an interval of time." Webster's, *supra*, at 874. The "end" of "any period" of "continuous physical presence" cannot logically refer to some period of time that has not even begun because continuity cannot transcend its own ending. The word "end" means a point at which an act, event, or phenomenon ceases or is completed. Webster's, *supra*, at 430-31. Periods of time are discrete units

with a beginning and an end. Once one period of continuous physical presence is deemed to end, nothing in the statute prevents another continuous period of physical presence from beginning.

Comparison of the wording used in 8 U.S.C. § 1229b(d)(2) also suggests that a second period of continuous physical presence may occur under 8 U.S.C. § 1229b(d)(1), even after commencement of proceedings. 8 U.S.C. § 1229b(d)(2) provides a bright-line rule for determining whether continuity of physical presence is broken by trips outside of the United States. It states that one who departs for over 90 days “shall be considered to have failed to maintain continuous physical presence.” 8 U.S.C. § 1229b(d)(2) (emphasis added). The physical presence that ends with too long a departure, however, begins anew upon return to the United States. Similarly, the termination of a period of physical presence under 8 U.S.C. § 1229b(d) does not necessarily preclude a subsequent period of physical presence.

Doubts about statutory construction in the area of deportation should be resolved in favor of affording the possibility of relief from deportation. See *INS v. Errico*, 385 U.S. 214, 225 (1966) (stating that doubts as to the correct construction of a statute should be resolved in the alien's favor when interpreting provisions related to relief from deportation). This is because deportation is a drastic measure and at times the equivalent of banishment or exile. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). In the absence of a clear legislative directive that a period of continuous physical presence after commencement of proceedings may not start anew, it should not be assumed that Congress meant to restrict eligibility beyond that what is by the narrower version of a reasonable interpretation.

The rule adopted by the BIA in this case will result in gross and unintended injustices in a number of cases. Take, for example, the situation of an alien who is granted cancellation of removal under 8 U.S.C. § 1229b(d) at trial before an Immigration Judge. Assume further that the INS appeals this decision to the BIA. Under the BIA's decision in this case, all future periods of continuous residence or physical presence would be ended by the initiation of proceedings, even if the respondent obtains or retains lawful permanent resident status after such proceedings are completed. In addition, sometimes aliens are found not to be deportable by an Immigration Judge, or the INS simply drops the proceedings after they are begun. It is absurd to conclude that an alien whose proceedings are terminated because he is not deportable or removable can no longer accrue continuous residence or physical presence for purposes of any future application for relief from deportation simply because (failed) proceedings were commenced against him at some point in the past. Yet that is the inevitable result of precluding any further period of continuous

physical presence for purposes of relief after the commencement of even failed proceedings. Indeed, the BIA's decision in this case is noteworthy for just this. After this Court reversed and remanded the case for reconsideration on the merits, the BIA dodged having to even look at the merits by deciding that the "stop-time" rule rendered the ultimate outcome irrelevant. [AR 1-3]

III. Conclusion

The Court should reverse the BIA's decision and remand for further proceedings.
DATED this _____ day of March, 2000.

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By Jeffrey Scott Moeller

CERTIFICATION PURSUANT TO RULE 32 (e)(4)

Pursuant to the Ninth Circuit Rule 32(e)(4), I certify that the opening brief is proportionately spaced, has a typeface of 14 points or more and contains 2,422 words.

DATE Jeffrey Scott Moeller
 Attorney for Amicus Curiae

STATEMENT OF RELATED CASES

This case is related to Arreola-Calderon v. INS, No. 94-70226, in that it involves the same parties. Counsel is unaware of any other related cases presently pending before the Court.

DATE Jeffrey Scott Moeller
 Attorney for Amicus Curiae