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When Time Is of the Essence: Applying Timing Rules in Immigration Proceedings

by Josh D. Friedman

"Time," proclaimed Byron, is "the corrector where our judgments err." Baron George Gordon Byron, *Childe Harold's Pilgrimage: A Romaunt* 228, canto IV, verse CXXX, line 4 (Thomas Moore ed., Henry Carey Baird 1856) (1812-1818). As is evident from his confidence, Byron was cheerfully ignorant of modern administrative law, which is notoriously replete with deadlines, limitations periods, effective dates, durational requirements, and other species of timing rules. *See* Jacob E. Gersen & Anne J. O'Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923, 939-42 (2008). This current reality is particularly true within the Immigration and Nationality Act and throughout the field of immigration law, where rules relating to time impact the applicability of grounds of removal and inadmissibility, eligibility for relief from removal and other benefits, claim-processing issues, and the right to administrative and judicial review. *See, e.g.*, section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) (making the current definition of "aggravated felony" applicable to convictions "entered before, on, or after" September 30, 1996); section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B) (disqualifying any application for asylum not filed within 1 year of the applicant's arrival in the United States); section 208(b)(1)(B)(iii) of the Act, (fixing May 11, 2005, as the effective date for the current credibility standard); section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B) (prohibiting from readmission aliens who accrue various specified periods of unlawful presence in the United States); section 240(c)(7)(C) of the Act, 8 U.S.C. § 1229a(c)(7)(C) (fixing a 90-day deadline for filing motions to reopen); section 240A(a)(1)-(2) of the Act, 8 U.S.C. § 1229b(a)(1)-(2) (authorizing cancellation of removal for aliens who have been lawful permanent residents "for not less than 5 years" and have "resided in the United States continuously for 7 years"); section 240A(d)(1) of the Act (setting forth the stop-time rule governing termination of an alien's continuous period of residence for purposes of eligibility for cancellation); section 242(b)(1) of the Act, 8 U.S.C. § 1252(b)(1) (providing a 30-day window of opportunity for requesting judicial review of removal orders).

Timing rules admittedly can be vexing. Because deadlines and limitations periods "are inherently arbitrary," *United States v. Boyle*, 469 U.S. 241, 249 (1985), they "necessarily operate harshly . . . with respect to individuals who fall just on the other side of them." *United States v. Locke*, 471 U.S. 84, 101 (1985). Despite this effect, timing rules "have long been respected as fundamental to a well-ordered judicial system." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Because they "are vital to the welfare of society and are favored in the law[,] [t]hey are found and approved in all systems of enlightened jurisprudence." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Modern democratic states have found that adherence to fixed dates is "often essential to accomplish necessary results." *Boyle*, 469 U.S. at 249.

To be sure, before and during proceedings, cutoff dates encourage the reasonably diligent presentation of claims by "prompt[ing] parties to act" before their claims are stale. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992). By the same token, the prompt presentation of claims serves "the interests of the parties and the legal system in fair warning." *Greenlaw v. United States*, 554 U.S. 237, 239 (2008). At the conclusion of proceedings, time limits produce finality in the judgment and peace of mind for the prevailing party by imposing tight deadlines for making post-judgment motions and taking appeals. *Taylor*, 503 U.S. at 644; Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 Creighton L. Rev. 493, 571 (2004). In view of these rationales, Justice Anthony M. Kennedy once wrote, on behalf of a unanimous U.S. Supreme Court, that "if the concept of a filing deadline is to have any content, the deadline must be enforced." *Locke*, 471 U.S. at 101.

Like Clockwork?

Although institutionally important in principle, timing rules may be challenging in practice. In fact, the most important area of malpractice exposure in civil litigation relates to the failure to meet deadlines. David F. Herr, Roger S. Haydock, & Jeffrey W. Stempel, *Motion Practice* § 7.06 (2004). Courts may also have difficulty applying the peculiar abundance of timing rules, notwithstanding their routine enforcement of deadlines.

Many of these problems stem from the failure to identify the correct triggering event or end date. For instance, in one case, the United States Court of Appeals for the First Circuit corrected both the start date and the end date in analyzing whether changed or extraordinary circumstances excused the respondent's late filing of an asylum application. *Lumataw v. Holder*, 582 F.3d 78, 86-90 (1st Cir. 2009); *see also Matter of F-P-R-*, 24 I&N Dec. 681, 685 (BIA 2008) (holding that the 1-year filing period should be calculated on the basis of the alien's last arrival on July 20, 2005, rather than the alien's prior arrival in the United States in 1989). Calculation of the continuous physical presence requirement applicable to eligibility for cancellation of removal has also proven challenging. *See, e.g.*, *Cantu-Delgadillo v. Holder*, 584 F.3d 682, 690 (5th Cir. 2009) (per curiam).

Another common blunder involves misinterpretation and misapplication of the operational language of the pertinent timing rule. Operational language includes any of those prepositional and adjectival phrases, such as "on or after," "prior to," or "not less than," that give meaning to the measure of time specified in the timing rule. For example, the Ninth Circuit held that the plain meaning of the asylum statute, which requires filing "'*within one year after the date* of the alien's arrival in the United States,'" does not include the applicant's date of arrival in the calculation of the 1-year period. *Minasyan v. Mukasey*, 553 F.3d 1224, 1227-29 (9th Cir. 2009) (quoting 8 U.S.C. § 1158(a)(2)(B)). Operational language also came into play in a recent Second Circuit case dealing with a claim to citizenship that turned on the construction of the phrase "under the age of eighteen years." *Duarte-Ceri v. Holder*, 630 F.3d 83, 87-88 (2d Cir. 2010) (quoting former section 321(a) of the Act, 8 U.S.C. § 1432(a) (repealed 2000)). The Second Circuit found that the phrase "under the age of eighteen years" should not be construed as meaning prior to the stroke of midnight on the 18th anniversary of the respondent's birth because, "when considering 'the great privilege of citizenship,' 'the method of arriving at the computation is to be in the interest of the person affected by it.'" *Id.* at 90 (quoting *Matter of L-M- and C-Y-C-*, 4 I&N Dec. 617, 620 (BIA 1952)).

Yet a third category of common errors arises from the failure to distinguish between jurisdictional deadlines, which impose absolute restrictions on a court's authority to permit or take action, and nonjurisdictional deadlines, which are subject to equitable exceptions. For example, the Second Circuit found that an Immigration Judge has "broad discretion" to depart from deadlines set by local court rules for filing supporting documentation where

a respondent demonstrates good cause for the failure to timely file documents and a likelihood of substantial prejudice from enforcement of the deadline. *Dedji v. Mukasey*, 525 F.3d 187, 191-92 (2d Cir. 2008). The Ninth Circuit has similarly held that Immigration Judges have authority to depart from nonjurisdictional time limits governing the filing of post-judgment motions and appeals. *See, e.g.*, *Irigoyen-Briones v. Holder*, 644 F.3d 943, 947-49 (9th Cir. 2011) (concluding that the 30-day deadline for filing motions to reconsider was a nonjurisdictional claim-processing rule subject to discretionary extension); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001) (en banc) (ruling that the filing deadline for motions to reopen was subject to equitable tolling).

Right on Time

Whatever the source of these mistakes may be, a court's misapplication of time limits is arguably more worrisome than a party's deadline waywardness, since the courts are tasked with safeguarding the procedural integrity of the legal system. *See Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 190 (1973) (Stewart, J., dissenting) ("[C]ourts of this country are the acknowledged architects and guarantors of the integrity of the legal system." (quoting L. Jaffe, *Judicial Control of Administrative Action* 589-90 (1965)) (internal quotation marks omitted)); *United States v. Ariza-Ibarra*, 651 F.2d 2, 17 (1st Cir. 1981) (Bownes, J., dissenting) ("As a court, we must at all times preserve the integrity of our legal system."). One possible way for adjudicators to properly apply timing rules is to follow a four-step process of (1) determining the temporal scope of the particular timing rule, (2) ascertaining the triggering event for when the timing issue arises and the correct end date, (3) calculating the intervening time to determine whether the rule has been satisfied, and (4) evaluating the applicability and effect of any relevant exceptions.

Step 1: Determine the Temporal Scope of the Timing Rule

The first step is to ask, "Was the rule in effect during the period of time at issue in the case?" This stage of analysis often requires determining whether a law applies retroactively or, conversely, whether a previously repealed law continues to have any validity. *INS v. St. Cyr*, 533 U.S. 289, 315-16 (2001). Because "[r]etroactive statutes raise special concerns" regarding the fairness of upsetting settled expectations, congressional enactments have no retroactive effect "'unless their language requires this result.'" *Id*. at 315-16 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

This presumption against retroactivity makes determining the temporal scope of timing rules fairly straightforward: a statute "may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result." *Id.* at 316. If the statute at issue is ambiguous with respect to retroactivity, then the adjudicator must determine whether the statute's retroactive application impermissibly "impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994)) (internal quotation marks omitted). Only after finding express language or the absence of an impermissible retroactive effect may a court proceed to retroactively apply a timing rule.

Step 2: Ascertain the Triggering Event and End Date

The second step involves asking, "When did the clock start, and when did it stop?" Some basic rules of thumb on the computation of statutory time limits, defined by units of time and operational language, can be helpful in this regard.

Rules of Thumb for Construing Units of Time:
Days, Months, and Years

Timing rules typically measure units of time in terms of days, months, and years because "people generally measure periods of more than one day by days, months or years." *Burnet v. Willingham Loan & Trust Co.*, 282 U.S. 437, 439 (1931). Each of these divisions of time carries with it its own unique set of considerations.

For instance, interpreting the word "day" involves two separate issues: distinguishing between calendar days and court days and determining what constitutes a day. Differentiating between calendar and court days is the easy part: unless the language of the statute or regulation provides otherwise, a timing rule stated in terms of days requires the adjudicator to count all calendar days, excluding from the calculation the last day of the time period if it falls on a weekend or a legal State or Federal holiday. *See* 8 C.F.R. §§ 1.1(h), 1001.1(h); Immigration Court Practice Manual, Chap. 3.1(c)(i), (ii) (2008). In a recent case in which the Ninth Circuit applied this

principle, it explained that "a period of voluntary departure [that] technically expires on a weekend or holiday . . . legally expires on [the] next business day" where the alien "files a motion that would affect his request for voluntary departure on the next business day." *Meza-Vallejos v. Holder*, 669 F.3d 920, 921 (9th Cir. 2012).

This principle finds support in Federal Rule of Civil Procedure 6(a) (2011), which sets out a method for "computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method." Although the Federal rules do not generally apply in immigration proceedings, *Matter of Magana*, 17 I&N Dec. 111, 115 (BIA 1979), Rule 6(a) provides strong persuasive authority as a manifestation of "[c]ongressional authorization and approval," applicable by analogy in immigration proceedings. *Matter of Escobar*, 18 I&N Dec. 412, 414 (BIA 1983). According to Rule 6(a)(1), "When the period is stated in days or a longer unit of time," the court should (1) "exclude the day of the event that triggers the period"; (2) "count every day, including intermediate Saturdays, Sundays, and legal holidays"; and (3) "include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Fed. R. Civ. Proc. 6(a)(1). Note that holidays may include days when the President has directed all executive branch departments and agencies of the Federal Government to be closed, even though the day has not specifically been declared a holiday. *See Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099 (D.C. Cir. 2003).

As for determining what constitutes a day, the default rule is that a court should not consider fractions of a day in computing time. *Matter of L-M- and C-Y-C-*, 4 I&N Dec. at 619. This rule of indivisibility is a legal fiction born of expedience—"a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time." *Willingham Loan & Trust Co.*, 282 U.S. at 439.

The rule of indivisibility, however, "is not of universal application." *Matter of L-M- and C-Y-C-*, 4 I&N Dec. at 619. "The legal fiction that a day is indivisible is a rule of convenience that is satisfactory only as long as it does not operate to destroy an important right." *Duarte-Ceri*, 630 F.3d at 88. As such, courts should look into fractions of days only when the text of the applicable rule is ambiguous and a fractional method of computation would prevent divestiture of important interests. *Id.* (holding that "whenever it becomes important to the ends of justice, . . . the law will look into fractions of a day, as readily as into the fractions of any other unit of time" (quoting *Town of Louisville v. Portsmouth Sav. Bank*, 104 U.S. 469, 474 (1881)) (internal quotation marks omitted)); *Matter of L-M- and C-Y-C-*, 4 I&N Dec. at 621 ("Where the language of the statute is capable of more than one construction, that construction is favored by law which will best preserve a right or prevent a forfeiture.").

For example, the Second Circuit noted in the derivative citizenship case of *Duarte-Ceri* that the applicable statute did not unambiguously provide "that a parent's naturalization had to take place 'before the child attains his eighteenth birthday' or 'prior to the child's eighteenth birthday'"; admittedly, this hypothetical language "would be unambiguous because the entirety of June 14, 1991 was Duarte's eighteenth birthday." 630 F.3d at 90. The actual statutory language instead revealed two possible meanings—one "refer[ing] to an applicant who has not yet reached the eighteenth anniversary of his birth" and the other "refer[ing] to an applicant who has not yet lived in the world for eighteen years." *Id.* at 88. Faced with these two conflicting constructions, the court observed that "[w]here a statute conferring citizenship derivatively is susceptible of two interpretations, the only difference being the divisibility of a unit of time, the law favors the interpretation that preserves the right of citizenship over the interpretation that forfeits it." *Id.* at 91. Applying a fractional method of computation to Duarte-Ceri's case, the court concluded that even though his mother took her naturalization oath on the morning of the day of his 18th birthday, "he was still 'under the age of eighteen years' when his mother was naturalized—he apparently had lived only for approximately seventeen years, 364 days, and twelve hours." *Id.* at 90. In arriving at this conclusion, the court reasoned that "[t]here is no indivisible unity about a day which forbids [a court], in legal proceedings, to consider its component hours, any more than about a month, which restrains [the court] from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules." *Id.* at 88 (quoting *Portsmouth Sav. Bank*, 104 U.S. at 475) (internal quotation marks omitted).

For similar reasons, courts should measure months by their component days according to the actual calendar rather than by arbitrary 30-day increments. *See Guar. Trust & Safe-Deposit Co. v. Green Cove Springs &*

Melrose R. Co., 139 U.S. 137, 145 (1891) (holding that a statute requiring notice by publication "once a week for four months" but lacking any legislative definition will be taken to mean calendar months). A calendar month, as the name suggests, consists of "the period of time running from the beginning of a certain numbered day up to, but not including, the corresponding numbered day of the next month, and if there is not a sufficient number of days in the next month, then up to and including the last day of that month." 74 Am. Jur. 2d *Time* § 8 (2012) (citing *Yingling v. Smith*, 259 Md. 260 (1970); *Licht v. Ass'n Servs., Inc.*, 236 Neb. 616 (1990)).

When a durational timing rule is measured in years, a proper computation most often utilizes the "anniversary method," according to which a period of 1 year runs from the date of the act, event, or default date on which the designated period of time begins to run until the anniversary date. *See United States v. Hurst*, 322 F.3d 1256, 1260 (10th Cir. 2003); *Mickens v. United States*, 148 F.3d 145, 148 (2d Cir. 1998) (citing *Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998); *Day v. Morgenthau*, 909 F.2d 75, 79 (2d Cir. 1990); Fed. R. Civ. Proc. 6(a)). This method effectively excludes the start date from the calculation but includes the terminal anniversary date, even when the intervening period includes an extra leap-year day. *See Smith v. Gale*, 137 U.S. 577, 578 (1891) (citing *Credit Co. v. Ark. Cent. Ry. Co.*, 128 U.S. 258 (1888)); *Lagandaon v. Ashcroft*, 383 F.3d 983, 992 (9th Cir. 2004); *Hurst*, 322 F.3d at 1260; *United States v. Tawab*, 984 F.2d 1533, 1534 (9th Cir. 1993) (per curiam). This method of computation is a "sensible default rule" because "'courts do not have stopwatches in hand when deadlines draw near, and because the anniversary date is clear and predictable and therefore easier for litigants to remember, for lawyers to put in their tickler files, and for courts to administer.'" *United States v. Inn Foods, Inc.*, 383 F.3d 1319, 1323 (Fed. Cir. 2004) (quoting *Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)).

But the anniversary method "is not the only measure of a 'year.'" *Habibi v. Holder*, 673 F.3d 1082, 1087 (9th Cir., 2011). The alternative "calendar method" counts "'[a] consecutive 365-day period beginning at any point.'" *Id.* (quoting *Black's Law Dictionary* 1754 (9th ed. 2009)). While the anniversary method "is useful for calculating terms of years from a particular starting date," *id.* at 1087, the calendar method is more appropriate for definitional purposes, such as "defining how many days a sentence must be to be a sentence of 'at least one year.'" *Id.* (quoting section 101(a)(43)(F) of the Act). In a recent case involving an alien who received a 365-day sentence to be served during a leap year, the Ninth Circuit applied this method to determine whether the alien had been convicted of a crime of violence for which the actual term of imprisonment was at least 1 year, reasoning that the contrary method would arbitrarily cause the definition of a crime of violence "to shift depending on whether the alien managed to serve some part of his sentence during a leap year, and when during the leap year he served his sentence." *Id.* at 1088. The takeaway from this case is that the choice of methodology for computing a period of years hinges on whether the timing rule allows the period to begin at any point in time or prescribes a particular starting date.

Rules of Thumb for Construing Operational Language

As for properly construing operational language, the plain-meaning rule dictates that our analysis should always begin with the text of the applicable statute. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). When the statute contains a definition of the particular word or phrase, then that definition generally governs. *Coluatti v. Franklin*, 439 U.S. 379, 392 (1979). If the word or phrase is not defined by statute, it may have an accepted meaning at common law. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established, . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))); *Morisette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

Although terms denoting time are numerous throughout the Act, the most frequently occurring words or phrases include "until," "from," "after," "by," "before," "at least," "not less than," and other similar expressions. The Act does not provide a statutory definition for any of these terms; however, the majority of these expressions have settled meanings established by case law. For

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CIRCUIT COURT DECISIONS FOR APRIL 2012

by John Guendelsberger

The United States courts of appeals issued 278 decisions in April 2012 in cases appealed from the Board. The courts affirmed the Board in 249 cases and reversed or remanded in 29, for an overall reversal rate of 10.4%, compared to last month's 15.3%. There were no reversals from the Fourth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for April 2012 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	2	1	33.3
Second	114	109	5	4.4
Third	22	20	2	9.1
Fourth	13	13	0	0.0
Fifth	5	4	1	20.0
Sixth	11	9	2	18.2
Seventh	1	1	0	0.0
Eighth	1	1	0	0.0
Ninth	95	78	17	17.9
Tenth	0	0	0	0.0
Eleventh	13	12	1	7.7
All	278	249	29	10.4

The 278 decisions included 148 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 33 direct appeals from denials of other forms of relief from removal or from findings of removal; and 97 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	148	128	20	13.5
Other Relief	33	26	7	21.2
Motions	97	95	2	2.1

The 20 reversals or remands in asylum cases involved credibility (3 cases); nexus (5 cases); past persecution (2 cases); changed conditions after a finding of past persecution (3 cases); well-founded fear (2 cases); and failure to include disfavored group analysis in Ninth Circuit Indonesian cases (2 cases). Other cases addressed corroboration, firm resettlement, humanitarian asylum, and protection under the Convention Against Torture.

Of the seven reversals or remands in the "other relief" category, four involved application of the modified categorical approach to various offenses. The others included a section 212(c) *Judulang* remand and a *Vartelas* remand (*Fleuti* rule applies to guilty pleas pre-dating IIRIRA). The two motions cases were from the Second and Eleventh Circuit and were remanded for the Board to further address changed country conditions evidence.

The chart below shows the combined numbers for January through April 2012 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	349	287	62	17.8
First	18	15	3	16.7
Fifth	32	27	5	15.6
Tenth	9	8	1	11.1
Sixth	36	32	4	11.1
Third	85	77	8	9.4
Fourth	46	42	4	8.7
Seventh	12	11	1	8.3
Eighth	14	13	1	7.1
Second	288	275	13	4.5
Eleventh	56	54	2	3.6
All	945	841	104	11.0

Last year's reversal rate at this point (January through April 2011) was 11.6%, with 1335 total decisions and 155 reversals.

The numbers by type of case on appeal for the first 4 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	511	458	53	10.4
Other Relief	165	132	33	20.0
Motions	269	251	18	6.7

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

RECENT COURT OPINIONS

Supreme Court:

Holder v. Gutierrez, Nos. 10-1542, 10-1543, 2012 WL 1810218 (U.S. May 21, 2012): The Supreme Court reversed the Ninth Circuit's doctrine of imputing a parent's period of lawful permanent residence to his or her minor child for purposes of satisfying the required 5 years of lawful permanent residence and 7 years of continuous residence after entry for cancellation of removal under section 240A(a) of the Act. In *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), the Ninth Circuit concluded that such imputation was required, based on the Act's objectives of promoting family unity and the Board's history of making parent-to-child imputations in other areas of immigration law. However, in *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007), the Board held that a parent's period of residence could not be imputed to a child, a position it reiterated in *Matter of Ramirez-Vargas*, 24 I&N Dec. 599 (BIA 2008). The Supreme Court jointly decided two cases, one involving imputation from parent to child to meet the 5-year requirement of section 240A(a)(1), the other involving imputation to satisfy the 7-year "residing after admission in any status" requirement of section 240A(a)(2). In both circumstances the Board requires an alien to meet the residence requirements independently, without counting any time accrued by a parent. The Court noted that if this view constitutes a reasonable construction of the statute, it warrants *Chevron* deference, regardless of whether other interpretations were possible. The Court found the Board's interpretation consistent with the statutory language, which refers to "the alien" and not "the alien and one of his parents." The argument was raised that because some circuits had interpreted the predecessor statute, section 212(c), to allow imputation, Congress would have expected the replacement statute to allow it as well. However, the Court concluded that in passing the new law, Congress focused on resolving the unrelated question whether the requisite period of "domicile" needed to accrue after the alien had obtained lawful permanent resident ("LPR") status. The Court held that since Congress replaced the word "domicile" (which the courts had interpreted to allow imputation), the statute was altered to the point that the earlier statute's history was no longer relevant. Regarding the Act's goal of giving priority to familial relationships, the Court pointed out that that family unity was not the Act's only purpose and that not every alien who obtains LPR status can immediately obtain the same status for family members. Regarding the Board's history of allowing imputation from parent to child in other contexts, the Court found that in *Matter of Escobar*, the Board adequately explained the distinction between those other instances, all of which involved the imputation of the parent's mental state, and the objective facts of the parent's place of residence and immigration status, which are at issue here. Accordingly, the Court afforded the Board's interpretation *Chevron* deference, reversed the Ninth Circuit's judgments, and remanded for further proceedings consistent with its opinion.

First Circuit:

Cheung v. Holder, No. 11-1889, 2012 WL 1522009 (1st Cir. May 2, 2012): The First Circuit denied the petition for review of the Board's order denying cancellation of removal. The petitioner was lawfully admitted to the United States on an H-1B visa and remained legally in that status until he applied for adjustment of status based on his marriage to a U.S. citizen. The visa petition was approved but 5 days before the petitioner had accrued 10 years of residence in the country, the visa petition was withdrawn at the wife's request and the petitioner was served with a Notice to Appear ("NTA") charging him with marriage fraud. Six months later, the Department of Homeland Security ("DHS") filed an I-261 withdrawing the original charge and instead charging the petitioner as an overstay. The petitioner conceded removability but argued that he was eligible for cancellation of removal. Both the Immigration Judge and the Board disagreed. The petitioner's sole argument was that the Immigration Judge erred in applying the "stop-time" rule to the original NTA because the marriage fraud charge was later withdrawn and replaced with another charge. The petitioner argued that proceedings should have been terminated and recommenced on the new charge, in which case he would have accrued the requisite 10 years of continuous residence for cancellation of removal. The court disagreed, citing its holding in *Magasouba v. Mukasey*, 543 F.3d 13, 16 (1st Cir. 2008), that "there is no requirement that the [Government] advance every

conceivable basis for deportability in the original show cause order." The court noted that the petitioner (1) was afforded ample notice of the amended charge, (2) failed to object, and (3) had the opportunity to respond at a hearing before the Immigration Judge.

Da Silva Neto v. Holder, No. 11-1847, 2012 WL 1648909 (1st Cir. May 10, 2012): The First Circuit denied the petition for review of the Board's order finding that the petitioner had been convicted of a crime involving moral turpitude ("CIMT"). The petitioner was separated from his wife, who had obtained a restraining order against him. She nevertheless invited the petitioner to a party, from which the petitioner departed drunk and then quickly returned, wishing to speak with his wife. When she refused to let him in, he kicked open the door, broke some glass, and threw furniture. He was arrested and admitted sufficient facts under Massachusetts law to support a conviction for malicious destruction of property, for which he was sentenced to probation and anger management classes. After the petitioner completed these, the State court dismissed all charges, but he was nevertheless placed into removal proceedings by the DHS. The petitioner sought to apply for cancellation of removal under section 240A(b) of the Act. However, the Immigration Judge found him ineligible, ruling that his conviction was for a CIMT, which prevented him from establishing the requisite period of good moral character. The Board reached the same conclusion but reasoned that the statute was divisible, covering destruction that is either wanton (indifferent to the consequences) or malicious (interpreted by Massachusetts case law to mean acts that were intentional and done out of cruelty, hostility, or revenge toward the owner). Applying the modified categorical approach, the Board agreed with the Immigration Judge that (1) the petitioner's conviction fell under the malicious portion of the statute (a point not contested by the petitioner) and (2) malicious destruction of property is a CIMT. On review, the court rejected the petitioner's argument that the statute does not require hostility toward the property's owner and found that he presented no case law to show that the Board was unreasonable in holding "that an intentional, destructive act committed with malice . . . toward an individual" is a CIMT.

Second Circuit:

Akinsade v. Holder, No. 10-0662-ag, 2012 WL 1506032 (2d Cir. May 1, 2012) (amended May 11, 2012): The Second Circuit granted the petition for review of an order of removal based on a determination that the petitioner was convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act, which covers offenses involving fraud or deceit in which the loss to the victim exceeds $10,000. The petitioner pled guilty to the Federal offense of embezzlement by a bank employee in violation of 18 U.S.C. § 656, which the Immigration Judge and the Board agreed was a divisible statute, because it can be satisfied by either an intent to injure or an intent to defraud. Since the Government conceded that only a statute requiring an intent to defraud meets the "fraud or deceit" requirement of section 101(a)(43)(M), the circuit court did not rule on whether the statute was divisible, but assumed arguendo that it was, which required application of the modified categorical approach. The court found that the plea colloquy, on which the Immigration Judge relied, was silent as to the petitioner's intent and therefore did not establish that the acts of embezzlement he conceded were motivated by his intent to defraud, as opposed to an intent to injure. The Board's decision was therefore vacated and the record remanded.

Sixth Circuit:

Thiam v. Holder, No. 10-3371, 2012 WL 1470133 (6th Cir. Apr. 30, 2012): The Sixth Circuit remanded the record in a case involving a petition for review of the Board's denial of asylum from Mauritania. The case arose within the jurisdiction of the Sixth Circuit, but it was heard via videoconference by an Immigration Judge sitting in the Fourth Circuit. The petitioner traveled to Arlington, Virginia, for the final hearing to allow the Immigration Judge to better assess credibility. The Immigration Judge therefore applied Fourth Circuit case law to determine that the petitioner was firmly resettled in Senegal and thus ineligible for asylum. The Immigration Judge alternatively found that although the petitioner suffered past persecution in Mauritania, she would no longer have a well-founded fear of persecution there as a result of changed country conditions. The Board affirmed on appeal. The petitioner filed her appeal in the Sixth Circuit, and the Government moved for a change of venue to the Fourth Circuit. However, the Sixth Circuit was persuaded to retain jurisdiction by the petitioner's arguments that (1) the proceedings originally arose in the Sixth Circuit and neither side moved for change of venue and (2) an applicant should be able to avail herself of all due process rights, including the right to appear in person for her hearing, without having to suffer the

penalty of being subjected to less favorable circuit law as a result. The court noted that in 2007, EOIR proposed regulations to address the questions of jurisdiction and venue in cases heard by televideo conferencing, and it encouraged EOIR to continue to pursue final rules on this issue but, in the meantime, declined to change venue. The court further held that its ruling was consistent with Fourth Circuit case law, citing to that court's decision in *Sorcia v. Holder*, 643 F.3d 117 (4th Cir. 2011). The court noted that the Immigration Judge found credible the petitioner's claim that she did not receive an official offer of settlement in Senegal (where she had resided for 14 years prior to entering the United States), and it stated that the question whether such an offer is required for a finding of firm resettlement is less clear in the Sixth Circuit than under Fourth Circuit case law. Instead of deciding the issue, the court remanded the record to the Board for its consideration in light of *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), which was issued subsequent to the decision in this case.

Eighth Circuit:

Popescu-Mateffy v. Holder, No. 11-2192, 2012 WL 1521072 (8th Cir. May 2, 2012): The Eighth Circuit denied the petition for review of a decision of the Board vacating an Immigration Judge's grant of adjustment of status and ordering the petitioner's removal. The petitioner was stopped while driving a tractor-trailer and was arrested for driving under the influence. A pipe and approximately 7 grams of marijuana were found in the tractor-trailer. The petitioner pled guilty to possession of drug paraphernalia in a motor vehicle in violation of the South Dakota law. Removal proceedings were initiated, charging that the petitioner overstayed and failed to comply with the terms of his nonimmigrant status. The petitioner conceded both charges and applied for adjustment of status and a section 212(h) waiver of his controlled substance conviction because it involved less than 30 grams of marijuana. The Immigration Judge granted relief and the DHS appealed. Discussing its ruling in *Matter of Espinoza*, 25 I&N Dec. 118 (BIA 2009), which was issued subsequent to the Immigration Judge's decision, the Board explained that although a drug paraphernalia conviction may be waived under section 212(h) if it involved a single offense of simple possession of less than 30 grams of marijuana, the holding in *Espinoza* does not apply to crimes containing elements that make the offense "substantially more serious than 'simple possession.'" The Board concluded that because the drug paraphernalia was possessed in a motor vehicle, which under South Dakota law carried the enhanced penalty of suspension of the offender's driver's license, it was more serious than simple possession and therefore rendered the petitioner ineligible for a section 212(h) waiver. Observing the Government's argument that this conclusion is justified because possession of drug paraphernalia within a vehicle "carries an inherent danger to the driver, passengers, and others on the road," the court found that the Board's decision was not arbitrary, capricious, or manifestly contrary to the statute.

BIA PRECEDENT DECISIONS

In *Matter of Rodriguez*, 25 I&N Dec. 784 (BIA 2012), the Board addressed the question whether an alien who entered the United States without inspection, subsequently adjusted to lawful permanent resident status, and then sustained an aggravated felony conviction is eligible for a waiver of inadmissibility under section 212(h) of the Act. In its decision in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), the Board previously held that a section 212(h) waiver is unavailable to an alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status, irrespective of the manner in which the status was attained. However the Fourth, Fifth, and Eleventh Circuits have concluded that an aggravated felony conviction bars an alien from relief under section 212(h) only if the conviction occurred after the alien was admitted to the United States as a lawful permanent resident following inspection at a port of entry. Acknowledging the tension between its decision and those of the courts, the Board held that it will follow *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012), in the Fourth Circuit; *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), in the Fifth Circuit; and *Lanier v. U.S. Attorney General*, 631 F.3d 363 (11th Cir. 2011), in the Eleventh Circuit but determined that *Matter of Koljenovic* will control in the remaining circuits.

The respondent, who had entered the United States without inspection, was convicted of an aggravated felony bank fraud offense after adjusting his status to lawful permanent resident. He conceded removability and sought adjustment of status, a requirement of which is eligibility for admission to the United States. Because the respondent's conviction was for a crime involving moral turpitude that rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, he required a section

212(h) waiver to adjust his status. The Immigration Judge found that the respondent was ineligible for a section 212(h) waiver because he sustained his aggravated felony conviction after his admission as a lawful permanent resident. On appeal, the Board had concurred, rejecting the respondent's argument that he was not barred from obtaining a section 212(h) waiver pursuant to *Martinez v. Mukasey*. Observing that the Fifth Circuit was confronted in *Martinez v. Mukasey* with an alien who had adjusted to lawful permanent resident status after being admitted as a nonimmigrant at a port of entry, the Board had reasoned that the court did not consider whether that rule applied where an alien, like the respondent, had adjusted status without ever being admitted.

Following the respondent's timely motion to reconsider, the Board acknowledged the controlling precedent of *Martinez v. Mukasey*. However, the Board noted its disagreement with the Fifth Circuit's interpretation that the language of section 212(h) was unambiguous and its determination that the Board's construction of the statute was not entitled to deference pursuant to *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). Similarly, the Board concluded that since *Bracamontes v. Holder* and *Lanier v. U.S. Attorney General* also found section 212(h) to be unambiguous, those decisions are binding in the Fourth and Eleventh Circuits. Notwithstanding, the Board determined that the Fifth Circuit's view of section 212(h) as limiting the aggravated felony bar solely to aliens who were admitted to lawful permanent resident status at the border was expansive enough to allow the respondent, who was not lawfully admitted to the United States as a lawful permanent resident, to apply for a section 212(h) waiver.

However, the Board reaffirmed its conclusion in *Matter of Koljenovic* that the language of section 212(h) is ambiguous when considered in context with the statute in its entirety. It therefore held that the proper resolution of the ambiguity is to interpret the statute as barring relief to any alien who has been convicted of an aggravated felony after acquiring lawful permanent residence, irrespective of how the status was acquired. Noting that adjustment of status does not fit within the statutory definition of an "admission" as contemplated by section 101(a)(13)(A) of the Act, the Board observed that treating adjustment as an admission is necessary to preserve the coherence of the statutory scheme and to avoid absurdities. Accordingly, the Board declined to observe the rule in *Bracamontes v. Holder*, *Martinez v. Mukasey*, and *Lanier v. U.S. Attorney General* outside of their respective circuits.

In *Matter of A-Y-M-*, 25 I&N Dec. 791 (BIA 2012), the Board held that the respondent did not "age out" as a derivative beneficiary of her mother's asylum application, despite having turned 22 by the time the Immigration Judge approved the application, because her mother filed the application after the enactment of the Child Status Protection Act ("CSPA"), Pub. L. No. 107-208, 116 Stat. 927 (2002).

The respondent and her mother filed separate I-589 applications for asylum and withholding of removal. Although the Immigration Judge denied the respondent's application, her mother's, which included the respondent, was approved. Therefore the respondent, who was 17 years old and a "child" within the meaning of section 101(b)(1) of the Act when her mother's application was filed, argued that she could qualify as a derivative beneficiary of her mother's asylum application.

Considering section 208(b)(3)(B) of the Act, which was enacted by the CSPA, the Board noted that an unmarried alien seeking derivative asylum status who turns 21 while his or her parent's application for asylum is pending continues to be classified as a "child" for purposes of that section. Since the respondent's mother's asylum application was filed after the CSPA was enacted, the Board concluded that section 208(b)(3)(B) applied. Therefore, despite turning 21 while her mother's application was pending, the respondent continued to be classified as a child and thus was eligible to be granted derivative asylum. The Board sustained the respondent's appeal and remanded the record for the requisite background checks.

In *Matter of Diaz-Garcia*, 25 I&N Dec. 794 (BIA 2012), the Board resolved two issues: First, it held that when an alien is unlawfully removed during the pendency of a direct appeal from a deportation or removal order in violation of 8 C.F.R. §1003.6(a), the Board retains jurisdiction to review the appeal. Second, it held that when an accomplice is defined as "one who aids another in the commission of an offense," an individual convicted of being an accomplice to a crime has been convicted of the offense as a second-degree principal.

The respondent had been convicted as an accomplice to the crimes of robbery and residential burglary in violation

of Arkansas law and was sentenced to two suspended 10-year terms of imprisonment. The respondent appealed the Immigration Judge's finding that he was removable as charged under section 237(a)(2)(A)(iii) for conviction of aggravated felonies, as defined in sections 101(a)(43)(F) and (G) of the Act. Before the appeal was adjudicated, the Department of Homeland Security ("DHS") wrongfully removed the respondent and contended that the Board lacked jurisdiction because the removal constituted a withdrawal of the appeal pursuant to 8 C.F.R. § 1003.4.

Examining the regulatory scheme, the Board observed that a deportation or removal order may not be executed during the period of time allowed for taking an appeal (unless the right to appeal has been waived) or during the pendency of an appeal, except in limited circumstances relating to bond and motions to reopen or reconsider for which a stay has been granted. Rejecting the DHS's argument that the respondent's removal effectuated a withdrawal of the appeal as provided in 8 C.F.R. § 1003.4, the Board reasoned that such an interpretation would mean that an unlawful deportation or removal by the DHS—whether intentional or unintentional—would result in a unilateral deprivation of the Board's jurisdiction over the case. Based on its reading of the regulations and notions of fundamental fairness, the Board concluded that such an unlawful deportation or removal does not deprive it of jurisdiction to adjudicate the appeal.

Turning to the respondent's arguments on the merits of his appeal, the Board identified the question as whether he had been convicted of the aggravated felonies of burglary and robbery, as defined in sections 101(a)(43)(F) and (G) of the Act, since he had been convicted only as an accomplice to the crimes. Finding the State accomplice statute to be divisible, the Board conducted a modified categorical inquiry and consulted the judgment and commitment order and the prosecutor's "short report of circumstances" attached to the order. The documents established that the respondent was present at the scene of the crime and committed his offense with another accomplice, so that he was a second-degree principal as an aider and abettor under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007). Concluding that the respondent had therefore been convicted of a burglary offense within the meaning of section 101(a)(43)(G) of the Act for which a sentence of a year or more was imposed, the Board found the respondent to be removable as an alien convicted of an aggravated felony. The appeal was dismissed.

REGULATORY UPDATE

77 Fed. Reg. 25,723 (May 1, 2012)
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

Extension and Redesignation of Somalia for Temporary Protected Status

ACTION: Notice.
SUMMARY: This notice announces that the Secretary of Homeland Security (Secretary) is both extending the existing designation of Somalia for temporary protected status (TPS) for 18 months from September 18, 2012 through March 17, 2014, and redesignating Somalia for TPS for 18 months, effective September 18, 2012 through March 17, 2014. The extension allows currently eligible TPS beneficiaries to retain their TPS through March 17, 2014. The redesignation of Somalia allows additional individuals who have been continuously residing in the United States since May 1, 2012, to obtain TPS, if eligible. The Secretary has determined that an extension is warranted because the conditions in Somalia that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Somalia based upon ongoing armed conflict and extraordinary and temporary conditions in that country that prevent Somalis who now have TPS from safely returning.

This notice also sets forth procedures necessary for nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) to re-register under the extension if they already have TPS or to submit an initial registration application under the redesignation, and to file Applications for Employment Authorization (Forms I–765) with U.S. Citizenship and Immigration Services (USCIS).

Under the redesignation, individuals who currently do not have TPS, or a TPS application pending, may apply for TPS from May 1, 2012 through October 29, 2012. In addition to demonstrating continuous residence in the United States since May 1, 2012, USCIS will determine whether initial applicants for TPS under this redesignation have demonstrated that they have been continuously physically present in the United States since September 18, 2012, the effective date of the redesignation of Somalia, before USCIS grants them TPS.

For individuals who have already been granted TPS under the Somalia designation, the 60-day re-registration period will run from May 1, 2012 through July 2, 2012. USCIS will issue new Employment Authorization Documents (EADs) with a March 17, 2014 expiration date to eligible Somali TPS beneficiaries who timely re-register and apply for EADs under this extension.
DATES: Extension of TPS: The 18-month extension of the TPS designation of Somalia is effective September 18, 2012, and will remain in effect through March 17, 2014. The 60-day re-registration period begins May 1, 2012 and will remain in effect until July 2, 2012. Redesignation of Somalia for TPS: The redesignation of Somalia for TPS is effective September 18, 2012, and will remain in effect through March 17, 2014, a period of 18 months. The initial registration period for new applicants under the Somalia TPS re-designation will run from May 1, 2012 through October 29, 2012.

When Time Is of the Essence *continued*

instance, when a timing rule fixes a period as running "from" or "after" a date, the computation generally excludes the given date and begins on the next day. *City of Owensboro v. Owensboro Waterworks Co.*, 243 U.S. 166, 171 (1917) (citing *Sheets v. Selden*, 2 Wall. 177, 190 (1864)). In keeping with this rule, the Ninth Circuit has held that the first day of the 1-year limitations period for filing an asylum application falls on the day after an applicant arrives in the United States, because the statutory language requires filing "*within one year after the date* of the alien's arrival in the United States." *Minasyan*, 553 F.3d at 1227 (quoting section 208(a)(2)(B) of the Act) (internal quotation marks omitted). Given that the applicant in that case arrived on April 9, 2001, and filed his application on April 9, 2002, the court concluded that he "barely squeezed in under the wire" of the filing deadline. *Id.* at 1228.

Similarly, "[w]here a period of time during which an act may or must be performed is referred to as being 'by,' 'before,' etc., a designated day or date, such words are generally construed as words of limitation of time and excluding the date or dates designated." *Matter of L-M- and C-Y-C-*, 4 I&N Dec. at 619; *accord William C. Atwater & Co. v. Bowers*, 74 F.2d 253, 255 (2d Cir. 1934) (observing that the word "before" generally excludes the date to which the word refers). However, where the fractional-computation method comes into play, such words of limitation will be construed as including the date designated. Thus, in an early Board case involving two foreign-born respondents who had returned to the United States on their 16th birthdays, one at 4:00 a.m. and the other at 8:00 a.m., the Board ruled that the respondents' arrival on the day they turned 16 was sufficient to satisfy a statute allowing children who had derived U.S. citizenship through birth abroad to U.S. citizens to retain their citizenship so long they "[took] up a residence in the United States . . . by the time [they] reache[d] the age of 16 years." *Matter of L-M- and C-Y-C-*, 4 I&N Dec. at 618 (quoting section 201(g) of the Nationality Act of 1940) (internal quotation marks omitted).

Expressions such as "at least" (or "at most") and "not less than" (or "not more than") require computation of entire natural days (as opposed to 9-to-5 business days), without having any effect on the general rule of excluding the start date and including the end date. *See Stringer v. United States*, 90 F. Supp. 375, 378 (Ct. Cl. 1950) (finding that "thirty full days of notice are required; and the period of notice therefore had to extend to the last minute of the thirtieth day, which was September 16," and holding that "[i]n computing the thirty-day period, the day on which the notice was given is regarded as an entirety, or a point of time, and is excluded").

In contrast to these unambiguous expressions, other operational phrases can be unclear. As an example, popular usage variably gives the word "until" either an inclusive or exclusive meaning. *See* 74 Am. Jur. 2d *Time* § 25 (2012). In such cases where operational language is ambiguous, consult dictionaries to draw generalizations regarding customary language usage and conventional meanings of words. *See, e.g.*, *Lagandaon*, 383 F.3d at 988 (surveying several dictionaries in concluding that the word "'when' does not mean 'prior to'"); *Matter of F-P-R-*, 24 I&N Dec. at 683 (relying on *The Random House Dictionary of the English Language* 809 (unabridged ed. 1973) to construe the word "last" as meaning "'most recent'" and "'occurring or coming after all others, as in time'").

When these rules of thumb are unavailing, apply general cannons of statutory construction. For a comprehensive survey of the most important cannons, see Yule Kim, *Statutory Interpretation: General Principles and Recent Trends* 4-17 (2008), *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf. One cannon that is

especially worthy of mention in the context of timing rules is that courts may apply a single set of computational rules to calculate two separate but related time periods that start running on the same exact date, even if the rules "directly speak" to the computation of only one of the two periods and remain silent as to the second one. *Barroso v. Gonzales*, 429 F.3d 1195, 1204 (9th Cir. 2005). For example, although "[t]he BIA regulations directly speak" to the calculation of the 30-day period for filing a motion to reconsider with the Board "but are silent" as to a 30-day period for voluntary departure running from the same exact date as the period for filing a motion to reconsider, "the proper solution is to apply the same rule to both thirty-day periods." *Id.* This approach "not only avoids 'unnecessary confusion' but also effectuates the purpose of . . . [the applicable] statutory provisions and provides a 'workable procedure'" for adjudicating claims. *Id.* (quoting *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005)) (citing *Salvador-Calleros*, 389 F.3d 969, 965 (9th Cir. 2004)).

Step 3: Calculate the Intervening Time

The fourth step asks, "Is the timing rule satisfied?" The precise answer to this question depends on whether it concerns a durational timing rule, like the continuous residence requirement for cancellation of removal, or a fixed-date timing rule, such as the 1-year bar to filing asylum applications.

For durational timing rules, look for whether the required period of time accrued between the trigger event and end date. There are useful resources for calculating the duration between two dates, such as TimeAndDate.com, which provides, free of charge, an easy-to-use online duration calculator. *See* TimeAndDate.com, Calculate Duration Between Two Dates, http://www.timeanddate.com/date/duration.html (last visited May 21, 2012).

For deadlines, statutes of limitations, and other fixed-date timing rules, check to see whether a legally operative event or action occurred by the deadline. Again, the website TimeAndDate.com may be helpful for performing this computation, since it also includes a date calculator that adds to or subtracts from a given date any number of years, months, or days. *See* TimeAndDate.com, Date Calculator: Add to or Subtract from a Date, http://www.timeanddate.com/date/dateadd.html (last visited May 21, 2012).

Step 4: Evaluate the Applicability and Effect of Relevant Exceptions

The final crucial question to ask is, "Do any exceptions apply, and, if so, how do they alter the results?" The application of exceptions to timing rules can often involve questions of retroactivity, triggering events, and computation, thus harkening back to the first three steps of the four-step analysis proposed in this article. Indeed, as Justice Blackmun once remarked, "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 464 (1975). This observation is equally applicable to deadlines, effective dates, durational requirements, and their ilk.

One common exception to a durational rule is the so-called "stop-time rule," applicable to cases involving claims to cancellation of removal and suspension of deportation. The stop-time rule specifies various events, including service of charging documents or commission of certain crimes, the occurrence of which cuts short the accrual of the necessary period of continuous residence required for eligibility for cancellation or suspension. *See* section 240A(d)(1) of the Act. This rule is a quintessential case of an exception whose application mirrors in miniature the general four-step approach to applying timing rules because, before assessing whether the event at issue triggers the rule, a court must first determine whether the rule was operational on the date when the event in question occurred. *See Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211-12 (9th Cir. 2001) (holding that application of the stop-time rule was erroneous where the date on which the event occurred was 4 days before the rule came into effect), *opinion corrected by* 250 F.3d 1271. In this regard, the Ninth Circuit has made application of the stop-time rule dependent on whether the applicant was eligible for relief or received a final administrative decision in his or her case prior to the date of the rule's enactment. *Compare Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1197-1203 (9th Cir. 2006) (holding that the criminal stop-time provision cannot be applied retroactively where the applicant was eligible for relief prior to its effective date), *and Arrozal v. INS*, 159 F.3d 429, 434 (9th Cir. 1998) (disallowing application of the stop-time rule to an applicant who obtained a final administrative decision before the rule came into force), *with Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1324-31 (9th Cir. 2006) (distinguishing *Sinotes-Cruz* where the applicant was not eligible for relief

at the time he committed the disqualifying offense, on the date he was convicted, or when the stop-time rule became effective).

In the realm of limitations periods and other fixed-date timing rules, exceptions most often arise from express statutory provisions or a court's inherent discretionary powers. The trick here is to distinguish between jurisdictional deadlines and nonjurisdictional claim-processing rules and time-related directives. Jurisdictional deadlines impose absolute conditions upon a court's adjudicatory authority to "permit[] or tak[e] the action to which the statute attached the deadline." *Dolan v. United States*, 130 S. Ct. 2533, 2538 (2010) (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008)). Jurisdictional "'prescriptions delineate[] the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating [adjudicatory] authority." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). The important point to remember for our purposes is that jurisdictional constraints are not subject to *any* equitable defenses, such as waiver, tolling, estoppel, or unique circumstances. *John R. Sand & Gravel Co.*, 552 U.S. at 133-34 (noting that jurisdictional time limits "forbid[] a court to consider whether certain equitable considerations warrant extending a limitations period" (citing *Bowles v. Russell*, 551 U.S. 205, 213 (2007); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006))); *Socop-Gonzalez*, 272 F.3d at 1188 ("If a time limit is jurisdictional, it is not subject to the defenses of waiver, equitable tolling, or equitable estoppel, although there may still be exceptions based on 'unique circumstance.'" (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Shamsi v. INS*, 998 F.2d 761, 762-63 (9th Cir. 1993); *Vlaicu v. INS*, 998 F.2d 758, 760 (9th Cir. 1993); *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1354-55 (9th Cir. 1980))). *But see Rios v. Ziglar*, 398 F.3d 1201, 1208-10 (10th Cir. 2005) (applying an equitable estoppel analysis to the Immuigration and Naturalization Service's failure to process an application under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997) ("NACARA")).

By contrast, time-related directives are "legally enforceable but do[] not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." *Dolan*, 130 S. Ct. at 2538 (citing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 171-72 (2003); *United States v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990); *Brock v. Pierce Cnty.*, 476 U.S. 253, 266 (1986)). Similarly, claim-processing rules "do not limit a court's jurisdiction, but rather regulate the timing of motions or claims brought before the court." *Id.* at 2538 (citing *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam)). These rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (citing *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 130 S. Ct. 584, 596 (2009); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004)).

In essence, nonjurisdictional time limits are procedural rules adopted solely "for the orderly transaction of [the court's] business." *Kontrick*, 540 U.S. at 454 (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970)) (internal quotation marks omitted). Their main distinction from jurisdictional impediments is that these rules allow flexibility, so long as they are not an embodiment of an underlying statute. *See Bowles v. Russell*, 551 U.S. 205, 211 (2007) (observing that the "'[c]ritical'" fact to the analysis in decisions that equitably excused deadlines noted in the Federal rules was "that '[n]o statute . . . specifie[d] a time limit'" (quoting *Kontrick*, 540 U.S. at 448)). In other words, nonjurisdictional rules are generally subject to equitable exceptions to "alleviate hardship and unfairness." *Id.* at 218 (Souter, J., dissenting) (citing *Day v. McDonough*, 547 U.S. 198, 207-08 (2006); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); *see also Dolan*, 130 S. Ct. at 2538 (observing that "[u]nless a party points out to the court that another litigant has missed [a nonjurisdictional] deadline," the deadline becomes subject to the equitable defense of waiver); *John R. Sand & Gravel Co.*, 552 U.S. at 133 ("Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations." (citing *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000))).

The general approach for differentiating jurisdictional conditions from nonjurisdictional claim-processing rules and time-related directives turns on express legislative intent:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts

> and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Reed Elsevier, Inc., 130 S. Ct. at 1244 (quoting *Arbaugh*, 546 U.S. at 515-16).

Applying this approach, the Ninth Circuit found in *Munoz v. Ashcroft* that the statutory deadline for filing for relief under NACARA "preclud[ed] equitable tolling" because the deadline functioned as a "statute of repose." 339 F.3d 950, 957 (9th Cir. 2003). The court described statutes of repose as "fixed, statutory cutoff date[s], usually independent of any variable, such as [a] claimant's awareness of a violation," that "'cut[] off a cause of action at a certain time irrespective of the time of accrual of the cause of action.'" *Id.* (quoting *Weddel v. Sec'y of Health & Human Servs.*, 100 F.3d 929, 931 (Fed. Cir. 1996)). Because the NACARA filing deadline was "'fixed by statute and unrelated to any variable,'" the court concluded that it served as a "jurisdictional prerequisite" that effectively closed the class of eligible NACARA applicants. *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1097 & n.5 (9th Cir. 2005) (quoting *Munoz*, 339 F.3d at 957); *see also Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1049 (9th Cir. 2008) (finding that the deadline to file a visa petition for the purpose of qualifying for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i), functioned as a jurisdictional statute of repose because it specified "a fixed statutory cutoff date, independent of any variable, and the deadline effectively close[d] the class of individuals entitled to special treatment under a statutory initiative").

In stark contrast to its *Munoz* holding, the Ninth Circuit in a later case found that the deadline for filing motions to reopen deportation proceedings under NACARA was *not* a jurisdictional time limit because the deadline did not involve "a threshold condition for eligibility under NACARA" but served the "more limited purpose" of allowing reopening for "those aliens who have *already complied* with [the threshold eligibility] deadlines" and did "not identify a specific cutoff date" but rather "allow[ed] the Attorney General discretion in fixing the date." *Albillo-De Leon*, 410 F.3d at 1097-98. In addition, while the statute's "plain language [did] *not* suggest that the statute is jurisdictional," "the legislative history suggest[ed] that Congress intended that motions to reopen be subject to equitable tolling." *Id.* at 1098 (citing 143 Cong. Rec. S12,265-67 (daily ed. Nov. 9, 1997)). Thus, the court, recalling the presumption that nonjurisdictional statutory filing deadlines "are generally subject to the defenses of waiver, estoppel, and equitable tolling," concluded that the deadline at issue could be equitable tolled. *Albillo-De Leon*, 410 F.3d at 1098 (quoting *Locke*, 471 U.S. at 94 n.10) (internal quotation marks omitted).

The Upshot

The four-step method outlined here suggests one route by which Immigration Judges can systematically traverse the timing-rule minefield of immigration law in order to obtain accurate and sensible results and, more generally, to protect the integrity, fairness, and efficiency of immigration proceedings. However, a word of caution is prudent: As one of many potentially workable frameworks, this four-step approach relies largely on rules of thumb that should not be regarded as rules of law but rather as "axiom[s] of experience" that do "not preclude consideration of persuasive [contrary] evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). As such, adjudicators should always make sure to temper constructions of timing-rules with common sense and, of course, take the right amount of time to get the timing right.

Josh D. Friedman is an Attorney Advisor to the Immigration Court in Los Angeles, California.