ELIGIBILTY FOR RELIEF:

CANCELLATION OF REMOVAL FOR PERMANENT RESIDENTS, INA § 240A(a)

By Kathy Brady, ILRC

Three forms of immigration relief are designed specifically to waive criminal record issues:

1. Inadmissibility waivers under INA § 212(h),
2. Cancellation of removal for lawful permanent residents under INA § 240A(a) ("LPR cancellation"), and
3. Waivers under the former INA § 212(c), the predecessor to LPR cancellation.

This advisory will focus on eligibility for LPR cancellation and will briefly discuss INA § 212(c).

For clients with criminal records, it is a good idea to start from scratch to see if one or more forms of immigration relief might be available. Any noncitizen should consider eligibility for INA § 212(h) relief, which provides a discretionary waiver of some of the crimes-based inadmissibility grounds. For permanent residents, if LPR cancellation cannot work due to an aggravated felony or lack of seven years of continuous residence, or even if it could work, see if the person is eligible under INA § 212(h). If any conviction from before April 1, 1997 is a problem, consider whether INA § 212(c) could resolve it.

Section 212(h) can be applied for multiple times, and can be combined with INA § 212(c), LPR cancellation, or any other waiver of inadmissibility, e.g., INA § 212(i). Section 212(c) and LPR cancellation cannot be combined with each other or applied for repeatedly. A person can be granted either INA § 212(c), or LPR cancellation, once.

You can apply for LPR Cancellation of Removal under INA § 240A(a) if ….

1. You are an LPR who does not fall within certain categories

The specific list of categories of whom is ineligible for LPR cancellation is found in the statute and includes persecutors, terrorists, crewmen, certain J-visa holders and others.[1]

2. You have not been convicted of an aggravated felony.

The immigration statute designates certain types of crimes as "aggravated felonies."[2] If the person was convicted of an aggravated felony at any time, it is a bar to LPR cancellation of removal.

3. **You have been an LPR for at least five years.**

The accrual of five years of LPR status is not subject to the "stop-time" rule set out at INA § 240A(d)(1), discussed in Subpart 4, below. The five years as an LPR continues to accrue through the removal proceedings until there is an administrative denial (meaning throughout the BIA appeal, if there is one).[3] The accrual of five years also can include time spent as a conditional resident, but children cannot use their parent's time, for either the five-year or seven-year requirement.[4]

> **Example**: Lucille was admitted on a border crossing card in 2009, fell out of status, and then adjusted to lawful permanent resident status in 2014. She was convicted of an alleged deportable offense and served with a Notice to Appear in 2017. She was not eligible for LPR cancellation because she lacked the five years as an LPR (although she did have the seven years since admission in any status, discussed below). In removal proceedings, she contested deportability, lost, and appealed her case to the BIA. In 2019, while the appeal was still pending, she reached the five years of LPR status. She asked the BIA to remand the case to the immigration judge to enable her to apply for LPR cancellation.

4. You have seven years of continuous residence in the United States since any admission.

a. *When does the seven-year period start?*

It starts with any admission, e.g., as an LPR, visitor, border crossing card-holder, refugee, student, etc., including if the person later fell out of status for some period before they adjusted.[5] If the person never was admitted, adjustment to LPR will count as the admission that starts the seven years. A grant of Family Unity is not an admission for this purpose, but advocates can consider arguments that a grant of Special Immigrant Juvenile Status (SIJS) is.[6]

b. When does the seven-year period stop?

INA § 240A(d)(1) provides that the seven years cease to accrue:

> "(A) …. when the alien (*sic*) is served a notice to appear under section 239(a), or
>
> (B) when the alien (*sic*) has committed an offense referred to in section 212(a)(2) that renders the alien (*sic*) inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest."

Served a qualifying NTA. For the NTA to stop the seven years, it should contain the place, date, and time of the proceedings. See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018).

Committed an offense "referred to" in INA § 212(a)(2). The clock also stops when the person "has committed an offense referred to in section 212(a)(2) that renders the alien (*sic*) inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4)."[7]

The first requirement is that the offense must be "referred to" in INA § 212(a)(2), which sets out the criminal inadmissibility grounds. What is *not* referred to in that section, and hence *never* can stop the seven-year clock?

- No deportable conviction stops the clock, unless the offense *also* happens to be "referred to" in some part of INA § 212(a)(2). For example, simply being deportable under the firearms, domestic violence, or crime involving moral turpitude (CIMT) ground alone will not stop the clock. It would stop the clock only if the deportable offense also happened to be an offense "referred to" in INA § 212(a)(2).[8]
- A CIMT that comes within the petty offense or youthful offender exception to the inadmissibility ground is not "referred to" in INA § 212(a)(2). (Remember that the petty offense exception applies when the person has committed just one CIMT, which has a potential sentence of a year or less, and a sentence of six months or less was imposed.) An offense that comes within one of these exceptions does not stop the clock, even if the conviction makes the person deportable. But the clock will stop as of the date of committing a second CIMT.[9]
- Inadmissibility grounds other than INA § 212(a)(2) – for example the health grounds at INA § 212(a)(1) or the alien smuggling or false claim grounds at INA § 212(a)(6)—are not "referred to" in INA § 212(a)(2) and do not stop the clock.

  Example: Tim pled guilty to committing felony California Penal Code § 273.5, domestic battery with injury, against his wife. It is his first conviction. He was sentenced to 15 days in jail. This is a deportable crime of domestic violence. To stop Tim's seven-year clock, however, it must be an offense "referred to" in INA § 212(a)(2). If we assume that Cal Pen Code § 273.5 is a CIMT (although this is debatable[10]), then Tim's conviction *is* referred to in INA § 212(a)(2). It is a conviction of a CIMT, and it does not come within the petty offense exception, because as a felony it has a sentence of more than a year. Tim's clock stopped as of the date he committed the offense.

  What if Tim is able to reduce the felony to a misdemeanor, under Cal Pen Code § 17(b)(3)? Then the CIMT conviction *will* come within the petty offense exception, because it will have a potential sentence of a year or less. In that case his clock will not be stopped.

That "renders" the person inadmissible or deportable. To stop the clock, the offense must be referred to in INA § 212(a)(2) *and* "render" the LPR inadmissible under INA § 212(a)(2) or deportable

under INA § 237(a)(2) or (4). In its fall 2019 session, the U.S. Supreme Court will address the meaning of "render" in this section, to resolve a split among circuit courts of appeals. *Barton v. Barr*, 139 S.Ct. 1615 (2019).

In the circuit split, the Ninth Circuit adopted the better view when it held that if removal proceedings are brought based on a charge of deportability, under INA § 237, a conviction never can "render" an LPR inadmissible, because the LPR is not seeking admission and thus is not subject to the inadmissibility grounds. In that type of proceeding, an offense stops the clock only if it is referred to in INA § 212(a)(2) and "renders" the person *deportable* under INA § 237(a)(2) or (3). *Nguyen v. Sessions,* 901 F.3d 1093, 1100 (9th Cir. 2018). While the court did not discuss this, it appears that the counterpart rule would be that if a returning LPR is found to be seeking admission at the border pursuant to INA § 101(a)(13)(C), and removal proceedings are brought under INA § 212, then the clock stops if the offense is referred to in INA § 212(a)(2) and "renders" the LPR *inadmissible* under INA § 212(a)(2). That person is seeking admission and so is not subject to the deportability grounds; therefore, they can't be "rendered" deportable.

Some other circuit courts of appeals held that an LPR can be "rendered" either inadmissible or deportable in removal proceedings brought under INA § 237. Under this interpretation, it appears that *any* offense "referred to" in INA § 212(a)(2) will stop the clock, because it will automatically "render" the person inadmissible.[11]

> **Example:** LPR Linda is charged in INA § 237 removal proceedings with being deportable for various offenses. Regarding when her seven-year clock stopped, she formally admitted to ICE that she used cocaine at a time when she had only accrued five of the seven years.
>
> In the Ninth Circuit, this did not stop accrual of her seven years. While formally admitting a drug offense (even without a conviction) is referred to in INA § 212(a)(2), it does not "render" her deportable; the deportation ground requires a conviction.
>
> But in the Second, Fifth, or Eleventh Circuit, currently it would stop accrual of the seven years, because admitting the offense is referred to in INA § 212(a)(2) and, according to the court, also "renders" her inadmissible under INA § 212(a)(2), even though she is not subject to grounds of inadmissibility. Under this reading, the clock stops any time a person's offense is "referred to" in INA § 212(a)(2). The Supreme Court will decide between the Ninth Circuit's and the other courts' interpretation in *Barton v. Barr*, 139 S.Ct. 1615 (2019).

Do pre-April 1, 1997 offenses stop the clock? In the Ninth Circuit, conviction of an offense before the enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[12] on September 30, 1996 does not stop the seven-year clock, for an applicant "who pled guilty before the enactment of IIRIRA and was eligible for discretionary relief at the time IIRIRA became effective" on April 1, 1997. *Sinotes-Cruz v. Gonzalez*, 468 F.3d 1190, 1203 (9th Cir. 2006) (granted because would have been eligible for INA § 212(c) relief). Circuits are split on this issue.[13] The *Sinotes-*

Cruz requirement of being "eligible" for relief as of April 1, 1997 should mean that the person had a conviction that qualified for INA § 212(c) relief, not that the person already had accrued the seven years required for INA § 212(c). See also *Valencia-Alvarez v. Gonzales,* 469 F.3d 1319, 1329 (9th Cir. 2006) (the clock did stop, because the person never was eligible for relief under INA § 212(c)).

Risks after winning INA §§ 240A or 212(h). Once relief has been granted to waive certain grounds, the person cannot be charged with being deportable or inadmissible based solely on the conviction.[14] But a conviction that occurred after admission and that was waived by a grant of some relief still can be joined to a *new, subsequent* conviction to create an immigration penalty, such as being deportable for two CIMT convictions.[15]

If the issue is inadmissibility, both the older, waived ground and the new ground must be waived in an application for adjustment of status. The BIA found that where LPR cancellation had been used to waive a prior conviction for possession of cocaine, and the LPR later became deportable for new CIMT convictions, he was not eligible to adjust status as a defense to removal: he was inadmissible both for the new CIMT and for the old cocaine convictions, and he could not waive the cocaine conviction using INA § 212(h). The BIA noted, however, that a previously waived inadmissible conviction would not trigger INA § 101(a)(13)(C)(v) for an LPR returning from a trip, according to its terms.[16]

If your conviction occurred before April 1, 1997,
You may be able to apply for INA § 212(c) relief for LPRs,
Or for an exception for LPRs who traveled while inadmissible solely because of such convictions, if …

If your LPR client is inadmissible or deportable for a conviction from before April 24, 1996, or in some cases before April 1, 1997, they might be eligible to apply for a waiver today under former INA § 212(c). This can be combined with a INA § 212(h) waiver, but not with LPR cancellation. See *Matter of Abdelghany,* 26 I&N Dec. 254 (BIA 2014); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); and online practice advisory.[17]

If your LPR client is charged with seeking an admission at the border pursuant to INA § 101(a)(13)(C), or charged with being deportable for having been inadmissible at last entry, INA § 237(a)(1), solely because they traveled outside the United States after one or more convictions of inadmissible offenses that occurred before April 1, 1997, they may have a defense. See *Vartelas v Holder*, 566 U.S. 257 (2012) (employing the old *Fleuti* definition of entry in this context) and online practice advisory.[18]

For more in-depth information, see books such as ILRC, *Removal Defense* (www.ilrc.org, 2019 edition forthcoming), or Kesselbrenner and Rosenberg, *Immigration Law and Crimes* (www.thomsonreuters.com).

ENDNOTES

[1] The person must not have been "convicted of" an aggravated felony. INA § 240A(a)(3). The person must not have come within the other categories pursuant to INA § 240A(c).
[2] See INA § 101(a)(43), and see ILRC, *Practice Advisory: Aggravated Felonies* (April 2017) at www.ilrc.org/crimes. To see if a particular offense is an aggravated felony, check references such as the California *Chart* (sign up at www.ilrc.org/chart).
[3] *Matter of Bautista Gomez*, 23 I&N Dec. 893 (BIA 2006) (While this is a non-LPR cancellation case, the interpreted statute, INA § 240A(d), applies to both forms of cancellation).
[4] *Holder v. Martinez-Gutierrez*, 566 U.S. 583 (2012).
[5] See, e.g., *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002).
[6] *Garcia v. Holder*, 659 F.3d 1261 (9th Cir. 2011) (SIJS grant is admission for this purpose). This is not secure because the case was partly based on the Ninth Circuit's finding that Family Unity status was an "admission" for this purpose, and the Ninth Circuit withdrew from its stance on Family Unity. See *Medina-Nunez v. Lynch*, 788 F.3d 1103, 1104 (9th Cir. 2015), *Matter of Espinoza*, 26 I&N Dec. 603, 603 (BIA 2015). But there may be an independent argument, separate from Family Unity, based on the parole and other language in the SIJS statute.
[7] INA § 240A(d)(1).
[8] *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000), interpreting INA § 240A(d), 8 USC § 1229b(d).
[9] *Matter of Deando-Roma*, 23 I&N Dec. 597 (BIA 2003), *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010).
[10] The Ninth Circuit held that § 273.5 is overbroad as a CIMT, because the level of force it requires, when committed against a former co-habitant, is not a CIMT. *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009). Advocates can argue that this means that *no* conviction of § 273.5 is a CIMT, because under the categorical approach § 273.5 is not "divisible" between the several listed types of relationships. See ILRC, *How to Use the Categorical Approach Now* (2019 version forthcoming) at www.ilrc.org/crimes.
[11] See *Nguyen v. Sessions,* 901 F.3d at 1100 ("Under the plain language of the stop-time rule and the INA, a lawful permanent resident cannot be 'rendered inadmissible' unless he is seeking admission."). But see *Heredia v. Sessions*, 865 F.3d 60, 67 (2d Cir. 2017); *Calix v. Lynch*, 784 F.3d 1000, 1008-09 (5th Cir. 2015); *Barton v. United States AG*, 904 F.3d 1294, 1295 (11th Cir 2018), *contra.* The Supreme Court accepted certiorari in *Barton v. Barr,* 139 S.Ct. 1615 (2019).
[12] Pub.L. 104–208, 110 Stat. 3009-546.
[13] See also *Jaghoori v. Holder*, 772 F.3d 764, 771 (4th Cir. 2014) and *Jeudy v. Holder*, 768 F.3d 595 (7th Cir. 2014), in accord. And see *Valencia-Alvarez v. Gonzales,* 469 F.3d 1319, 1329 (9th Cir. 2006) (*Sinotes-Cruz* did not apply, because the person who committed a drug offense between April 24, 1996 and April 1, 1997, and was convicted after April 1, 1997, never was eligible for relief under § 212(c).) Other courts hold that convictions from before April 1, 1997 do stop the clock. See, e.g., *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006); *Martinez v. Mukasey*, 523 F.3d 365 (2nd Cir. 2008), *Briseno-Flores v. Att'y Gen. of the United States*, 492 F.3d 226 (3rd Cir. 2007), *Heaven v. Gonzales*, 473 F.3d 167 (5th Cir. 2006).
[14] *Matter of Gordon*, 20 I&N Dec. 52, 56 (BIA 1989) *Matter of Balderas*, 20 I&N Dec. 389, 393 (BIA 1991).
[15] *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997); *Molina-Amezcua v. INS*, 6 F.3d 646 (9th Cir. 1993); *Matter of Balderos*, 20 I&N Dec. 389 (BIA 1991).
[16] *Matter of Taveras*, 25 I&N Dec. 834 (BIA 2012), upheld in *Taveras v. AG of the United States*, 731 F.3d 281 (3rd Cir. 2013), and see *De Hoyos v. Mukasey*, 551 F.3d 339 (5th Cir. 2008)
[17] See advisories on *Matter of Abdelghany,* 26 I&N Dec. 254 (BIA 2014) and on *Judulang v. Holder,* 565 U.S. 42 (2011) at http://www.nipnlg.org/practice.html
[18] See practice advisory on *Vartelas v. Holder, supra,* at http://www.nipnlg.org/practice.html