IMMIGRATION RELIEF TOOLKIT AND CHART FOR CRIMINAL DEFENDERS (2024)

How to Quickly Spot Possible Immigration Relief for Noncitizen Defendants

The Immigrant (www.ilrc.org) first created the Toolkit on behalf of the Defending Immigrants Partnership, a national consortium that supports criminal defenders in their task of competently representing noncitizen clients.

TABLE OF CONTENTS

IMMIGRATION RELIEF TOOLKIT

§ 17.1 HOW AND WHY SHOULD I USE THIS TOOLKIT?

A. Why Should I Use This Toolkit?

Many of your noncitizen clients are already deportable ("removable"). This includes all undocumented people, as well as lawful permanent residents (green card-holders) who have become deportable because of a conviction. If immigration authorities identify these clients, the clients will be deported *unless* they are granted some kind of immigration relief.

For these defendants, staying eligible to apply for immigration relief is their most important immigration goal, and may be their highest priority in the criminal defense. It can mean the difference between remaining in the United States with their family and being deported to another country for the rest of their lives. The Supreme Court has recognized that preserving eligibility for relief from removal is "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010), citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

The purpose of this Toolkit is to help defenders or paralegals to spot a defendant's possible immigration relief *relatively quickly*. If you determine that your client might be eligible for specific relief, this will help inform your criminal defense goals. Ideally, *every defender who is not already a "crim/imm" expert will consult with a crim/imm expert on each case*. But the Toolkit can help defenders to collect information, speak more efficiently with the expert, and be better able to explain and discuss the issues with the defendant and in some cases with the prosecutor or court.

Resources. For a series of essays on basic crim/imm topics, along with practice aids like this Toolkit, go to www.ilrc.org/crimes-summaries. Defenders and immigration advocates researching California offenses can register for the free *California Quick Reference Chart*, analyzing immigration consequences of 200 offenses, at https://calchart.ilrc.org/registration/. See also resources at www.immigrantdefenseproject.org and www.nipnlg.org, and check for state-specific resources in your state.

B. How can I Use This Toolkit to Represent My Client?

For a review of the steps needed to represent a noncitizen defendant, see materials such as *§ N.1 Overview* and *§ N.1A How to Analyze a Crim/Imm Case* at www.ilrc.org/crimes-summaries.

Regarding relief, you will first confirm that the defendant really is a removable non-U.S. citizen. Might the client unknowingly be a U.S. citizen—despite multiple past deportations? See **§ 17.3**. Is your permanent resident client really deportable? Use immigration analysis tools cited above to analyze the permanent resident's past conviction/s and current plea proposal/s. If the person might not be deportable yet, one of your goals is to not make them deportable now.

Second, if the client is or might be removable, work with them to complete the ***Client Screening Questionnaire*** that appears at **§ 17.2**. Answering these questions will identify possible relief. It will let you know if the client is even in the ballpark to qualify for some immigration application. A paralegal or attorney may be able to complete the form with the defendant in 10–20 minutes. (The questionnaire also appears at *§ N.16 Client Questionnaire*, at www.ilrc.org/crimes-summaries).

If the client answers "Yes" to any question, the questionnaire will identify one or more forms of relief for which they might be eligible. Use the Table of Contents, above, to locate the form of relief, at **§§ 17.3–17.26**. If you and the client review the short (usually two-page) material, you should get a real sense of whether they may be eligible. If the client *might* be eligible for any relief, advise them to try hard to obtain expert immigration counsel to advise about applying. Advise the client that in many cases—for example citizenship claims or family visa matters—a nonprofit immigration agency can be a good free or

low-cost option. Some nonprofits provide representation in removal proceedings. If a private immigration office is needed, the attorney might agree to do an analysis of eligibility for relief for a few hundred dollars or work out a fee payment schedule to take the whole case. Note that whether private or nonprofit, not all immigration attorneys are experts in immigration and crimes. The client should ask the attorney what their experience is. The client should be fully involved in important discussions and receive copies of the relevant materials.

Regarding the criminal defense, the *Toolkit* section on each form of relief contains two parts. The Quick Test titled *Is the Person Eligible?* will ask questions to determine whether the client meets basic requirements for the relief, and identify what kinds of convictions, sentences, and other issues would bar eligibility for that relief. These are the dispositions the person would need to avoid. The *Additional Facts* following the Quick Test provides important facts about each form of relief.

The ultimate goal is to identify a realistic disposition for the client's case that would not destroy eligibility for the relief and try to get that disposition. Of course, in some cases it will not be possible to negotiate a plea that maintains the client's eligibility for relief—but at least you will have advised your client of the real cost of the proposed disposition, and the client can make an informed choice. As you know, some noncitizen clients would do almost anything, including take a risky case to trial or accept additional criminal penalties, to remain in the United States with their families. Other noncitizen clients will only be interested in getting the least criminal penalty.

If the client will need to leave the United States, advise them of the benefits of departing under voluntary departure rather than removal, and the serious consequences to illegal re-entry into the United States after removal. See **§ 17.25**.

As with any criminal case involving a noncitizen, the best practice is to have an expert in crimes and immigration confirm the immigration case analysis and defense goals. This could be "crim/imm" experts used by your office, or your own research, if you are willing and able to put in the time.

§ 17.2 IMMIGRANT DEFENDANT QUESTIONNAIRE

"USC" stands for U.S. Citizen and "LPR" stands for Lawful Permanent Resident (green card)

Attorney name, email	**Defendant's name**	**Defendant's A# if any**

Def's Country of Birth	**Def's Date of Birth**	**In custody?**	**ICE detainer or interview?**
		☐Yes ☐No	☐Yes ☐No ☐ Don't Know

1. ENTRY:

Date first entered US	Visa type (or none)	Departures from U.S. (approximate OK; append list)
		Date/s and length of departure/s:

2. IMMIGRATION STATUS AND RELATIVES

a. Lawful permanent resident ("green card")	**b. Other immigration status**
☐ Yes ☐ No Date Obtained? _____ On what basis (e.g. family visa, refugee): _____ Check one. To obtain LPR status, D: --Went to an interview in the home country ☐ --Processed ("adjusted status") here in U.S. ☐ Possible U.S. citizenship (LPRs): Before D's 18th birthday, was D an LPR and at least one of D' parents a USC? ☐ Yes ☐ No (Stepparents do not qualify.)	☐ Undocumented ☐ Doesn't know ☐ Has "Employment Authorization" card but unsure of status ☐ Refugee ☐ Asylee ☐ Temporary Protected Status ☐ U visa ☐ Deferred Action Childhood Arrival (DACA) Other:
c. Possible U.S. citizenship (all persons): Grandparent or parent may have been USC at time of D's birth. (Stepparents do not qualify.) ☐ Yes ☐ No Comments: _____	**d. Parent, Spouse, Child, Significant Other is LPR or USC?** ☐ Yes ☐ No List each relationship (including stepparents) and say whether the person is an LPR or USC. Include the age of each child. (Possible family immigration/relief) **BE SURE TO PHOTOCOPY ANY IMMIGRATION CARD OR DOCUMENT**

3. PRIOR REMOVAL / DEPORTATION / VOLUNTARY DEPARTURE

Was D ever deported or got voluntary departure?	Saw an immigration judge?	Describe what happened, to extent possible (Just signed form before leaving U.S.? Caught at the border?)	Where? When? For each deportation or voluntary departure
☐Yes ☐No ☐ Don't know	☐Yes ☐No	_____	_____

Immigrant Defendant Questionnaire, p. 2
Attorney name: Client name or case number:

NOTE: Checking the box means the client *might* be eligible for the relief. To see a two-page summary of each relief plus the crimes bars, see *N.17 Defenders Relief Toolkit* at www.ilrc.org/chart.

4. ***Has your LPR client lived in the U.S. for at least seven years?*** (LPR cancellation) ☐ **Yes** ☐ **No**

5. ***Has your undocumented client lived in the U.S. for at least ten years, and does he or she have a parent, spouse or unmarried child under age 21 who is a USC or LPR?*** (Non-LPR cancellation) ☐ **Yes** ☐ **No**

6. ***Has client or a family member been abused by a spouse, parent, or adult child?*** ☐ **Yes** ☐ **No**

   a. Client, or client's parent or child, may have been abused (including emotional abuse) by a USC or LPR spouse, parent, or adult child. (VAWA) ☐ Yes ☐ No

      -What is the relationship between abuser and abused: _____

      -What is the abuser's immigration status: _____

   b. Client under age 21 lives with just one parent. (Special Immigrant Juvenile) ☐ Yes ☐ No

   c. Client is charged with a DV or stalking offense, or has a conviction, but in fact is the primary victim in the relationship. (Domestic Violence Waiver) ☐ Yes ☐ No

7. ***Has your client been a victim of a crime, or of human trafficking?*** ☐ **Yes** ☐ **No**

   a. Victim of a crime including, but not limited to, DV, assault, false imprisonment, extortion, stalking, labor-related, sexual abuse, etc., and was or would be willing to cooperate in investigation or prosecution of the crime. (U visa) ☐ Yes ☐ No

   b. Victim of (a) sex trafficking of persons (if under age 18, victim could have consented), or (b) labor trafficking, e.g., forced to work by threat, fraud, coercion, etc. (T visa) ☐ Yes ☐ No

8. ***Is your client afraid to return to his or her home country for any reason?*** ☐ **Yes** ☐ **No**
   (Asylum, refugee, withholding, Convention Against Torture, Temporary Protected Status)

9. ***Did your client, or their parent or spouse, live in the U.S. in the 1980's or 1990's?*** ☐ **Yes** ☐ **No**
   (Amnesty, Family Unity, NACARA, HRIFA)

10. ***Is your client or their spouse, parent, or child a U.S. veteran or serviceperson?*** ☐ **Yes** ☐ **No**
    (Possible naturalization or adjustment benefits)

Immigrant Defendant Questionnaire, p. 3

Attorney name: Client name or case number:

Information on Prior Conviction/s from Any Jurisdiction

Include additional page if needed					
Code section	F/M	Offense Date	Conviction Date	Sentence	Post-Con relief (PC 17, etc)

Information on Current Charges

Include additional page if needed			
Code sec.	F/M, strike, etc.	Date committed	Other info

Current Plea Offer/s if Any

Include additional page if needed			
Code sec	F/M, strike, etc	Sentence	Other info: DA flexibility, priorities; Your comments

INDIVIDUAL FORMS OF RELIEF

§ 17.3 MIGHT YOUR CLIENT ALREADY BE A U.S. CITIZEN?

Some people who believe that they are undocumented actually may be U.S. citizens—including people who have been deported. If the answer to any of the Quick Test questions below is "Yes," refer the client for counseling, or research the issue yourself. Many immigration non-profits can help with this kind of case.

See further discussion in Additional Facts below, and in the *USCIS Policy Manual* (hereafter *USCIS Manual*) at http://www.uscis.gov/policymanual/HTML/PolicyManual.html at Volume 12: Citizenship and Naturalization, Part H. For in-depth information see books such as ILRC, *Naturalization and U.S. Citizenship: The Essential Legal Guide*, https://store.ilrc.org/publications.

QUICK TEST: Might the Client Be a U.S. Citizen or National?

1. *Was the client born in the United States or its territories or possessions?* If so, the person is almost surely a U.S. citizen or national. See Additional Facts below.
2. *At the time of the client's birth in another country, did they have a parent or grandparent who was a U.S. citizen (not including stepparents)?* If so, it is possible that the client acquired U.S. citizenship at birth. See Additional Facts below.
3. *Did the client's parent with legal and physical custody of the client become a U.S. citizen before the client turned 18?* If so, it is possible the client derived citizenship after birth. See Additional Facts below.

ADDITIONAL FACTS: U.S. Citizenship

Overview. These categories identify persons who already are U.S. citizens. They became U.S. citizens automatically by operation of law when certain events occurred. They do not need to submit an application for naturalization, establish good moral character, or meet any other requirements. They will benefit from obtaining documentation from the government that *confirms* their U.S. citizenship, however. If the client is out of criminal and immigration custody, the fastest way to do this is to apply to the U.S. Passport Agency for a passport. Best practice is to file an N-600 application for a certificate of citizenship from DHS as well, so that the person has documentation from DHS that the person is a citizen. A client in custody may have to file an N-600 application, and/or raise the citizenship issue before an immigration judge. A passport and a certificate of citizenship are equally valid documentation that the person is a U.S. citizen. See *USCIS Manual*, *supra*, Vol. 12, Part H for further explanation.

Effect of U.S. Citizenship. There is no lawful authority for the United States government to detain, deport, or deny admission to a U.S. citizen. This is true even if the person was erroneously deported in the past. See, e.g., *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2005) (partly overruled on other grounds). It is a complete defense to any crime for which "alienage" is an element, for example, illegal re-entry into the United States after removal. INA § 276, 8 USC § 1326.

Born in the U.S. or Its Territories. Any person born in the United States is a U.S. citizen, except for certain children of foreign diplomats. Persons born in Puerto Rico, Guam, and U.S. Virgin Islands, as well as those born after November 4, 1988, and in many cases before, in the Northern Mariana Islands also are U.S. citizens. INA §§ 301-308, 8 USC § 1401-1407.

Persons born in American Samoa and Swains Islands are U.S. nationals. INA §§ 101(a)(29), 308(1), 8 USC §§ 1101(a)(29), 1408(1). A national is not a U.S. citizen but cannot be deported.

U.S. Citizen Parents at Time of Client's Birth Abroad (Acquisition of Citizenship). Some children born outside of the United States to a U.S. citizen, acquired U.S. citizenship at birth. INA § 301, 8 USC § 1401. Whether the individual is a U.S. citizen depends on five factors: whether the child was born in wedlock; the child's date of birth (because different rules have applied at different periods); whether one or both parents were U.S. citizens at the time of the child's birth; whether the U.S. citizen parent(s) met certain residence/physical presence requirements prior to the child's birth; and whether the child retained citizenship by fulfilling certain residency requirements (if applicable).

Whether a grandparent was a U.S. citizen is relevant because the grandparent might have unknowingly passed on citizenship to the parent, who in turn might have passed it on to the child. In that case counsel must analyze whether both the parent and the child acquired citizenship.

To determine whether a client actually did acquire citizenship at birth, refer the client to a competent immigration attorney or non-profit organization. Or, consult ILRC charts summarizing the rules at different time periods at http://www.ilrc.org/resources/acquisition-derivation-quick-reference-charts.

Before Client's 18th Birthday, at Least One Parent Was a U.S. Citizen (Derivation of Citizenship). Different rules apply depending on the person's date of birth. A person born on or after February 28, 1983, automatically becomes a U.S. citizen if before their 18th birthday and after February 28, 2001, the following events occur in either order: (a) at least one parent who has legal and physical custody of the child is a U.S. citizen by birth or naturalization, and (b) the child is a lawful permanent resident (LPR). *See, e.g., Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001) (discussing the Child Citizenship Act of 2000 and INA § 320, 8 USC § 1431). A person automatically becomes a U.S. citizen through adoptive parents if the person was born on or after February 28, 1983, and (a) they were legally adopted by a U.S. citizen before age 16, and (b) they became an LPR, and resided in the legal custody of the citizen parent for two years, before age 18. *Id*. A step relationship is not recognized under any of these rules, so that children never derive or acquire citizenship through a stepparent. (A step relationship is recognized in many other immigration contexts, however, including family-based immigration. See **§ 17.7**.)

The law is different for people claiming citizenship before the effective date of the Child Citizenship Act (February 28, 2001). Generally, both parents had to have naturalized to U.S. citizenship, or the child had to be in the legal custody of the citizen parent if there had been a divorce or separation. The Second and the Ninth Circuits have held that a child did not necessarily have to have been an LPR to derive citizenship, based on different wording of the prior law. See *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013), *Cheneau v. Garland*, 997 F.3d 916 (9th Cir. 2021) (finding that the statutory requirement that someone "reside permanently" can include something lesser than LPR status). See additional information on these rules at the ILRC charts cited above.

PRACTICE TIP: Juvenile defenders. When representing a permanent resident who is under the age of 18, counsel can advise the family that the minor will automatically become a citizen—and therefore be immune to deportation—if one parent with lawful custody naturalizes to U.S. citizenship before the minor's 18th birthday. See discussion of derivation of citizenship, above. This is true regardless of the client's juvenile or adult criminal record. Timing is crucial: the parent should file their naturalization application early because the process might take several months or more. See **§ 17.4** on naturalization.

§ 17.4 NATURALIZATION TO U.S. CITIZENSHIP

For official statements and information on naturalization, see the *USCIS Official Policy Manual* at www.uscis.gov/policymanual/HTML/PolicyManual.html (hereafter *USCIS Manual*), at Volume 12: Citizenship and Naturalization. For further information, see books such as ILRC, *Naturalization and Citizenship: The Essential Legal Guide* (2022) (www.ilrc.org).

QUICK TEST: Is the Person Eligible?

1. Is the person serving in the military or reserves, or is the person a military spouse or a veteran?

   Veterans of the U.S. armed forces during certain armed conflicts (which include World War II, the Korean, Vietnam, and Gulf Wars, and the entire period from September 11, 2001 to the present), and who if separated from the armed forces were honorably discharged, enjoy benefits in naturalizing. Good moral character needs to be shown only for a "reasonable period of time," and the person can even be deportable. A person who enlisted while within the United States may not even need to be an LPR. Some benefits also apply to spouses. See INA § 329, 8 USC § 1440. The rest of the "Quick Test" questions apply to persons who do not come within this category.

   A person who ever has served in the military for an aggregate of one year, and who has not been less than honorably discharged, also has some advantages, including the ability to naturalize while deportable. See INA § 328, 8 USC § 1439. But if the person qualifies for the armed conflict category described in the above paragraph, that is preferable. See USCIS Manual, supra, Vol. 12, Part I for more information.

2. Has the person been an LPR for five years, or been an LPR married to a USC for three years?

   The person can file a naturalization application up to three months before reaching the five- or three-year mark. For the three-year category, the person must both have been an LPR and married to a USC for the entire three-year period. See INA §§ 316, 319, 8 USC §§ 1427, 1430.

3. Can the person establish good moral character during this time period?

   A naturalization applicant must demonstrate good moral character for the same five years or three years of permanent residence. Military applicants must show a "reasonable period" of good moral character. Conviction of an aggravated felony on or after November 29, 1990 is a permanent bar to establishing good moral character and thus is a bar to naturalization, absent effective post-conviction relief or pardon. See Additional Facts below.

4. Is the person deportable?

   While being deportable is not technically a bar to citizenship, as a practical matter it is likely to prevent it. With the exception of some military personnel, one cannot naturalize while in removal proceedings. It is possible that the immigration judge and ICE will agree to terminate removal proceedings for an LPR who, while deportable for an older offense, can establish the requisite, recent good moral character required for naturalization. But the person must have very strong humanitarian equities. See Additional Facts below. If the person is not deportable yet, advise them to consult an immigration practitioner and to consider applying for naturalization.

ADDITIONAL FACTS: Naturalization to U.S. Citizenship

Naturalization is complex, and ideally cases should be referred to an immigration attorney or non-profit. For comprehensive information on naturalization, see works such as ILRC, *Naturalization: A Guide for Legal Practitioners and Other Community Advocates* (www.ilrc.org).

Establishing Good Moral Character (GMC). A naturalization applicant must have been a person of "good moral character" ("GMC") during the required period (i.e., five or three years, or a "reasonable period") that immediately precedes the date of the filing of the application and continuing up to the time of taking the oath of allegiance for citizenship. INA § 316(a)(3), 8 USC § 1427(a)(3).

To establish GMC the applicant must show that they do not come within one of the statutory bars at INA § 101(f), 8 USC 1101(f). In addition, the applicant must persuade the authorities to find as a matter of discretion that they really have shown good moral character during the required time. Conviction of an aggravated felony on or after Nov. 29, 1990 is a permanent bar to GMC. See discussion of GMC in general at **§ 17.26**.

Some additional GMC requirements apply only to naturalization applicants. A person cannot be granted naturalization while still on probation or parole in a criminal case. 8 CFR § 316.10(c)(1). The applicant may apply to naturalize while on probation or parole, so long as it has ended by the time of the naturalization interview. However, authorities might decline to count the period of probation or parole following commission of a barring offense toward the required period of GMC. In addition, willful failure to pay child support, failure to file taxes, or commission of immoral unlawful acts (such as adultery that destroys a marriage, prostitution, or incest) may prevent a finding of GMC. 8 CFR § 316.10(b). Males who knowingly and willfully failed to register for selective service while between 18-26 years of age may not be able to establish good moral character during that period. In that case the person must start accruing the GMC period beginning from the last date he could have registered, so that, e.g. a person who needs five years of GMC would not be able to prove it until he turns 31. In some cases an applicant who now is over 26 years old and failed to register can demonstrate that he was not aware of the requirement. See information in *USCIS Manual*, Vol. 12, Chapter 7, Part D.

Some classes of persons are permanently barred from naturalization. These include subversives (INA § 313, 8 USC § 1424); some noncitizens who deserted the military or fled the country to avoid wartime service (INA § 314, 8 USC § 1425), although violators from most wars have been pardoned; and noncitizens who received an exemption or discharge from U.S. military service based on "alienage" (INA § 315, 8 USC § 1426).

Application for naturalization by an LPR who is deportable. A noncitizen who is in removal proceedings, or who has an outstanding final finding of deportability, pursuant to a warrant of arrest, may not naturalize. INA § 318, 8 USC § 1429. The Notice to Appear, which initiates removal proceedings, counts as a "warrant of arrest," for this purpose, except within the Ninth Circuit. 8 CFR 318.1; *Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018). There is an exception for certain persons who served honorably in the U.S. military during periods of conflict, including since September 11, 2011 (INA § 329, 8 USC § 1440) and persons who have honorable military service aggregating one year at any time (INA § 328, 8 USC § 1439); see **Question 1** in Quick Test above.

Apart from the military exception, in order to naturalize the LPR must either avoid, or be released from, removal proceedings. An LPR who is deportable for a crime but not yet in removal proceedings needs extensive counseling from a local, experienced immigration attorney before deciding to apply for naturalization with DHS. Depending on the crime, DHS may or may not choose to put the naturalization applicant in removal proceedings. Some naturalization applicants with more serious convictions have been arrested and detained from the naturalization interview.

An LPR who is in removal proceedings can ask the immigration judge to terminate the proceedings to permit them to pursue a filed naturalization application. 8 CFR § 1239.2(f). The person should have extremely strong equities, must have the required good moral character, and be eligible to apply for naturalization but for the deportable offense. *Id*. For example, an LPR who is deportable for an offense based on a ten-year-old conviction, who has shown good moral character for the past five years, and who is supporting U.S. citizen dependents, especially if any have special needs or illness, may be a likely candidate. Significantly, the immigration judge may terminate proceedings on this basis *only if ICE (the immigration prosecutor) agrees to it*. See, e.g., *Hernandez v. Gonzales*, 497 F.3d 927, 933-34 (9th Cir. 2007).

PRACTICE TIP: If it appears that an LPR defendant will not become deportable, advise them to go to an immigration attorney or non-profit and ask about applying for naturalization.

§ 17.5 LPR CANCELLATION OF REMOVAL

Cancellation of removal for lawful permanent residents (LPRs) is found at INA § 240A(a), 8 USC § 1229b(a). It is an important waiver for long-time LPRs who become removable. For more information on this relief, especially in light of the Supreme Court's decision in *Barton v. Barr*, 590 U.S. 222 (2020), see online practice advisories.[1]

QUICK TEST: Is the Lawful Permanent Resident (LPR) Defendant Eligible?

1. *Has the LPR ever been convicted of an aggravated felony?* If so, they are not eligible for LPR cancellation. (But if the conviction was before 4/1/97, see **§ 17.6 Former § 212(c)**.)
2. *Has the person been an LPR for five years, or fairly close to it?* They must reach five years as an LPR prior to a final decision in their removal case. Because they will continue to accrue the five years while in jail, immigration detention, and removal proceedings, four years or even less may be enough.

   The remaining questions determine whether the defendant has the required seven years of "continuous residence" in the United States. You will need the person's criminal history and some immigration information.

3. *Start-date for the seven years:* The seven-year period starts (a) on the date that the person was first admitted to the U.S. in any status (e.g., as a tourist, refugee, etc., including if the person went out of status later), *or* (b) on the date that they became an LPR—*whichever came earliest.*
4. *End-date for the seven years:* Accrual of time toward the seven-year period will end when one of two events occurs: (a) upon the commission of certain offenses,[2] or (b) when the person is served with a Notice to Appear ("NTA," the charging document in removal proceedings) that contains the place, date, and time of the proceedings[3]—*whichever came earliest.*
5. *Which offenses will end the seven-year period?* The statute provides that the seven year period ends when the person commits an offense that is "referred to" in the crimes inadmissibility grounds, if it "renders" the person inadmissible or deportable.[4] In *Barton v. Barr*, the Supreme Court interpreted this language to create what is in practice a very broad rule: if an LPR meets the full description of a *criminal ground of inadmissibility*—for example, if they were convicted, or made a qualifying admission, of possessing a controlled substance—then their seven years cease to accrue as of the date they *committed* the offense.

   Example: LPR Lucy possessed a small amount of marijuana on April 20, 2015, for which she was convicted on January 11, 2016. Her seven years ceased to accrue as of April 20, 2015. (See following Additional Facts for other examples.)

[1] See generally ILRC, *Eligibility for Relief: Cancellation of Removal for Lawful Permanent Residents* (Dec. 2020), https://www.ilrc.org/resources/eligibility-relief-cancellation-removal-permanent-residents-ina-%C2%A7-240aa.
[2] INA § 240A(d)(1)(B); 8 USC § 1229b(d)(1)(B). This also governs when time ceases to accrue for purposes of the ten years of physical presence required for non-LPR cancellation, INA § 240A(b)(1). See § 17.13.
[3] Without this required information, the NTA might not stop the accrual of time towards the seven years. See *Pereira v. Sessions*, 585 U.S. 198 (2018), and for updates see AIC and NIPNLG, *Strategies and Considerations in the Wake of Niz Chavez v. Garland* (July 2024), https://nipnlg.org/work/resources.
[4] See 8 USC § 1229b(d)(1)(B), INA § 240A(d)(1)(B).

This "stop-time" rule applies to all LPRs, regardless of whether they are subject to the grounds of inadmissibility and deportability.[5]

The following are the criminal inadmissibility grounds that stop the accrual of the seven years.[6] If an LPR comes within the description of the ground (meaning they both committed the offense, and the conviction, admission, or other event has occurred), their seven years will cease to accrue as of the date that they *committed* the offense:

a. Conviction or qualifying admission of an offense relating to a controlled substance (including simple possession of 30 grams of marijuana);[7]
b. Conviction or qualifying admission of *one* crime involving moral turpitude (CIMT) will stop the clock unless it comes within either of two exceptions:[8]
    - The petty offense exception: Committed just one CIMT, which carries a maximum possible sentence of a year or less, where the sentence imposed was six months or less;
    - The youthful offender exception. Convicted as an adult of one CIMT, committed while under age 18, and conviction/jail ended at least 5 years before the current application is filed.

A first CIMT that comes within an exception will not stop the clock, but a second CIMT will stop the clock as of the date of commission of the second CIMT;[9]

c. Conviction of two or more offenses with an aggregate sentence imposed of five years or more;
d. There is evidence that the person engaged in the practice of "prostitution" (offering intercourse for a fee) in the last ten years, or came to the United States to engage in prostitution or commercialized vice;
e. Immigration officials have "reason to believe" (probative evidence) that the person ever participated in drug trafficking, human trafficking, or money laundering.
f. Less commonly charged grounds involve government officials who engaged in religious persecution, and noncitizens who asserted immunity from prosecution based on "alienage."
g. Finally, in some jurisdictions, including the Fourth, Seventh, Ninth, and Eleventh Circuits, some convictions that occurred before September 30, 1996 will not stop the seven-year clock.[10]

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[5] For discussion of the stop-time rule as set out under *Barton*, which essentially makes superfluous the statutory language on being "rendered" deportable, see IDP, ILRC, NIPNLG, *Avoiding the Stop Time Rule after Barton v. Barr* (June 25, 2020), https://www.ilrc.org/practice-advisory-avoiding-stop-time-rule-after-barton-v-barr and see ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (2021), Part F, www.ilrc.org/crimes-summaries.

[6] See 8 USC § 1182(a)(2), INA § 212(a)(2).

[7] This includes a conviction or *admission* of possessing any amount of marijuana, even if permitted under state law. While the controlled substance ground of deportability has an exception for possessing 30 grams or less of marijuana, the inadmissibility ground does not.

[8] See INA § 212(a)(2)(A)(ii), 8 USC § 1182(a)(2)(A)(ii), and see *§ N.7A All those Rules About Crimes Involving Moral Turpitude* (2021), www.ilrc.org/crimes-summaries. Reduction to a misdemeanor meets the one-year requirement. See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

[9] *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003).

[10] See *Jaghoori v. Holder*, 772 F.3d 764 (4th Cir. 2014), *Jeudy v. Holder*,768 F.3d 595 (7th 2014), *Sinotes-Cruz v. Gonzalez*, 468 F.3d 1190 (9th Cir. 2006), *Rendon v. USAG*, 972 F.3d 1252 (11th Cir. 2020), finding that because Congress did not specifically order retroactive application, and such application would harm reliance interests, it will not apply retroactively in at least some situations. Each circuit may have different requirements for what

6. *Calculate the seven years.* The client needs at least seven years between the start date from **Question 3** and the stop date, if any, from **Question 4**. See additional Case Example below.

ADDITIONAL FACTS: Cancellation of Removal for LPRs, INA § 240A(a), 8 USC § 1229b(a)

What Are the Benefits of Winning LPR Cancellation? Do Many Applicants Actually Win? Winning a cancellation case allows an LPR who is in removal proceedings to keep their LPR status and end the proceedings. If the LPR is eligible to apply for cancellation, there is a real chance that the immigration judge will grant it based on factors such as the person's remorse and rehabilitation, or potential for it. It may well be worth applying even if the person must wait months or more in immigration detention for the full hearing. The person should try hard to retain immigration counsel, which improves chance of success.

What are the bars to eligibility for LPR cancellation? An LPR cannot apply if they:

- Were convicted of an aggravated felony;
- Received a prior grant of cancellation of removal, suspension of deportation, or § 212(c) relief;
- Persecuted others or come within the national security or terrorism bars to immigration; or
- Fail to reach the required seven years of "continuous residence" after admission, or five years of lawful permanent resident status. See "Is the Defendant Eligible?" in Quick Test above.

Case Example: Calculating John's Five and Seven Years. Refer to the eligibility rules in Quick Test above. John was admitted to the U.S. on a tourist visa in July 2016. He overstayed the permitted time and lived in the U.S. in unlawful status until 2019, when he adjusted status to become an LPR.

In 2020 John was convicted of a firearm possession offense that made him *deportable* under the firearms ground, but that was not a crime involving moral turpitude (CIMT) or any other *inadmissible* offense. In 2024 he faces a charge of felony Cal PC § 422 committed against his husband, based on an incident that occurred in 2022. Section 422 is a CIMT and, if committed against a protected person, also a deportable "crime of domestic violence." The DA demands an eight month jail sentence.

Is John deportable? Yes, he is deportable for a crime of domestic violence, based on the 2024 conviction.

Has John had a green card for five years? As of 2024: He does now, or will soon, since he became an LPR in 2019. The five-year period keeps accruing during jail and removal proceedings; see **Question 2** in Quick Test above.

Does he have the seven years' lawful continuous residence? Let's check. See **Question 3–5** in Quick Test above.

> *When did John's seven-year period start?* On the date of his admission as a tourist in July 2016.
>
> *Did it end when he was convicted of the firearms offense?* No. Being *deportable* under INA § 237(a)(2), 8 USC § 1227(a)(2), without more, does not stop the seven-year clock. The offense also must be referred to in the inadmissibility grounds in INA § 212(a)(2), 8 USC § 1182(a)(2), which this offense is not. See **Question 4** in Quick Test above.
>
> *Will it end if he is convicted of the current charge?* Yes, because PC § 422 is a crime involving moral turpitude (CIMT) and the conviction stops the clock because it does not come within an exception. His seven-year period will cease to accrue as of 2022, when he committed the

scenarios make retroactive application impermissible. In all cases, the conviction, not just the commission, of the offense must have occurred before the date. *Valencia–Alvarez v. Gonzales*, 469 F.3d 1319 (9th Cir.2006). *Cf. Guzman v. Att'y Gen. U.S.*, 770 F.3d 1077, 1078 (3d Cir. 2014), finding retroactive application is permissible. See further discussion in the ILRC manual, *Removal Proceedings* (2024), www.ilrc.org/publications.

offense—so he won't have the seven years he needs. This is where informed pleading can save the day.

A single CIMT is not "referred to" in the inadmissibility ground at INA § 212(a)(2), 8 USC § 1182(a)(2), if it comes within the petty offense exception: has a potential sentence of one year or less, with no more than a six-month sentence imposed. See **Question 4.b** above. A felony CIMT does not qualify for the exception because it has a potential sentence of over a year (plus in this case, the DA wants an eight-month sentence). To come within the petty offense exception, John needs the § 422 to be designated a misdemeanor, and to get a sentence of no more than six months (perhaps by taking pre-hearing time in jail and then waiving credit for time served in exchange for a shorter sentence). Or, he could try to substitute or add a comparable offense that is not a CIMT, e.g., Cal PC § 243(e), or misdemeanor or felony PC 236/237. See discussion of alternatives in the *California Chart*. This can make all the difference, in that now John at least can apply for LPR cancellation of removal.

§ 17.6 Former § 212(c) Relief: LPRs with Older Convictions

A lawful permanent resident (LPR) whose convictions pre-date April 1, 1997 might be eligible for relief under former INA § 212(c), 8 USC § 1182(c), even if the conviction(s) are aggravated felonies.

This area of the law is complex, and defenders mainly should be alert to this scenario: If an LPR has a conviction from before April 24, 1996 (or in some cases, April 1, 1997), they might be able to get a waiver of deportability for the old conviction/s—even for one or more drug trafficking or violent offenses or aggravated felonies. But if the person pleads to a new deportable offense, they may have no remedy for that. Get expert advice.

Quick Test: Is the Client Eligible?

1. *Is The client an LPR who is deportable based on one or more **convictions**, including an aggravated felony, that occurred before April 24, 1996?*

   If so, the person might be eligible to apply for a waiver under § 212(c). This is true for convictions by trial as well as by plea. *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014).

2. *Is the client an LPR who is deportable based on conviction/s that occurred between April 24, 1996 and April 1, 1997?*

   The more complex rules governing § 212(c) and newer offenses are beyond the scope of this article. See resources listed below. To summarize, § 212(c) is available to waive just a limited number of deportability grounds for convictions from between April 24, 1996 and April 1, 1997, due to the extreme "AEDPA" limits. (AEDPA stands for the Anti-Terrorism and Effective Death Penalty Act of 1996). For a conviction from this period, § 212(c) cannot waive the aggravated felony, controlled substance, firearms, or "miscellaneous" (conviction of espionage, sabotage, treason, certain military service problems, etc.) deportation grounds. In addition, § 212(c) under AEDPA will not waive two moral turpitude convictions if *both* carry a potential sentence of a year or more, although it can waive other CIMTs. In California, reducing one or more felonies to misdemeanors after January 1, 2015 ought to result in a misdemeanor with a potential sentence of 364 days, under Pen C § 18.5(a).

   Arguably, the AEDPA limits—which concern deportation grounds—should not apply to LPRs seeking admission at the border. In that case, a waiver of inadmissibility should be available for any conviction received up until April 1, 1997. Immigration advocates might argue that

AEDPA limits also should not apply to adjustment of status applications, although the BIA has ruled against this.[11]

3. *Is the LPR client deportable based on conviction/s from both before and after April 1, 1997?*

   A more recent deportable conviction might mean that § 212(c) relief cannot save the person. An applicant cannot apply for both § 212(c) (for the old conviction/s) and cancellation of removal (for a new one/s).[12] But an LPR facing a charge of inadmissibility at the border, or one who can apply to re-adjust status through a relative or employment as a defense to a charge of deportability, *can* use waivers under both § 212(h) (for the new conviction/s, if that is sufficient) and § 212(c) (for the old conviction/s). Note that § 212(h) will not waive any controlled substance conviction except for possession 30 grams or less of marijuana. Consult an immigration attorney, and see discussion of family immigration at **§ 17.7**.

4. *Was the client convicted of one or more aggravated felonies on or after November 29, 1990, for which the client served an aggregate sentence of five or more years?*

   This is a bar to § 212(c) relief. See Matter of Abdelghany, 26 I&N Dec. 254, 272 (BIA 2014) and see discussion in Toia v. Fasano, 334 F.3d 917, 920-21 (9th Cir. 2003).

ADDITIONAL FACTS: § 212(c) Waivers

The former INA § 212(c) permitted an LPR with seven years of lawful domicile to waive most crime grounds of inadmissibility and deportability, including conviction/s of aggravated felonies. As of April 24, 1996, Congress reduced the reach of § 212(c), so that it could not be used by a person *deportable* for most offenses other than certain crimes involving moral turpitude (although it still waived all inadmissibility grounds). As of April 1, 1997, Congress abolished § 212(c) altogether, and substituted LPR cancellation of removal for it. Unlike § 212(c), LPR cancellation cannot be used to waive an aggravated felony conviction, and it has a complex stop-time provision. See discussion at **§ 17.5**.

Section 212(c) is not dead, however. The Supreme Court held that an LPR can apply today for § 212(c) to waive one or more qualifying convictions that occurred before the 1996 or 1997 dates. See *INS v. St. Cyr*, 533 U.S. 289 (2001); *Judulang v. Holder*, 565 U.S. 42 (2011); *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). Thus, a qualifying LPR who is put into removal proceedings today may be able to apply for the former § 212(c) waiver to waive a deportable aggravated felony conviction—for example, for drug trafficking—from before April 24, 1996. This is true whether the conviction was by plea or trial. The applicant did not have to have the seven years' residence by 1997, but only when the application is filed (e.g., today). Note that there is a § 212(c) regulation, 8 CFR § 1212.3, but it has not been updated over time. The most accurate statement of the government's position is *Matter of Abdelghany, supra*.

While § 212(c) cannot be applied for in conjunction with an application for LPR cancellation, it can be applied for in conjunction with a waiver under INA § 212(h), 8 USC § 1182(h). See, e.g., *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). The § 212(h) waiver could address a conviction from after the applicable 1996 or 1997 date, while § 212(c) could address convictions from before that date.

[11] Under AEPDA, § 212(c) is limited in that it cannot be used to cure *deportability* if the conviction was received between April 24, 1996 and April 1, 1997. LPRs applying for admission at the border are not deportable, as they are not subject to deportation grounds. Arguably, the same should apply to people applying for adjustment of status as a defense to a deportation charge; they should be able to use § 212(c) to waive *inadmissibility* based on convictions of a drug offense, etc., that occurred during that 1996-1997 period. However, the BIA and the Second Circuit have ruled that§ 212(c) cannot be used for adjustment of status in this way (*Matter of Gonzalez-Camarillo*, 21 I&N Dec 937 (BIA 1997), *Ruiz-Almanzar v. Ridge*, 485 F.3d 193 (2nd Cir. 2007).

[12] INA § 240A(c)(6); 8 USC § 1229b(c)(6).

The rules governing § 212(c) are complex. If your client *might* be eligible, consult an immigration expert before entering a plea to a new deportable offense.

§ 17.7 IMMIGRATION THROUGH FAMILY

Is the defendant eligible? Is this to be used as a defense against deportation? Some noncitizens may be able to get a green card through a U.S. citizen or lawful permanent resident parent, spouse, or child (or less commonly, a USC sibling). This section addresses basic questions to see if your client may be eligible.

A. What kind of status does one obtain from immigrating through a family member?

B. What crimes destroy eligibility for family immigration?

C. How does immigration law define spouse, parent, child, and sibling?

D. Which noncitizens can "adjust status" through a family visa, and thereby avoid deportation?

E. If my client can't adjust status, is a family visa petition and consular processing still worthwhile?

F. What will happen to my client? How long will this all take?

G. How Can I Keep My Client from Becoming Inadmissible, or at Least Retain Their Eligibility for a Waiver? (Table)

Family visas are complex, and the defendant should get immigration help to complete the process. A non-profit agency may be able to handle the case if the criminal issues are not complex, or if they have expert staff. But criminal defense counsel will provide a tremendous service and might prevent a family from being destroyed if they can spot this potential relief, avoid pleading the defendant to a disqualifying (inadmissible and unwaivable) offense, and provide some basic advice. For further information, go to https://www.uscis.gov/ and click on "Family" under "Topics" or see, *A Guide for Immigration Advocates* (2024) (www.ilrc.org).

A. What Kind of Status Does One Obtain from Immigrating Through a Family Member?

Lawful permanent resident status (LPR, a green card). To "immigrate" means to become an LPR.

B. What Crimes Destroy Eligibility for Family Immigration?

To immigrate through family, the person must be "admissible." That means either they must not come within any of the grounds of inadmissibility at INA § 212(a)(2), 8 USC § 1182(a), or *if* they come within one or more inadmissibility grounds, they must be granted a waiver of the ground(s). To determine whether your client is inadmissible, see the table at **Part G** below, and see other detailed materials. Note that any conviction relating to a federally-defined controlled substance is an absolute bar to family immigration. The exception is that in some cases, one can apply for a waiver of a first conviction for simple possession of 30 grams or less of marijuana (or of being under the influence of, or possessing paraphernalia specifically to use with, 30 grams or less of marijuana).

If your client *might* be eligible for family immigration and you can avoid making them inadmissible by avoiding an inadmissible offense in the criminal case, you have done a great job. If possible, use the following information to further help them by determining if they really are eligible, and if so whether they can use this eligibility to fight deportation ("removal").

C. How Does Immigration Law Define Spouse, Parent, Child, and Sibling?

All family visas, and all other immigration benefits based on family, require a qualifying spousal, parent/child, or sibling relationship as defined under immigration law. The USC or LPR who is applying to immigrate their noncitizen family member is called the "petitioner," and the noncitizen family member

is called the "beneficiary." In some cases, family members can still benefit from a filed petition after the petitioner dies. In addition, some widows or widowers of U.S. citizens can file a new petition on their own for up to two years after the death of the U.S. citizen spouse.

Spouse. See 8 CFR § 204.2. The only requirement is that the marriage was bona fide (not a fraud) at the time it occurred and was legally valid in the jurisdiction in which it was performed. This includes same-sex marriages that were legal where they were performed. (The definition of "spouse" is slightly broader for persons applying for VAWA relief due to abuse by a USC or LPR spouse; see **§ 17.8**.).

Parent, Child, Son, Daughter, Sibling. See INA § 101(b)(1), 8 USC § 1101(b)(1). A parent/child relationship for immigration purposes includes a child born in wedlock, a biological child of a mother, and in some cases a father's biological child born out of wedlock (note "biological" can include where there is either a genetic or gestational link to a legal parent, encompassing situations involving assisted reproductive technology, for instance). A stepparent relationship is recognized if the parents married before the child's 18th birthday. An adoptive relationship is recognized if the adoption was finalized before the child's 16th birthday (or the child's 18th birthday, if a sibling was also adopted by age 16) and the child has resided in lawful custody with the parent for two years at any time. If the biological parent's rights were terminated, that parent/child relationship is no longer recognized for immigration purposes.

A "child" is defined as a person with a relationship described above, who is under age 21 and unmarried. "Unmarried" includes marriage ended in death, divorce, or annulment. A "son or daughter" is a person who once was a child under the above definition but no longer is, because the person is age 21 or older, or under age 21 and married. Siblings are two people who have or had the same "parent," according to the definition above.

D. Which Noncitizens Can "Adjust Status" through a Family Visa, and Thereby Avoid Deportation?

A noncitizen can immigrate through a family visa using one of two procedures—adjustment of status or consular processing. Some noncitizens are eligible to "adjust status" to that of a lawful permanent resident (LPR). "Adjustment of status" is a technical term that means that the person can process the green card application at a local DHS office or immigration court, without having to leave the U.S. Adjustment of status can be a defense against being deported. We discuss adjustment of status in this Part. Noncitizens who are not eligible to adjust status must go to a U.S. consulate in their home country in order to process their application. That is discussed in **Part E**. But a trip to process their case at a U.S. consulate abroad, can create other legal problems. If instead the defendant can adjust status, they will become an LPR, removal proceedings will not be initiated (or end if the person was already in removal proceedings), and they will not have to leave the U.S.

A person who is undocumented or has almost any immigration status can apply for adjustment of status through a family visa as a defense to removal (deportation), if they meet the following requirements:

- The defendant is the beneficiary of a visa petition filed by a U.S. citizen (USC) spouse, or a USC son or daughter age 21 or older, or, if the defendant is an unmarried child under the age of 21, by a USC parent, *and* the defendant was admitted or paroled into the U.S. on any kind of visa, border-crossing card, lawful permanent resident card, or other document, even if later they were in unlawful status. This is called a regular adjustment or "245(a) adjustment." See INA § 245(a), 8 USC § 1255(a).

  OR

- The defendant is the beneficiary of any family visa petition based on any qualifying relationship described in **Part C** above—spouse, parent/child, or even sibling—that was submitted on or before April 30, 2001, and that can be used now. This is called "245(i) adjustment." See INA § 245(i), 8

USC § 1255(i). If a pre-May 1, 2001 petition exists, the defendant should seek immigration counsel to see if they fulfill all the requirements for this.

With a few technical exceptions, any noncitizen in any status (e.g., undocumented, TPS, student visa, etc.) who meets the above requirements can apply for adjustment. A qualifying **LPR who has become deportable for crimes** can apply for adjustment of status as a defense to removal. The deportable LPR must have a petitioning family member as described in the first bullet point above, and must either be admissible or be granted a waiver of the inadmissibility ground.[13] In this process, the LPR loses their current green card and then applies to "re-adjust" status and get a new green card, all in the same proceeding. They are not ordered removed, and do not leave the U.S. (Note that some LPRs are not eligible for a waiver of inadmissibility under INA § 212(h). See **§ 17.10** regarding the § 212(h) waiver.)

Increasingly ICE is arguing that a person who has been convicted of a broadly defined "violent or dangerous" offense should be denied adjustment as a matter of discretion, and be forced to go through consular processing. The Ninth Circuit has upheld this position.[14]

E. If my client can't adjust status, is a family visa petition and consular processing still worthwhile?

Noncitizens who do not qualify for adjustment of status will have to leave the U.S. and process the application for a green card through a U.S. consulate in their home country. This is called "consular processing." If the application is granted, they can return to the U.S. as an LPR.

This process carries more risks, however, than getting the green card through adjustment of status. Depending on various factors, the person could have to remain outside the U.S. for just a few weeks, or some years. The problem is that people who have lived without lawful status in the United States become inadmissible under the "unlawful presence" grounds the moment they set foot outside the United States. (This is why it is so valuable to be able to adjust status instead. Because the person does not physically leave the U.S. before getting the green card, they are able to avoid triggering the "unlawful presence" grounds). These grounds can bar people from getting a green card for three or ten years. Fortunately, family hardship waivers are available for the three- and ten-year bars, but in order to be able to apply for a waiver, you must have certain qualifying family members with lawful immigration status—spouse or parents. Some people only have children with immigration status, and children do not qualify them for the waiver, no matter how old they are. People who left the U.S. after more than one year of unlawful presence and then re-entered unlawfully may be subject to the so-called "permanent" bar, and this is far more serious. Unlike the three- and ten-year bars, which can be overcome with an approved waiver so that the person does not have to wait the three or ten years, with the permanent bar the person *must* wait ten years outside the country before they can even apply for a waiver to try to come back to the U.S.; there is no exception that will let them skip the ten years outside the country.[15]

While consular processing can be risky, please do not inform a defendant that they should give up on family immigration, and do not abandon the goal of keeping the person admissible. As criminal defense attorneys, we are not expert in the nuances, possible defenses, and near-constant updates in this area. But we should tell defendants that they must consult with a skilled immigration nonprofit or private attorney before going through consular processing. This step might save them a lot of heartache.

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[13] *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).
[14] *Torres-Valdivias v. Lynch*, 786 F.3d 1147 (9th Cir. 2015).
[15] See discussion of the inadmissibility grounds based on unlawful presence plus travel outside the United States at ILRC, *Understanding Unlawful Presence Under §212(a)(9)(B) and Unlawful Presence Waivers, I-601 and I-601A* (Mar. 28, 2019), https://www.ilrc.org/resources/understanding-unlawful-presence-under-%C2%A7-212a9b-and-unlawful-presence-waivers-i-601-and-i; ILRC, *I-601A Provisional Waiver: Process, Updates, and Pitfalls to Avoid* (Jun. 27, 2019), https://www.ilrc.org/resources/i-601a-provisional-waiver-process-updates-and-pitfalls-avoid.

Defenders have two criminal defense goals. First, *try hard to avoid a conviction that makes the defendant inadmissible*. See **Part G** below. Defendants who can avoid being inadmissible for a crime and have an approved visa petition might qualify for a "stateside waiver" of the three/ten-year unlawful presence bars, which would cut down on the time and risk of the trip abroad to consular process.[16] Of course, many defendants already have criminal records that preclude this, but where it is possible it is a huge advantage.

Second, if the person cannot avoid becoming inadmissible, try to plead to a ground that might be waived, so that the person still can get a green card. See **Part G** below. If the person is in removal proceedings now, advise them to consult with immigration counsel to see if voluntary departure is a good option, and/or if they might get released on bond based on the availability of a family visa petition. See **§ 17.25**.

F. What Will Happen to My Client? How Long Will This All Take?

Your client can be detained and placed in removal proceedings despite being eligible for a family visa. If they can adjust status, their family should get help to get the appropriate papers filed with DHS and the immigration court. If they are not subject to "mandatory detention," they might well win release from detention. If they aren't released, they will apply for adjustment in removal proceedings held while they are detained, often at a court located in the detention facility.

If they can immigrate through family but are ineligible to adjust status, or the judge denies adjustment as a matter of discretion, they must request voluntary departure and go through consular processing in the home country. Before leaving, they need legal counseling about the consequences of leaving the U.S. and the waivers they will need if they are ever to return on the family visa. See **Part E** above.

How Long Does It Take to Immigrate (Get the Green Card)? This depends on the noncitizen's country of birth, when the application for a family visa petition was filed, and especially on the type of family visa. There are two types of family visas: **immediate relative** visas, which have *no* legally mandated waiting period (although processing the application may take some months to a year or longer), and **preference category** visas, which may legally require a wait of months, years, or even decades before the person can immigrate, because only a certain number of these types of visas are made available to each country each year. The categories are:

1. Immediate relative: Noncitizen is the spouse of a USC; the unmarried child under 21 years of age of a USC; or the parent of a USC who is at least 21 years old.
2. First preference: Noncitizen is the unmarried son or daughter (at least 21 years old) of a USC.
3. Second preference: Noncitizen is the spouse, child, or unmarried son or daughter of an LPR.
4. Third preference: Noncitizen is the married son or daughter (any age) of a USC.
5. Fourth preference: Noncitizen is the brother or sister of an adult USC. This category may have a legally mandated waiting period of 20 years or more.[17]

How can one tell how long the wait is for a preference visa? The online "Visa Bulletin" provides some help. See the Visa Bulletin and instructions at https://travel.state.gov/ (select "U.S. Visas" and then "Check the Visa Bulletin"). To read it, you will need the client's "priority date" (the date that their relative first filed the visa petition), to compare with the current date for their preference category (see above), and country of origin. Look at "Family-Sponsored Preferences" and Chart A, Final Action Dates. When the person's priority date comes up on the chart in their category (or is *earlier* than the date listed), the visa is available and the person can apply for the green card.[18] Note, however, that the Bulletin categories do *not* progress in real time. In next month's Bulletin, the priority date in the client's category will not

[16] See information at https://www.uscis.gov/family/family-us-citizens/provisional-unlawful-presence-waivers and see ILRC, *I-601A Provisional Waiver: Process, Updates, and Pitfalls to Avoid*, above.
[17] See INA §§ 201(b), 203(a), 8 USC §§ 1151(b), 1153(a).
[18] Sometimes adjustment applicants can file early, according to Chart B in the Visa Bulletin. For more information see https://www.uscis.gov/visabulletininfo.

necessarily have advanced by one month: it might have leapt ahead three months, stayed the same, or even regressed to an earlier date. Consult an immigration lawyer to get a realistic time estimate for when the client might immigrate.

G. How Can I Keep My Client from Becoming Inadmissible, or at Least Retain Their Eligibility for a Waiver?

Below is a chart showing common crimes grounds.

Note that apart from drug cases, immigrants applying for a family visa who are inadmissible usually can apply for a highly discretionary waiver called the "212(h) waiver." See INA § 212(h), 8 USC § 1182(h). But if the person admits or is convicted of an offense that involves a federally-defined controlled substance, or if the government has "reason to believe" they trafficked in such a drug, they cannot apply for the waiver and will not qualify for a green card through family. The one exception is that the 212(h) waiver can waive certain offenses that relate to a single incident involving simple possession of 30 grams or less of marijuana or hashish. See **§ 17.10** for more on § 212(h).

For more information on inadmissibility grounds see other *Notes* at www.ilrc.org/chart, advisories at www.ilrc.org/crimes, and manuals at www.ilrc.org/publications and elsewhere.

Crimes Ground of Inadmissibility: 8 USC § 1182(a)(2)	**Waiver?**
Convicted of/admitted a first simple possession of 30gms or less marijuana, or being under the influence, or possessing paraphernalia; includes hashish.	§ 212(h) waiver [8 USC § 1182(h)]
Convicted of/admitted any other offense relating to federally-defined controlled substance.	No waiver
Immigration authorities have "reason to believe" person was involved in trafficking in a federally-defined controlled substance at any time.	No waiver
Current drug abuser or addict.	No waiver
Convicted of/admitted one crime involving moral turpitude (CIMT). Client is not inadmissible and § 212(h) waiver is not needed if: ✓ Petty offense exception (only one CIMT, maximum possible sentence = 1 yr or less, sentence imposed = 6 months or less). ✓ Youthful offender exception (convicted as adult of one CIMT, committed while under age 18, conviction and any imprisonment ended at least 5 years before this application).	§ 212(h) waiver
Engaged in prostitution, meaning sexual intercourse for hire.	§ 212(h) waiver
Conviction of 2 or more offenses of any type with aggregate sentence imposed of at least 5 years.	§ 212(h) waiver
An aggravated felony conviction is not a ground of inadmissibility *per se*, but the conviction might cause inadmissibility under the CIMT or drug grounds.	Bars some LPRs from § 212(h).
Prior deportation or removal. Emergency: Client probably *illegally re-entered* after being removed. Client is at high risk for referral for federal prosecution for illegal re-entry under 8 USC § 1326. Try to get client out of jail. Family visa is *not* an option while client is in the U.S.	No waiver for illegal re-entry while in the U.S.; very limited waiver once outside the U.S. for at least 10 years.

§ 17.8 RELIEF UNDER VAWA: ABUSED BY USC OR LPR FAMILY MEMBER

Under the Violence Against Women Act (VAWA), if a noncitizen or their child or parent is the victim of abuse (including emotional abuse) by certain U.S. citizen or lawful permanent resident family members, the noncitizen and victims may be able to apply for lawful permanent residence (green card) under VAWA, either through a VAWA "self-petition" or a grant of VAWA cancellation of removal. VAWA benefits are available to any gender, not just to women.

Extensive resources exist to help VAWA applicants. Some Legal Aid offices and non-profit immigration agencies have funding to handle indigent persons' applications. The government and nonprofits provide free information online,[19] and see also ILRC, *The VAWA Manual* (www.ilrc.org/publications).

QUICK TEST: Is the Client Eligible?

1. *Is the client either the spouse or a child (including stepchild or adopted child) of a lawful permanent resident (LPR) or U.S. citizen (USC) who has abused them?* ***Or****, is the client abused by an adult USC son or daughter?*

   Noncitizens who were abused by the above-described relatives may be eligible for VAWA. In addition, some noncitizens qualify for benefits if their parent or child, rather than themselves, was the victim of abuse. If the noncitizen's child was abused by the noncitizen's USC or LPR spouse, the noncitizen may qualify for VAWA (regardless of the child's immigration status). Also, if an abused noncitizen becomes an LPR through VAWA, their children might qualify for parole and for LPR status as derivatives. See Additional Facts below.

2. *Is the family relationship with the abuser one that is recognized for immigration purposes?*

   Immigration law recognizes only certain marital or parent/child relationships. See Additional Facts. Note that although the abused spouse must show that they have resided with the abuser, they need not show that they have shared a residence in the United States.

3. *Does the USC or LPR relative's action amount to "battery" or "extreme cruelty" for VAWA purposes?*

   For VAWA purposes, battery or extreme cruelty can include a number of different acts by the abuser, including: any act or threatened act of violence, including forceful detention, which results or threatens to result in physical or mental injury; psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution; as well as purely psychological abuse in the form of social isolation, threats of deportation, belittling behavior, and other forms of asserting power and control over the noncitizen. The abuse need not have occurred in the United States. See 8 CFR §§ 204.2(c)(1)(vi), 203.2(e)(1)(vi).

4. *Note: If your client is a victim of domestic violence but does not qualify for VAWA, consider the U Visa*

   Unlike VAWA, the U visa does not require that the abuser was a USC or LPR, or that a family relationship was legally valid or existed at all. See discussion of U Visas at **§ 17.16**.

[19] The government provides information at www.uscis.gov/batteredspouseschildrenandparents and https://www.uscis.gov/policy-manual/volume-3-part-d-chapter-2. See also materials at websites such as https://www.ilrc.org/u-visa-t-visa-vawa.

ADDITIONAL FACTS: Violence Against Women Act (VAWA)

The VAWA immigration provisions were enacted to prevent abusive U.S. citizens (USCs) and lawful permanent residents (LPRs) from using their immigration status as a means of holding their spouse, child, or parent (of an adult) hostage, e.g., by refusing to help them immigrate, or threatening to call ICE on them if they try to leave. VAWA gives the noncitizen a means of becoming an LPR that is independent of the abuser, through either of two methods: VAWA self-petitioning or VAWA cancellation of removal.

VAWA Self-Petitioning. An abused spouse, child, or parent who is a noncitizen can "self-petition," meaning file a visa petition for themselves, without sponsorship by their USC or LPR relative. The self-petitioner must meet the definition of a "spouse," "child," or "parent" of the USC or LPR under immigration law, but some expanded definitions apply for VAWA self-petitioners. Regarding a spouse, the marriage must be legal in the jurisdiction where it was performed. This includes same-sex marriages and common law marriages that meet that requirement. For VAWA purposes only, a "marriage" also includes one that is legally invalid because the USC or LPR spouse did not divulge the existence of a prior marriage. "Spouse" can include a spouse who was divorced within the last two years if there is a connection between the divorce and the abuse, or a spouse whose abusive USC spouse died within the last two years, or a spouse whose abusive LPR spouse lost their status within two years of self-petitioning due to an incident of domestic violence. If the noncitizen's USC or LPR spouse abused the noncitizen's child, the noncitizen may self-petition even if they were not abused. Finally, an abused spouse can include any of their children as derivative beneficiaries, even if the children were not abused, are not related to the abuser, and do not reside in the United States. See 8 CFR § 204.2(c).

The definition of child includes adopted children and stepchildren. For children, an adoptive relationship is recognized if the adoption was finalized before the child's 16th birthday (or the child's 18th birthday, if a sibling was adopted by age 16) and the child has resided in lawful custody with the parent for two years at any time. A step relationship is recognized if the parents married before the child's 18th birthday. See INA § 101(b)(1), 8 USC § 1101(b)(1) and family visas at **§ 17.7**. Children who qualify for VAWA while under age 21 will not lose benefits after they turn 21 years old, and some children may petition for VAWA up to age 25 if they can show that the abuse was one reason for not filing before turning 21. See 8 CFR § 204.2(e).

The self-petitioner must establish that the abuser is or was a USC or LPR; that the self-petitioner has been subject to battery or "extreme cruelty" during the marriage (if based on marriage to the abuser); and that the self-petitioner resided with the abuser. Battery or extreme cruelty is broadly defined to include not only acts of violence, but also emotional abuse, isolating the person, threatening them with deportation, etc. A fairly wide range of evidence, including affidavits, will be considered. 8 CFR § 204.2(c).

The person must prove good moral character for the three-year period before they file their application, and may be required to submit police clearance records showing their own criminal history or lack thereof for the last three years. 8 CFR § 204.2(c)(1)(i)(F), (c)(2)(v). See discussion of good moral character at **§ 17.26**. The rules governing good moral character bars are relaxed somewhat for VAWA self-petitioners: if a bar to good moral character is an offense that also could be waived under INA § 212(h)—for example, if it is one or more convictions of a crime involving moral turpitude—and the offense was connected to the abuse, the bar may be forgiven. INA § 204(a)(1)(C), 8 USC § 1154(a)(1)(C). See also 3 USCIS Policy Manual (USCIS-PM) D.2(G)(3).

Once the self-petition is granted, the self-petitioner receives deferred action, which provides temporary protection from deportation and eligibility for work authorization. The self-petitioner can then adjust status to an LPR if they are not inadmissible, or if they are inadmissible and can obtain a waiver. Special VAWA provisions eliminate the need to show hardship to an LPR or USC family member as a requirement for certain waivers. See, e.g., INA § 212(h)(1)(C), 8 USC § 1182(h)(1)(C).

VAWA Cancellation. Noncitizens who are in removal proceedings and who have been battered or subjected to extreme cruelty by a USC or LPR spouse or parent may apply for VAWA cancellation, a form of non-LPR cancellation. Notably, an adult "child" of a USC or LPR parent may qualify for VAWA cancellation, unlike the VAWA self-petitioning provision, which requires that a "child" self-petitioner be under 21 years old at the time of application. A noncitizen parent of an abused child also can apply, even if they themselves have not been abused. INA § 240A(b)(2), 8 USC § 1229b(b)(2). The VAWA applicant must have three years of physical presence in the United States and three years of good moral character, immediately preceding the application. They must not be inadmissible under grounds relating to crimes or terrorism/national security and must not be deportable under grounds relating to crimes, marriage fraud, failure to register, document fraud, false claim to U.S. citizenship, and security and related grounds. Note that the VAWA applicant must not "be" deportable or inadmissible, meaning that to be barred they (a) must be subject to the either deportability or inadmissibility grounds, and (b) must come within one of those grounds. For example, a noncitizen who has not been admitted into the United States is subject to the grounds of inadmissibility, not deportability, so they are barred only if they come within an inadmissibility ground.[20] An applicant can apply to waive being deportable under the domestic violence deportation ground (except for child abuse) if they can make certain showings, including showing that they were the primary victim in the relationship.[21] A noncitizen convicted of an aggravated felony is not eligible for VAWA cancellation.

Once a VAWA self-petition is granted, the children of the grantee, or if the grantee is a minor, their parent, shall be granted parole into the United States and can apply for adjustment of status with the grantee. INA § 240A(B)(4)(A), 8 USC § 1229b(b)(4)(A).

§ 17.9 Special Immigrant Juvenile Status (SIJS)

Young people under the age of twenty-one who are under the jurisdiction of almost any court may qualify to apply for lawful permanent resident status as a "special immigrant juvenile," if the court makes certain determinations concerning parental abuse, neglect, or abandonment. Once the child's petition for SIJS has been approved, they may also be granted deferred action and become eligible to apply for a work permit while they wait for a visa to be available. Once a visa is available to them, which could take several years, they can file an application for adjustment of status (a green card).

Quick Test: Is the Client Eligible?

1. *Is the client unmarried and under age 21? Are they under the jurisdiction of a delinquency, dependency, family, probate, or other "juvenile" court, or could they open a case in one of these courts?*
2. *Has the child experienced parental abuse, neglect, or abandonment (which in some states includes death of a parent), and would it not be in the child's best interest to be returned to the home country? Abuse, neglect, and abandonment are defined by state law, so can include different types of treatment in different states.*

If the answer to both questions is "Yes," counsel should investigate special immigrant juvenile status.

Additional Facts: Special Immigrant Juvenile Status (SIJS)

SIJS came into being in 1990, but it was substantially broadened and clarified by the Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA). See INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J),

[20] Compare this to the bars to cancellation eligibility under INA § 240A(b)(1) which apply if the person is *convicted* of an offense described in either the deportability or inadmissibility grounds.
[21] See discussion of this waiver, INA § 237(a)(7)(A), 8 USC § 1227(a)(7)(A), at § 17.11.

as amended by TVPRA. The regulations were updated in 2022 to align with the statute. See 8 CFR § 204.11. See basic information at www.uscis.gov (search for "special immigrant juvenile") and see advisories and materials at https://www.ilrc.org/immigrant-youth (see in particular ILRC, *Overview of Seeking SIJS Findings in Juvenile Court* (2022)[22]). For a comprehensive manual, see ILRC, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth* (Nov. 2021), www.ilrc.org/publications.

What Order Must the Court Make? The court must make a determination, and sign an order to be submitted with the SIJS petition, that (a) the child cannot be reunified with one or both parents because of abuse, neglect, abandonment or a similar basis under state law, and (b) it is not in the child's best interests to be returned to the country of origin.

What Kind of Court Can Make This Order? A juvenile court, broadly defined to include any court located in the United States having jurisdiction under state law to make judicial determinations about the dependency and/or custody and care of juveniles, can issue the order. Depending on the state, the court might be called family, delinquency, dependency, probate, orphans,' or other. A child who has been declared dependent on the court is eligible; a child who has been legally committed by the court to the custody of a state agency, department, entity, or individual is also eligible.

Can the Child Be in a Parent or Guardian's Custody? Yes, the court may legally commit the child to the custody of an individual, for example the non-abusive parent or a guardian.

What Requirements Must the Child Meet? The child must be under age 21 on the date of filing the SIJS petition with USCIS, and must be unmarried. To get permanent residency, the child must be admissible. There are discretionary SIJS waivers for many grounds of inadmissibility. INA § 245(h), 8 USC § 1255(h). However, if the child is inadmissible because the government may have "reason to believe" they trafficked in drugs, this is a dangerous situation and counsel should not proceed without expert counseling. The same is true for youth with convictions in adult court that may cause inadmissibility. See advisory with a chart on inadmissibility and SIJS athttps://www.ilrc.org/resources/special-immigrant-juveniles-grounds-inadmissibility. To get permanent residency, the child must also have a visa available. Currently, there is a backlog of visas for youth applying for a green card based on SIJS from all countries, meaning youth will have to wait several years before they can apply for a green card. For more information, see ILRC's advisory about the visa backlog at https://www.ilrc.org/resources/special-immigrant-juvenile-status-visa-availability. While young people wait for a visa to become available and once their SIJS petition has been approved, they may be granted deferred action, which creates eligibility for work authorization. For more information, see the USCIS Policy Manual at 6 USCIS-PM J.4(G).

§ 17.10 § 212(H) WAIVER OF INADMISSIBILITY

For more information see ILRC, *Eligibility for Relief: Waivers under INA § 212(h)* (Jan. 2020).[23]

QUICK TEST: Is the Defendant Eligible for Relief Under INA § 212(h), 8 USC § 1182(h)?

1. *Which Immigrants Can Apply for a § 212(h) Waiver?*

   The person must be an LPR already, or must be applying to become an LPR based on a family visa, VAWA, or an employment visa. The person:

   a. Must be the spouse, parent, or child of a U.S. citizen or lawful permanent resident (USC or LPR) who would suffer extreme hardship if the person was deported, or

[22] Available at https://www.ilrc.org/resources/overview-of-seeking-special-immigrant-juvenile-status.
[23] Available at https://www.ilrc.org/resources/eligibility-relief-waivers-under-ina-%C2%A7-212h.

b. Must have been convicted (or engaged in the conduct) at least 15 years ago, or
c. Must be inadmissible only for prostitution, or
d. Must be applying for VAWA relief due to abuse by a USC or LPR family member; see § 17.8.

2. *Which Inadmissibility Grounds Can Be Waived Under § 212(h)?*[24]

a. Conviction of one or more crimes involving moral turpitude (CIMT). Note that the person is not inadmissible and the waiver is not needed if there is only one CIMT conviction that comes within:
   - The petty offense exception. The person must have committed just one CIMT, which carries a maximum possible sentence of a year or less (including a misdemeanor wobbler in California), where the sentence imposed was six months or less; or
   - The youthful offender exception. The person was convicted as an adult of one CIMT, committed while under age 18, and conviction/jail ended at least 5 years before the current application is filed.

b. Two convictions of any type of offense, with aggregate sentences imposed of at least five years
c. Engaging in "prostitution" (the practice of offering sexual intercourse for a fee, with or without a conviction).
d. No drug crimes can be waived, except those arising from a single incident involving possession of 30 grams or less of marijuana, or similar offenses such as: possession of an amount of hashish comparable to 30 gm or less of marijuana, possessing paraphernalia for use with 30 grams or less of marijuana, (arguably) using marijuana or hash, and in the Ninth Circuit attempt to be under the influence of THC.[25]

3. *How Likely Is It That the Waiver Will Be Granted?*

The waiver is granted as a matter of discretion. It is crucial to get immigration counsel. Winning can be difficult if the person must show "extreme hardship" to a qualifying family member (see **Question 1.a** above). Conviction of a vaguely defined "violent or dangerous" offense will not be waived absent "exceptional and extremely unusual hardship" (including to the applicant) or national security concerns.[26] Thus, it will be easier to waive a conviction for theft or fraud than one for robbery or serious assault.

ADDITIONAL FACTS: § 212(h) Crimes Waiver

Because § 212(h) is used in combination with other immigration law provisions, the analysis might be especially challenging for criminal defenders. Seek expert advice, or see *Eligibility for Relief: Waivers under INA § 212(h)*, cited above, or the ILRC manual *Removal Defense* (2024) at www.ilrc.org.

When Is the § 212(h) Waiver Used? Usually with an application to become an LPR via a family visa or VAWA application, or to help an inadmissible LPR get back into the U.S. after a trip abroad.

> **Example:** Erin was admitted to the U.S. on a tourist visa and overstayed. Now she wants to become an LPR through her U.S. citizen husband, but she is inadmissible because of a CIMT

[24] See INA § 212(h), 8 USC § 1182(h)(1), referring to certain grounds of inadmissibility at INA § 212(a)(2), 8 USC § 1182(a)(2).
[25] See, e.g., *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (use); INS General Counsel Legal Opinion 96-3 (April 23, 1996) (comparable amount of hashish); *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (THC).
[26] 8 CFR § 1212.7(d). See discussion of same standard in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

conviction. She can submit an application for adjustment of status along with a § 212(h) application to waive the CIMT. If it is granted, she will become an LPR.

Example: Tim became an LPR but later was convicted of a CIMT that made him inadmissible. In 2019 he took a trip outside the U.S. Upon his return, he was stopped at the airport and charged with being an arriving non-U.S. citizen who was inadmissible for CIMT.[27] He can apply for a "stand-alone" § 212(h) waiver. If he wins, he can keep his green card and be admitted into the U.S.

For many years, the BIA held that if an LPR should have been stopped at the border and charged with being *inadmissible* for a conviction (as Tim was in the above example), but instead was mistakenly permitted to enter the United States and then was charged with being *deportable* based on the conviction, the LPR could apply for a § 212(h) inadmissibility waiver "nunc pro tunc" (as if at the border) as a defense to deportability. The person did not need to also apply for adjustment of status. But in *Matter of Rivas*,[28] the BIA overruled these cases. It held that a § 212(h) waiver can be submitted in removal proceedings based on a charge of deportability only if it is filed with an application for adjustment of status. If the LPR is not eligible to adjust—for example, because they are not the beneficiary of an immediate relative visa petition—then they cannot apply for § 212(h) relief. Courts have upheld the *Matter of Rivas* rule as a reasonable interpretation of the statute, but advocates can consider arguing that at least it should not apply retroactively to convictions from before the date *Matter of Rivas* was published, which was June 20, 2013.[29] Advocates should also consider arguing that after the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), courts of appeal are no longer required to defer to the BIA's interpretation of the INA, and therefore can conclude that *Matter of Rivas* is wrongly decided. While pursuing these arguments, counsel also should investigate the possibility of vacating the conviction.

Sometimes § 212(h) Can Waive a (Non-Drug) Aggravated Felony Conviction. Some crimes involving moral turpitude (CIMTs) also qualify as aggravated felonies. Except for some LPRs (see below), the fact that the CIMT also is an aggravated felony is not a bar to applying for § 212(h), although it may make it harder to win the case. But see **Question 3** in Quick Test above, regarding conviction of a "violent or dangerous" crime.

Special Restrictions Apply to Some LPRs. The last paragraph of INA § 212(h) sets out two bars to eligibility that apply only to certain LPRs. An LPR subject to the bars cannot apply for the waiver if they (a) were convicted of an aggravated felony since being admitted at a border as an LPR, or (b) failed to complete a continuous seven years in the U.S. in some lawful status before removal proceedings began.[30]

Who is subject to the bars? Only LPRs who were *previously physically "admitted" as an LPR or conditional permanent resident at a U.S. border or other port of entry*.[31] This includes anyone who became an LPR by admission to the U.S. after consular processing. However, becoming an LPR by adjusting status within the U.S. does not trigger the bars, because there was no physical admission at the border or other port of entry.[32] Similarly, people admitted as refugees who later adjust status to LPRs do

[27] See INA § 101(a)(13)(C), 8 USC § 1101(a)(13)(C).
[28] *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), upheld in *Rivas v. U.S. A.G.*, 765 F.3d 1324 (11th Cir. 2014).
[29] See *Margulis v. Holder*, 725 F.3d 785, 789 (7th Cir. 2013) (ordering BIA to consider whether *Rivas* should be applied retroactively); and see e.g., *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947 (9th Cir. 2007) (regarding factors considered in prospective application of a new rule announced by BIA precedent).
[30] If the Notice to Appear did not provide a date, time, and place, it might not stop the seven-year clock. See *Pereira v. Sessions*, 585 U.S. 198 (2018), and subsequent cases discussed in AIC and NIPNLG, *Strategies and Considerations in the Wake of Niz Chavez v. Garland* (July 2024), https://nipnlg.org/work/resources.
[31] *Matter of Paek*, 26 I&N Dec. 403 (BIA 2014) (bar applies to conditional residents).
[32] *Matter of J-H-J-*, 26 I&N 563 (BIA 2015). See discussion of adjustment of status at § 17.7, above.

not come within the bars.[33] A person who traveled outside the U.S. while an LPR *may or may not* have become subject to the bars; it should depend on whether the person was treated as seeking a new "admission" upon their return.[34] The bars do not apply to undocumented people or any other non-U.S. citizens, other than this category of LPRs.

§ 17.11 WAIVER OF DOMESTIC VIOLENCE AND STALKING

A noncitizen is deportable if convicted of stalking or of a "crime of domestic violence," or if found in criminal or civil court to have violated certain provisions of a domestic violence protection order. INA § 237(a)(2)(E), 8 USC § 1227(a)(2)(E). Sometimes a person who actually is the victim of domestic violence in the relationship ends up being cross-charged and gets one of these deportable dispositions. The purpose of this waiver is to help that type of person. If the person makes certain showings, an immigration judge may waive deportability under this ground. The waiver also can preserve eligibility for non-LPR cancellation. See below and see INA § 237(a)(7)(A), 8 USC § 1227(a)(7)(A).

QUICK TEST: Is the Client Eligible?

1. *Is the client someone who needs to avoid deportability, e.g., a permanent resident or refugee? Or are they an undocumented applicant for non-LPR or VAWA cancellation of removal?*

   This waiver protects against a deportable offense. If granted, it will prevent an LPR, refugee, or other person with lawful status from being deported for domestic violence or stalking.

   This waiver also will allow an applicant to be statutorily eligible to apply for either non-LPR or VAWA cancellation, despite the fact that they are convicted of a crime under the domestic violence deportation ground. Without the waiver, a conviction described in criminal grounds of deportation is a bar to eligibility for these forms of relief. See §§ 17.3, 17.8 and see INA § 240A(b)(5), 8 USC § 1229b(b)(5).

2. *Is the Client Deportable for a Conviction of a "Crime of Domestic Violence," "Stalking," or Violating a Domestic Violence Protection Order Provision Such as a Stay-Away Order?*

   The waiver will excuse deportability under the domestic violence ground based on these offenses. It will not excuse deportability based on conviction of a crime of child abuse, neglect, or abandonment. Also, it does not excuse deportability under other grounds, e.g., if the offense also is a deportable firearms offense or crime involving moral turpitude.

3. *Is the Client Not the Primary Perpetrator of Violence in the Relationship, and Can the Client Make Certain Showings?*

   The client must be someone "who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship." INA § 237(a)(7)(A), 8 USC § 1227(a)(7)(A). In addition, the client must show one of the following: (1) that the client was acting in self-defense; (2) that the client was found to have violated a protection order intended to protect them; or (3) that the client committed, was arrested for, or convicted of a crime that did not result in serious bodily injury, and that was connected to the client having been battered or subjected to extreme cruelty. In making this determination, an immigration

[33] *Matter of N-V-G-*, 28 I&N 380 (BIA 2021). Refugees are not "previously admitted as LPRs" despite the fact that their adjustment to LPR status is retroactive to their date of entry as refugees.

[34] An LPR who travels outside the U.S. is not considered to be seeking admission upon their return, unless they come within an exception at INA § 101(a)(13)(C), 8 USC § 1101(a)(13)(C). For example, an LPR whom the government proves committed an inadmissible offense, or who stayed outside the U.S. for 180 continuous days, is seeking a new admission. See discussion in ILRC, *Removal Proceedings* (2024) at www.ilrc.org/publications.

judge can look at any relevant, credible evidence, and is not limited to the reviewable record of conviction. INA § 237(a)(7)(B), 8 USC § 1227(a)(7)(B).

Example: Marta is an LPR who is being abused by her boyfriend. After one altercation, she is convicted of a deportable crime of domestic violence, California Penal Code § 273.5. In removal proceedings, she applies for the domestic violence waiver and shows that she is primarily the victim in the relationship, and that her offense was connected to the abuse and did not result in serious bodily injury. If the waiver is granted, she can keep her green card and not be deported.

If instead Marta were undocumented and applying for "ten year" cancellation, she could apply for the same waiver. If she won, she would not be disqualified from non-LPR cancellation by having a deportable conviction.

§ 17.12 DEFERRED ACTION FOR CHILDHOOD ARRIVALS

Deferred Action for Childhood Arrivals ("DACA") grants work authorization and protection from removal to certain people who came to the United States as children. Currently DACA is only being granted to those who already have DACA or whose DACA expired within the year.

On August 20, 2022, the Biden Administration issued a new rule on DACA that incorporated the DACA policy into the Federal Regulations. The DACA regulation does not change who can access DACA. Note that as of September 2024, the DACA regulation has only been implemented partially due to pending litigation. USCIS is accepting and processing DACA renewal requests and accompanying employment authorization under the DACA regulations at 8 CFR 236.22 and 236.23.

Per the DACA injunction and most recent decision in *Texas v. United States*, that found the DACA regulation to be unlawful,[35] USCIS is accepting and adjudicating renewal applications from individuals who currently have DACA or whose DACA expired less than one year ago. Due to the Court decision, USCIS is not adjudicating any initial DACA requests. USCIS is interpreting initial DACA requests to be DACA requests from individuals who were not granted DACA prior to the July 2022 Texas court decision, any DACA requests by individuals whose DACA had expired more than a year before their renewal application, and those whose DACA had been terminated. USCIS can accept DACA initials and late renewals, though applicants will not get a decision until the Court case is finalized.

As of the writing of this resource the pending case that is considering the legality of the DACA regulation, is before the Fifth Circuit Court of Appeals. Before advising anyone, be sure to check for the latest information at, e.g., www.ilrc.org/daca or www.unitedwedream.org.

QUICK TEST: Is the Client Eligible for DACA? Rules as of September 2024

1. *Was Your Client Previously Granted DACA?*

   Applicants are eligible to apply for DACA if they currently have DACA or had DACA that expired less than a year ago. USCIS will not approve any initial DACA request while the order from the U.S. District Court for the Southern District of Texas in in effect. USCIS is currently holding cases for individuals who applied and were not granted prior to the Texas court decision as well as any applications submitted after the court order.

[35] See USCIS *DACA Litigation Information and Frequently Asked Questions*, at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions.

Individuals can still submit an initial DACA request to USCIS. USCIS will hold those requests to comply with the Court order.[36] This will also be the case for DACAs that expired more than a year ago or were terminated. To meet the initial DACA requirements, the applicant:

a. Must be at least 15 years old at the time of filing their request. However, a youth who is currently in removal proceedings, or has a final order of removal or voluntary departure, can request DACA while under the age of 15.
b. Must have come to the United States before their 16th birthday;
c. Must have continuously resided in the United States since at least June 15, 2007 to the present time, and was physically in the U.S., undocumented, and under age 31 as of June 15, 2012;
d. Must either be in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
e. Must not have been convicted (as an adult) of a felony, significant misdemeanor, or three or more other misdemeanors, and Must not pose a threat to national security or public safety. See Additional Facts below.

2. *Can a Client Who Has an Immigration Hold or Is in Removal Proceedings Apply for DACA?*

Yes. If a client in these circumstances meets the guidelines for DACA, they can request deferred action. Keep in mind that current guidelines only permit the granting of applications for renewals. See above.

3. *What Happens if the DACA Application Is Denied?*

If the DACA request is denied, USCIS has stated that it will not issue a Notice to Appear (NTA) or refer the case to ICE for possible enforcement action based on their denial unless it is determined that the case involves denial for a criminal offense, fraud, a threat to national security or public safety concerns.

ADDITIONAL FACTS: DACA—Crimes Bars

The Government's "Frequently Asked Questions"[37] ("FAQ") provides official information about DACA requirements. Bars to DACA include:

One Felony Conviction. A felony is defined as any local, state, or federal offense that has a potential jail sentence of over one year. *FAQ*, Question 67.

One "Disqualifying Misdemeanor" Conviction. For DACA, a disqualifying misdemeanor is an offense punishable by imprisonment for more than five days but not more than one year. It also must be either (a) a conviction, regardless of sentence imposed, of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence; *or* (b) a conviction for any offense if the person was sentenced to more than 90 days, excluding suspended sentences or time spent pursuant to an immigration hold. *FAQ*, Question 68.

[36] USCIS, *DACA Litigation Information and Frequently Asked Questions*, Q10-Q13 at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/daca-litigation-information-and-frequently-asked-questions.
[37] See the "Criminal Convictions" section of the government's DACA *Frequently Asked Questions*, updated March 8, 2018, at https://www.uscis.gov/archive/frequently-asked-questions#renewal%20of%20DACA.

Three "Other" Misdemeanor Convictions Not Arising from a Single Incident. A misdemeanor conviction must meet the federal definition of misdemeanor (punishable by imprisonment for more than five days but not more than one year) and not be a "disqualifying" misdemeanor. While three misdemeanor convictions generally are will bar DACA, multiple convictions that occur on the same day and arise out of the same act, omission, or scheme of misconduct are treated as just one offense for the purpose of the three misdemeanors. Minor traffic offenses such as driving without a license, and convictions of state immigration offenses, will not be considered. *FAQ*, Questions 69-70. For example, a person who was convicted of two misdemeanors from the same incident, one misdemeanor from a different incident, and one misdemeanor driving without a license, does not have three misdemeanors for this purpose.

Note: Misdemeanor Possession or Under the Influence of a Controlled Substance. While immigration law usually punishes even minor drug offenses, a misdemeanor possession conviction alone is not a bar to eligibility for DACA, unless a sentence of 91 days or more was imposed. (However, it will make the person inadmissible and probably unable to get permanent residency in the future, should that option become available. For more on this issue see *§ N.8 Controlled Substances* at www.ilrc.org/chart.

Juvenile Adjudications and Expunged Convictions. Juvenile delinquency adjudications are not convictions and are not absolute bars to DACA. A juvenile convicted in adult court will have an adult conviction for DACA purposes. *FAQ*, Question 73. In contrast to the rest of immigration law, DACA recognizes to some extent a withdrawal of plea pursuant to "rehabilitative relief," such as expungement, deferred adjudication, etc. "Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted." *Id*.

Discretionary Denials, Allegations of Gang Participation. Even if the person avoids all of the above, USCIS retains the right to deny the DACA application as a matter of discretion, based on the totality of the circumstances. *FAQ*, Question 1, 53. Further, USCIS will not grant DACA if it determines that the applicant poses a threat to national security or public safety. "Indicators that [someone] pose[s] such a threat include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States." *FAQ*, Question 71.

In particular, DACA will be denied based on even flimsy evidence of tenuous gang associations, and in many cases the applicant then is referred to removal proceedings. Any person who might be on a gang database or list, or with any record of gang associations, should get expert counseling before applying.

§ 17.13 "10-YEAR" CANCELLATION FOR NON-LPRS

Undocumented persons or others who have lived in the U.S. for at least ten years, and are not deportable or inadmissible for crimes, might be able to apply for a green card as a defense to removal, that is, while they are in removal proceedings. INA § 240A(b)(1), 8 USC § 1229b(b)(1).

QUICK TEST: Is the Defendant Eligible?

1. ***Has the defendant lived in the U.S. for ten years, or nearly that?*** *See Additional Facts below, for more information on calculating the ten-year period.*
2. *Does the defendant have a U.S. citizen or lawful permanent resident parent, spouse, or unmarried child under 21?* If Yes, note the name/s and relationship/s of qualifying relative/s:
3. *If time permits, get brief answers from the defendant to these questions regarding hardship; use additional sheet as needed. If you don't have much time, skip this question.*
    - Do these relative/s suffer from any medical or psychological condition; if so, what is it?

- Is there any other reason that the defendant's deportation would cause these relative/s to suffer exceptional, unusual hardship if the defendant were deported?

4. *Crime Disqualifiers. The defendant will be barred if they come within any of the following categories. Check any bars that apply and give the date of conviction and code section.*

   a. **Convicted at any time** of an offense described in the criminal grounds of inadmissibility and deportability,[38] including:

   - An aggravated felony;
   - An offense relating to a controlled substance (as defined under federal law);
   - A firearms offense (as defined under federal law, excluding several California offenses;
   - A crime involving moral turpitude (CIMT), *unless* one of the following occurred:
     - The person committed just one CIMT, which has a maximum possible sentence of *less* than one year (364 days or less), and the sentence imposed is no more than six months (this is not the petty offense exception; see Additional Facts below); or
     - Arguably, if the offense came within the youthful offender exception because the person committed just one CIMT, while under the age of 18, and the conviction in adult court as well release from resulting imprisonment ended at last five years ago;
   - Two or more offenses of any type with an aggregate sentence imposed of at least five years;
   - Prostitution (sexual intercourse for a fee);
   - A technically defined "crime of domestic violence," violation of a DV protective order prohibiting violent threats or repeat harassment; stalking; or a crime of child abuse, neglect, or abandonment (but not if these convictions occurred before September 30, 1996). Other than for a crime of child abuse, a discretionary waiver is available for certain mitigating factors see **§ 17.11**.
   - Federal conviction of high speed flight from checkpoint, some federal immigration offenses, federal failure to file as a sex offender;

   b. **Events within about the last ten years** (see below regarding exact time) that bar establishing the required "good moral character":[39]

   - Person engaged in prostitution (ongoing practice of offering sexual intercourse for a fee), regardless of conviction;
   - DHS has "reason to believe" that the person is or helped a drug trafficker, regardless of conviction;
   - Person made a qualifying admission that they committed a controlled substance offense or crime involving moral turpitude, regardless of conviction;
   - Person engaged in "alien smuggling" or lied under oath to get a visa or immigration benefit;
   - Person was a 'habitual drunkard' or convicted of gambling offenses; and

[38] INA § 240A(b)(1)(C), 8 USC § 1229b(b)(1)(C).
[39] INA § 240A(b)(1)(B), 8 USC § 1229b(b)(1)(B). See § 17.26, and INA § 101(f), 8 USC § 1101(f), for statutory bars to establishing good moral character.

- Assume that *two or more DUI convictions* within the last 10 years functions as a bar.[40]

ADDITIONAL FACTS: Cancellation of Removal for Non-LPRs

What Status Does the Client Get if They Are Granted Non-LPR Cancellation? An undocumented person (or an applicant of any status) who wins cancellation for non-LPRs will become a lawful permanent resident (LPR or "green card" holder). See INA § 240A(b)(1); 8 USC § 1229b(b)(1).

Do Many Applicants Actually Win? Only a very limited number do. An applicant must convince the immigration judge that a U.S. citizen or LPR parent, spouse, or unmarried child under age 21 will suffer "exceptional and extremely unusual hardship" if the applicant is deported. Hardship to the applicant does not count. This is a high standard and most grants are based upon a qualifying relative's significant physical or mental health problems, although other situations also can support a grant.[41] (Compare this to LPR cancellation, which generally is easier to win.)

So, Is It Worthless? No! The person will get their day in court and some do win. Also, eligibility is a positive factor in winning release from ICE detention. Defenders should try hard to keep the defendant from being convicted of an offense that destroys eligibility for non-LPR cancellation.

What if the Person Was Granted Cancellation or Other Relief Before? The applicant must not have received a prior grant of cancellation, suspension of deportation, or § 212(c) relief, nor have a J-1 visa.

When Does the Ten-Year Period Run? The required ten years of continuous physical presence will stop when the person is served with a Notice to Appear (NTA) in immigration court,[42] *unless* the NTA failed to state the date, time, and place of the hearing.[43] (It also stops with the commission of certain crimes, but most of these are absolute bars to relief in any event.) The person must also show good moral character for ten years up to the time the judge makes a final decision in the case. The exact ten-year periods can be complex in some situations; seek expert advice if dates are close or urge the client to do so.

What Are the Crimes Bars to Non-LPR Cancellation? Basically, the applicant cannot have been *convicted at any time* of an offense that is described in the crimes-related inadmissibility or deportability grounds.[44] See list in **Question 4** in Quick Test above, "Convicted at any time."

Note two special cases. First, there is a discretionary waiver for applicants who were convicted of a deportable crime of domestic violence, stalking, or violation of certain provisions of a domestic violence protection order, if the person proves that they were primarily the victim in the relationship and makes other showings; see **§ 17.11**.

Second, this relief has a unique bar to eligibility relating to crimes involving moral turpitude (CIMT). A single CIMT conviction is a bar unless a sentence of more than six months was imposed, and the CIMT carries a *maximum possible sentence of less than one year*. For example, a CIMT that carries a potential sentence of six months or of 364 days is not an automatic bar under this provision, but one that carries a potential sentence of a year (or more) is a bar. Several states have changed the potential sentence of a misdemeanor to 364 days, rather than one year, in order to help immigrants in cases like this. These include at least California, Colorado, Connecticut, Nevada, New York, Oregon, Utah, and Washington.

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[40] Having two DUIs creates a strong presumption that the person cannot establish good moral character for at least 10 years in the cancellation of removal context. *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019).
[41] See, e.g., discussion of hardship in *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 (BIA 2001).
[42] See INA 240A(d)(1)(A), 8 USC 1229b(d)(1)(A).
[43] See *Pereira v. Sessions*, 585 U.S. 198 (2018), and subsequent cases and see AIC, NIPNLG, *Strategies and Considerations in the Wake of Niz Chavez v. Garland* (July 2024), https://nipnlg.org/work/resources.
[44] See INA §§ 212(a)(2), 237(a)(2), 237(a)(3), 8 USC §§ 1182(a)(2), 1227(a)(2), 1227(a)(3).

Other states, such as New Mexico, always have had a 364-day limit for a misdemeanor. (Note that this bar to relief is slightly different from the CIMT "petty offense exception." That requires a maximum possible sentence of one year or less,[45] while the bar to non-LPR cancellation requires a maximum 364 days or less.). If the CIMT at issue has a maximum possible sentence of a year or more, consider whether a plea to "attempt" to commit the offense would result in a possible sentence of less than a year.

In addition, the applicant must establish good moral character for the last ten years. Significantly, the person must not have spent 180 days or more in jail as a result of one or more convictions during that time. See **Question 4** in Quick Test above, and see further discussion of good moral character at **§ 17.26**.

Ninth Circuit Relief for Persons with Pre-April 1, 1997 Conviction(s). In proceedings arising within Ninth Circuit states, a person whose relevant convictions pre-date April 1, 1997 might qualify for a better form of relief, suspension of deportation, despite being deportable or inadmissible.[46] See **§ 17.14**.

§ 17.14 SUSPENSION OF DEPORTATION FOR UNDOCUMENTED CLIENTS WITH OLDER CONVICTIONS

This relief might permit an undocumented person with old convictions—even old drug convictions—to become a lawful permanent resident. This is a defense under pre-1997 deportation proceedings that can be applied for in removal proceedings arising in the *Ninth Circuit Court of Appeals only*; other circuit courts of appeals may not have considered the issue. For further discussion, see the ILRC manual *Removal Defense* (March 2024), www.ilrc.org.

QUICK TEST: Is the Client Eligible?

1. *Are the client's deportable convictions all from before April 1, 1997? If the client was convicted of an aggravated felony, did the conviction occur before November 29, 1990?* and
2. *Since receiving the above conviction(s), has the client maintained good moral character?*

   If so, the client may be able to apply for the former "suspension of deportation." See discussion of good moral character at **§ 17.26**.

ADDITIONAL FACTS: Former Suspension of Deportation

Suspension of Deportation and Cancellation of Removal. Before April 1, 1997, an immigration judge had the discretion to "suspend the deportation" of certain undocumented persons who had resided illegally in the U.S. for seven years. If the judge did grant suspension, the person could adjust to lawful permanent residence. In addition, "ten-year" suspension of deportation was possible for qualifying applicants who became deportable for a crime but established ten years of good moral character immediately after. The applicant had to demonstrate exceptional hardship to themselves and/or to a USC or LPR family member. See former INA § 244(a)(2), 8 USC § 1254(a)(2).

As of April 1, 1997, Congress eliminated suspension of deportation and replaced it with cancellation of removal for non-permanent residents, see **§ 17.13**. Many noncitizens are barred from cancellation because they are inadmissible or deportable for crimes, or they do not have a USC or LPR family member. However, the Ninth Circuit indicated that a qualifying noncitizen still may apply for suspension of deportation today, in removal proceedings, if they were convicted of a deportable offense before April 1, 1997. The court used the same reliance analysis on eligibility for suspension that the U.S. Supreme Court used in considering ongoing eligibility for the former INA § 212(c) relief in *INS v. St.* Cyr, 533 U.S. 289,

[45] 8 USC § 1182(a)(2)(A). See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).
[46] See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006) and discussion in *Defending Immigrants in the Ninth Circuit*, § 11.4 (www.ilrc.org).

316 (2001). See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853 (9th Cir. 2006); *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 935 (9th Cir. 2007).

Specific Convictions. Under the former ten-year suspension, a person who is deportable under one of the crime-related grounds, such as the moral turpitude, controlled substances, or aggravated felony grounds, must show ten years of continuous physical presence and good moral character (GMC) immediately following the event that rendered them deportable. See former INA § 244(a)(2); 8 USC § 1254(a)(2). Thus, undocumented clients who have a serious conviction in the distant past still might be eligible for this form of suspension, if they are able to establish the required GMC beginning after that. Note that conviction of an aggravated felony is a *permanent* bar to establishing GMC, and thus a bar to suspension, if it occurred on or after November 29, 1990. Murder is a permanent bar to establishing GMC in all cases. See *Lopez-Castellanos, supra* at 851, and see **§ 17.26** regarding good moral character.

§ 17.15 THE T VISA: SURVIVORS OF TRAFFICKING IN PERSONS

The T visa is available to survivors of "a severe form of trafficking in persons" and their derivative family members. The T visa is a nonimmigrant status that allows the noncitizen to live and work legally in the United States for four years. After three years in this status, the T visa-holder can apply to obtain lawful permanent residency (a "green card"). 8 CFR § 245.23.

Many people who have survived human trafficking, and their advocates, prefer the term "survivor" to "victim." ILRC supports this. This section will use the term "victim" only to avoid confusion, because that is the term used in the law governing T visas.

QUICK TEST: Is the Client Eligible?

1. *Has the Client Been a Victim of Labor Trafficking?*

   A severe form of trafficking includes recruiting, obtaining, harboring, transporting, or providing persons for labor or services through the use of force, fraud, or coercion for the purpose of subjecting the person to involuntary servitude, peonage, debt bondage, or slavery. 22 USC § 7102(11)(B). This includes being promised a certain type of job, but the reality is something different, or being unable to leave the situation. Labor trafficking may have occurred even if the victim never provided the labor for which they were recruited. It can also involve being paid in food or shelter instead of money or having to work without compensation to pay off the debt from the trip to the United States. Although unpaid wages or a failure to pay may be signs of trafficking, labor trafficking may still be present if the victim was fully paid for their work. Labor trafficking can occur in many sectors, such as factories or sweatshops, the agricultural industry, domestic work, construction, or the restaurant industry.

2. *Has the Client Been a Victim of Sex Trafficking?*

   A severe form of trafficking also includes "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." 22 USC § 7102(12). A commercial sex act is any sexual act on account of which anything of value is given to or received by any person. 22 USC § 7102(4). If the person is under 18, they are eligible for a T visa even if the sexual act was voluntary; if the person is over 18, they must show the sexual act was induced by force, fraud, or coercion. Sex trafficking may include work at strip clubs, brothels, spas and massage parlors, or with escort services. It may also include compelled sexual activity that is not considered work or that is in exchange for something that has non-economic value (such as safety, protection, work authorization, or immigration status).

3. *Is the Client a Family Member of Someone Who Is Eligible for or Has a T Visa?*

   Certain relatives of a trafficking victim may be eligible for immigration relief as a derivative of the case. If the trafficking victim is age 21 or older, their spouse and child(ren) may qualify. If the victim is under age 21, the spouse, child(ren), parents, and unmarried siblings under the age of 18 may qualify. INA § 101(a)(15)(T)(ii), 8 USC § 1101(a)(15)(T)(ii); 8 CFR § 214.11(k). In situations in which the victim's family is in present danger of retaliation by the trafficker, certain additional family members may also qualify as derivatives. See 8 CFR § 214.11(k)(1)(iii).

ADDITIONAL FACTS: T Visas

In addition to showing that they are a victim of a severe form of trafficking, applicants for a T visa must meet other eligibility criteria. For example, an applicant must be present in the United States or at a port of entry because of the trafficking and must show they would suffer "extreme hardship involving unusual and severe harm" if removed from the United States. 8 CFR § 214.11(b). It is important to note that the trafficking need not be the reason they initially came to the United States; a T visa applicant can be recruited after entering the country. A T visa applicant who is 18 years old or older must also show compliance with any reasonable law enforcement agency request for assistance in the investigation or prosecution of acts of trafficking. See INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T), and 8 CFR § 214.11. T visa applicants are eligible for a broad waiver of the grounds of inadmissibility, including any criminal acts or convictions. INA § 212(d)(13), 8 USC § 1182(d)(13). This waiver is available if the applicant can show the inadmissibility was 'caused by or incident' to their victimization. T visa applicants are also available for a general discretionary waiver pursuant to INA § 212(d)(3), 8 USC § 1182(d)(3), where factors such as risk of harm to society, seriousness of immigration or criminal violations, and need to remain in the United States will be considered. If the offense that triggered inadmissibility can be linked to the trafficking, it might be helpful for defense counsel to put a statement explaining that in the record.

Resources to learn more about trafficking in persons and services for victims are available at:

- Coalition to Abolish Slavery & Trafficking (CAST) http://www.castla.org/training.
- Freedom Network USA https://freedomnetworkusa.org/.
- KIND (Kids in Need of Defense) https://supportkind.org/.

Contact these or other non-profit organizations or bar associations to see if it may be possible to obtain pro bono assistance for your client. More information about the T visa program is also available on the USCIS website at https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes.

§ 17.16 THE U VISA: SURVIVORS OF CRIME WHO ASSISTS LAW ENFORCEMENT

U nonimmigrant status (the "U visa") provides temporary lawful status and a path to lawful permanent residence to survivors of certain crimes who are, were, or will cooperate in investigation or prosecution of the offense. See INA §§ 101(a)(15)(U), 245(m); 8 USC §§ 1101(a)(15)(U), 1255(m); 8 CFR §§ 212.17, 214.14, 245.24.

QUICK TEST: Is the Client Eligible?

1. *Was the Person a Victim of Serious Crime in the United States?*

   The regulations outline a wide variety of qualifying crimes that could make someone eligible for U nonimmigrant status, regardless of when the crime occurred (there is no statute of limitations): "Qualifying crime or qualifying criminal activity includes one or more of the

following or any similar activities in violation of Federal, State or local criminal law of the United States: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; stalking, fraud in foreign labor contracting; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. The term "any similar activity" refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities." See 8 CFR § 214.14(a)(9). Regarding offenses such as witness tampering or obstruction, see § 214.14(a)(14)(ii).

2. *Did the Person Suffer "Substantial Physical or Mental Abuse" as a Result of Having Been the Victim of a Qualifying Crime?*

   Physical or mental abuse means "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim." 8 CFR § 214.14(a)(8).

3. *Can the Person Obtain Certification from Authorities That They Have Been, Are Being, or Are Likely to Be Helpful to Federal, State, or Local Authorities Investigating or Prosecuting the Criminal Activity?*

   The person must obtain a certificate completed by a certifying agency confirming that the person is helping or has helped officials already, or is willing and likely to be helpful in the future. A certifying agency is broadly defined to include "a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor." 8 CFR § 214.14(a). The certification may be made by an employee empowered to take such action.

   In California, Penal Code § 679.10 mandates California law enforcement, prosecutors, judges, and other parties designated by federal law to respond to all certification requests within 30 days (7 days if the person is in removal proceedings or can show that their family member will lose eligibility within 60 days), creates a rebuttable presumption of helpfulness, and requires them to keep records of the number of requests they have granted and denied. The CA state law has been modified several times, most recently to require certifiers to provide written explanation if they do not sign a certification form and to clarify a certifier may not refuse to certify for, among other specified reasons, a person's criminal or immigration history.

   If the victim is a child under the age of 16, then the parent, guardian, or next friend of the child victim may possess the information and indicate the willingness to be helpful in lieu of the victim. 8 CFR § 214.14.

4. *Or, Is the Client a Relative of a Victim Eligible for a U Visa?*

   "Victim" is interpreted broadly to include bystander victims (who suffer an unusually direct injury as a result of the crime they witnessed) and indirect victims (who are spouses, unmarried children, parents if the victim is under age 21, and siblings under the age of 18 if the victim is under age 21—if the direct victim was incompetent, incapacitated, or deceased).

   Additionally, certain family members may qualify as derivatives. If the victim eligible for a U visa is age 21 or older, their spouse and child(ren) may qualify. If the victim eligible for a U visa is under age 21, the spouse, child(ren), parents, and unmarried siblings under the age of

18 may qualify. 8 CFR § 214.14(f). At the time that the U visa recipient adjusts status to permanent residence, qualifying family members may also be able to adjust. See Additional Facts below.

ADDITIONAL FACTS: U Visas

Procedure and Benefits. The U visa begins as an application for a temporary, non-immigrant visa that allows the noncitizen to work and live legally in the United States for four years. Qualifying family members (defined in Quick Test above) also may qualify for a derivative U visa. See 8 CFR § 214.14(c) and resource materials cited below for information on application procedures for the U visa.

After three years in this status, U visa-holders can apply to obtain lawful permanent residence (a "green card"). Permanent residence will be granted for humanitarian, family unity, or public interest purposes. The applicant must have maintained continuous presence in the United States for three years, and must not have unreasonably refused to participate in an investigation or prosecution. The spouse and children of the crime victim (and parents of a child victim) may be granted permanent residence if they have not already been granted U derivative status and authorities consider it necessary to avoid extreme hardship. 8 CFR § 245.24.

There is a limit of 10,000 U visas granted a year. In recent years, this has created a lengthy backlog, which means current applicants will not have their cases adjudicated for many years. U visa applications which are deemed bona fide and in the United States will receive deferred action. However, there is currently a wait even for this bona fide determination.

Crimes Bars. When applying for a U visa, all grounds of inadmissibility except the national security grounds are potentially waivable. INA § 212(d)(14), 8 USC § 1182(d)(14). However, in the case of U visa applicants inadmissible on criminal grounds, the regulation states that discretionary waivers for those convicted of "violent and dangerous crimes" will only be granted "in extraordinary circumstances." U visa holders seeking to adjust status through the U visa are not subject to the majority of inadmissibility grounds, including the crimes grounds. Nevertheless, the adjustment process is an incredibly discretionary process, and criminal and immigration violations can cause a denial as a matter of discretion.

Resources. See USCIS Policy Manual on U visas at https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-2. For more resources, go to https://www.ilrc.org/u-visa-t-visa-vawa. For a comprehensive manual, see ILRC, *The U Visa: Obtaining Status for Immigrant Survivors of Crime* (www.ilrc.org). Search online, or contact non-profit organizations, bar associations, or resource centers, to see if it may be possible to obtain pro bono assistance for your client.[47]

§ 17.17 THE "S" VISA: KEY INFORMANTS

Certain informants or witnesses who supply "critical reliable information" or other critical help relating to terrorism or organized crime may qualify for a non-immigrant "S" visa. Only 250 of these visas potentially can be distributed each year, and they are difficult to win. INA §§ 101(a)(15)(S), 214(k), 8 USC §§ 1101(a)(15)(S), 1184(k); 8 CFR §§ 214.2(t), 236.4.

QUICK TEST: Is the Client Eligible

1. *Does the client have critical, reliable information relating to terrorism or organized crime (even if the client themselves have committed serious crimes)?*

[47] For example, in Los Angeles see the Legal Aid Foundation of Los Angeles (www.lafla.org); in San Francisco see the Immigrant Center for Women and Children (www.icwclaw.org); and in San Diego see various organizations.

2. *Is an interested federal or state law enforcement authority willing to support the application?*

   If the answer to both questions is "Yes," consider the possibility of applying for an "S" Visa. Understand, however, that this may be a long process and a long shot, as the applications go through an extensive vetting procedure and few are available. See, generally, 8 CFR § 214.2(t).

ADDITIONAL FACTS: "S" Visas

Criteria. Regarding information about organized crime, noncitizen may receive an "S-5" non-immigrant visa if "in the exercise of discretion pursuant to an application on Form I-854 by an interested federal or state law enforcement authority ("LEA"), it is determined by the Commissioner that the [noncitizen]: (i) Possesses critical reliable information concerning a criminal organization or enterprise; (ii) Is willing to supply, or has supplied, such information to federal or state LEA; and (iii) Is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise." 8 CFR § 214.2(t)(i).

Regarding information about terrorism, a noncitizen may receive an "S-6" non-immigrant visa if "it is determined by the Secretary of State and the Commissioner acting jointly, in the exercise of their discretion, pursuant to an application on Form I-854 by an interested federal LEA, that the [noncitizen]: (i) Possesses critical reliable information concerning a terrorist organization, enterprise, or operation; (ii) Is willing to supply or has supplied such information to a federal LEA; (iii) Is in danger or has been placed in danger as a result of providing such information; and (iv) Is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956, 22 U.S.C. 2708(a).

Benefits. An "S" visa is a non-immigrant visa providing temporary lawful status, admission into the U.S. if needed, and employment authorization. Similar visas may be available to the recipient's spouse, married or unmarried children, and parents. 8 CFR § 214.2(t)(3). All grounds of inadmissibility, except Nazi and genocide-related grounds, can be waived. INA § 212(d)(1), 8 USC § 1182(d)(1). Under some circumstances the S visa holder and family can adjust status to permanent residence. 8 CFR § 245.11.

A noncitizen who adjusted on an S visa is subject to strict removal conditions. 8 CFR §§ 236.4, 208.22(b). The person will be found deportable for one moral turpitude conviction if the offense was committed within 10 years after admission. INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i). If you represent such a person, consult an expert before entering a plea.

§ 17.18 APPLYING FOR ASYLUM OR WITHHOLDING OF REMOVAL

An individual who establishes a fear of persecution if returned to their home country may gain lawful status indefinitely if granted asylum (INA § 208, 8 USC § 1158) or temporary lawful status if granted withholding of removal (INA § 243(b)(3), 8 USC § 1231(b)(3)).

These applications are legally challenging and require expert immigration counsel. Criminal defense counsel can perform a vital service, however, by spotting possible cases. If your client is from a country where there are human rights abuses, you could ask if the person would like to have a *confidential* conversation about any worries they might have about returning. Note that it may take some time to gain the client's trust and get the whole story. In some areas, nonprofits or bar association groups represent asylum applicants pro bono, and might be willing to screen a defendant. Or, an attorney or non-attorney staff person from your office who is fluent in the client's language might work with the client. The client's story also might assist in the criminal case: in some instances, evidence of persecution may help persuade a judge or prosecutor to be flexible. Note: if you are representing a person who *already* has been granted asylum or refugee status, see **§ 17.20**.

QUICK TEST: Is the Client Eligible for Asylum or Withholding of Removal?

1. *Does the client reasonably fear that if returned to the home country, they will be persecuted based on race, religion, national origin, political views, or social group?*

   As a non-expert, your threshold question is simply, are there human rights abuses in the country and might the client have a serious problem or subjective concern about harm? For defenders interested in more information: the case will depend upon the client's ability to prove that they come within the technical terms in the above question. The client must show possible persecution due to membership in one of the above groups. The client can prove the case by evidence of past persecution and/or fear of future persecution, and must support their story with some documentation of human rights abuses. The persecution may come from the government or private individuals beyond the government's control, including criminal groups or even family members engaged in domestic abuse. Some individuals have won asylum from Mexico based on threats from the drug cartels that the government is unable or unwilling to control.

2. *Can the client qualify for asylum, or just for withholding of removal?*

   Asylum is preferable, because after one year the person can apply for lawful permanent residence and provide derivative relief to their spouse and children. INA § 209(b), 8 USC § 1159(b). An asylum applicant (a) must submit the application within one year of entering the U.S., absent extenuating or changed circumstances, (b) faces stricter bars based upon criminal convictions, (c) can be denied asylum as a matter of discretion, and (d) only needs to prove a "well-founded fear" of persecution (interpreted as a 10% likelihood).

   A person granted withholding receives permission to live and work in the U.S., but it does not enable the person to apply for permanent residence. A withholding applicant (a) may apply at any time, (b) has somewhat less strict criminal bars, (c) cannot be denied withholding as a matter of discretion, if the person qualifies under the statute, and (d) must prove a "reasonable probability" of persecution (interpreted as more than a 50% likelihood).

ADDITIONAL FACTS: Crimes That Bar Eligibility

Conviction of a "Particularly Serious Crime": Aggravated Felony. Both asylum and withholding are barred if the person is convicted of a broadly defined "particularly serious crime" ("PSC"). Aggravated felonies are treated differently as PSC's in asylum than in withholding. For asylum purposes, any aggravated felony conviction, including, for example, a nonviolent theft offense with a one year suspended sentence, automatically is a PSC and therefore a bar to asylum. 8 CFR 208.13(c)(2)(D). For withholding purposes, an aggravated felony is a PSC if the person was sentenced to at least five years in the aggregate for one or more aggravated felonies. 8 USC § 1231(b)(3)(B)(iii). Without the five-year sentence, an aggravated felony conviction is not necessarily a PSC for withholding. Instead, it will be considered on a case-by-case basis (see next paragraph). For example, the Board of Immigration Appeals found that despite the fact that it was an aggravated felony, a federal conviction of "alien smuggling" was not a PSC for purposes of withholding when in that case there was no violence or serious injury, and a sentence of three months was imposed. But as an aggravated felony, it was a PSC for purposes of asylum. *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999).

Conviction of a PSC: Other Offenses. Other than the aggravated felony bar, determining whether an offense is a PSC is done on a case-by-case basis in the asylum and withholding contexts. The adjudicator may look beyond the record of conviction, at least to some extent. Factors include, e.g., whether the offense involved violence against people, the extent of injury, and the length of sentence. See *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007).

The Attorney General created a very strong presumption that a conviction for drug trafficking is a PSC. There is a narrow exception for an immigrant who was peripherally involved in a transaction involving a small amount of drugs and money, where violence did not occur and minors were not affected. *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002). The Ninth Circuit held that this presumption applies only to convictions received on or after the date of publication of *Matter of Y-L*, which was May 5, 2002. *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947 (9th Cir. 2007).

Based on the individual circumstances of the case, the BIA has found the following convictions are not of PSCs: burglary with intent to commit theft of an unoccupied house (*Frentescu, supra*), and "alien smuggling" with a three-month sentence (an aggravated felony) (*Matter of L-S-*, 22 I&N Dec. 645,651 (BIA 1999)). The following were held to be PSCs: residential burglary with aggravating factors (*Matter of Garcia Garrocho*, 19 I&N Dec. 423 (BIA 1986)); robbery and assault with a deadly weapon (*Matter of Rodriguez-Coto,* 19 I&N Dec. 208 (BIA 1985), (*Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997)); a nonconsensual sexual act involving threat with a knife (*Matter of N-A-M-, supra*); and possession of child pornography (*Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012)). The Ninth Circuit found that a conviction of mail fraud to defraud victims of two million dollars was a PSC. *Arbid v. Holder*, 700 F.3d 379 (9th Cir. 2012). The Ninth Circuit remanded a case to the BIA to provide more justification for its unpublished finding that driving under the influence is a PSC. *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011)(en banc), see Reinhardt, J, *concurring* at 1111-1112

Discretionary Denials of Asylum; "Violent or Dangerous" Offenses. An application for asylum can be denied as a matter of discretion for various reasons, including criminal convictions that are less serious than a PSC. In addition, absent extraordinary circumstances asylum will be denied as a matter of discretion if the applicant was convicted of a "violent or dangerous" offense. *Matter of Jean*, 23 I&N. Dec. 373, 383 (A.G. 2002). There is no more specific definition of this term, but wherever possible counsel should plead to an alternate offense that does not involve serious violence against persons. In discretionary findings, however, a judge is not limited to the record of conviction.

Additional Bars to Asylum and Withholding. Under INA §§ 208(b)(2)(A) and 241(b)(3)(A), 8 USC §§ 1158(b)(2)(A) and 1231(b)(3)(B), immigration authorities may deny asylum or withholding to an applicant based on the following: the applicant ordered or participated in the persecution of another person; there are serious reasons to believe that the they committed a serious nonpolitical crime outside the U.S.; there are reasonable grounds to believe that the applicant is a danger to U.S. security; or the applicant is inadmissible or removable for terrorist activities (see INA §§ §§ 212(a)(3)(B)(i), 237(a)(4)(B), 8 USC §§ 1182(a)(3)(B)(i), 1227(a)(4)(B)).

§ 17.19 Convention Against Torture (CAT)

Quick Test: Is the Client Eligible for Relief under CAT?

1. *Does the Client Fear That They Will Be Tortured if Returned to the Home Country?*

   In 1999, the U.S. implemented the international Convention Against Torture (CAT), which prohibits a nation from sending a noncitizen to a country where they will be tortured. See 8 CFR §§ 208.16–208.17.

   An applicant for CAT must establish that it is more likely than not that they will be tortured upon return to the home country. 8 CFR § 208.16(c). The definition of torture is severe pain, whether emotional or physical, intentionally inflicted upon a person for any of various reasons, such as to obtain information, punish, or coerce. 8 CFR § 208.18(a). There is no requirement that the torture be on account of the person's race, religion, or other categories required for asylum or withholding. In fact, CAT was granted to an Iranian Christian who submitted extensive evidence that he would be tortured partly due to his U.S. conviction for drug

trafficking. *Matter of G-A-*, 23 I&N 366 (BIA 2002) (en banc). But see *Matter of M-B-A-*, 23 I&N 474 (BIA 2002) (en banc), where this argument failed for a Nigerian who was held to have submitted insufficient documentary evidence that traffickers would be tortured. See also **Question 4** below, regarding the limited relief available to applicants convicted of a particularly serious crime.

2. *Is the Threat That Either the Government Itself Will Torture the Person, or That the Government Will Turn a Blind Eye to a Third Party Who Will Torture the Person?*

   According to the Ninth Circuit and several other circuits, either of these options will suffice. Under 8 CFR § 208.18(a)(1), the feared torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." This does not mean, however, that a government official must agree with or support the torture. It may be enough that the official is aware of the practice and turns a "blind eye" to it, due to a lack of ability or will to intervene. *Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003) (informant's reasonable fear that Chinese "snakehead" smugglers would torture him is sufficient for CAT, without proof that Chinese officials approve of the torture), disapproving *Matter of S-V-*, 22 I&N 1306 (BIA 2000) (although the guerrillas controlled a significant part of Colombia, torture by the guerilla forces did not qualify for protection under the CAT because the government did not support the torture).

3. *Can the Person Document the Practice of Torture in the Home Country?*

   While legally an applicant's consistent and credible testimony can be sufficient (8 CFR § 208.16(c)), in practice it will be crucial to present documentary evidence of the practice of torture of similarly situated persons, from e.g., human rights reports, news articles, scholarly articles, expert affidavits, etc.

4. *What Is the Effect of Conviction of a Particularly Serious Crime ("PSC")?*

   A conviction will not bar relief under the CAT, which is why the CAT is a good alternative when asylum or withholding is barred by a conviction. See **§ 17.18**. However, a conviction may severely limit relief. There are two different forms of status under the CAT. A noncitizen who has not been convicted of a PSC and does not come within the other bars to withholding may seek CAT *withholding of removal*. The person will be released from detention and provided with employment authorization. 8 CFR § 208.16(b)(2). In contrast, a noncitizen who is convicted of a PSC may only apply for CAT *deferral of removal*. This person might not be released from immigration detention and could be removed to a third country if one would accept them. 8 CFR § 208.17(a), (b). For CAT purposes, the definition of PSC includes one or more aggravated felony convictions for which an aggregate sentence of five years or more was imposed, or where the facts and circumstances of an offense make it a PSC. 8 CFR § 208.17(a).

§ 17.20 DEFENDING ASYLEES AND REFUGEES

Asylees and refugees were granted lawful status because they showed that they would be persecuted if returned to the home country. They want to keep this lawful status. They also want to apply to adjust their status to lawful permanent residence. For more information on asylum, see **§ 17.18**, *supra*, online resources, or manuals such as ILRC, *Essentials of Asylum Law* (www.ilrc.org).

QUICK TEST: Can Client Keep Asylee/Refugee Status? Apply for Adjustment to LPR?

1. *Confirm: Is the Defendant Really an Asylee or Refugee?*

   Photocopy any document. Note that some people may think they have asylum status when they only have had a credible fear interview at the border or have a pending asylum application plus employment authorization. Did the person have an interview, and/or a hearing before a judge? What happened?

   Keep defendant out of removal proceedings. While the law is complex, assume that to stay out of removal proceedings refugees and asylees need to avoid a conviction of a "particularly serious crime," and refugees also need to avoid a deportable conviction.

2. *Is an Asylee Already, or About to Be, Convicted of a "Particularly Serious Crime"?*

   If "Yes," the person can be put in removal proceedings.

   A particularly serious crime (PSC) includes conviction of any aggravated felony, or of any drug trafficking offense, or other offenses on a case-by-case basis (usually those involving threat or force against persons, and not a single misdemeanor).

3. *Is a Refugee Already, or About to Be, Convicted of An Offense That Will Make Them Deportable?* Yes/No.

   If "Yes," it appears that the person can be put in removal proceedings.

4. *List or Attach Sheet with Prior Convictions and Current Charges That May Be Deportable Offenses or PSC's. Include Code Section and Sentence.*

   Keep defendant eligible for adjustment of status. A year after the person was admitted to the U.S. as a refugee or granted asylum in the U.S., they can apply for adjustment of status to become a lawful permanent resident. To do this they must be admissible, or if inadmissible they must be eligible for a special waiver—meaning they should not come within **Question 6 or 7** below. Qualifying for adjustment of status is a top priority; among other things, it is a defense to removal. See next page.

5. *Is the Person Inadmissible?* Yes/No

   If "Yes," they may be eligible for a waiver. See section (B)(4) below.

6. *Does ICE Have "Reason to Believe" That the Person Ever Participated in Drug Trafficking?*

   If "Yes," they cannot get the waiver and cannot adjust status to LPR as a refugee or asylee. However, if they were not *convicted* for drug trafficking, and they are not otherwise convicted of a PSC (and, if a refugee, also is not deportable) they might be able to keep their asylee or refugee status.

7. *Was the Person Convicted of a "Violent or Dangerous" Offense?*

   If "Yes," the waiver of inadmissibility will not be granted *unless* they show exceptional equities.

ADDITIONAL FACTS: Asylee and Refugee Status

A refugee is a person from a country designated by the U.S. who was granted refugee status after showing a well-founded fear of persecution in their home country due to their race, religion, nationality, political opinion or membership in a social group. They are admitted into the U.S. as a refugee.

An asylee is a person who entered the U.S. from *any* country, legally or illegally, and was granted asylum status here after making the same showing of fear of persecution. The person may have made this showing to an asylum officer in an affirmative application, or to an immigration judge as a defense to removal. The person had to submit the application for asylum within one year of entering the U.S., unless there were extenuating circumstances.

How Long the Person Remains in Asylee or Status and What Puts Them in Removal Proceedings. Asylee or refugee status remains valid indefinitely unless it is terminated; it can last for years or decades. Conviction of a "particularly serious crime" is a basis for termination of asylum status and institution of removal proceedings. The BIA has held that refugees can be placed in removal proceedings for a deportable offense.[48] In some cases a change in conditions in the home country is a basis for termination of asylum status.

Particularly Serious Crime (PSC). A PSC includes conviction of any aggravated felony, or of any drug trafficking offense (with the exception of a very small drug transaction in which the person was peripherally involved).[49] Other offenses are evaluated as PSC's on a case-by-case basis depending on whether people were harmed/ threatened, length of sentence, and other factors; in many cases the adjudicator may look beyond the record of conviction.[50] Conviction of major mail fraud and of possession of child pornography have been held to be PSCs. Generally, a misdemeanor that is not an aggravated felony is not a PSC.[51] See further discussion in **§ 17.18**.

Convictions Which Can Be Waived During Adjustment of Status of Asylees and Refugees. A year after either admission as a refugee or a grant of asylum, the person can apply to adjust status to lawful permanent residence. Even an asylee or refugee who is in removal proceedings and subject to termination of status can apply for adjustment, as a defense to removal. The adjustment applicant must be "admissible," or if inadmissible must be eligible for and granted a discretionary, humanitarian waiver created for asylees and refugees, at INA § 209(c), 8 USC § 1159(c). This waiver can forgive *any* inadmissible crime, with mainly two exceptions.[52] First, it cannot waive inadmissibility based upon the government having "reason to believe" the person has participated in drug trafficking.[53] Second, the waiver will not be granted if the person was convicted of a "violent or dangerous" crime, unless the person shows "exceptional and extremely unusual hardship" or foreign policy concerns.[54] None of these terms has been specifically defined. In some cases, medical hardship for family or applicant has been sufficient hardship for a waiver. Apart from those two exceptions, the waiver can forgive any offense, including an inadmissible conviction that also is an aggravated felony, for example for theft or fraud, or a non-trafficking drug offense.

§ 17.21 TEMPORARY PROTECTED STATUS (TPS)

QUICK TEST: Is the Defendant Eligible?

Noncitizens from certain countries who have experienced a devastating natural disaster, civil war, or other unstable circumstances may be able to obtain Temporary Protected Status (TPS) if their country

[48] See INA § 208(c)(2)(B), 8 USC § 1158(c)(2)(B) (asylee), Matter of D-K-, 25 I&N 761 (BIA 2012) (refugee).
[49] See *Matter of Y-L-*, 23 I.&N. Dec. 270 276-77 (AG 2002). Try to put such positive facts in the criminal record.
[50] *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982).
[51] *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (absent extraordinary circumstances, misdemeanor is not PSC).
[52] It also cannot waive certain terrorism and security related inadmissibility grounds. *See* INA § 209(c), 8 USC 1159(c).
[53] INA § 212(a)(2)(C), 8 USC § 1182(a)(2)(C).
[54] See *Matter of Jean*, 23 I.&N. Dec. 373, 383-84 (A.G. 2002).

has been officially designated for TPS by the Department of Homeland Security (DHS), and they meet the other eligibility requirements. See INA § 244, 8 USC § 1254a and 8 CFR § 244.1.

For more information, see materials at https://www.ilrc.org/tps and the ILRC manual, *Temporary Protected Status: Practice and Strategies* (December 2023), www.ilrc.org/publications.

1. Is the Client a National of a Country That Has Been Designated for TPS?

   In what country was the client born (country of nationality or, if stateless, the country where they last resided for an extended period)? _____

   Go to https://www.uscis.gov/humanitarian/temporary-protected-status to see which countries currently are designated for TPS. If the person is not from one of the designated countries, TPS is not an option. This country list can change at any time, so it is important to consult the USCIS website for the most accurate and updated information.

2. *If Yes: Did, or Can, the Client Meet the TPS Requirements for Nationals of Their Country, in Terms of Date of Entry into the U.S. and Date of Registration for TPS?*

   Required date of entry into U.S.: _____ Client's date of entry _____

   Deadline for registration/re-registration: _____ Client's reg. date, if any_____

   It may be difficult to tell what dates apply to the client by looking at the USCIS online materials. A nonprofit immigration agency or an immigration attorney can help with this.

3. *Can the Client Avoid Convictions That Are Bars to Eligibility for TPS?*[55]

Try to avoid the following automatic disqualifiers. Circle if client has a prior or is charged with:

- ✓ Any felony conviction (an offense with a potential sentence of more than a year).[56]
- ✓ Any two misdemeanor convictions (an offense with a potential sentence of more than five days but not more than one year).[57]

The person also must not be inadmissible. Criminal grounds of inadmissibility are:

- ✓ Conviction or qualifying admission of an offense relating to a controlled substance (including a small amount of marijuana).
- ✓ Conviction or qualifying admission of a crime involving moral turpitude (CIMT), unless it comes within the petty offense or youthful offender exceptions.
  - Petty offense exception: Committed only one CIMT, which carries a potential sentence of a year or less, and a sentence of no more than six months was imposed
  - Youthful offender exception: Committed only one CIMT, while under age of 18, and conviction and resulting imprisonment ended at least five years ago.
- ✓ Two or more convictions with a total sentence of more than five years imposed.
- ✓ Immigration authorities have substantial evidence that the person has ever participated in any way in drug trafficking, human trafficking, or money laundering;
- ✓ Evidence that the person engaged in "prostitution" (defined as an ongoing practice of offering sexual intercourse for a fee).

[55] For a more detailed discussion, see *The Impact of Crimes on TPS Eligibility* (April 2023), https://www.ilrc.org/resources/community/impact-crimes-tps-eligibility.
[56] *See* 8 CFR § 244.1, "Felony."
[57] *See* 8 CFR 244.1, "Misdemeanor."

The person can apply for a discretionary waiver of inadmissibility based on conviction or admission of possessing 30 grams or less of marijuana, evidence of engaging in prostitution, or (with more difficulty) the government having reason to believe they engaged in human trafficking or money laundering.[58]

ADDITIONAL FACTS: Temporary Protected Status (TPS)

The Secretary of Homeland Security may designate TPS for any country encountering catastrophic events such as ongoing armed conflict, earthquake, flood, drought, or other extraordinary and temporary conditions. Nationals of that country who are granted TPS will be protected from deportation and permitted to remain legally in the United States for a certain period of time and will receive employment authorization. TPS usually is granted for eighteen months, but it can be renewed multiple times as long as the country's designation continues. TPS is not permanent resident status (a green card).

Requirements for Temporary Protected Status:

- National of a country that was designated for TPS;
- Continuous presence in U.S. since the date required for nationals of that country;
- Admissible (not inadmissible for certain crimes or immigration violations), or eligible for a waiver of any applicable grounds of inadmissibility;
- Not convicted of a felony or two or more misdemeanors;
- Not subject to the asylum bars (has not persecuted others, not convicted of "particularly serious crime"); and
- Registered and/or re-registered on time, or eligible to late-register.

Countries Currently Designated for TPS. The list changes frequently, as do the dates for registering or re-registering. To see which countries currently are designated for TPS and special requirements for each country's nationals, consult https://www.uscis.gov/humanitarian/temporary-protected-status. Some of these designations have been in place for decades, while others are recent designations. Usually, a designation is for eighteen months, when it is either extended or terminated. Sometimes DHS will extend and re-designate a country for TPS due to continuing unstable conditions. Re-designation updates the eligibility dates allowing more recently arrived nationals to apply for TPS for the first time. For as long as the designation is extended, eligible applicants can renew their TPS status.

"Physical Residence" and "Registration" Requirements. When DHS announces the TPS designation of a country, it will set a date by which the nationals of the country must have resided in the United States in order to qualify. This means only people who were already residing in the United States at that time are eligible for TPS. DHS will also set a deadline for nationals of that country to "register" (apply for TPS). If TPS is extended again past the first period, the person must re-register by a certain date. In some cases, late initial registration is permitted. For example, where an eligible person did not apply because they had another pending immigration application, they may qualify for late initial registration.

Downside and the Upside to Applying for TPS. The downside is that an applicant for TPS is giving DHS their contact information and often acknowledging they are in the United States without lawful status. If a person's application for TPS is denied or the TPS designation of their country is terminated, they could be at risk of being placed in removal proceedings. The upside is that TPS has resulted in lawful status for a few years or even decades for some individuals, allowing them to remain in the United States lawfully with employment authorization. People are able to have TPS and at the same time pursue other,

[58] 8 USC 1254a(c)(2)(A), INA § 244A(c)(2)(A); 8 CFR § 244.3, and see ILRC, *Grounds of Inadmissibility for Temporary Protected Status* (Jul. 6, 2023), https://www.ilrc.org/resources/grounds-inadmissibility-temporary-protected-status.

more permanent forms of status. In some cases, TPS can also help people who are eligible to seek permanent residence through a family member to complete the process in the United States rather than return to their country of origin.

§ 17.22 NACARA FOR NATIONAL OF EL SALVADOR, GUATEMALA, AND THE FORMER SOVIET BLOC

Certain nationals from El Salvador, Guatemala, or former Soviet bloc countries who applied for asylum or similar relief in the early 1990's are eligible to apply for lawful permanent resident status (a green card) under the 1997 Nicaraguan Adjustment and Central American Relief Act (NACARA). See 8 CFR § 240.60-65. They can apply for a special form of suspension or cancellation of removal now, under the more lenient suspension of deportation standards that were in effect before April 1, 1997. Persons who became deportable or inadmissible for a criminal offense more than ten years before applying for NACARA can apply under the lenient rules governing the former "ten-year" suspension (see **§ 17.14**), except that an aggravated felony conviction is an absolute bar to NACARA. See 8 CFR §§ 240.60–61, 65. Family members of these persons also may be eligible to apply. For more information, go to www.uscis.gov and search for "NACARA eligibility" and other NACARA topics.

Specifically, the following persons may be eligible for NACARA. Salvadoran nationals are eligible if they (1) first entered the U.S. on or before September 19, 1990 and registered for benefits under the *ABC v. Thornburgh*, 60 F. Supp. 796 (N.D. Cal. 1991), settlement agreement on or before October 31, 1991 (either by submitting an *ABC* registration or by applying for temporary protected status (TPS)), unless apprehended at the time of entry after December 19, 1990, or (2) filed an application for asylum with the INS on or before April 1, 1990. Guatemalan nationals are eligible if they (1) first entered the U.S. on or before October 1, 1990 and registered for *ABC* benefits on or before December 31, 1991, unless apprehended at the time of entry after December 19, 1990, or (2) filed an application for asylum with the INS on or before April 1, 1990. Regarding the former Soviet Union, noncitizens are eligible if they entered the U.S. on or before December 31, 1990, applied for asylum on or before December 31, 1991, and at the time of application were nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia or any state of the former Yugoslavia.

§ 17.23 HRIFA RELIEF FOR HAITIANS AND DEPENDENTS

Before 2000, about 50,000 Haitian nationals in the U.S. were granted relief under HRIFA, the Haitian Refugee and Immigrant Fairness Act (1998).

Although the application period has closed for HRIFA principal applicants, some dependents of these HRIFA grantees still can apply for adjustment of status to lawful permanent residency (a green card). See 8 CFR § 245.15(d), (e). A person who is the spouse or unmarried child under 21 of a grantee may be eligible, as well as an unmarried son or daughter over age 21 who has lived in the U.S. since December 31, 1995. The dependent's relationship to the principal must have existed at the time that the principal was granted permanent residence and continue to exist at the time the dependent is granted permanent residence. The applicant must be admissible, but waivers are available. The applicant must document that all of the above requirements are met. Further discussion of requirements as well as the process for filing the Form I-485 appears at 8 CFR § 245.15(d), (e). Information is also available at www.uscis.gov (search for HRIFA).

See also Temporary Protected Status at **§ 17.21**, which more recently provided some relief to Haitians.

§ 17.24 THE AMNESTY PROGRAMS OF THE 1980'S *AND* FAMILY UNITY

In the 1980's and 1990's, a few million persons became lawful permanent residents through two amnesty programs under the Immigration Reform and Control Act of 1986 (IRCA). In the Legalization Program, persons who had lived in the U.S. from 1982 to 1986 applied first for lawful temporary residency, and then for lawful permanent residency. INA § 245A, 8 USC § 1255a; 8 CFR § 245a. In the Special Agricultural Worker (SAW) program, persons who had worked as farmworkers for certain time periods applied for lawful temporary residence, and automatically became lawful permanent residents as of December 1, 1989 or December 1, 1990. INA § 210, 8 USC § 1160; 8 CFR § 210.

Some spouses and children of amnesty recipients did not qualify for amnesty, but did qualify for the Family Unity program, as the spouse or the child under 21 years old (as of May 5, 1988) of a noncitizen legalized through amnesty, who entered the U.S. (and in case of a spouse, married) by May 5, 1988. See 8 CFR §§ 236.10-236.18. Family Unity provided temporary lawful status and work authorization, as a bridge until the recipient could immigrate through the relative who had become an LPR under amnesty. Today most people have moved on from these programs, but you may encounter some clients who either still are processing old amnesty applications, or still have Family Unity status.

QUICK TEST: Is the Client Still Processing an Amnesty Application?

1. *Does the client have, or believe he had, a "Lawful Temporary Resident" card?*
2. *Does the client believe they are participating in a class action suit arising from the Legalization and SAW programs of the 1980's?*

If the answer to either question is "Yes," refer the client to immigration counsel. For information on the amnesty class actions, see, e.g., www.uscis.gov/sites/default/files/document/policy-manual-afm/afm24-external.pdf.

Goal: Try to avoid a plea to one felony or three misdemeanors (any offense), or an offense that will make the person inadmissible. These are bars to continuing in the Legalization program.

QUICK TEST: Does the Client Still Have Family Unity Status?

1. *Does the client have a current or recent Family Unity employment authorization card? Or, does the client state that they have Family Unity status?*
2. *Regardless of Family Unity, the client might be eligible for regular family immigration if the marriage still exists. Complete the Relief Questionnaire with this in mind.*

Photocopy the person's employment authorization card and consult with an immigration attorney. Consider the possibility of family immigration.

Goal: To avoid bars to Family Unity, try to avoid a plea to one felony or three misdemeanors, a "particularly serious crime" (see Asylum and Withholding at **§ 17.18**, above), or a deportable offense. If while a minor, the person pled guilty to "an act of juvenile delinquency which if committed by an adult" would be a felony involving violence or the threat of physical force, Family Unity can be terminated. 8 CFR §§ 236.13, 236.18. Try to avoid an inadmissible conviction, or at least remain eligible for a waiver, in case family immigration is possible.

§ 17.25 VOLUNTARY DEPARTURE INSTEAD OF REMOVAL

Clients who are detained and must leave the United States may gain crucial benefits from leaving under a grant of voluntary departure rather than under a removal order. Leaving under voluntary departure may

make it more likely that a client can return legally. In addition, it will limit their exposure to federal prosecution should they attempt to re-enter the U.S. unlawfully in the future. Detained clients may need to advocate vigorously for themselves to get voluntary departure; see "Practice Tip for Clients" at the end of this section. A non-detained client should get expert advice before applying for voluntary departure.

The client may apply for a grant of voluntary departure from an immigration judge (8 CFR § 1240.26) or, if not in removal proceedings, from a DHS official (8 CFR § 240.25).

A. Pre-Hearing Voluntary Departure: Aggravated Felony Bar

If the client has no possible relief from, or defense against, removal, they may want to skip the full removal hearing and leave the United States. This client should consider applying for "pre-hearing" voluntary departure. Authorities may grant voluntary departure "in lieu of being subject to [removal proceedings] or prior to the completion of such proceedings."[59] Certain DHS officers have authority to grant voluntary departure in lieu of initiating removal proceedings, or the immigration judge may grant pre-hearing voluntary departure at the start of court proceedings.[60] To qualify, the person must be willing and able to depart the United States, and must not be deportable under the aggravated felony ground (8 USC § 1227(a)(2)(A)(iii) and 8 USC § 1101(a)(43)) or under the terrorist grounds (8 USC § 1227(a)(4)(B)). The person may also need to pay for transportation to the home country. Keep in mind that even a person who meets all of these requirements may be denied voluntary departure as a matter of discretion.

An aggravated felony may not be a bar for some immigrants. The voluntary departure regulation, created by DHS, bars persons who are "convicted of" an aggravated felony. However, the voluntary departure statute, created by Congress, only bars persons who are "deportable under" the aggravated felony ground.[61] The difference is that a person who has not been admitted to the United States, for example who entered without inspection, cannot be found "deportable" for a crime.[62] Therefore, despite the regulation, a person who entered without inspection ought to be eligible for pre-hearing voluntary departure even with an aggravated felony conviction. To date, no court has specifically addressed this discrepancy between the statute and regulations, but rather courts have uniformly applied this "aggravated felony bar" to all applicants for voluntary departure. Therefore, in practical terms, a noncitizen would be denied voluntary departure by the immigration judge and have to appeal this argument to a federal court in order to receive it, likely while remaining in detention.

B. Post-Hearing Voluntary Departure Has Several Requirements

Voluntary departure may also benefit clients who will be able to apply for relief in removal proceedings (e.g., adjustment of status, cancellation, asylum or VAWA), or contest that they are deportable. They can apply for voluntary departure "in the alternative," in case the immigration judge denies their primary application to stay in the United States. Whether a non-detained person should apply for voluntary departure in the alternative can be a complex question in immigration practice because there are harsh consequences if the person is granted voluntary departure and then fails to depart by the deadline. However, as a criminal defense attorney it is best to preserve the alternative for the client if possible.

To receive voluntary departure, the client must meet several requirements. Similar to pre-hearing voluntary departure, the person must not be deportable under the aggravated felony or terrorist grounds, and must be willing and able to depart voluntarily. In addition, the person must establish five years of good moral character, must establish at least one year of presence in the United States before removal

[59] See INA § 240B(a)(1), 8 USC § 1229c(a)(1).
[60] See 8 CFR § 240.25; 8 CFR § 1240.26(b).
[61] Compare 8 CFR § 1240.26(b)(1)(i)(E) with 8 USC § 1229c(a)(1).
[62] See INA § 237(a)(2), 8 USC § 1227(a)(2).

proceedings were begun, and must establish their ability and intent to leave the United States at their own expense, including by posting a bond and presenting valid travel documents.[63]

C. Advantages of Voluntary Departure Instead of Removal

There are several benefits to leaving the United States under voluntary departure. If the person is not in immigration detention, they may be granted a period of some months before leaving under voluntary departure. This will provide the person time to make arrangements to leave behind life in the United States. Detained persons benefit from voluntary departure as well.

A noncitizen who re-enters the United States illegally after being ordered removed has committed a federal felony. See 8 USC § 1326(b). This is a very commonly prosecuted federal felony, and sentences for illegal re-entry commonly run to 30 months or more. In contrast, a first conviction for illegal entry, not after removal, is a federal misdemeanor with a maximum six-month sentence. 8 USC § 1325. In other words, if the client might end up trying to return illegally to the United States, obtaining voluntary departure rather than removal may protect them from spending years in federal prison later on.

Voluntary departure also is valuable because a person who is ordered removed may not re-enter the United States legally for a period of 10 years unless they obtain a discretionary waiver of inadmissibility. See INA § 212(a)(9)(A)(ii), (iii), 8 USC § 1182(a)(9)(A)(ii), (iii). Therefore someone who hopes to return, for example on a family visa, will benefit from not having been "removed," but having left voluntarily.

Finally, voluntary departure allows the person to depart for any country that will permit them to enter, whereas removal is to a designated country. This may be useful for individuals who are afraid to return to their country of origin but are denied asylum and related protections.

D. Practice Tip for Clients: How to Get Voluntary Departure While in Detention

Immigration officers at detention facilities are authorized to grant pre-hearing voluntary departure.[64] Unfortunately, some officers commonly offer detainees the opportunity to sign a paper agreeing to "voluntary *removal*," while leaving detainees with the impression that this is a "voluntary *departure*." Voluntary removal qualifies as a "removal" (deportation) and carries none of the advantages of voluntary departure discussed above. The one advantage it carries is that the detained person can get out of detention faster by just signing the paper, rather than fighting to get voluntary departure. While this advantage may be very tempting for detainees who wish to leave detention as soon as possible, they may bitterly regret the decision if they intend to return to the United States in the future.

The only sure way for motivated detainees to receive voluntary departure is to request it and refuse to sign anything else offered by DHS officials. The detainee must read any offered paper very carefully and get assistance from a lawyer or other advocate in evaluating the paper. The detained individual can also wait to see an immigration judge for a master calendar hearing—which could take a month or longer.

Since you, the criminal defense attorney, are likely to be the last lawyer a detainee ever sees, try to help the client to understand how to obtain voluntary departure, and why it may be important to consider this information before they come into contact with DHS officials.

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[63] INA § 240B(b)(2), 8 USC § 1229c(a)(1); 8 CFR § 1240.26(b). But note that in *Matter of M-F-O-*, the BIA held that an NTA that lacks the time, date, and place of removal proceedings will not "stop the clock" for purposes of counting the one-year period for voluntary departure. 28 I&N Dec. 408, 416-17 (BIA 2021). This means that even someone who is placed in removal proceedings shortly after arriving in the U.S. might still qualify for post-hearing voluntary departure if their NTA does not contain this required information.

[64] 8 CFR § 240.25.

§ 17.26 ESTABLISHING "GOOD MORAL CHARACTER" (GMC)

A. Overview

Several forms of immigration relief, as well as naturalization to U.S. citizenship, require the applicant to establish that they have been a person of "good moral character" during a certain period of time leading up to filing the application. This section will discuss good moral character ("GMC"). Bars to establishing GMC appear at INA § 101(f), 8 USC § 1101(f); see also 8 CFR § 316.10.

What Forms of Relief Require Good Moral Character? Applicants must establish that they have been a person of good moral character for the preceding five years or three years in order to apply for naturalization (see **§ 17.4**); the preceding ten years to apply for cancellation of removal for non-lawful permanent residents (**§ 17.13**); the preceding seven or ten years for NACARA or the former suspension of deportation (**§§ 17.14, 17.22**); the preceding three years or some reasonable period to apply for relief under VAWA (**§ 17.8**); or the preceding five years to apply for voluntary departure *at the end of* removal proceedings (**§ 17.25**).

Immigration benefits that do not require good moral character include family immigration; adjustment of status; asylum, withholding of removal, and the Convention Against Torture; Temporary Protected Status; LPR cancellation; the former § 212(c) relief; Special Immigrant Juvenile status; DACA; the T, U, and S visas; and voluntary departure *before* removal proceedings are concluded.

What Is the Difference Between Statutory Bars to, and Discretionary Findings of, GMC? The immigration statute defines good moral character in the negative, by setting out factors that will bar a finding, rather than setting out factors that establish good moral character. See list at INA § 101(f), 8 USC § 1101(f) discussed below. The task of criminal defense counsel is to keep the client from coming within one of these statutory bars. That is the focus of these materials.

Note, however, that if you and the client succeed in avoiding the statutory bars, the client still has a second job: they will need to convince the immigration judge to make a discretionary, affirmative finding that they actually were of good moral character during the period. In that determination, the judge must consider all positive factors relevant to the evaluation of the person's character, as well as negative factors (including criminal history and underlying facts). *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991). Good moral charter means "character which measures up to the standards of average citizens in the community in which the applicant resides." 12 USCIS-PM ch. 1(A). In practice, positive statements by probation officers, sentencing judge, or even defense counsel may be quite helpful in winning a discretionary case.

Calculating the Time for Which Good Moral Character Must Be Established. Good moral character need only be established for a certain period of time for each remedy, e.g. the preceding five years for naturalization. Usually, one counts backwards from the date of filing the application. A new period of GMC starts the day after the event that is a bar. If a conviction is a bar, the period starts the day after commission of the offense, not conviction.[65]

> **Example:** Elsa pled guilty on January 14, 2020, to an allegation that she committed a moral turpitude offense on January 1, 2020. The conviction made her inadmissible and was a bar to establishing good moral character. She potentially may establish five years of good moral character starting on January 2, 2025, five years after the date she committed the offense. At that time, even if the conviction still exists and she still is inadmissible, she will not be statutorily barred from establishing good moral character. (She still will need to persuade the adjudicator to find as a matter of discretion that she actually showed good moral character.)

[65] See, e.g., *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972), 8 CFR § 316.10(b)(2).

B. Statutory Bars to Establishing Good Moral Character

Bars Based on Inadmissibility Grounds. Some of the bars to establishing good moral character reference crimes grounds of inadmissibility.[66] A person is barred who is described in these grounds:

- Crimes involving moral turpitude (except for an offense that comes within the petty offense or youthful offender exception);
- Conviction or admission of a drug offense (except for a single conviction of simple possession of 30 grams or less of marijuana);
- Immigration authorities' "reason to believe" the person is a drug trafficker;
- total of five years' sentence to confinement imposed for two or more convictions;
- Engaging in prostitution (sexual intercourse for a fee) or commercialized vice;
- "Alien smuggling," and
- Polygamy.

Bars Unique to the Good Moral Character Statute. Other bars to establishing GMC don't refer to inadmissibility grounds, and only appear at 8 USC § 1101(f), parts (1), (4)-(7). The bars apply to a person:

- Who is a "habitual drunkard;"
- Whose income is derived principally from illegal gambling, or who has been convicted of two or more gambling offenses during such period;
- Who has given false testimony to obtain any immigration benefits; and
- Who has during the GMC period been confined as a result of conviction to a penal institution for an aggregate period of 180 days or more, regardless when the offense was committed.

The bar based on 180 days' confinement refers to *actual* time served in jail or prison as a result of the conviction. This bar is different from the definition of sentence imposed ("term of imprisonment") at 8 INA § 101(a)(48)(B), USC § 1101(a)(48)(B). This bar does not count suspended sentences of any kind. If a one-year sentence is imposed but the person is released for any reason after 170 days, the person has not been confined for 180 days. The nature of the offense does not matter, and it does not matter when the offense(s) were committed, as long as the time in jail occurs during the GMC period.[67] The confinement must be "as a result of a conviction" under the immigration definition, e.g. not as a result of a delinquency disposition. The 180 days does not include pre-sentencing time in jail *unless* that is claimed as credit for time served. One defense strategy to avoid the 180-day (or other sentencing) consequence is to put off the sentencing hearing until the person has served some time in custody, and then bargain to waive credit for the time served in exchange for a shorter "sentence."

Permanent Bars: Aggravated Felony After November 29, 1990, and Murder. A conviction of murder at any time, and a conviction of an aggravated felony after November 29, 1990, will permanently bar a finding of GMC.[68] For example, an LPR—including a military veteran—who was convicted of an aggravated felony in 1991 never will be permitted to naturalize, because they never will be able to establish good moral character. Some additional permanent bars to establishing good moral character apply only to naturalization, for example, desertion from military duty. See **§ 17.4**.

Two or More DUIs. In 2019, former Attorney General Barr held that there is a presumption that a person convicted of two DUI offenses during the statutory GMC period is barred from showing good moral character, regardless of the person's rehabilitation or the fact that the person is not a "habitual drunkard." *Matter of Castillo-Perez*, 27 I&N Dec. 664 (AG 2019). The presumption cannot be rebutted by

[66] 8 USC § 1101(f)(3), referencing inadmissibility grounds at 8 USC § 1182(a)(2), (6)(E), (9)(A).
[67] See, e.g., *Matter of Piroglu*, 17 I&N Dec. 578, 580 (BIA 1980).
[68] 8 USC § 1101(f)(8); 8 CFR § 316.10(b)(1)(ii); *U.S. v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (*en banc*).

rehabilitation or good works during the GMC period, but perhaps by a showing that the conduct was an "aberration." *Id*. at 671.[69] Avoiding two or more DUIs within a five-year period for any noncitizen who may need to show GMC in the near-future, is therefore an important defense goal.

Other Bars. Federal regulation and instructions pertaining to naturalization (which might also be considered in other applications) provide that, absent extenuating circumstances, failure to support dependents, having an extramarital affair that destroys a marriage, or "committing unlawful acts" that adversely reflect on his character, may bar good moral character. 8 CFR § 316.10 (b)(3). Being on *probation or parole* during the GMC period might or might not prevent a finding of GMC. The person must not be on probation at the time of a naturalization interview. See 8 CFR § 316.10(b), (c) and see **§ 17.4**.

[69] See discussion at CLINIC/NIPNLG, Practice Pointer: *Matter of Castillo-Perez* (March 2020), https://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2020_25Mar_Castillo-Perez.pdf.

