

## **§ N.17 Immigration Relief Toolkit For Criminal Defenders**

*How to quickly spot  
possible immigration relief  
for noncitizen defendants*

**Immigrant Legal Resource Center**  
**[www.ilrc.org](http://www.ilrc.org)**

## Table of Contents

Why and How to Use this Toolkit .....	3
Client Questionnaire .....	4
Comprehensive Chart: Eligibility for Immigration Relief Despite Crimes .....	6
Quick Test/Fact Sheets on Key Forms of Relief:	
- LPR Cancellation.....	12
- Non-LPR Cancellation .....	14
- Section 212(h) Crimes Waiver .....	16
- Family Immigration, Adjustment of Status .....	18
- Refugees and Asylees .....	21
- Temporary Protected Status .....	23

The Immigrant Legal Resource Center ([www.ilrc.org](http://www.ilrc.org)) created this toolkit on behalf of the Defending Immigrants Partnership, a national consortium that supports criminal defenders in their task of competently representing noncitizen clients. Defenders can register for free additional resources at [www.defendingimmigrants.org](http://www.defendingimmigrants.org). Many thanks to the Defending Immigrant Partnership national partners, the Immigrant Defense Project ([www.immigrantdefense.org](http://www.immigrantdefense.org)) and National Immigration Project of the National Lawyers Guild ([www.nipnlg.org](http://www.nipnlg.org)), and national defender partners, the National Association of Criminal Defense Lawyers ([www.nacdl.org](http://www.nacdl.org)) and National Legal Aid and Defender Association ([www.nlada.org](http://www.nlada.org)). Thanks also to Allen Phou of the Santa Barbara Office of the Public Defender for formatting the write-on client questionnaire.

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## Immigration Relief Toolkit

### **Why Should I Use This Toolkit?**

Many of your immigrant 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 find them, these people will be deported *unless* they can apply for some kind of immigration status or relief.

For these defendants, staying eligible to apply for lawful status or relief may be the most, if not the only, important immigration consideration. The Supreme Court has recognized that preserving eligibility for discretionary 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*, 130 S. Ct. 1473, 1483 (2010), citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

These materials should help defenders or paralegals to spot *possible* immigration relief *relatively quickly*. If you determine that your client might be eligible for specific relief, this will help inform your defense goals, and you can tell your client that it is especially important for him or her to get immigration counsel.

### **How Should I Use This Toolkit?**

These materials can be used in three steps. First, complete the ***Client Immigration Questionnaire***. A paralegal or attorney can complete this form with the defendant. Page 1 of the form captures the information needed to analyze whether the person is deportable or inadmissible based on convictions. Page 2 asks twelve questions to identify *possible* relief. This will let you know if the client is even in the ballpark to make some immigration application.

Second, look at the ***Annotated Chart***, entitled “Eligibility for Selected Immigration Relief Despite Criminal Convictions.” This will identify which convictions may bar eligibility for the type of relief that your client might apply for.

**Example:** Look in the Chart at the first row across, “LPR Cancellation.” You can see that an aggravated felony conviction is a bar to eligibility, but that no other conviction is. You also can see that it has a seven-year “clock-stop” requirement.

Third, the Toolkit contains two-page ***Quick Test/Fact Sheets*** that go into more detail about common forms of relief. In each case the first page (Quick Test) asks questions to determine real eligibility for the relief, while the second page (Fact Sheet) provides key facts about the relief.

## Defendant Immigration Questionnaire: Basic Information

*This information is confidential and protected by attorney-client privilege*

Interviewer's name	Phone number	Email address

Defendant's Name	A# (if possible)	Next hearing date
Def's Country of Birth	Def's Date of Birth	Immigration Hold:
		<input type="checkbox"/> Yes <input type="checkbox"/> No

### 1. ENTRY:

Date first entered U.S.	Visa Type (or 'none')	Significant Departures (approximate OK; append list)
		Dates: Length of departures:

### 2. IMMIGRATION STATUS:

Lawful permanent resident?	Other Current Immigration status? (check one)
<input type="checkbox"/> Yes <input type="checkbox"/> No Date Obtained? _____.  On what basis (e.g. family visa, refugee):  Screen for possible US citizenship if: <input type="checkbox"/> Grandparent or parents were US citizen at time of Def's birth; OR <input type="checkbox"/> Parent(s) became naturalized US citizens while Def was under age 18; Def became LPR while under age 18	<input type="checkbox"/> Undocumented <input type="checkbox"/> Doesn't know <input type="checkbox"/> Has work permit (is there a pending application for status or relief?) <input type="checkbox"/> Refugee <input type="checkbox"/> Asylee <input type="checkbox"/> Temporary Protected Status <input type="checkbox"/> Deferred Action for Childhood Arrivals (DACA) Other: _____
<b>Photocopy <u>all</u> immigration documents!</b>	

### 3. PRIOR REMOVAL/DEPORTATION/VOLUNTARY DEPARTURE:

Was Defendant ever deported?	Describe what happened, to extent possible (e.g., saw an imm. judge, just signed form before leaving U.S., etc.)	Where? When?
<input type="checkbox"/> Yes <input type="checkbox"/> No		

### 4. DEFENSE GOALS & CRIMINAL HISTORY

Defendant's Goals Re: Immigration Consequences	Criminal History & Current Charges
<input type="checkbox"/> Avoid conviction that triggers deportation <input type="checkbox"/> Preserve eligibility to apply for immigration status or relief from removal (see <i>Questionnaire</i> on next page for all undocumented or otherwise deportable defendants) <input type="checkbox"/> Get out of jail ASAP <input type="checkbox"/> Immigration consequences/deportation not a priority <input type="checkbox"/> Other goals re: imm consequences:	Append separate sheet to:  <b>List Criminal History</b> (include offense name and cite, date of conviction, sentence even if suspended for each conviction. Include expunged convictions, juvie, and other resolutions)  <b>List Current Charge/s, Plea Offer/s</b>

<b>List Criminal History</b>

<b>List Current Charge(s), Plea Offer(s)</b>

## Defendant Immigration Questionnaire: Possible Relief

(If answer to any question is “yes,” the client might be eligible for the relief indicated.  
Circle the relief and **get more details**. Additional research will be needed to confirm eligibility.)

1. **Might client be a U.S. citizen?** If the answer to *either* question is yes, investigate whether client is a USC. (1) At time of birth, did client have a USC parent or grandparent? (2) Before age of 18, did client become an LPR, and did one of client’s parents naturalize to U.S. citizenship?
2. **LPR with seven years in U.S.** Client is an LPR now (has a green card) and has lived in the U.S. for at least seven years since he or she was admitted at the U.S. border in any status (e.g. as a tourist, LPR). No aggravated felony conviction. *Consider LPR cancellation of removal.*
3. **Close family member who is USC or LPR.** Client has a USC: spouse; child who is over 21; or parent if the client is unmarried and under age 21. *Consider “immediate relative” visa petition.*  
Client has an LPR spouse; an LPR parent if Client is unmarried; or a USC parent if the Client is age 21 or older and/or married. *Consider less beneficial “preference” visa petition.*
4. **Abused by USC or LPR spouse or parent.** Client, or his or her child or parent, has been battered or abused by a USC or LPR spouse or parent. *Consider VAWA relief.*
5. **Domestic Violence Waiver.** Client is LPR who is deportable for a DV conviction, but in fact client is the victim of DV in the relationship. *Consider Domestic Violence Waiver.*
6. **Ten years in U.S.** Client has lived in U.S. at least ten years since entry, and has a USC or LPR parent, spouse or child. Very minor criminal record. *Consider Non-LPR cancellation.*
7. **Terrible events in home country.** Client is from a country with recent significant human rights violations or natural disaster. *Consider asylum, withholding or the Convention Against Torture. Consider Temporary Protected Status.*
8. **Victim/witness of crime.** Client was victim of a crime and is or was willing to cooperate in the investigation or prosecution of the crime, if crime is, e.g., rape, incest, DV, assault, kidnapping, false imprisonment, extortion, obstruction of justice, or sexual assault, abuse. *Consider U Visa.*
9. **Victim of “severe” alien trafficking.** Client is victim of (a) sex trafficking of persons under age 18, or (b) trafficking persons by use of force, fraud, or coercion “for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” *Consider T Visa.*
10. **Juvenile victim of abuse, neglect, abandonment.** Client is under the jurisdiction of a delinquency, dependency, or probate court and can’t be returned to a parent (here or in home country) due to abuse, neglect or abandonment. *Consider Special Immigrant Juvenile.*
11. **DACA (DREAM) for young persons.** Client entered U.S. while under 16 and before 6.15.2007, and was under 31 as of 6.15.2012. Strict crime bars. *Consider Deferred Action for Childhood Arrivals.*
12. **Waiver under INA § 212(h).** Client is an LPR now, or is eligible to apply for LPR on a family or VAWA visa (see #3, 4 above) and is inadmissible for: CIMTs, prostitution, and/or possessing 30 gms or less marijuana – and no “dangerous or violent” crimes. *Consider the § 212(h) waiver. (Non-LPRs, and some LPRs, may qualify even with a non-drug aggravated felony.)*

## Eligibility for Immigration Relief Despite Criminal Record, Including Ninth Circuit-Only Rules<sup>1</sup>

RELIEF	AGG FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME RULE and OTHER TIME REQUIREMENTS
<p><b>LPR CANCELLATION</b></p> <p><b>For Long-Time Lawful Permanent Residents</b></p> <p><b>INA § 240A(a), 8 USC § 1129b(a)</b></p>	<p>AUTOMATIC BAR</p>	<p>NOT A BAR</p>	<p>7 YRS RESIDENCE since admission in any status; periods of unlawful status count.<sup>2</sup> Clock stops at issuance of NTA, or a drug offense, CIMT (except first CIMT, misdo, six months or less sentence), prostitution, or 2 or more convictions with 5 yr aggregate sentence.<sup>3</sup></p> <p>9<sup>th</sup> Cir. only: Conviction before 4/1/97 does <i>not</i> stop clock.<sup>4</sup></p> <p>5 YRS LPR STATUS. Clock stops only with final decision in removal case.<sup>5</sup></p>
<p><b>FORMER § 212(c) RELIEF</b></p> <p><b>For Long-Time Lawful Permanent Residents with pre- 1997 Convictions</b></p> <p><b>Former INA § 212(c), 8 USC § 1182(c)</b></p>	<p>Pre-4/24/96 agg felony conviction is not a bar to waiving DEPORTATION charge if the conviction also would cause inadmissibility; see <i>Judulang v. Holder</i><sup>6</sup></p> <p>Pre-4/1/97 agg felony conviction is not a bar to waiving INADMISSIBILITY, e.g. in an application for adjustment or admission.<sup>7</sup></p> <p>An agg felony with 5 yrs served is a BAR to 212(c) unless the plea was before 11/29/90.<sup>8</sup></p>	<p>DEPORT. CHARGE Not a bar if convicted before 4/24/96, or in some cases before 4/1/97<sup>9</sup></p> <p>FIREARMS deport grnd shd be waivable if conviction also wd cause inadmissibility, under <i>Judulang</i><sup>10</sup></p> <p>INADMISSIBILITY (apply for adjustment or admission) Not a bar if convicted before 4/1/97</p>	<p>NEED 7 YEARS LPR STATUS AT TIME OF APPLICATION; But don't need 7 yrs before conviction or before 4/1/97</p> <p>WON'T WAIVE CONVICTIONS RECEIVED AFTER 4/1/97, or in many cases 4/24/96;</p> <p>Can be applied for with § 212(h) or an adjustment application, but not with cancellation</p>
<p><b>§ 212(h) WAIVES INADMISSIBILITY<sup>11</sup> for:</b></p> <p><b>Moral Turpitude; Prostitution; Possession of 30 Gms or Less Marijuana; &amp; 2 or More Convictions w/ 5 Yrs Aggregate Sentence Imposed</b></p> <p><b>INA § 212(h), 8 USC § 1182(h)</b></p>	<p><i>IF</i> the 212(h)-type conviction (CMT, prostitution, etc.) <i>also</i> is an aggravated felony, can be waived unless LPR bar applies</p> <p>LPR Bar: § 212(h) is barred if the AF conviction occurred after applicant became LPR. But in 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 11<sup>th</sup> Circuits this bar applies only to persons admitted <i>at the border</i> as LPRs, not those who adjusted status to LPR. Watch for new cases in other Circuits.<sup>12</sup></p>	<p>§ 212(h) waives inadmiss. grnds listed to the left; in some contexts waives deport charges based on these convictions</p> <p>Very tough standard for discretionary grant of § 212(h) if a "dangerous or violent" offense.<sup>13</sup></p>	<p>NO STOP-TIME RULE EXCEPT FOR LPR BAR</p> <p><i>IF</i> LPR BAR APPLIES: Must have acquired 7 years lawful continuous status before NTA was issued.</p> <p>But at least in the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 11<sup>th</sup> Circuits, the bar does not apply to persons who became LPRs thru adjustment of status and who were not admitted at US border as LPRs.<sup>14</sup></p>

RELIEF	AGGRAVATED FELONY (AF)	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME RULE and OTHER TIME REQUIREMENTS
<b>ADJUST or RE-ADJUST STATUS TO LPR</b> <b>Based on family or employment visa</b> INA § 245(a), (i) 8 USC § 1255(a), (i)	Not a <i>per se</i> bar, because there is no AF inadmissibility ground; but see agg felony bar to § 212(h) for LPR's	Must not be inadmissible, or if inadmissible must qualify for a waiver <sup>15</sup>	NONE, but see 7 yr requirement for § 212(h) for LPR's
<b>NON-LPR CANCELLATION</b> INA § 240A(b)(1) 8 USC § 1229b(b)(1)	AUTOMATIC BAR	BARRED by conviction of offense described in crimes deportability or inadmissibility grounds. <sup>16</sup> Special rule CIMTs <sup>17</sup>	Must have ten years physical presence and good moral character <sup>18</sup> immediately before filing; show extraordinary hardship to USC or LPR relative.
<b>-Ninth Circuit only- FORMER 10-YEAR SUSPENSION</b> <b>Former</b> INA § 244(a)(2), 8 USC § 1254(a)(2) <sup>19</sup>	AGG FELONY IS NOT A BAR IF CONVICTION WAS BEFORE 11/29/90 <sup>20</sup>	CONVICTION BEFORE 4/1/97 CAN BE WAIVED	Good for undocumented or documented persons. Only waives pleas from before 4/1/97; need 10 years good moral character immediately following conviction
<b>ASYLUM</b> <b>Based on fear of persecution</b> INA § 208 8 USC § 1154	AUTOMATIC BAR	BARRED by “particularly serious crime.” <sup>21</sup> Very tough to win if convicted of a “dangerous or violent” crime <sup>22</sup>	Must show likelihood of persecution; Must apply within one year of reaching U.S., unless changed or exigent circumstances
<b>ADJUST to LPR for ASYLEE OR REFUGEE</b> Waiver at INA § 209(c), 8 USC § 1159(c)	Not a <i>per se</i> bar, because no agg fel ground of inadmissibility	§ 209(c) waives any inadmissibility ground except “reason to believe” trafficking, but see tough standard, <i>supra</i> , if “dangerous or violent” crime	Can apply within one year of admission as refugee or grant of asylee status, but in reality greater wait
<b>WITHHOLDING</b> INA § 241(b)(3), 8 USC § 1231(b)(3)	BARRED only if five year sentence imposed for one or more AF's	Barred by conviction of “particularly serious crime,” includes almost any drug trafficking <sup>23</sup>	Must show clear probability of persecution; No time requirement
<b>CONVENTION AGAINST TORTURE</b> <sup>24</sup>	AGG FELONY NOT A BAR	OTHER GROUNDS NOT A BAR	Must show likely to be tortured by gov't or groups it will not control; No time requirements



<b>RELIEF</b>	<b>AGGRAVATED FELONY (AF)</b>	<b>DEPORTABLE/ INADMISSIBLE CRIME</b>	<b>STOP TIME RULE and OTHER TIME REQUIREMENTS</b>
<b>TEMPORARY PROTECTED STATUS (TPS)</b>  INA § 244A, 8 USC § 1254a	AGG FELONY is not technically a bar	INADMISSIBLE; or convicted of two misdos or one felony or a particularly serious crime.	Must be national of a country declared TPS, and have been present in U.S. and registered for TPS as of specific dates. Go to <a href="http://www.uscis.gov">www.uscis.gov</a> to see what countries currently are TPS and what dates apply.
<b>VOLUNTARY DEPARTURE</b>  INA § 240B(a)(1) 8 USC 1229c(a)(1)	AGG FELONY IS A BAR (but question whether AF conviction shd bar an EWI applicant for pre-hearing voluntary departure) <sup>25</sup>	No other bars to <i>pre-hearing</i> voluntary departure  Post-hearing VD requires 5 yrs good moral character	Post-hearing voluntary departure requires one year presence in U.S. and five years good moral character
<b>NATURALIZATION</b> (Affirmative or with Request to Terminate Removal Proceedings)	AGG FELONY IS A BAR <i>UNLESS CONVICTION IS BEFORE 11/29/90</i> <sup>26</sup>	DEPORTABLE applicants may be referred to removal proceedings	Requires certain period (e.g., three or five years) of good moral character. GMC bars includes several crimes-grounds of inadmissibility <sup>27</sup>
<b>IS THE PERSON A U.S. CITIZEN ALREADY?</b>  <b>Derived or acquired citizenship</b>	If the client answers yes to either of the following two threshold questions, investigate further. She <i>might</i> have become a U.S. citizen automatically, without knowing it.  1. At the time of her birth, did she have a parent or grandparent who was a U.S. citizen? OR 2. Did the following two events happen, in either order, before her 18 <sup>th</sup> birthday? She became an LPR, and a parent with custody of her naturalized to U.S. citizenship.		
<b>VAWA Cancellation</b> <sup>28</sup>	VAWA is for victims of abuse by a USC or LPR spouse or parent. VAWA cancellation is barred if inadmissible or deportable for crimes; also need 3 yrs good moral character.		
<b>VAWA Self-Petition</b> <sup>29</sup>	Good moral character is required for I-360. Section 212(h) waiver can cure bar to GMC where offense is related to abuse. Adjustment requires admissibility or waiver to cure inadmissibility.		
<b>DV Deportability Waiver for Victims</b> <sup>30</sup>	Waiver of deportability for persons convicted of DV offense who primarily are DV victims.		
<b>Special Immigrant Juvenile</b> <sup>31</sup>	Minor in delinquency or dependency proceedings whom court won't return to parent/s due to abuse, neglect, or abandonment can apply to adjust to LPR. Adjustment requires admissibility; some waivers available, but none for "reason to believe" trafficking.		
<b>T Visa</b> <sup>32</sup>	Victim/witness of "severe alien trafficking" (but not if person also becomes trafficker)		
<b>U Visa</b> <sup>33</sup>	Victim/witness of certain types of crime (assault, DV-type offenses, etc). For T and U Visas, all convictions, including aggravated felonies, are potentially waivable.		
<b>DACA – Deferred Action for Childhood Arrivals</b>	Temporary work authorization and protection against removal. Must have arrived in U.S. while under age 16 and by June 15, 2007, and been under age 31 as of June 15, 2012. Have or be pursuing education or military. Crimes bars are one felony, three misdos, or one "significant" misdo. Several online sources provide more information and assistance. <sup>34</sup>		

## ENDNOTES

<sup>1</sup> This chart was prepared by Katherine Brady of the Immigrant Legal Resource Center. For additional free resources, defenders can register at [www.defendingimmigrants.org](http://www.defendingimmigrants.org). For extensive discussion of forms of relief affected by criminal convictions, see Kesselbrenner and Rosenberg, *Immigration Law and Crimes* ([www.thomsonreuters.com](http://www.thomsonreuters.com) 2012), and within the Ninth Circuit, see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit: Consequences of Crimes under California and Other State Laws* ([www.ilrc.org](http://www.ilrc.org) 2013). For discussion of all aspects of relief for permanent residents, see the national manual, see Privitera, Brady & Junck, *Remedies and Strategies for Permanent Resident Clients* ([www.ilrc.org](http://www.ilrc.org) 2012).

<sup>2</sup> This includes, e.g., admission on a tourist visa followed by years of unlawful residence. Where there was no actual admission at the border, the “admission” clock can start with adjustment of status. According to the Ninth Circuit it also can start with grant of Family Unity (*Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1015-16 (9<sup>th</sup> Cir. 2006)) but BIA disagrees and possible Ninth will reverse.

<sup>3</sup> Clock stops on date of commission if offense makes person inadmissible. This includes crimes involving moral turpitude, prostitution, drug convictions, “reason to believe” drug trafficking, and two convictions with an aggregate sentence imposed of at least five years. It does not, however, include several other grounds of inadmissibility or any grounds of deportability. Therefore offenses that trigger *only*, e.g., the domestic violence, firearms, drug addiction and abuse, or alien smuggling grounds do not stop the clock. *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).

<sup>4</sup> *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9<sup>th</sup> Cir. 2006). The Fifth Circuit came to the opposite conclusion at about the same time in *Heaven v. Gonzales*, 473 F.3d 167 (5<sup>th</sup> Cir. 2006). The BIA will not apply the *Sinotes-Cruz* rule outside the Ninth Circuit. *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006).

<sup>5</sup> Time continues to accrue until the decision is administratively final (BIA appeal waived or exhausted) or, where deportability was contested, through federal court appeal.

<sup>6</sup> Section 212(c) was eliminated in the 1990’s, but it remains available in removal proceedings today to waive convictions from before operative dates in 1996 and 1997, under *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). In *Judulang v. Holder*, 132 S.Ct. 476 (2011) the Supreme Court further supported the present-day application of § 212(c) when it overruled *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and the several federal cases that had followed it. In *Matter of Blake* the BIA had held that while the former §212(c) can waive deportation grounds that have an analogous ground of inadmissibility, it will *not* waive a charge of deportability under the aggravated felony ground unless there is a very similar ground of inadmissibility. An offense such as sexual abuse of a minor was not similar enough to, e.g., crimes involving moral turpitude for § 212(c) to apply. In practice only the drug trafficking aggravated felony qualified. The Supreme Court rejected the Board’s reasoning, and that of the great majority of Circuit Courts of Appeal that had deferred to it, as an irrational reading of the law. It remanded the *Judulang* case to the Ninth Circuit to resolve. See Vargas et al, “Implications of *Judulang v. Holder*” at [www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Implications\\_%20of\\_Judalang\\_v\\_Holder.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Implications_%20of_Judalang_v_Holder.pdf). The aggravated felony conviction must have occurred before April 24, 1996 because as of that date Congress ruled that § 212(c) no longer can waive certain deportation grounds, including the aggravated felony ground. For a quick chart reviewing waivable inadmissibility and deportability grounds see Brady, Chart on § 212(c) at [www.ilrc.org/files/documents/chart\\_212c\\_judulang.pdf](http://www.ilrc.org/files/documents/chart_212c_judulang.pdf). For a comprehensive chart by M. Baldini-Poterman go to [http://nationalimmigrationproject.org/legalresources/practice\\_advisories/cd\\_pa\\_Chart\\_on\\_212c\\_After\\_Judulang.pdf](http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Chart_on_212c_After_Judulang.pdf)

<sup>7</sup> Different and better rules apply where § 212(c) is used to waive an inadmissibility ground, as in an application for adjustment of status (affirmatively or as a defense to removal) or for admission. First, § 212(c) can waive *inadmissibility* for any type of conviction, including drug crimes and aggravated felonies, that was received up until April 1, 1997. In contrast, § 212(c) can waive only a few grounds of *deportability* if the conviction was received between April 24, 1996 and April 1, 1997. See next footnote. Second, the fact that an offense also is an aggravated felony or a firearms offense has no effect on waiving inadmissibility grounds with § 212(c). This was true even under *Matter of Blake*. See *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) (aggravated felony conviction not related to drugs can be waived in the context of an application for adjustment). As discussed above, we hope that *Judulang* has taken care of this problem for deportation grounds – but in the inadmissibility context, the issue does not even come up.

<sup>8</sup> See discussion in *Toia v. Fasano*, 334 F.3d 917 (9<sup>th</sup> Cir. 2003).

<sup>9</sup> A charge of deportability based upon conviction by plea taken between April 24, 1996 and April 1, 1997 comes under the AEDPA rules governing § 212(c) for that period. Deportation grounds that cannot be waived under AEDPA §212(c) include conviction of an aggravated felony, conviction of controlled substance offense, and the “miscellaneous” deportation ground that includes conviction of espionage, sabotage, treason, certain military service problems, etc. In addition, AEDPA § 212(c) will not waive conviction of two moral turpitude offenses, *both* of which carry a potential sentence of a year or more. AEDPA did not limit *inadmissibility* grounds that can be waived under §212(c), however.

<sup>10</sup> The firearms deportation ground was treated like the aggravated felony deportation ground, and so the firearms ground may benefit under the reasoning of *Judulang*. Authorities had held that deportability based on the firearms ground cannot be waived under § 212(c), because there is no sufficiently analogous inadmissibility ground. Similar to *Blake*, this problem can be averted by applying for adjustment of status so that the applicant is attempting to waive a ground of inadmissibility (e.g., if the firearms offense also is a crime involving moral turpitude) and not deportability. See, e.g., *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). Now, a charge of deportability under the firearms ground also might be waived under § 212(c), if the conviction also would cause inadmissibility.

<sup>11</sup> For more information in general see Brady, “Update on § 212(h) Strategies” (2011) at [www.ilrc.org/crimes](http://www.ilrc.org/crimes) (scroll down) and *Bender Immigration Bulletin* (September 15, 2011). See also newer articles on 212(h) on that web-page.

<sup>12</sup> For more information see Brady, “LPR Bars to 212(h) – To Whom Do They Apply?” (Sept. 2012), and “Update on § 212(h)” (2011), *supra*, at [www.ilrc.org/crimes](http://www.ilrc.org/crimes). See *Hanif v. Holder*, --F.3d-- (3<sup>rd</sup> Cir. Sept. 14, 2012), *Bracamontes v. Holder*, 675 F.3d 380 (4<sup>th</sup> Cir. 2012), *Leiba v. Holder*, --F.3d-- (4<sup>th</sup> Cir. Nov. 9, 2012), *Martinez v. Mukasey*, 519 F.3d 592 (5<sup>th</sup> Cir. 2008), *Lanier v. United States AG*, 631 F.3d 1361, 1366-67 (11<sup>th</sup> Cir. 2011), finding that adjustment to LPR status does not trigger the LPR bars to eligibility for § 212(h). Arguably the Ninth Circuit made the same holding in *Sum v. Holder*, 602 F.3d 1092 (9<sup>th</sup> Cir. 2010), but the BIA failed to acknowledge that in *Matter of Rodriguez*, 25 I&N Dec. 784 (BIA 2012).

<sup>13</sup> See requirement of extraordinary positive equities required for conviction of a dangerous or violent offense, at 8 CFR 212.7(d); see also *Matter of Jean*, 23 I&N 373 (BIA 2002), similar standard for asylum and asylee/refugee adjustment.

<sup>14</sup> See Brady, “LPR Bars to § 212(h),” *supra*.

<sup>15</sup> An applicant who is deportable still may apply for adjustment (or “re-adjustment”) of status if she or he is not inadmissible. *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992). Or, a deportable *and* inadmissible applicant may apply if she or he is eligible for a waiver of inadmissibility. See, e.g., adjustment with a § 212(c) waiver discussed in *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) (waiver of an offense that also is an aggravated felony in connection with adjustment does not conflict with the holding in *Matter of Blake*, *supra*); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); adjustment with a § 212(h) waiver discussed in *Martinez v. Mukasey*, 519 F.3d 532 (5<sup>th</sup> Cir. 2008) (§ 212(h) waiver).

<sup>16</sup> See 8 USC §§ 1182(a)(2), 1227(a)(2); INA §§ 212(a)(2), 237(a)(2). A person who entered without inspection (EWI), and therefore is not subject to the grounds of deportation because she has not been admitted, still is barred if convicted of an offense described in the deportation grounds. *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9<sup>th</sup> Cir. 2004). The effective date of a deportation ground applies, however, so that a person convicted of a domestic violence or child abuse offense from before 9/30/96 is not barred. *Matter of Gonzalez-Silva*, 24 I&N 218 (BIA 2007).

<sup>17</sup> The Board held that a single conviction of a crime involving moral turpitude that comes within the petty offense exception to the CMT ground of inadmissibility is a bar to non-LPR cancellation if it carries a potential sentence of a year or more, but is not a bar if it carries a potential sentence of less than one year. *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010). This will be appealed to circuit courts. It continues the controversy started with *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009). See discussion of that case in Brady, “*Matter of Almanza-Arenas*: Defense Strategies” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

<sup>18</sup> See 8 USC § 1101(f), INA § 101(f) for statutory bars to establishing good moral character. These include the inadmissibility grounds relating to drugs, prostitution, moral turpitude (unless it comes within the petty offense or youthful offender exceptions), and two convictions of any type of offense with a sentence of five years or more imposed. They also include other bars, such as spending 180 days in jail for a conviction during the time for which good moral character must be shown.

<sup>19</sup> A documented or undocumented immigrant can apply in removal proceedings arising in Ninth Circuit states for the former 10-year suspension of deportation, in order to waive a conviction by plea from before 4/1/97, the date the former

suspension was eliminated. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006). Because good moral character is required, the person cannot have an aggravated felony conviction from on or after 11/29/90. See discussion in *Defending Immigrants in the Ninth Circuit*, § 11.4 (2011, [www.ilrc.org](http://www.ilrc.org)).

<sup>20</sup> Suspension requires a showing of good moral character, and an aggravated felony conviction on or after 11/29/90 is a permanent bar to establishing good moral character. IMMACT 1990 § 509(a), and *Lopez-Castellanos*, *supra*.

<sup>21</sup> The general definition of a particularly serious crime appears in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) and cases following. This determination is not subject to the categorical approach. See discussion in *Defending Immigrants in the Ninth Circuit*, §§ 11.14, 11.15 (2011, [www.ilrc.org](http://www.ilrc.org)). In asylum, but not in withholding, an aggravated felony is automatically a particularly serious crime.

<sup>22</sup> See *Matter of Jean*, *supra*.

<sup>23</sup> The general definition of a particularly serious crime appears in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) and cases following. This determination is not subject to the categorical approach. See discussion in *Defending Immigrants in the Ninth Circuit*, §§ 11.14, 11.15 (2011, [www.ilrc.org](http://www.ilrc.org)). When the Attorney General held that virtually any drug trafficking offense is a “particularly serious crime,” the Ninth Circuit upheld his right to make the ruling, but found that it could not be applied retroactively to plea bargains before May 2, 2002. *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950-51 (9<sup>th</sup> Cir. 2007).

<sup>24</sup> See 8 CFR §§ 208.16 – 208.18.

<sup>25</sup> The statute states the pre-hearing voluntary departure is barred to persons who are “deportable” under the aggravated felony bar, meaning who were convicted of an aggravated felony after admission. But the regulation bars persons who merely were “convicted” of an aggravated felony, which also applies to persons who never were admitted. In a situation where it is beneficial to the client, immigration counsel may want to appeal this issue on the grounds that the regulation is *ultra vires*. Compare INA § 240B(a)(1), 8 USC § 1229c(a)(1) with 8 CFR § 1240.26(b)(1)(i)(E), and see discussion in *Defending Immigrants in the Ninth Circuit*, § 11.22 (2011 [www.ilrc.org](http://www.ilrc.org)).

<sup>26</sup> An aggravated felony conviction on or after 11/29/90 is a permanent bar to good moral character; see n. 17.

<sup>27</sup> See n. 18, *supra*.

<sup>28</sup> VAWA cancellation is at INA § 240A(b)(2), 8 USC § 1229b(b)(2). For further information on self-petitioning and cancellation, see [www.ilrc.org/immigration-law/vawa-and-u-visas.php](http://www.ilrc.org/immigration-law/vawa-and-u-visas.php) and see Abriel & Kinoshita, *The VAWA Manual: Immigration Relief for Abused Immigrants* ([www.ilrc.org](http://www.ilrc.org)).

<sup>29</sup> See VAWA information, *supra*.

<sup>30</sup> A person who essentially is the victim of domestic violence but was “cross-charged” and found guilty of domestic violence may qualify for a waiver of the domestic violence deportation ground under INA § 237(a)(7), 8 USC § 1227(a)(7).

<sup>31</sup> See information and resources on special immigrant juvenile status at [www.ilrc.org](http://www.ilrc.org) under remedies for children and youth, and see Kinoshita, Junck and Brady, *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth* ([www.ilrc.org](http://www.ilrc.org)).

<sup>32</sup> INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T). For information on T visas, see Lee & Parker, *Representing Survivors of Human Trafficking* (ILRC 2011) at [www.ilrc.org](http://www.ilrc.org), and several websites including [www.uscis.gov](http://www.uscis.gov).

<sup>33</sup> INA § 101(a)(15)(U), 8 USC § 1101(a)(15)(U). For information on U visas, see free material at [www.ilrc.org/immigration-law/vawa-and-u-visas.php](http://www.ilrc.org/immigration-law/vawa-and-u-visas.php) and see Kinoshita, Bowyer & Ward-Seitz, *The U Visa: Obtaining Status for Victims of Crime* (ILRC).

<sup>34</sup> See, e.g., [www.unitedwedream.org](http://www.unitedwedream.org) and [www.ilrc.org/info-on-immigration-law/deferred-action-for-childhood-arrivals](http://www.ilrc.org/info-on-immigration-law/deferred-action-for-childhood-arrivals) and government information at [www.uscis.gov](http://www.uscis.gov) (Under “Humanitarian” see “Consideration of Deferred Action”). As of January 2013 DHS defines a “significant misdemeanor” as a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days and is an offense of domestic violence, sexual abuse or exploitation, unlawful possession or use of a firearm, drug sales, burglary, driving under the influence of drugs or alcohol or any other misdemeanor for which the jail sentence was more than 90 days.

**LPR CANCELLATION OF REMOVAL, 8 USC § 1229b(a)****Quick Test: Is the Defendant Eligible?**

1. **Has the lawful permanent resident (LPR) ever been convicted of an aggravated felony?**

YES NO. If yes, she is not eligible for LPR cancellation.

2. **Has the person been a lawful permanent resident (LPR, green card-holder) for five years, or close to it?** YES NO. When, or about when, did the person become an LPR? \_\_\_\_\_

*She will need five years as an LPR when she files the cancellation application. But because she will continue to accrue the five years while in jail and immigration detention, four years or even less time since becoming an LPR may be enough.*

**Seven years “lawful continuous residence.”** You need LPR’s entire criminal history.

3. **Start date for the seven years:** Before the person became an LPR, was she admitted to the U.S. on any kind of visa – e.g. tourist, student, refugee, permanent resident, worker, border-crossing card?

YES NO. If yes, what was the date of the admission? \_\_\_\_\_

*This date is the start of the seven-year period (even if the person soon becomes “illegal”).*

Or, did the person first enter the U.S. surreptitiously, i.e. without being inspected or admitted?

YES NO. If so, the seven years started when the person became an LPR; see Question 2.

4. **End date for the seven years:** Does the person come within any of these inadmissibility grounds? If so, circle it and note the date the defendant committed the offense.<sup>1</sup>

- Convicted of an offense relating to a controlled substance
- Convicted of a “crime involving moral turpitude” (CIMT) *unless* it comes within (a) petty offense exception (just one CIMT, max possible sentence is *one year* or less, and sentence imposed is *six months* or less; in California, misd. “wobbler” meets the one-year requirement<sup>2</sup>) or (b) youthful offender exception (convicted as an adult of one CIMT committed while under age 18, and conviction/jail ended 5 yrs before application.)
- Convicted of two or more offenses of any type with an aggregate sentence imposed of five years
- Evidence of or conviction for engaging in prostitution, meaning sexual intercourse for a fee
- Probative evidence of drug trafficking (this category might not apply; consult an expert)

*If yes to any of the above, the seven years stopped on the date that the LPR committed the offense. If LPR is not yet within an above category but pleads to one, the clock stops as of the date the LPR committed the offense pled to. If LPR can avoid these categories, the clock will not stop until removal proceedings are initiated (sometime after he or she completes jail). In the Ninth Circuit only: No conviction from before April 1, 1997 will stop the clock.<sup>3</sup>*

5. **Calculate the seven years.** Take the start date from Question 3 and the stop date, if any, from Question 4. Need at least seven years between the two dates. See also Case Example, next page.

<sup>1</sup> See 8 USC 1229b(d)(1)(B). While the statutory language is more convoluted, the above is the rule.

<sup>2</sup> See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

<sup>3</sup> *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190 (9th Cir. 2006).



## More Information on Cancellation Of Removal For Permanent Residents

***What are the benefits of winning LPR Cancellation? Do many applicants actually win?*** Winning a cancellation case allows a lawful permanent resident (LPR or “green card” holder) who is in removal proceedings to keep his LPR status and end the proceedings. 8 USC §1229b(a), INA § 245A(a).

If the LPR qualifies to apply for cancellation, there is a very reasonable chance that the immigration judge will grant the application based on factors such as the person’s remorse and rehabilitation or potential for it. Therefore it may well be worth applying even if the person must wait several months or more in immigration detention before the removal hearing or during appeals.

***What are the bars to eligibility for LPR Cancellation?*** A lawful permanent resident is not eligible to apply for LPR Cancellation if she:

- Ever was convicted of an *aggravated felony*
- Received a prior grant of cancellation of removal, suspension of deportation, or § 212(c) relief
- Persecuted others or comes within the terrorism bars to immigration
- Fails to reach the required seven years of “lawful continuous residence” or five years of lawful permanent resident status. See “Is the Defendant Eligible?” on the other side of this page.

***Case example: Calculating the five and seven years.*** To understand this example, refer to the eligibility rules on the other side of this page. John was admitted to the U.S. on a tourist visa in July 2004. He overstayed the permitted time and lived in the U.S. in unlawful status until 2007, when he was able to adjust status to permanent residence (get a green card) through family.

In 2008 he was convicted of possessing a revolver. This made him deportable under the firearms ground, but it is not a CIMT. Currently he is charged with domestic violence with injury under Cal. P.C. § 273.5, based on an incident in June 2011. That offense is a CIMT, a deportable crime of domestic violence, and, if a sentence of a year or more is imposed, an aggravated felony. The DA wants eight months jail time. Is John deportable? If so, can he qualify for LPR cancellation?

**Is John already deportable?** Yes, under the firearms ground for the 2008 conviction.

**Has he been convicted of an aggravated felony?** No. He would be if he got a sentence imposed of a year or more on the current domestic violence charge, but the DA is suggesting eight months.

**Has he had a green card for about five years?** If not yet he will soon, since it is 2012 and he got his green card in 2007. The five-year period keeps accruing even during jail and removal proceedings; see Question 2, previous page.

**Does he have the seven years lawful continuous residence?** See Questions # 3-5, previous page.

-- *When did John’s seven-year period start?* On the date of his admission as a tourist in July 2004.

-- *Did it end when he was convicted of the firearms offense?* No. While the offense made him deportable for firearms, it is not a CIMT and doesn’t otherwise come within the five categories that stop the clock. (See categories listed in Question # 4, previous page.)

-- *Will it end if he is convicted of the DV offense?* If the conviction brings John within one of the five “clock-stopping” grounds, his seven years will cease to accrue as of June 2011 -- a month short of the seven years he needs. We need to avoid this. The offense is a CIMT, and therefore to avoid stopping the seven years it must come within the petty offense exception. If he pleads to this offense, John needs a misdemeanor conviction with a sentence of six months or less imposed. One defense strategy would be to defer the plea until he has spent two or more months in jail, then waive credit for time served and bargain for a sentence of six months rather than the eight the DA request. Or, plead to a non-CIMT.

**“10 YEAR” CANCELLATION FOR NON-PERMANENT RESIDENTS  
(including undocumented persons), 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?*** YES NO. Entry date \_\_\_\_\_.  
*See next page for more information on calculating the ten-year period.*
2. ***Does defendant have a U.S. citizen or lawful permanent resident parent, spouse, or unmarried child under 21?*** YES NO. If yes, what are 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. ***Crimes disqualifiers. The defendant will be barred if he or she comes within any of the following categories. Check any bars that apply and give date of conviction and code section. Be sure to indicate if the threat is based on a current charge that defense counsel could try to avoid.***

Convicted at any time of, or currently charged with:

- An aggravated felony
- An offense relating to a federally defined controlled substance
- A firearms offense
- A crime involving moral turpitude (CIMT), unless it has a maximum possible sentence of *less* than one year, sentence imposed is six months or less, and the person committed just one CIMT.
- Two or more offenses of any type with an aggregate sentence imposed of at least five years
- Prostitution (sexual intercourse for a fee)
- High speed flight from checkpoint, some federal immigration offenses, federal failure to file as a sex offender
- Stalking, a crime of domestic violence, violation of a DV protective order prohibiting violent threats or repeat harassment, or a crime of child abuse, neglect or abandonment, but not if the conviction occurred before September 30, 1996

Event within about the last ten years, including now (see next page regarding exact time):

- Defendant engaged in prostitution, regardless of conviction
- DHS has “reason to believe” that the person is or helped a drug trafficker
- Defendant spent or will spend more than 180 days physically in jail as a penalty for a conviction
- Defendant engaged in alien smuggling or lied under oath to get a visa or immigration benefit
- Defendant was a ‘habitual drunkard’ (e.g., multiple DUI’s) or convicted of gambling offenses

## Facts on Cancellation Of Removal For Non-Permanent Residents

**What status does the client get if she is granted non-LPR Cancellation?** An undocumented person (or an applicant of any status) who wins cancellation for non-LPRs can become a lawful permanent resident (LPR or “green card” holder). See 8 USC §1229b(b)(1), INA § 245A(b)(1).

**Do many applicants actually win?** Only a limited number do. An applicant must convince the immigration judge that a U.S. citizen or permanent resident parent, spouse, or unmarried child under age 21 will suffer “exceptional and extremely unusual hardship” if the applicant is deported. Hardship to the applicant him- or herself 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.<sup>4</sup> (Compare this to LPR cancellation, which generally is easier to win.)

**What if the person got 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 residence and good moral character is counted backwards from the date that the person files the application. The exact ten-year periods can be complex in rare situations, so if there is any question criminal defense counsel should consult with immigration counsel or urge the family to do so. The most relevant rules are that the required ten-year period of physical presence starts when the person first enters the U.S. legally or illegally and stays in the U.S. without very significant interruption, and it ends when removal proceedings are started (generally, not until after the person is released from jail). The ten-year period of good moral character is counted backwards from when the person applies for cancellation.

**What are the crimes bars to eligibility for non-LPR Cancellation?** There are two. First, the applicant cannot have been *convicted at any time* of an offense that is described in the crimes inadmissibility or deportability grounds.<sup>5</sup> See list on the previous page, Question 4, under “Convicted at any time.” Note that a single conviction for a crime involving moral turpitude (CIMT) is a bar unless a sentence of no more than six months was imposed, and the offense carries a *maximum possible sentence of less than one year*, e.g. carries a maximum six-month sentence. (This is slightly different from the more common CIMT “petty offense exception.”<sup>6</sup>) In some states a plea to “attempt” to commit a one-year misdemeanor will result in a maximum possible sentence of less than a year.

If the applicant does not come within this first bar, she then must consider a second bar: within the ten years leading up to the date of filing the application, the person must not have come within any of the statutory bars to establishing good moral character. These bars are listed on the previous page, Question 4, under “Event within the last ten years.”

**Ninth Circuit relief for persons with pre-April 1, 1997 conviction/s.** In immigration proceedings arising within Ninth Circuit states, an undocumented person whose only convictions pre-date April 1, 1997 might qualify for a much better form of relief, suspension of deportation.<sup>7</sup> See “Suspension.”

<sup>4</sup> See, e.g., discussion of hardship in *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 (2001).

<sup>5</sup> See 8 USC §§ 1182(a)(2), 1227(a)(2) [INA §§ 212(a)(2), 237(a)(2)]. Usually an undocumented person is not affected by the grounds of deportability, but under the specific language of the non-LPR cancellation bars even a person who entered without inspection will be barred if convicted of an offense in the deportation grounds.

<sup>6</sup> The petty offense exception to the crime involving moral turpitude (CIMT) inadmissibility ground applies if the person committed only one CIMT with a maximum possible sentence of *one year or less* (not less than one year, as in this cancellation bar) and the sentence imposed did not exceed six months. 8 USC § 1182(a)(2)(A).

<sup>7</sup> 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).



## **§ 212(h) WAIVER OF INADMISSIBILITY, 8 USC § 1182(h)**

### **Quick Test: Is the Defendant Eligible?**

#### **1. Which immigrants can apply for a § 212(h) waiver?**

First, the person must be a lawful permanent resident (LPR) already, or must be applying to become an LPR based on a family visa or by VAWA (see below). Second, the person must:

- a. 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*
- b. Have been convicted (or engaged in the conduct) at least 15 years ago, *or*
- c. Be inadmissible only for prostitution, *or*
- d. Be a VAWA self-petitioner (applying for a type of family visa, where the U.S. citizen or permanent resident spouse or parent battered or abused the applicant or applicant's child).

#### **2. Which inadmissibility grounds (types of offenses) can be waived under § 212(h)?<sup>8</sup>**

- a. Conviction/s of a crime involving moral turpitude (CIMT). But 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), and the sentence imposed was six months or less); *or*
  - The youthful offender exception: The person was convicted as an adult for one CIMT, committed while under age 18, and conviction/jail ended at least 5 years ago
- b. Two convictions of any type of offense, with aggregate sentence imposed of at least five years
- c. Engaging in prostitution (sexual intercourse for a fee)
- d. No drug crimes can, except first offense "simple possession of 30 grams or less of marijuana"
  - This also includes first offense possession of an amount of hashish comparable to 30 gm or less marijuana, under the influence of mj or hash, possession of paraphernalia for use with 30 grams or less mj, and in the Ninth Circuit attempt to be under the influence of THC.<sup>9</sup>

#### **3. What types of offenses are almost sure to be denied the waiver?**

An immigration judge or officer grants the § 212(h) waiver as a matter of discretion. Many cases fail to win a discretionary grant. Further, federal regulation forbids a discretionary grant to waive conviction of a "violent or dangerous" offense except in cases involving national security or "exceptional and extremely unusual hardship."<sup>10</sup> Thus, e.g., even though robbery is a moral turpitude crime that could be waived under § 212(h), there is hardly any chance that the § 212(h) application actually will be granted. Fraud, theft, obstruction of justice, etc. are more likely to be granted.

<sup>8</sup> See 8 USC § 1182(h)(1) referring to certain grounds at 8 USC § 1182(a)(2), INA § 212(a)(2).

<sup>9</sup> 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); *US v Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (attempted under the influence of THC).

<sup>10</sup> 8 CFR 1212.7(d).

## Facts, Examples of the § 212(h) Crimes Waiver

**Sometimes § 212(h) can waive an aggravated felony conviction.** Some crimes involving moral turpitude (CIMTs) also are aggravated felonies, e.g. fraud where the loss to the victim exceeds \$10,000, or theft with a sentence imposed of a year or more. In some cases the client can waive a CIMT with § 212(h) even though it also is an aggravated felony. Two caveats:

- Some LPRs are barred from waiving an aggravated felony with § 212(h); see below.
- Section 212(h) is granted as a matter of discretion. If the aggravated felony is a “violent or dangerous” crime, the waiver will almost certainly be denied (see #3, previous page). Even if it is not, authorities may be especially tough on an aggravated felony conviction.

**When is the § 212(h) waiver usually used?** Usually with an application for a family visa (including VAWA self-petition) or to help an inadmissible LPR get back into the U.S. after a trip.

**Example:** Erin was admitted to the U.S. on a tourist visa and overstayed. Now she wants to adjust status to become an LPR through her U.S. citizen husband – but she is inadmissible because of a fraud (CIMT) conviction. As a defense to removal, she can submit an application for adjustment of status, along with a § 212(h) application to waive the CIMT. (Because she is not a LPR, she can apply even if the fraud conviction also is an aggravated felony.)

**Example:** Lucia became an LPR in 2003 and later was convicted of some minor thefts that are CIMTs, so that she is inadmissible and deportable for CIMT. Returning from a trip abroad in 2012, she was stopped at the San Diego airport and charged with being inadmissible for CIMT. She can apply for a § 212(h) waiver; if she wins she can keep her green card.

**Special restrictions apply to some LPRs.** The statute (8 USC § 1182(h)) sets out two bars for LPRs. The LPR person cannot apply for § 212(h) if he or she (a) has been convicted of an aggravated felony since becoming an LPR, or (b) failed to complete seven years in some continuous lawful status (e.g., LPR, or student visa and then LPR) before removal proceedings are started against him or her.

At this writing in October 2012, two different rules apply as to *which* LPRs are potentially subject to these bars. In immigration cases arising within the Third, Fourth, Fifth, and Eleventh Circuits, the bars apply only if the person previously was *physically admitted into the U.S. as an LPR at a border or other port of entry*. The bars do not apply to persons who adjusted their status to LPR, at an office within the U.S. But in all other Circuits, the BIA will find that *all* LPRs are subject to these two bars, with no exception. See “Practice Advisory on § 212(h) LPR Bars” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes), and watch for new developments.

**Example:** Herman became a lawful permanent resident (LPR) when he was admitted into the U.S. on an LPR visa at the Miami Airport. Three years later he was convicted of theft with a one-year sentence imposed. This conviction makes him deportable under the aggravated felony and crime involving moral turpitude (CIMT) grounds. Herman is put in removal proceedings. As a defense to removal, he will apply to re-adjust status through his wife. He will need a § 212(h) waiver for this, since his conviction is an inadmissible CIMT.

Herman is out of luck. All courts agree that because he was admitted at the border as an LPR, the LPR bars to § 212(h) apply to him, and therefore the aggravated felony conviction bars him.

Sally adjusted status to LPR at her local CIS office. Like Herman, she later was convicted of theft with a one-year sentence imposed, which was an aggravated felony and CIMT. She also wants apply to re-adjust status with a § 212(h) waiver as a defense to removal. She can apply for § 212(h), *if* her case arises within the “right” Circuit; see above.

## IMMIGRATION THROUGH FAMILY

### Is the Defendant Eligible? Is it 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 rarely, a USC sibling)*

Family visas are complex. The defendant will need immigration assistance, but if you can spot this potential relief and avoid pleading the defendant to a disqualifying offense, you will have provided a great benefit. If possible, give them further help by using the below material to see if they actually can immigrate through family, and if they can use it as a defense to removal.

#### 1. What kind of status do you obtain from immigrating through a family member?

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

#### 2. What crimes make you ineligible for family immigration?

To immigrate through family the person must be “admissible.” That means either she must not come within any of the grounds of inadmissibility at 8 USC § 1182(a), or *if* she comes within one or more inadmissibility grounds, she must qualify for and be granted a waiver of the ground/s. To determine whether your client is admissible, see the chart below and see other detailed materials.

If your client *might* be eligible for family immigration and you can avoid making her inadmissible, you have done a great job. If possible, use the following to further help her by determining if she really is eligible and if so, if she can use this to fight deportation (“removal”).

#### 3. In the best-case scenario, when can family immigration be used as a defense to removal?

To use a technical term, to fight removal the defendant must be eligible for family immigration through ***adjustment of status***. “Adjustment of status” means that the person can process the whole application *without having to leave the U.S.* (A person who doesn’t qualify to adjust status still can apply for a family visa, but she must go back to the home country to process through a U.S. consulate there – and that trip alone can create other legal problems.) If the defendant can adjust status she will become an LPR and the removal proceedings will end.

A person who is undocumented or has almost any immigration status can apply for adjustment through a family visa as a defense to removal, if she meets the following requirements:

1. The defendant has a U.S. citizen (USC) spouse, or a USC child age 21 or older, or the defendant is an unmarried child under the age of 21 of a USC parent, including stepparent or adoptive parent, *and*

The defendant was inspected and admitted into the U.S. on any kind of visa, border-crossing card, lawful permanent resident card, or other document, even if later he was in unlawful status. This is called regular adjustment or “§ 245(a) adjustment.”

OR

2. The defendant entered the U.S. with or without inspection by December 21, 2000; a family visa petition for her was submitted before April 30, 2001; and the defendant is the subject of an approved visa petition that can be used immediately, based on any qualifying family relationship (see # 4, below.) This is called “§245(i) adjustment.” These two adjustment provisions are found at 8 USC § 1255(a), (i); INA § 245(a), (i).

Not only an undocumented person, but also a qualifying ***lawful permanent resident (LPR) who has become deportable for crimes can apply for adjustment of status as a defense to removal***. The LPR must have the U.S. citizen relatives described in the first bullet point above, and must be admissible or granted a waiver of the inadmissibility ground. In this process the LPR loses her current green card and then applies for a new one in the same hearing, and never is removed.<sup>11</sup> Note that some LPRs are not eligible for a waiver of inadmissibility under § 212(h). See Quick Test/Fact Sheet on § 212(h).

### **3. If the client can't adjust status, is a family visa petition still worth anything?**

Yes! The person will have to leave the U.S., but might be able to come back as an LPR pursuant to the family visa. Depending on various factors, this could take a few weeks or some years; the person should consult with a community agency or immigration attorney. You have two defense goals. First, avoid conviction of an aggravated felony so that the person can request voluntary departure instead of removal. Second, avoid a conviction that makes the defendant inadmissible (or if inadmissible, at least not disqualified from requesting a waiver). See Question 5. If the defendant can *avoid being inadmissible and has an immediate relative visa petition*, he or she might qualify for a “provisional stateside waiver” of bars based on unlawful presence, which would cut down time spent abroad.<sup>12</sup>

### **4. What will happen to my client? How long will this all take?**

***What happens now.*** If the client is subject to immigration detention, she will be detained. If she can adjust status through a family visa petition, her family must get help to get the papers filed. If she is eligible for adjustment and is not subject to “mandatory detention” (see discussion in § *N.I Overview*), she might be released from detention. Otherwise she will apply for adjustment in removal proceedings held in the detention facility.

If she is not eligible to adjust status, or the judge denies adjustment as a matter of discretion, she must request voluntary departure and go through consular processing in the home country. Before leaving she needs legal counseling about the consequences of leaving the U.S., and the waivers she will need to apply for if she is ever to return on the family visa.

***How long will it take to immigrate (get the green card)?*** This depends upon the noncitizen's country of birth, when the application for a family visa petition was first filed, and especially on the type of family member. There are two types of family visas: **immediate relative** visas, which have *no* legally mandated waiting period, and **preference visas**, which may require a wait of months or years before the person can immigrate, because only a certain number of these types of visas are made available to that country each year. The categories are:

1. Immediate relative: Noncitizen is the spouse, the parent of a child over 21, or the unmarried child under 21 years of age of a U.S. citizen.
2. First preference: Noncitizen is the unmarried son or daughter (over 21) of a U.S. citizen
3. Second preference: Noncitizen is the spouse or unmarried son or daughter (any age) of a lawful permanent resident
4. Third preference: Noncitizen is the married son or daughter of a U.S. citizen (any age)
5. Fourth preference: Noncitizen is the brother or sister of an adult U.S. citizen (may have a legally mandated waiting period of 15 years or more to immigrate)<sup>13</sup>

<sup>11</sup> *Matter of Rainford* 20 I&N Dec. 598 (BIA 1992); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).

<sup>12</sup> See information at [www.uscis.gov](http://www.uscis.gov).

<sup>13</sup> See 8 USC §§ 1151(b), 1153(a) [INA §§ 201(b), 203(a)].

How can you or the client tell how long the wait is for a preference visa? The online “Visa Bulletin” provides some help. To use this you must know the client’s “priority date,” which is the date that their relative first filed the visa petition, as well as the preference category and country of origin. See the Visa Bulletin and instructions for use at <http://travel.state.gov> (select “Visas” and then “Visa Bulletin,” or [http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html) ). Note, however, that the Bulletin categories do *not* progress on real time. The date for a particular category might advance slowly, leap ahead, or regress. Consult an immigration lawyer for a realistic approximation of time. When the person’s priority date comes up on the chart, the visa is available and she can apply for the green card.

### 5. How can I keep my client from becoming inadmissible, or at least eligible for a waiver?

This a complex question, and this section will just list the basic categories of inadmissibility. For more information, see materials on inadmissibility and on the § 212(h) waiver. Note that a “dangerous or violent” crime almost never can be waived under § 212(h), and that some permanent residents cannot submit a § 212(h) waiver at all. See Quick Test/Fact Sheet on § 212(h).

Ground of inadmissibility – See 8 USC § 1182(a)(2)	Family Visa Waiver?
Convicted/admitted first simple possession 30 gms or less marijuana	See “§ 212(h) waiver” at 8 USC § 1182(h)
Convicted or admitted any other controlled substance offense	No waiver
Immigration authorities have “reason to believe” person was involved in drug trafficking at any time (no conviction required)	No waiver
Conviction/admitted one crime involving moral turpitude (CIMT) Client is not inadmissible and no waiver is needed if: <ul style="list-style-type: none"> <li>✓ Petty offense exception (only one CIMT, maximum possible sentence = 1 yr or less, sentence imposed = 6 months or less)</li> <li>✓ Youthful Offender exception (convicted as adult of one CIMT committed while under age 18, conviction and any imprisonment ended at least 5 years ago)</li> </ul>	See § 212(h) waiver
Engaged in prostitution (no conviction required)	See § 212(h) waiver
Conviction of 2 or more offenses of any type with aggregate sentence imposed of at least 5 years	See § 212(h) waiver
An aggravated felony conviction is not a ground of inadmissibility <i>per se</i> , but the conviction might cause inadmissibility under the CIMT or drug grounds. Can bar some LPRs from 212(h).	Aggravated felony conviction bars some LPRs from § 212(h)
Prior deportation or removal. Emergency! Client probably <i>illegally re-entered</i> after being removed. This is the #1 prosecuted federal felony in the U.S. Client is at high risk for referral for federal prosecution and prison. If no ICE hold yet, 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.

## ASYLEES AND REFUGEES

### Quick Test: Can the Defendant Keep Status? Apply for Adjustment to LPR?

*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 their asylee or refugee status. More important, they want to apply to adjust their status to permanent residence*

**1. Is the defendant an asylee or refugee? YES NO**

Ask the person, and photocopy any document. If she has an Employment Authorization card, under “Category” see if it says A5 (asylee), A3 (refugee), or C8 (just an applicant). An asylum applicant may wrongly think that she already has won asylum; see #1 on next page for requirements for asylum applicants.

**→ 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 the asylee already, or about to be, convicted of a “particularly serious crime”?**

YES NO 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). See next page.

**3. Is a refugee already, or about to be, convicted of an offense that will make him or her 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.**

**→ ADJUSTMENT OF STATUS.** A year after the person was admitted to the U.S. as a refugee or granted asylum in the U.S., she can apply for adjustment of status to a lawful permanent resident. To do this she must be admissible, or if inadmissible she must be eligible for a special waiver – meaning she must not come within Question 6 or 7, below. If needed she can apply for adjustment as a defense in removal proceedings, so qualifying for adjustment of status is a top priority. See next page.

**5. Is the person inadmissible? YES NO**

**6. Does ICE have “reason to believe” that she ever participated in drug trafficking? YES NO**

If yes, she cannot get the waiver and cannot adjust status to LPR as a refugee or asylee. However if she was not *convicted* for drug trafficking, and she is not otherwise convicted of a PSC (and, if a refugee, also is not deportable) she might be able to keep her asylee or refugee status.

**7. Was the person convicted of a “violent or dangerous” offense? YES NO**

If it is, the waiver of inadmissibility will not be granted *unless* she shows exceptional equities. See next page.



## MORE FACTS ABOUT ASYLEE AND REFUGEE STATUS

### 1. How does a person become an asylee or refugee?

A refugee is a person from a country designated by the U.S. who was granted refugee status after showing a reasonable fear of persecution in the home country due to race, religion, national origin, political opinion or social group. She was 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 asylee status here, after making this same showing of fear of persecution to an immigration officer or judge. An asylum application must be submitted within one year of entering the U.S., absent extenuating circumstances. The application is barred by conviction of a PSC, and nearly barred by a “violent or dangerous” crime. See below. An applicant barred from asylum by crimes might qualify for withholding or for the Convention Against Torture. See *Chart: Eligibility for Relief, supra*.

### 2. How long can the person remain in that status? What puts them in removal proceedings?

Asylee or refugee status remains good until it is terminated; it can last for years. Conviction of a “particularly serious crime” is a basis for termination and institution of removal proceedings for an asylee, and a refugee can be placed in removal proceedings for a deportable offense.<sup>14</sup> In some cases a change in conditions in the home country is a basis for termination of status.

### 3. What is a 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<sup>15</sup>). 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.<sup>16</sup> Conviction of mail fraud and of possession of child pornography have been held PSCs. Generally, a misdemeanor that is not an aggravated felony is not a PSC.<sup>17</sup>

### 4. In an application to adjust status as an asylee/refugee, what convictions can be waived?

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. See 8 USC § 1159(c). This waiver can forgive *any* inadmissible crime, with two exceptions. First, it cannot waive inadmissibility based upon the government having “reason to believe” the person has participated in drug trafficking.<sup>18</sup> 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.<sup>19</sup> 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.

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<sup>14</sup> See 8 USC 1158(c)(2)(B) (asylee), *Matter of D-K-*, 25 I&N 761 (BIA 2012) (refugee).

<sup>15</sup> See *Matter of Y-L-*, 23 I&N Dec. 270 276-77 (AG 2002). Try to put such positive facts in the criminal record.

<sup>16</sup> *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982).

<sup>17</sup> *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (absent extraordinary circumstances, misdemeanor is not PSC).

<sup>18</sup> 8 USC § 1182(a)(2)(C), INA § 212(a)(2)(C).

<sup>19</sup> See *Matter of Jean*, 23 I&N Dec. 373, 383-84 (BIA 2002).

## TEMPORARY PROTECTED STATUS (TPS)

### Quick Test: Is the Defendant Eligible?

*Noncitizens from certain countries that have experienced devastating natural disaster, civil war or other unstable circumstances may be able to obtain Temporary Protected Status (TPS). For more information, see online resources or see A Guide for Immigration Advocates ([www.ilrc.org](http://www.ilrc.org)).*

**1. Is the client a national of a country that the U.S. has designated for TPS? YES NO**

*In what country was the client born? \_\_\_\_\_*

*To see which countries currently are designated for TPS, go to [www.uscis.gov](http://www.uscis.gov). Under “Humanitarian,” click on “Temporary Protected Status.” If the person is not from one of those few designated countries, then TPS is not an option. This country list can change at any time, but see the list as of January 2013, next page.*

**2. If YES: Did, or can, the client meet the TPS requirements for nationals of his or her country, in terms of date of entry into the U.S. and date of registration for TPS? YES NO.**

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 CIS on-line materials. A nonprofit immigration agency or an immigration attorney can help with this. See next page.*

**3. Can the client avoid convictions that are bars to eligibility for TPS?**

*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)<sup>20</sup>
- ✓ Any two misdemeanor convictions (offenses with a potential sentence of a year or less)<sup>21</sup>
- ✓ Conviction of an offense relating to a controlled substance
- ✓ Immigration authorities have substantial evidence that the person ever has been or helped a drug trafficker, even if no conviction
- ✓ Evidence that the person was a prostitute (sexual intercourse for a fee), even if no conviction
- ✓ Conviction of a crime involving moral turpitude (CMT), *unless* it comes within the petty offense or youthful offender exceptions.
  - Petty offense exception: client committed only one CMT, which carries a potential sentence of a year or less, and a sentence of no more than six months was imposed
  - Youthful offender exception: client committed only on CMT while under age of 18 and conviction and resulting jail ended at least five years ago.

<sup>20</sup> In California, a “wobbler” felony/misdemeanor conviction will be a misdemeanor for this purpose if it is designated as or reduced to a misdemeanor. See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

<sup>21</sup> A conviction of an offense classed as an “infraction” or other offense that is less than a misdemeanor should not be considered not a misdemeanor for this purpose.



## **Facts About Temporary Protected Status (TPS)**

### **1. What is Temporary Protected Status? What benefits does the client get from it?**

The Secretary of Homeland Security may designate Temporary Protected Status (TPS) for any foreign 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 permitted to stay legally in the U.S. for a designated period of time, and will receive employment authorization.<sup>22</sup> TPS is usually granted for about a year, but it can be renewed multiple times. TPS is not permanent resident status (green card).

### **2. What are the 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
- Registered and/or re-registered on time, or eligible to late-register
- Admissible (not inadmissible for crimes)
- Not convicted of a felony or two or more misdemeanors
- Not barred from “withholding of removal” (has not persecuted others, not convicted of “particularly serious crime”)

### **3. Which countries are designated for TPS?**

The list changes frequently. To see which countries currently are designated for TPS and special requirements for each country’s nationals, consult [www.uscis.gov](http://www.uscis.gov).<sup>23</sup> **As of January 1, 2013, El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan and Syria** were designated for TPS. Usually the designation is for just a year at a time, but several renewals are possible.

### **4. What are the “physical residence” and “registration” requirements?**

When it announces the TPS designation of a country, the U.S. will set a date by which the nationals of the country must have resided in the U.S. in order to qualify. The U.S. also will 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 registration is permitted, for example where the person had a pending immigration case, or for some relatives of persons granted TPS. See discussion at [www.uscis.gov](http://www.uscis.gov). Lawsuits may provide more opportunity for late registration.

### **5. What is the downside and the upside to applying for TPS?**

The downside is that an applicant for TPS is giving DHS her contact information and telling them that she is here without lawful status. While we are not aware of cases where people were put in removal proceedings simply because TPS was ended for their country, it could happen.

The upside is that in some cases, TPS has resulted in lawful status for a few years to well over a decade, allowing the person to remain in the U.S. lawfully with employment authorization.

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<sup>22</sup> INA § 244A, 8 USC § 1254a, added by IA90 § 302(b)(1).

<sup>23</sup> Go to [www.uscis.gov](http://www.uscis.gov) and click on “Humanitarian” and then “Temporary Protected Status.”