



ALL THOSE RULES ABOUT CRIMES INVOLVING MORAL TURPITUDE

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A “crime involving moral turpitude” (CIMT) is a technical term for a category of criminal offenses that can make a noncitizen deportable, inadmissible, and/or barred from relief, depending on a number of factors set out in the Immigration and Nationality Act. This advisory will summarize and discuss the rules governing CIMTS:

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This Advisory¹ was updated in light of *Sanchez v. Mayorkas*, No. 20-315 (at Supreme Court) (see Part I, subpart 2); *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. 2021), denying petitions for rehearing and amending *Velasquez-Rios v. Barr*, 979 F.3d 690 (9th Cir. 2020) (see Part II, subparts 1, 4, 11); *Ortega-Lopez v. Barr*, 978 F.3d 680, 692 (9th Cir. 2020) (see Part II, subpart 10); and *Barton v. Barr*, 140 S.Ct. 1442 (2020) (see Part II, subparts 6-8).

I. Overview: Deportability, Inadmissibility, Relief, and Conviction and Admission

To use the moral turpitude rules, first we must identify *which* rule/s apply to your client in their particular situation. The Immigration and Nationality Act (INA) sets out two lists of reasons that a noncitizen can be “removed” from the United States: the grounds of inadmissibility and the grounds of deportability. These grounds are incorporated into some other penalties, as well. Especially when looking at crimes involving moral turpitude (CIMTs), we need to understand which list applies to your client. Here are the basics.

A. Seeking Admission: Inadmissibility Grounds

A noncitizen who asks to enter the United States at a port of entry (border, international airport, etc.) is seeking to be “admitted” and is subject to the grounds of inadmissibility at INA § 212(a), 8 USC § 1182(a). A person applying for many forms of relief, even from within the United States (including adjustment of status, a U Visa, T Visa, special immigrant juvenile status, and more), also is subject to those grounds.

Example: A person with a student visa, visitor visa, or lawful permanent resident visa (just acquired pursuant to consular processing) who applies for admission at the border can be denied entry if they are inadmissible, e.g., because they were convicted of an offense listed in INA § 212(a)(2).

Example: A person who comes to the border with no visa or entry document is subject to the grounds of inadmissibility, and is automatically inadmissible due to not having a visa. INA § 212(a)(7).

Example: A person who entered the United States without inspection is subject to the grounds of inadmissibility.

On the last point, a noncitizen who entered the United States without inspection (e.g., surreptitiously crossed a border) never has been “admitted,” and so they still technically face the grounds of inadmissibility even if they are arrested years later and far from a border. This entry may be referred to as “EWI,” for entry without inspection. The person is inadmissible under INA § 212(a)(6) based on their illegal entry, even if they have no criminal issue. They can be removed unless they are granted some form of relief. A person who is paroled into the United States likewise is subject to the grounds of inadmissibility. A criminal record might subject these people to mandatory detention under the ground of inadmissibility rules; see Part 10, below.

If someone entered EWI and was later granted some form of immigration relief within the United States, that status may or may not be considered an “admission.” This area of law is evolving, and results sometimes differ by circuit. If it is not clear whether your client has been “admitted,” check with an expert.

A lawful permanent resident (LPR) who travels abroad on a trip enjoys a special legal benefit: They are not considered to be seeking a new admission when they return to a U.S. port of entry, and they can simply re-enter without having to face the grounds of inadmissibility. But there are a few exceptions. The returning LPR *is* subject to the grounds of inadmissibility if the government can prove that they come within any of five exceptions listed in INA § 101(a)(13)(C), 8 USC § 1101(a)(13)(C).² Two commonly applied exceptions are that the LPR committed an offense listed in the crimes grounds of inadmissibility, or stayed outside the United States for more than six months. If the government proves that a § 101(a)(13)(C) exception applies, the LPR at the border is treated like any other noncitizen: they are seeking a new admission and they must either be admissible, or be granted a waiver of inadmissibility, in order to be admitted.

See Parts 3-5, below, for when a conviction or admission of a CIMT can cause inadmissibility.

B. Already Admitted: Deportability Grounds

A noncitizen who has been “admitted” to the United States in any status, or who has adjusted status within the United States, can be removed subject to the grounds of deportability. See INA § 237(a), 8 USC § 1227(a). An “admission” to the United States is a legal term that includes entering the country with a visa. A person also is deemed admitted who is granted certain forms of relief while in the United States, including adjustment of status, a U visa, and, in some jurisdictions, Temporary Protected Status (this TPS issue is pending before the Supreme Court in *Sanchez v. Mayorkas*, No. 20-315). If a person who has been admitted comes within a deportation ground, they can be placed in removal proceedings and removed, unless they are eligible for some relief. If they have a criminal record, they might be subject to mandatory detention; see Part 10, below.

Example: A permanent resident, or a person admitted on another visa such as a student or tourist visa, can be placed in removal proceedings if they become deportable under INA § 237 (e.g., by being convicted of an offense listed in § 237(a)(2)).

Example: A person on a student, tourist or other non-immigrant visa who has stayed past their permitted time, or violated the terms of the visa, is deportable under § 237(a)(1) due to their lack of lawful permission to be here, even with no criminal record.

See Parts 1-2, below, for when one or more convictions of a CIMT can cause deportability.

Bottom line: All persons in the United States with no lawful status are removable. No matter how they entered, these people are at risk of removal. If they were admitted but are no longer here legally, they are *deportable* because they are out of status. INA § 237(a)(1). If they entered without inspection and never obtained status, they are *inadmissible* because they have no lawful status. INA § 212(a)(6). Anyone without lawful status needs to be able to apply for *relief* if they are to defend against removal.

C. Bars to Various Forms of Relief

We use the term “relief” to include any immigration benefit, lawful status, or waiver, such as asylum, family immigration, cancellation of removal, DACA, etc. Anyone who is undocumented, or who has lawful status such as a green card but has become deportable or otherwise disqualified from keeping the status, can be removed unless they can qualify for and be granted some relief.

Each form of relief has its own requirements, including its own rules for which types of crimes serve as a bar to eligibility. A bar might include an inadmissible offense, deportable offense, both, or neither. (To see a summary of different forms of relief and their applicable crimes bars, see ILRC, *N.17 Relief Toolkit* (2018) at www.ilrc.org/chart.) We must pay careful attention to the wording in the statute that describes the bars. For example, must the person actually “be” deportable (both subject to the deportation grounds and comes within a ground), or just be convicted of an offense “described in” the deportation ground, to be barred? Must there be a criminal conviction, as in the deportation grounds? Or is making a qualifying admission that they committed the CIMT sufficient, as in the inadmissibility grounds? This Advisory will highlight these differences; see also discussion of different forms of cancellation of removal in Parts 6-8, below.

D. Immigration Definition of Conviction and Admission of Conduct

Conviction of an offense. The CIMT deportation grounds, and some other penalties, only apply if the person was “convicted” of the offense in criminal court. Without a conviction, they are not deportable for CIMT.

Immigration law uses its own, federal definition of conviction. State criminal court dispositions that do not meet this definition are not “convictions” for immigration purposes. These include state diversion programs and other alternative dispositions *if* there was no guilty plea or finding of facts supporting guilt; a conviction that is on appeal on the merits (according to the BIA); a conviction that has been vacated based on legal error; a juvenile delinquency disposition (see Part 11 for more on delinquency); and a few other categories.³ But if there was a conviction and the person “expunged” it, e.g., because they completed probation, counseling, or other requirements, they still have a conviction for most immigration purposes.⁴

Example: Kyong was charged with a CIMT, but was allowed to complete pretrial diversion with no plea or finding of guilt. See, e.g., California Pen C § 1001.36 (mental disorder diversion). Louis pled guilty to a CIMT, but later the conviction was vacated due to legal error. See, e.g., Pen C § 1473.7. Matteo pled guilty to a CIMT but later expunged it because he showed he had completed probation. See, e.g., Pen C § 1203.4(a). Who has a conviction for immigration purposes?

Kyong and Louis do not have a conviction. Kyong never had one because there was no plea or finding of guilt. Louis no longer has a conviction because the court vacated (eliminated) it based on legal error. But for almost all immigration purposes, Matteo still has a conviction.

See ILRC resources for further discussion of the immigration definition of conviction.⁵

Admitted committing an offense. A person can be found inadmissible, but not deportable, *without a conviction*, if they make a qualifying admission that they committed a CIMT. If the admitted CIMT comes within the petty offense exception, the person is not inadmissible. (Note that controlled substance offenses are treated similarly: either a conviction or a qualifying admission of conduct is a basis for inadmissibility, but a conviction, rather than just an admission, is required for deportability.)

Although no conviction is required, several other requirements apply to the admission. For example, the officer must explain all of the elements of the offense before taking the admission. In every instance where the CIMT (or controlled substance) inadmissibility ground might affect a case, advocates must be ready to advise clients about the risk of and potential defenses against making a damaging admission to an immigration judge or officer. This might even involve refusing to answer a question on Fifth Amendment grounds. See Part 3 for further discussion of inadmissibility based on admitting conduct, and see Part 6, subpart c, for discussion of admitting conduct during a cancellation hearing.

II. All Those Rules About Crimes Involving Moral Turpitude

A crime involving moral turpitude (CIMT) can affect someone's immigration case in a variety of ways. Once you have determined whether your client is subject to the grounds of inadmissibility or deportability, or whether your client is seeking to establish eligibility for a certain type of immigration relief, the next question is whether and how their CIMT affects their case.

A. When Does One CIMT Trigger the CIMT Deportation Ground?

1. Summary

A single conviction of a CIMT can make a noncitizen deportable, but only if (1) the offense carries a maximum possible sentence of one year or more, and (2) the person committed the offense within five years "after the date of admission."⁶ Stated another way, to *avoid* becoming deportable for one CIMT conviction, either the offense must have a potential sentence of 364 days or less, *or* the person must have committed the offense more than five years after the date of an admission, or both. A conviction always is required for the CIMT deportation grounds; admitting the conduct will not cause deportability. Being convicted of an offense that is not a CIMT does not affect this analysis; only CIMTs are counted.

2. The CIMT Must Have a Potential Sentence of One Year or More

Bottom line: A CIMT must carry a potential (maximum possible) sentence of at least one year in order to trigger this deportation ground. Many California misdemeanor offenses are described in code sections (e.g., California Penal Code, Vehicle Code) as having a potential sentence of

“not more than one year” or “up to one year.” Under California Pen C § 18.5(a), these offenses actually have a potential sentence of up to 364 days, not one year. A CIMT with a potential sentence of just 364 days will not trigger this deportation ground.

Unfortunately, the BIA and the Ninth Circuit have held that for federal immigration purposes, the 364-day limit in Pen C § 18.5(a) only applies to convictions from on or after January 1, 2015. A California misdemeanor conviction from before January 1, 2015 still can have a potential sentence of one year for immigration purposes, and thus still can trigger the deportation ground. See *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. 2021), denying petitions for rehearing and amending *Velasquez-Rios v. Barr*, 979 F.3d 690 (9th Cir. 2020), upholding *Matter of Velasquez-Rios*, 27 I&N Dec. 460 (BIA 2018), declining to give immigration effect to the retroactivity clause in Pen C § 18.5(a).

Thus, the current rule is that a California “one-year” misdemeanor has a potential sentence of 364 days if the conviction occurred (or arguably, became final) on or after January 1, 2015; that conviction cannot trigger this deportation ground. But if the conviction occurred (or became final) before January 1, 2015, it has a potential sentence of a year, and can trigger the ground. See discussion of “wobbler” offenses, below.

If your client will be hurt by a pre-January 1, 2015 CIMT conviction under this rule, try to vacate the conviction for cause, for example under Pen C §§ 1473.7, 1016.5, or other vehicle. See materials at <https://www.ilrc.org/immigrant-post-conviction-relief>.

Why do we have the January 1, 2015 cutoff? Several states have passed legislation to reduce the maximum possible sentence for a misdemeanor in their state from one year to 364 days. This can help to prevent state residents from being deported for a single misdemeanor conviction. California created Penal Code § 18.5, effective January 1, 2015, which provided that going forward, a misdemeanor would have a potential sentence of no more than 364 days. Section 18.5 was viewed as so beneficial that, effective January 1, 2017, California gave it retroactive effect, so that the 364-day limit would apply to *all* California misdemeanor convictions, regardless of the date of conviction. Section 18.5(a) now provides:

Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days. This section shall apply retroactively, whether or not the case was final as of January 1, 2015.

However, the Ninth Circuit Court of Appeals and the Board of Immigration Appeals (BIA) held that federal law, including immigration law, will not give effect to retroactively applied provisions of some state criminal reform initiatives, including Pen C § 18.5(a). They only will accept

prospective effect on new convictions. See *Velasquez-Rios* decisions, cited above. Thus the Ninth Circuit held that for immigration purposes, a California misdemeanor conviction from before January 1, 2015 has a potential sentence of up to a year, while a conviction of the same misdemeanor on or after January 1, 2015 has a potential sentence of up to 364 days, under § 18.5(a).

Example: In 2010, LPR Melissa was convicted of California felony welfare fraud, a CIMT, which she committed within five years of her admission to the United States. This made her deportable based on conviction of a CIMT offense committed within five years of admission, that had a maximum possible sentence of one year or more.

In 2014 Melissa's conviction was reduced to a misdemeanor under Pen C § 17(b)(3). But she still was deportable because the misdemeanor still had a potential sentence of a year. (And see below regarding felony reductions.)

On January 1, 2015, Pen C § 18.5 took effect, but that did not help Melissa because it only applied prospectively, to new convictions.

On January 1, 2017, the Pen C § 18.5(a) retroactivity clause took effect and Melissa's offense – like all prior California offenses with a potential one-year sentence, regardless of date -- automatically changed to have a maximum possible sentence of 364 days. Melissa was so relieved that she was no longer deportable.

On October 4, 2018, the BIA held in *Matter of Velasquez-Rios* that federal immigration authorities would not give effect to the retroactivity clause in Pen C § 18.5(a). It held that a conviction must have occurred on or after January 1, 2015 for a misdemeanor to have a potential 364 days. Melissa became deportable again! The Ninth Circuit upheld that ruling. Melissa needs to seek post-conviction relief, such as Pen C § 1473.7, to eliminate the 2010 conviction and try to re-plead to a non-CIMT offense. In fact, there was a legal error: she was not advised in 2010 that the conviction would make her deportable under this CIMT ground.

If Melissa's misdemeanor conviction had occurred in 2016 rather than in 2010, she would not be deportable under *Velasquez-Rios*. Even for immigration purposes, her conviction would have a maximum possible sentence of just 364 days.

Felonies Reduced to a Misdemeanor under Pen C § 17(b)(3).⁷ California and some other state laws provide that certain offenses can be punished as either a felony or a misdemeanor.⁸ These offenses often are referred to as “wobblers.” In California, a criminal court judge can designate a wobbler offense to be a felony or misdemeanor *at the time of sentencing* to probation, and also can reduce a felony wobbler to a misdemeanor *at any time thereafter*, under Pen C § 17(b)(3). A California wobbler misdemeanor is a “one-year” misdemeanor that is subject to Pen C § 18.5 and *Velasquez-Rios*.

Two questions about wobblers are (1) Will authorities continue to give immigration effect to a court’s order reducing a felony to a misdemeanor under Pen C § 17(b)(3), as they have in the past? and (2) If they do, and if the original felony wobbler conviction occurred before January 1, 2015, but the reduction to a misdemeanor took place after that date, will the resulting misdemeanor have a potential 364 days?

Regarding the first question, federal courts consistently have given immigration effect to California § 17(b)(3) orders reducing a felony wobbler to a misdemeanor. For example, the Ninth Circuit held that a noncitizen qualified for the petty offense exception when, several years after his conviction, and after removal proceedings already had started, the criminal court judge reduced the felony CIMT to a misdemeanor.⁹ DHS might try to push back against this established rule based on recent AG decisions, but advocates should fight this and get help if needed.¹⁰

Note that there is a trend in federal decisions to refuse to give federal effect to a retroactive change made to a state conviction by a state statute that was *enacted after the conviction became final*. The idea is that a new state law should not “rewrite history” for federal law purposes. This is why the Ninth Circuit in *Velasquez-Ruiz* refused to give effect to the retroactivity clause of Pen C § 18.5(a). But wobblers are not in this category. Wobbler statutes were in effect at the time of the original conviction (they have existed in California since the 1800’s). Both the BIA and the Ninth Circuit in their *Velasquez-Rios* decisions noted that because “wobbler” offenses have the potential to be a misdemeanor *as of the initial date of conviction*, the reduction to a misdemeanor is not a new retroactive law. However, § 17(b)(3) was not directly at issue in *Velasquez-Rios*, and ICE may continue to push the Ninth Circuit to reverse its precedent.

Regarding the second question, advocates can argue that if a felony wobbler conviction occurred before January 1, 2015, and the wobbler was reduced to a misdemeanor under § 17(b)(3) after that date, the new misdemeanor has a potential sentence of 364 days. (As with all untried arguments, at the same time advocates should investigate the possibility of vacating the conviction for cause.) California law provides that a misdemeanor reduction under § 17(b)(3) is

prospective; the misdemeanor cannot relate back to the date of the felony. “[C]lassification of the offense as a misdemeanor did not operate retroactively to the time of the crime’s commission, the charge, or *the adjudication of guilt.*” *People v Park* (2013) 56 C4th 782, 791, note 6, emphasis added. For example, a post facto misdemeanor reduction has no retroactive effect on the statute of limitations (*Doble v Superior Court* (1925) 197 Cal. 556); on the liability of an accessory after the fact to felony burglary despite the principal’s conviction of a misdemeanor (*People v Moomey* (2011) 194 CA4th 850, 856-858); on a defendant’s ineligibility for diversion as a result of a prior felony conviction (*People v Marsh* (1982) 132 Cal.App.3d 809, 812-813); or other factors.

Warning: Assume that an order under Prop 47 changing a prior felony conviction to a misdemeanor will NOT be given immigration effect. Because Prop 47 is a new law that makes a retroactive change to previously existing convictions,¹¹ it is likely to suffer the same fate as Pen C § 18.5(a). See *Velasquez-Rios*, 988 F.3d at 1086-1087, citing *United States v. Diaz*, 838 F.3d 968, 975 (9th Cir. 2016) (declining to give effect to Prop 47 in evaluating a sentence enhancement). Seek post-conviction relief to vacate the conviction.

Other California Offense Levels. Some other California misdemeanors have a potential sentence of up to six months. The code section may refer to these simply as a “misdemeanor”; see Pen C § 19. Some have a sentence of 90 days. These do not trigger this deportation ground. Note that an “attempt” to commit an offense often has a potential sentence of half of the actual offense. All California felonies have a potential sentence of more than a year. See also ILRC, *California Sentences and Immigration* (November 2020) at https://www.ilrc.org/sites/default/files/resources/immigration_and_sentence_11.2020.pdf

3. Committed the CIMT Within Five Years of Admission

The person must have committed the CIMT within five years after their “date of admission.” The BIA states that the “date of admission” refers to “the admission by virtue of which the alien was then in the United States.” *Matter of Alyazji*, 25 I&N Dec. 397, 398 (BIA 2011). It held that the person’s first admission to the United States in any status starts the five-year clock. The clock does not re-start if the person later adjusts status to become an LPR; it just keeps going. By contrast, if the person entered without inspection and then adjusts status, the five years begins on the date of adjustment. See examples, below.

In *Alyazji* the BIA discussed different scenarios to show when the admission starting the five-year clock occurs. In each of the following examples, *assume that the person was convicted of a CIMT that has a potential sentence of a year or more.* The person will be deportable if the offense was committed within five years after the “date of admission.”

Example 1. Alice is admitted to the United States on a visitor’s visa in 2011. She overstays her visa. In 2016 she adjusts status to lawful permanent residence. She commits and is convicted of the CIMT in 2018. Her “date of admission” for purposes of the five years is the date she was admitted as a visitor in 2011. Since that was more than five years before she committed the offense in 2018, she is not deportable.

Example 2. Ben enters the United States without inspection in 2011. In 2016 he adjusts status to lawful permanent residence (for example, pursuant to INA § 245(i) or as an asylee). His “date of admission” for purposes of the five years is the 2016 date of adjustment. If he commits the CIMT in 2018, he will be deportable.

Example 3. Cory is admitted to the United States as a permanent resident in 2002. In 2008 he leaves the United States for a few weeks to visit his mother. Upon his return, he does not make a new “admission,” pursuant to INA § 101(a)(13)(C). In 2009 he commits the CIMT. While *Alyazji* does not address this situation, under the *Alyazji* test the date of admission for purposes of the five years should be 2002, not 2008, because his 2008 re-entry was not a new “admission.”

Example 4. The BIA discussed a hypothetical example involving a long absence. Say that David was admitted as a visitor in 2000, then left the United States in 2000, re-entered without inspection in 2012, and later adjusted status in 2014. The BIA held that for purposes of this deportation ground, the five years began at his adjustment in 2014. He is not in the United States “by virtue of” his admission in 2000.

Example 5. The BIA did not discuss what happens to a person living in the United States with a student or work visa, who took short trips outside the United States occasionally (and therefore made new admissions after each trip), but maintained uninterrupted lawful presence. DHS may assert that the person’s five years began again with each return, but advocates can investigate defenses to this.

B. When Do Two or More CIMTs Trigger the CIMT Deportation Ground?

A person who is subject to the grounds of deportability is deportable for two or more CIMT convictions that occur after admission, as long as they do not arise from a *single scheme of criminal misconduct*. INA § 237(a)(2)(A)(ii), 8 USC § 1227(a)(2)(A)(ii). A conviction always is required for the CIMT deportation grounds; admitting the conduct will not cause deportability. Being convicted of an offense that is not a CIMT does not affect this analysis; only CIMTs are counted.

The BIA has a narrow definition of the “single scheme” exception, which is essentially that the two charges arose from the very same incident. For example, the BIA held that using bad credit cards at four locations over the course of a few hours is not a single scheme. *Matter of Islam*, 25 I&N Dec. 637, 638 (BIA 2011).

Example: Stan entered the United States without inspection. He was convicted of a CIMT. Then he adjusted status. Six years after that he committed and was convicted of two CIMTs arising from a five-minute incident at a store. Is Stan deportable under the CIMT grounds?

Stan should not be found deportable. His first conviction was not after admission, so it does not count for deportability purposes. The next two convictions do not make him deportable. They should come within the “single scheme” exception for multiple CIMT convictions since they arose from the same incident. Also, they do not trigger deportability based on one CIMT conviction (see Part 1, above) because they were committed more than five years after the date admission. But if Stan ever gets another CIMT conviction, he will be deportable.

Can a prior, waived CIMT conviction join with a new CIMT conviction to cause deportability? Once a waiver has been granted, the person cannot be charged with being deportable or inadmissible based solely on the waived conviction.¹² But if the person later gets a new CIMT conviction, then a prior conviction that occurred *after admission* and that was waived by some relief can be joined to the new one, to make the person deportable for two CIMT convictions “after admission.” If the person applies for adjustment of status as a defense to removal, both the older, waived conviction/s and the new conviction/s must be waived.

Example: Mel was admitted as a student and fell out of status. A few years later, they were convicted of a CIMT. They married a USC and adjusted status; the CIMT was waived under INA § 212(h) (or it came within the petty offense exception; either way). Years later, Mel was convicted of a second CIMT. They are deportable for conviction of two CIMTs after admission.¹³ They can apply to adjust status again, and submit another § 212(h) application to waive *both* CIMTs.

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 the old cocaine conviction, and he could not waive the cocaine conviction using § 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 the terms of the statute.¹⁴

C. When Does a CIMT Cause Admissibility? What is a Qualifying Admission of a CIMT?

A noncitizen is inadmissible if they are subject to the grounds of inadmissibility, and if at any time they are convicted of, *or* make a qualifying admission that they committed, a CIMT. There are two important exceptions to the CIMT inadmissibility ground, called the petty offense exception and the youthful offender exception. See Parts 4 and 5, below. A person who comes within either exception is not inadmissible for CIMTs, or deemed to be described in that inadmissibility ground, for any immigration purpose. A person is inadmissible who was convicted of or admitted to two or more CIMTs.

We discussed the immigration definition of a “conviction” in the Overview, subpart d, above. This section will discuss when a person is inadmissible based on *admitting that they committed* a CIMT, and possible defenses to this. See other resources for further discussion of a qualifying admission of conduct.¹⁵

Note: Admitting commission of a drug offense. Like the CIMT inadmissibility ground, the controlled substance inadmissibility ground can be triggered by either a conviction of, *or* a qualifying admission that the person committed, a controlled substance offense.¹⁶ Admissions can be especially dangerous for clients when it comes to *legalized marijuana*. Because several states have legalized some use of marijuana, those state residents may not realize that possessing marijuana remains a *federal* controlled substance offense. Admitting to any marijuana use – even use at home, even medical marijuana, while obeying all state laws – can make a noncitizen inadmissible. DHS and Department of State officers may ask applicants for adjustment, naturalization, or consular processing if they ever have used marijuana, and may review applications to see if the person has worked in the legal marijuana industry.¹⁷ Warn clients that admitting to any conduct involving marijuana, or being employed in the industry, is dangerous. See the below discussion on admissions, and consult more in-depth advisories and resources, to best advise your clients.¹⁸

A noncitizen is inadmissible who is “convicted of, *or who admits having committed, or who admits committing acts which constitute the essential elements of* – (1) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime....”¹⁹ An “admission” must meet certain criteria to make someone inadmissible (see below), but no conviction is required.

A qualifying admission may cause harm in every context where the crimes inadmissibility grounds are used as a standard, e.g., as a bar to establishing good moral character²⁰ or to

eligibility for some forms of relief, or a basis for mandatory detention for a person who was not admitted.

The petty offense exception is a protection in all contexts. Admitting having committed a CIMT that comes within that exception will not make the person inadmissible, or trigger penalties based on that standard.

Admissions may also be an issue in cancellation of removal cases, especially based on the Supreme Court's decision in *Barton v. Barr*, 140 S.Ct. 1442 (2020). In a cancellation hearing, ICE may try to get the applicant to "admit" to an earlier CIMT that does not come within the petty offense exception (or to a controlled substance offense), to try to create an early cut-off to the required continuous residence or continuous physical presence period, or to show inability to establish good moral character. See Parts 6-8, below, on LPR, non-LPR, and VAWA cancellation of removal, and see especially Part 6, subpart c.

Advocates must work with their clients to prevent DHS from gaining damaging admissions during removal proceedings or official interviews. They should become familiar with requirements for admitting conduct, and defenses against this.

Requirements for an effective "admission." Strict rules control what kinds of statements by a non-citizen constitute an "admission" of a CIMT (or controlled substance offense). The conduct must be a crime under the laws of the place where it allegedly was committed.²¹ The person must admit to commission of facts that constitute the essential elements of that offense. General admissions to broad and/or divisible statutes will not qualify. Where the noncitizen does not admit sufficient facts, DHS or consular officials cannot use inferences.²² The DHS or consular official must provide the noncitizen with an understandable definition of the elements of the crime at issue; this "informed admissions" rule is to ensure that noncitizens receive "fair play." The noncitizen's admission must be free and voluntary.²³

If your client already might have admitted committing a CIMT to an immigration officer, gather information from the client as to whether the officer explained all of the elements of the offense in an understandable manner before the admission was made, and met other immigration requirements for such admissions.

Exception if the charge was brought to criminal court. In several older decisions, the BIA held that if a criminal court has heard charges relating to an incident, immigration authorities will defer to the resolution of the case in that court. If the final disposition is something less than a conviction, then the person cannot be found inadmissible for admitting that same conduct. The BIA has declined to find inadmissibility based on a guilty plea if the conviction is followed by effective post-conviction relief, pardon, or where no resolution amounting to a conviction is

entered pursuant to the plea.²⁴ This is true even when the defendant has independently admitted the crime before an immigration officer or immigration judge.²⁵ (But the protection might not apply if the defendant was acquitted.) Note, however, that ICE might argue against this BIA rule or attempt to get it overturned, so clients still should make every effort not to admit the conduct.

Example: Abel was convicted of a CIMT, but the conviction was vacated based on legal error. Baker was charged with a CIMT, but was permitted to complete a pre-trial diversion program with no guilty plea required. Charlie was charged with a CIMT, but the charges were dropped.

None of them has a conviction for immigration purposes.²⁶ Each of them should act conservatively and try to avoid admitting to an immigration judge or official that they committed the offense. But if they already did make such an admission, they can argue that because the conduct was brought before a criminal court judge and the result was less than a conviction, they cannot be found inadmissible based on admitting that conduct.

An admission made by a minor, or by an adult about conduct committed while a minor, does not trigger inadmissibility under this ground, because the admission was of committing civil juvenile delinquency, not a criminal offense.²⁷ This is in keeping with consistent holdings of the BIA “that acts of juvenile delinquency are not crimes ... for immigration purposes.”²⁸ See Part 11, below, regarding delinquency.

Defense strategies. Advocates should consult books and online materials cited above. If the client has engaged in conduct that might lead to an admission, the advocate and client should discuss the issues and practice how to respond to DHS questions. If possible, the advocate should accompany the client to any interview. In some cases, together you may decide that the client should assert the Fifth Amendment. Advocates can argue that the judge should not punish the applicant for declining to provide ICE with a formal admission so that ICE can assert a bar to relief; declining to take action to make oneself inadmissible is different from simply refusing to provide factual information. For discussion of defense strategies during cancellation hearings, see Part 6, subpart c, below.

D. What is the Petty Offense Exception to the CIMT Inadmissibility Ground?

A noncitizen who is subject to the grounds of inadmissibility, and who is convicted of or formally admits committing one CIMT (that is not a “purely political” offense), is inadmissible – *unless* they come within a statutory exception like the so-called “petty offense” exception. This exception applies when the person committed only one CIMT (ever); the person was not sentenced to more than six months in jail, and the “maximum penalty possible did not exceed imprisonment for one year.” INA § 212(a)(2)(A)(ii)(II).

Maximum possible sentence of not more than one year. A CIMT can carry a potential sentence of up to and including one year (365 days), and still come within the petty offense exception. This means that any California misdemeanor, regardless of the date of conviction, meets the potential sentence requirement for the petty offense exception. This also should be true of any California “wobbler” that is reduced from a felony to a misdemeanor under Pen C § 17(b)(3). See Box discussing wobbler offenses in Part 1, above.

Example: In 2013, Maurice was convicted of California misdemeanor grand theft, a CIMT. This is his only CIMT offense. He was sentenced to two days in jail. At the time of his conviction, the offense had a potential sentence of one year. Maurice comes within the petty offense exception to the CIMT inadmissibility ground: he has just one CIMT, his sentence was not more than six months, and his potential sentence was not more than one year. He is not inadmissible for CIMT.

(Note that a CIMT must have a different potential sentence in order for the person to avoid deportability based on one CIMT conviction (see Part 1) or the CIMT bar to non-LPR cancellation (see Part 6): the CIMT must have a potential sentence of up to *364 days*, not 365 days. See discussion of California Pen C § 18.5(a) and *Matter of Velasquez-Rios*, 27 I&N Dec. 460 (BIA 2018) in Part 1, above. In contrast, to qualify for the petty offense exception, the person does not need Pen C § 18.5(a) and is not affected by *Velasquez-Rios*, because the exception can take a potential sentence of up to 365 days.)

The petty offense exception applies universally. A person who comes within the petty offense exception automatically is not inadmissible under the CIMT ground. They do not need to apply for a waiver; the statute provides that the CIMT inadmissibility ground “shall not apply” to a person who comes within this exception. In every context that the CIMT inadmissibility ground is used as a standard – as a bar to eligibility for relief, a statutory bar to establishing good moral character, the stop-time rule in cancellation of removal, etc. -- the petty offense exception protects the person.²⁹ See also the youthful offender exception, discussed next.

E. What is the Youthful Offender Exception to the CIMT Inadmissibility Ground?

A noncitizen who is subject to the grounds of inadmissibility, and who is convicted of or formally admits committing one CIMT (that is not a “purely political” offense), is inadmissible – *unless* they come within a statutory exception like the “youthful offender” exception. This exception applies to a person who was convicted in adult court for an offense they committed while under the age of 18, if (1) they committed only one such CIMT (ever), and (2) the conviction of the offense and release from any resulting imprisonment occurred at least five years before the current application.³⁰ Note that a youth whose case is handled in delinquency rather than adult criminal court does not need this exception, because delinquency is not a “crime” and the court’s finding is not a “conviction.” See Part 11, below.

Youthful offender exception applies universally. Like the petty offense exception (see Part 4, above), the youthful offender exception applies automatically to prevent inadmissibility under the CIMT ground. There is no need to apply for a waiver; the statute provides that the CIMT inadmissibility ground “shall not apply” to a person who comes within this exception. In every context that the CIMT inadmissibility ground is used as a standard – as a bar to eligibility for relief, a statutory bar to establishing good moral character, the stop-time rule in cancellation of removal, etc. -- the exception protects the person.

F. When Does a CIMT Stop the Clock on the Seven Years of Continuous Residence Required for LPR Cancellation, or for Other Forms of Cancellation?

An applicant for LPR cancellation must show that they have accrued seven years of continuous residence since admission in any status, before either (1) removal proceedings are begun, or (2) the applicant commits certain offenses. See INA § 240A(a)(2), (d). When either of those events occurs, the applicant will stop accruing time toward the required seven years; practitioners may say that the seven-year “clock” has stopped. If this happens before the person has accrued the seven years, they are not eligible for LPR cancellation. Section 240A(d) also governs when the “clock” stops on accruing the periods of continuous physical presence required for non-LPR cancellation (see Part 7) and VAWA cancellation (see Part 8).

This section will focus on what offenses stop the clock, and review a recent a Supreme Court decision. The bottom line is that the clock will stop when the LPR commits an offense that brings them within the CIMT inadmissibility ground. A conviction or admission of a CIMT will not stop the clock if it comes within the petty offense or youthful offender exception, but it will stop the clock if it does not qualify for either exception.

1. Reasoning of *Barton v. Barr*

In April 2020, the Supreme Court published a restrictive decision on when committing an offense will stop the clock under INA § 240A(d). See *Barton v. Barr*, 140 S.Ct. 1442 (2020). Mr. Barton was applying for LPR cancellation of removal, but this ruling also will govern § 240A(d) as it applies to non-LPR and VAWA cancellation cases.

Barton interpreted INA § 240A(d), which governs when the clock stops for the period of continuous residence after admission (required for LPR cancellation) or continuous physical presence (required for VAWA and non-LPR cancellation) due to the commission of an offense. Section 240A(d) provides that the period of residence or physical presence ends when the person commits an offense that meets two requirements: the offense is “referred to” in INA § 212(a)(2) (the criminal inadmissibility grounds); *and* it “renders” the person inadmissible or deportable under INA § 212(a)(2) or § 237(a)(2) (the criminal inadmissibility and deportability grounds).³¹ The Supreme Court held that for all cancellation applicants, regardless of whether they were admitted, the “clock” stops upon commission of an offense that is “referred to” in § 212(a)(2) and that “renders” them inadmissible under § 212(a)(2). In other words, the clock can stop even if the offense did not make the person deportable.

While a full analysis of *Barton* is beyond this advisory,³² here is a summary of the case for advocates who are interested. The issue was whether Mr. Barton had accrued the seven years of continuous residence required for LPR cancellation. He had committed deportable offenses only after he reached the seven years, but he had committed *inadmissible* offenses before reaching the seven years. He argued that conviction of the inadmissible offenses did not stop the clock: while the offenses met the first requirement of § 240A(d) because they were “referred to” in § 212(a)(2), they did not meet the second requirement because they did not “render” him inadmissible or deportable under the crimes grounds. They did not render him deportable because they were not deportable offenses. They did not render him inadmissible because, as a noncitizen admitted into the United States, he was not subject to the grounds of inadmissibility. He argued that for people like him who had been admitted, the clock stops only if the offense is referred to in § 212(a)(2) and renders them *deportable*. This was the Ninth Circuit’s interpretation³³ and is the only interpretation that gives meaning to all of the language of § 240A(d). However, the Supreme Court’s conservative majority rejected that interpretation. It held that for all cancellation applicants, regardless of whether they were admitted, the “clock” stops upon commission of an offense that is “referred to” in § 212(a)(2) and that “renders” them inadmissible under § 212(a)(2). In effect, the majority collapsed all the convoluted language of § 240A(d) into a rule that a person’s clock stops if they are described in § 212(a)(2).

2. When the Clock Stops Under *Barton*

Advocates should keep abreast of advisories on *Barton* and possible new defenses, and always should investigate post-conviction relief to erase a harmful conviction. But they should assume that DHS will assert that under *Barton*, the rules regarding continuous residence and physical presence are:

- If any cancellation applicant is described in the criminal *inadmissibility* grounds at INA § 212(a)(2), then the clock stops as of the date that the person committed the relevant offense. *Barton* held that a person described in those grounds has been “rendered” inadmissible for this purpose, even if they were admitted to the United States and thus are not subject to the grounds of inadmissibility.
- If the offense is *not* described in § 212(a)(2), then committing the offense does *not* stop the clock. This is true even if the offense made the person deportable. Note that the BIA has held that a CIMT that comes within the petty offense exception is *not* described in § 212(a)(2), and commission of that offense does *not* stop the clock. See example below.

Courts have held that the clock stops as of the date the person committed the offense, not the date that the person was convicted or made a qualifying admission.³⁴ A conviction that is not charged in the NTA still can stop the clock.³⁵

In the case of LPR cancellation, while circuits are split, in some jurisdictions certain convictions from before September 30, 1996 do not stop the clock.³⁶

Which kinds of offenses stop the clock? Offenses described in inadmissibility grounds at INA § 212(a)(2). The clock stops as of the day that the person committed an offense that resulted in:

- 1) A conviction of, or qualifying admission of committing, a CIMT, *unless* it comes within the petty offense or youthful offender exceptions. See example below.
- 2) A conviction of, or qualifying admission of committing, a controlled substance offense (including admitting to possession of marijuana, even if that was permitted under state law³⁷).
- 3) Conviction of two or more offenses with a total sentence imposed of at least five years.
- 4) Being found to have engaged in prostitution in the last ten years, or coming to the United States to engage in prostitution.

- 5) Immigration authorities having reason to believe³⁸ that the person aided or participated in:
- Trafficking in controlled substances (plus certain family members who benefitted from this);
 - Severe trafficking in persons (plus certain family members who benefitted from this); or
 - Money laundering.
- 6) Foreign government officials who committed severe violations of religious freedom.

Which offenses do not stop the clock? Offenses that are not referred to in INA § 212(a)(2):

- 1) A CIMT conviction or admission is not referred to in § 212(a)(2), and does not stop the clock, if it comes within the petty offense or youthful offender exceptions to the inadmissibility grounds. See example below.
- 2) A CIMT or a controlled substance offense is not referred to in § 212(a)(2) unless there was a conviction or a qualifying admission of having committed the offense. See Overview, above, for the immigration definition of conviction, and see Part 3, above, for the definition of a qualifying admission. See Subpart c., below, regarding admitting conduct during a cancellation hearing.
- 3) A deportable offense is not referred to in § 212(a)(2) and so does not *per se* stop the clock.
 - For example, becoming deportable under the firearms or domestic violence grounds does not stop the clock.³⁹ If the offense *a/so* triggers a criminal inadmissibility ground, for example as a CIMT, then it would stop the clock – but not because it made the person deportable.
- 4) An offense or condition that makes the person inadmissible under grounds other than § 212(a)(2) does not stop the clock.
 - For example, a person who is a drug abuser is inadmissible under INA § 212(a)(1). Alien smuggling causes inadmissibility under INA § 212(a)(6). Because these are not referred to in § 212(a)(2), they do not stop the clock.

Example: The Petty Offense Exception. The petty offense exception to the CIMT inadmissibility ground applies if the person committed just one CIMT, the sentence imposed was six months or less, and the potential sentence was one year or less.⁴⁰ See Part 4, above.

The BIA held that a CIMT that comes within the petty offense exception is not “referred to” in § 212(a)(2) and does not stop the clock on the seven years. *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010). The youthful offender exception to the CIMT inadmissibility ground would have the same effect. This is true even if the conviction made the person deportable.

If a person comes within one of the exceptions, and later is convicted of a second CIMT, the clock stops on the date of commission of the second CIMT. *Matter of Deando-Roma*, 23 I&N Dec. 597 (BIA 2003).

Example: Fiona was admitted to the United States as a permanent resident in 2009. In 2013 she was convicted of a CIMT that has a potential sentence of one year. She was sentenced to 10 days in jail. Fiona is deportable, because she was convicted of a CIMT with a potential sentence of one year that she committed within 5 years of her admission. (See Part 1.) But this conviction also comes within the petty offense exception to the inadmissibility ground.

In 2018, Fiona committed and was convicted of another CIMT. Did Fiona accrue the seven years residence since admission required for LPR cancellation?

Yes. The seven years started with her admission in 2009. The 2013 conviction did not stop the clock because it came within the petty offense exception and thus was not “referred to” in INA § 212(a)(2). See Matter of Garcia. Her second CIMT conviction did stop the clock, as of the date she committed that offense in 2018. See Matter of Deando-Roma. By 2018, she had accrued seven years of residence since 2009.

3. Defense Strategies: Don’t Let an Admission of Conduct During the Hearing Stop the Clock

For a CIMT to be referred to in INA § 212(a)(2) and stop the clock, the person must have been convicted of, or made a qualifying admission of committing, the CIMT. Also, the CIMT must not come within the petty offense or youthful offender exceptions. (Similarly, a person is inadmissible if they were convicted of, or made a qualifying admission of committing, a controlled substance offense. See INA § 212(a)(2)(A)(i).)

Note that some other § 212(a)(2) grounds do not require a conviction or admission, for example, “engaging in” prostitution, or if authorities have “reason to believe” the person participated in drug trafficking.

The immigration definition of conviction is discussed in the Overview, above, and in online resources.⁴¹ This discussion centers on the risk to an applicant who admits during their cancellation hearing, that they committed an inadmissible CIMT or drug offense in the past.

A person can be found inadmissible (but not deportable) even without a conviction, if they admit to having committed (a) a CIMT that does not come within the petty offense or youthful offender exceptions, or (b) any offense relating to a federally defined controlled substance. See further discussion of requirements for admissions at Part 3, above. ICE may focus on trying to get cancellation applicants to admit to having committed a CIMT or controlled substance offense in the past. If the person makes a qualifying admission, the seven-year clock will stop as of the date the offense was committed.⁴²

Example: Emilio was admitted as a tourist in 2011, and adjusted status to LPR in 2014. He committed and was convicted of a deportable offense in 2019. Now he is applying for LPR cancellation.

At Emilio’s hearing, the ICE attorney asked him if ever committed welfare fraud. Emilio said, “I guess I did because I was living with my family for six months while they were collecting welfare in 2016. But that was just because I could not get a job because I was injured.” DHS may assert that Emilio is no longer eligible for cancellation because he admitted having committed CIMTs that do not come within the petty offense exception (more than one in an extended welfare period), and he committed the offenses in 2016, before he reached the seven years since 2011.

Advocates can argue that Emilio’s admission did not stop the clock because it did not meet certain requirements – for example, the ICE attorney did not first set out all of the elements of the offense in an understandable manner. However, by far the best strategy would have been to carefully prepare with Emilio before the hearing. (An even more common question in cancellation hearings may be, “Have you ever tried marijuana?” See box on admission of drug offenses, at Part 3, above.)

Advocates and clients should work together to make sure that the client understands the risks and is not surprised by any ICE question, and should practice how to withstand questioning. In some cases, you all may decide that the client should not answer the question and should assert

the Fifth Amendment. Advocates can argue that the judge should not punish the applicant as “failing to prosecute the application,” because the applicant declines to provide ICE with a formal admission of a crime so that ICE can stop their clock. This is different from simply declining to provide the information the judge needs in order to decide the case. Advocates also should keep track of new analyses and defenses relating to *Barton v. Barr*, at www.ilrc.org/crimes. For further discussion of admissions, see Part 3, above, and other resources.⁴³

G. When Does a Single CIMT Conviction Bar Eligibility for Non-LPR Cancellation?

Cancellation of removal for non-permanent residents is a defense to removal for people who have lived in the U.S. for at least ten years and meet other strict requirements, such as showing exceptional and extremely unusual hardship to certain U.S. citizen or LPR family members. While it can be difficult to win a case due to the hardship requirement, there are important advantages in simply being statutorily eligible to apply. For example, this entitles the person to a regular hearing before an immigration judge and a work permit while the application is pending, and eligibility is a positive discretionary factor in obtaining release from ICE detention. For more information about non-LPR cancellation in general, see ILRC resources.⁴⁴

An applicant is barred from non-LPR cancellation if they are *convicted* of an offense that is described in the criminal grounds of deportability or inadmissibility (regardless of whether the person is subject to the grounds of inadmissibility or deportability, see below). One CIMT conviction is a bar, *unless* the offense has a maximum possible sentence of *364 days or less*, and the sentence imposed was six months or less.

An applicant also must establish ten years of physical presence in the United States, and good moral character during this time. Here, the person may face another threat to eligibility: even though they have no inadmissible *conviction* (if they did, they would not be eligible), ICE may try to get them to *admit* to having committed an inadmissible CIMT (or controlled substance) offense. A qualifying admission of that conduct could “stop the clock” on accruing ten years of physical presence, or act as a statutory bar to establishing good moral character. We will discuss each of these different bars to relief.

1. Barred by Conviction of a Single CIMT, Unless it Meets Certain Requirements

Non-LPR cancellation of removal is subject to a uniquely worded statutory bar. The person must not have been “convicted of an offense under” the criminal inadmissibility or deportability grounds.⁴⁵ *Conviction* of any offense listed in INA §§ 212(a)(2) and 237(a)(2) is a bar. Engaging in conduct, or making an admission, without a conviction does not trigger this bar (but see discussion in Subpart b, next).

Interpreting this phrase, the BIA combined the CIMT deportability and inadmissibility grounds, including the petty offense exception, to create a unique, hybrid standard that *only* applies to non-LPR cancellation. It held that any conviction of a CIMT is a bar to this relief, unless it meets three criteria: it is the only CIMT the person has committed; a sentence of six months or less was imposed; and the offense carries a maximum possible sentence of *364 days or less*. Advocates challenged this rule, but after several years of litigation a Ninth Circuit panel has agreed to defer to the BIA's view. See *Ortega-Lopez v. Barr*, 978 F.3d 680, 692 (9th Cir. 2020), upholding *Matter of Ortega-Lopez*, 27 I&N Dec. 382 (BIA 2018) ("*Ortega-Lopez III*").

Meanwhile, this bar is one reason that several states, including California, Colorado, Nevada, New York, Oregon, Utah, and Washington, changed state law to define their misdemeanor offenses to have a potential sentence of up to 364 days, rather than up to one year (365 days). In California, Pen C § 18.5(a) provides that no misdemeanor, regardless of the date of conviction, has a potential sentence of more than 364 days. However, the BIA and the Ninth Circuit held that for immigration purposes, the 364-day maximum only applies to convictions from on or after January 1, 2015. The rule is:

- If the California conviction occurred before January 1, 2015, the BIA will hold that a misdemeanor has a potential sentence of 365 days. That is a bar to 10-year cancellation.
- If the California conviction occurred on or after January 1, 2015, the BIA *will* give effect to Pen C § 18.5 and the misdemeanor will have a potential sentence of 364 days. Thus, a single CIMT misdemeanor is not a bar to 10-year cancellation, as long as the sentence imposed did not exceed six months.

People with damaging pre-2015 convictions should seek post-conviction relief to erase the conviction. See resources at <https://www.ilrc.org/immigrant-post-conviction-relief>. See further discussion of *Velasquez-Rios* and of California wobblers in Part 1, above.

Compare the Bar to Non-LPR Cancellation with the Petty Offense Exception. A person qualifies for the petty offense exception to the CIMT inadmissibility ground if they have committed just one CIMT, a sentence of six months or less was imposed, and the potential sentence is *one year (365 days) or less*. See Part 4, above. To avoid the bar to non-LPR cancellation, the applicant must meet the same requirements except that the potential sentence must be *364 days or less*. Thus, applicants for non-LPR cancellation need Pen C § 18.5(a) to apply to them, and they can be hurt by the limit imposed by *Velasquez-Rios*. But people who just need the petty offense exception do not need Pen C § 18.5(a) and are not affected by *Velasquez-Rios*.

Finally, if your client was convicted in adult court of a single CIMT, committed while under the age of 18, consider proposing a standard based on combining the youthful offender exception with the deportation ground. After all, the BIA combined the petty offense exception with the deportation ground to create the current bar to 10-year cancellation. See Part 5, above, regarding the youthful offender exception.

2. Establishing Ten Years of Physical Presence and Good Moral Character

An applicant for non-LPR cancellation must establish good moral character and physical presence in the United States for the ten years leading up to the application. INA § 240A(b)(1)(A), (B). Section 240A(d) provides that this period of physical presence ends on the date that a Notice to Appear is issued, or on the date that the person commits certain offenses. The Supreme Court interpreted INA § 240A(b) in April 2020. *Barton v. Barr*, 140 S.Ct. 1442 (2020). The ruling in *Barton* is discussed in more detail in Part 6, above.

The bottom line is that DHS will assert that under INA § 240A(d) and *Barton v. Barr*, the physical presence period always ends when the person *commits an offense that is described in a criminal ground of inadmissibility at INA § 212(a)(2)*, if the person later is convicted of or makes a qualifying admission that they committed the offense. This rule applies even if the applicant was admitted to the United States (and thus is not subject to the inadmissibility grounds). Committing an offense does *not* stop the clock if it does not bring the person within INA § 212(a)(2). Conviction or admission of a CIMT that comes within the petty offense or youthful offender exception does *not* stop the clock – but any other CIMT does. See Parts 4 and 5, above, regarding those exceptions.

Practice Tip. Please see Part 6, Subpart b, for a discussion of which offenses do and do not stop the clock under *Barton*. This is important to read even if it appears that your client did not have any problems during the ten years. The clock will stop if your client admits committing an inadmissible CIMT or an inadmissible controlled substance conviction. Note that, apart from CIMTs, **at the cancellation hearing, the DHS attorney might ask the client whether they have ever tried marijuana.** Especially if the client lives in a state where marijuana has been legalized, they may think it is fine to answer yes. In fact, that could destroy the person's eligibility for cancellation. As Part 6 discusses, it is important to talk to the client before the hearing and practice answering difficult questions, whether regarding possible CIMTs or possible drug offenses.

If the person's continuous physical presence is found to stop under INA § 240A(d), the non-LPR cancellation case may be lost. The person must maintain continuous physical presence up to the filing of the application. The BIA has held that once the time stops due to a criminal offense

under INA § 240A(d), it cannot re-start to accrue a new period of physical presence.⁴⁶ The offense also may be a bar to establishing good moral character, if it comes within the period for which good moral character must be shown.

For more on dealing with admissions of a CIMT or controlled substance, see Part 6 above, and see online resources.⁴⁷

H. When Does a CIMT Conviction Bar Eligibility for VAWA Cancellation of Removal or VAWA Self-Petitioning?

Non-citizens who have been abused by certain USC or LPR family members can apply for immigration relief under VAWA (Violence Against Women Act). They may qualify for VAWA cancellation as a defense to removal, and/or for VAWA self-petitioning. For more information about VAWA, see ILRC manuals and resources.⁴⁸

The crimes bars to VAWA cancellation are quite strict, and the person also must demonstrate extreme hardship to a relative. The requirements for eligibility for VAWA self-petitioning are somewhat less strict, with a broader waiver for CIMTs and no requirement of showing extreme hardship to relatives.

1. VAWA Cancellation of Removal

Non-citizens who have been abused by certain USC or LPR family members and meet other requirements can apply for VAWA cancellation as a defense to removal. INA § 240A(b)(2). (See also VAWA self-petitioning, Part B, below.) The various VAWA cancellation bars based on crimes provide:

- **Crimes bars:** Under the crimes bars at INA § 240A(b)(2)(iv), a person who “is” deportable for crimes is barred from VAWA cancellation. That refers to a person who (a) was admitted into the United States and (b) became deportable for crimes. (There is a special waiver for some victims of domestic violence who themselves are deportable under the domestic violence deportation ground.⁴⁹)

A person who “is” inadmissible for crimes also is barred under this provision. This usually would just refer to a person who has not been admitted; however, see next bullet point.

- **Bar based on clock-stopping provision.** This analysis that is discussed in more detail below. The bottom line is that the person must have accrued three years of continuous physical presence “immediately preceding the application.” INA § 240A(b)(2)(a)(ii). In *Barton v. Barr*, the Supreme Court held that under INA § 240A(d), the clock stops for *any* person who is described in a crimes inadmissibility ground, regardless of whether they were admitted

or not. Further, once the clock stops based on crimes, it cannot be restarted; therefore it appears that if the person is described within the crimes inadmissibility grounds at *any* time, it is an absolute bar to VAWA cancellation. A conviction or qualifying admission of a CIMT that comes within the petty offense or youthful offender exception is not described in the CIMT inadmissibility ground and does not stop the clock.

- **Good moral character**. The person must have been of good moral character during the three years, but with some exceptions allowed if the event was connected to the abuse. INA § 240A(b)(2)(C).

Under these rules, who can apply for VAWA cancellation despite CIMT issues? The person must not have been described in the crimes inadmissibility grounds. For CIMT purposes, this means they have no qualifying admission or conviction of a CIMT, or they have one but it comes within the petty offense or youthful offender exception. See Parts 3-5, above. Further, if the person was admitted, they must not have become deportable under the crimes grounds. See Parts 1, 2, above. The following section provides further discussion of these bars.

Crimes bars: Not inadmissible or deportable. One requirement for VAWA cancellation is that the person “is not inadmissible” and “is not deportable” under the crimes grounds. Unlike the criminal bars to non-LPR (“10-year”) cancellation, here the automatic bar does *not* require a conviction, but it *does* require that the person actually is deportable or inadmissible.⁵⁰ A person who never was admitted to the United States is not subject to deportation grounds; therefore the person should not be barred from VAWA even if they are convicted of an offense described in the deportation grounds. A person who was admitted is barred if they are convicted of a deportable offense.

Example: Francois entered the United States without inspection. He married a lawful permanent resident who was abusive to him, and also refused to help him immigrate. He was convicted of a CIMT that had a potential sentence of one year, and he was sentenced to three days’ time served. He is not deportable for CIMT because, since he never was admitted, he is not subject to the grounds of deportability. He is not inadmissible for CIMT, since his offense comes within the petty offense exception. The conviction is not an automatic bar to VAWA cancellation.

Example: Samantha entered the United States without inspection. She married a U.S. citizen who was abusive to her. She was convicted of an offense described in the firearms deportation ground, when police discovered illegal guns at their home (which belonged to her wife, but Samantha pled guilty anyway). She is not barred from cancellation for being “deportable,” since she never has been

admitted. She is not inadmissible because there is no firearms inadmissibility ground, and possessing a firearm is not a CIMT. She is not barred from cancellation.

Example: Let's say that Samantha was admitted on a tourist visa, rather than entered without inspection. Because this firearms offense is not a CIMT, she does not have to worry about being deportable for a CIMT. However, if the offense meets the relevant immigration definition of a firearms offense, she would be deportable under the firearms ground, and would be barred from VAWA cancellation. She could investigate applying for VAWA self-petitioning, instead. In all cases, Samantha should investigate whether she can vacate her conviction using post-conviction relief.

Stopping the clock on the three years of physical presence; *Barton v. Barr*. A VAWA cancellation applicant must have accrued at least three years of physical presence and good moral character, immediately preceding the application.⁵¹ Under INA § 240A(d), the person's period of physical presence will end if the person commits certain offenses that cause them to be *described in the crimes grounds of inadmissibility at INA § 212(a)(2)*. This rule applies to all applicants regardless of whether they have been admitted to the United States. See *Barton v. Barr*, 140 S.Ct. 1442 (2020), discussed in Part 6, above.

Under *Barton*, the clock only stops if the person is described in INA § 212(a)(2). For CIMTs, that means that the person must be convicted of, or make a qualifying admission that they committed, a CIMT that does not come within the petty offense or youthful offender exceptions. If they have, then the clock stops on the date that the offense was committed.

Please see Part 6, Subpart b, for a discussion of which offenses do and do not stop the clock under *Barton*. This is important to read even if it appears that your client did not have any problems during the three years. For one thing, the DHS attorney might ask them about CIMTs they may have committed even without being arrested. For another, even apart from CIMTs, ***at the cancellation hearing, the DHS attorney might ask the client whether they have ever tried marijuana.*** Especially if the client lives in a state where marijuana has been legalized, they may think it is fine to answer yes. In fact, that could destroy the person's eligibility for cancellation. As Part 6 discusses, it is important to talk to the client before the hearing and practice answering difficult questions.

If the person's continuous physical presence is found to stop under INA § 240A(d), the case is likely lost. The person must maintain continuous physical presence up to the filing of the application. The BIA has held that once the time stops due to a criminal offense under INA § 240A(d), it cannot re-start to accrue a new period of physical presence.⁵² The offense also may

be a bar to establishing good moral character, if it comes within the period for which good moral character must be shown.

For more on *Barton v. Barr* and stopping the clock under § 240A(d), see Part 6 on LPR cancellation, in Subparts a and b. For more on dealing with admissions of a CIMT or controlled substance, see online resources⁵³ and see Part 6, subpart c, and Part 3.

If your client is barred from VAWA cancellation, be sure to consider VAWA self-petitioning (next section) as well as obtaining post-conviction relief.

2. VAWA Self-Petitioning

See ILRC resources for general information about VAWA self-petitioning.⁵⁴ In short, non-citizens who have been abused by certain USC or LPR family members can “self-petition” to obtain a green card, either affirmatively or as a defense to removal.

The crimes bars to VAWA self-petitioning are less complex and restrictive than the bars to VAWA cancellation. For the I-360 self-petition to be approved, the self-petitioner should show good moral character (GMC) for the preceding three years. Normally, a CIMT conviction or qualifying admission, or any inadmissible crime, that occurs during the period for which GMC must be proved will bar a finding of GMC, unless it is a CIMT that comes within the petty offense or youthful offender exceptions. See INA § 101(f)(3). However, an officer has the discretion to find that a VAWA self-petitioner can show GMC, as long as the disqualifying act or conviction could be waived under INA § 212(h), and was connected to the person having been battered or subjected to extreme cruelty. See INA 204(a)(1)(C) and other materials.⁵⁵ Potentially, a self-petitioner could be found to have GMC despite multiple CIMT convictions, although they would need to show strong positive equities.

Once the self-petition is approved and a visa is available, the VAWA self-petitioner can apply to adjust status. Those who are inadmissible for crimes can apply for a waiver under INA § 212(h), which, again, potentially can waive multiple CIMTs. VAWA self-petitioners have a much easier standard of proof to be granted this waiver; for example, they do not need to show extreme hardship to certain relatives. INA § 212(h)(1)(C).

Note that the special conditions for showing GMC and for the § 212(h) waiver also extend to other crimes inadmissibility grounds beyond CIMTs. Unfortunately, there is a very limited waiver for drugs: they can waive a single incident involving simple possession of 30 grams or less of marijuana.

I. When is a CIMT Conviction a Bar to Establishing Good Moral Character?

In general, a noncitizen is statutorily barred from establishing good moral character if, during the time for which good moral character must be shown, they are “described in” the crimes grounds of inadmissibility. INA § 101(f)(3), 8 USC § 1101(f)(3). This includes the CIMT inadmissibility ground, which is triggered by a conviction of, or a qualifying admission that one committed, a CIMT. As always, the CIMT inadmissibility ground does not include an offense that comes within the petty offense or youthful offender exceptions. See 8 CFR § 316.10(b)(2) and see Parts 3-5, above.

A person who is not statutorily barred from establishing good moral character still needs to offer evidence showing that they in fact have had good moral character during the required period. See a brief summary of good moral character at *N.17 Relief Toolkit* at www.ilrc.org/chart, and see comprehensive discussion in ILRC, *Naturalization and U.S. Citizenship: The Essential Legal Guide* (2018) at www.ilrc.org/publications.

J. What is the Effect of a Delinquency Finding of Committing a CIMT?

A disposition in juvenile delinquency proceedings is not a “conviction” of a crime for immigration purposes, under INA § 101(a)(48)(A). This is in keeping with consistent holdings of the Board of Immigration Appeals “that acts of juvenile delinquency are not crimes ... for immigration purposes.”⁵⁶ Being deportable for a CIMT requires a conviction, so a delinquency disposition is not sufficient.

A person can be found inadmissible under the CIMT ground just for formally admitting having committed a CIMT, or acts that make up a CIMT, even if there is no conviction. See Part 3, above. However, an admission made by a minor, or by an adult about a CIMT committed while a minor, should not trigger inadmissibility because the admission is of committing a civil offense of juvenile delinquency, not a “crime.”⁵⁷ For more on delinquency, see ILRC resources.⁵⁸

K. When Does a CIMT Trigger Mandatory Detention?

Under the mandatory detention provisions, immigration authorities must “take into custody” and thereafter not release certain noncitizens who are inadmissible or deportable for crimes.

A noncitizen who “is inadmissible by reason of having committed any offense covered in” INA § 212(a)(2) is subject to mandatory detention.⁵⁹ Here the person must be *subject to* the grounds of inadmissibility, e.g., because they entered the United States without inspection, or were paroled in. See **Overview**, above. To be inadmissible under the CIMT ground, they must be convicted of, or make a qualifying admission that they committed, a CIMT that does not come within the petty offense or youthful offender exceptions. See Parts 3-5, above.

A noncitizen is subject to mandatory detention who is deportable for conviction of (a) two or more CIMTs after admission that did not arise from a single scheme, or (b) one CIMT, committed within five years of admission, if a sentence of one year or more was *imposed*.⁶⁰ The person must be *subject* to the deportation grounds, e.g., because they were admitted or adjusted status. See **Overview**, above. Please note that the mandatory detention trigger based on conviction of one CIMT is different from the CIMT deportation ground based on one CIMT conviction. Mandatory detention requires that a sentence of at least a year was *imposed*. The deportation ground only requires a *potential* sentence of at least one year. See Part 1, above.

Example: Sal was admitted in 2015 and committed a felony CIMT in 2019. Although the felony has a potential sentence of 3 years, he was sentenced to just 45 days. Sal is deportable for a CIMT conviction because he committed the offense within five years of admission and it has a potential sentence of a year or more. But he is not subject to mandatory detention, because he was not sentenced to a year or more in jail.

Generally, the Supreme Court has held that mandatory detention applies even if the person was not taken directly from jail to ICE custody. *Nielsen v. Preap*, 138 S. Ct. 1279 (2019). But in some areas of California, mandatory detention does not fully apply. Because of an injunction, individuals in California’s Central District for the time being continue to receive bond hearings after six months of detention.⁶¹ The Central District of California includes Los Angeles, Orange, San Bernardino, San Luis Obispo, Santa Barbara, Riverside, and Ventura Counties. For more information on mandatory detention, see online practice advisory.⁶²

L. When Can a CIMT Conviction Be Waived Under INA § 212(h)?

A qualifying non-citizen can ask to waive one or more CIMT convictions and admissions under INA § 212(h), 8 USC § 1182(h). There is no statutory limit on the number of CIMTs that can be waived in one § 212(h) application, or on the number of times a person can apply under § 212(h). Section 212(h) also waives several other criminal grounds of inadmissibility, although it waives a very limited class of drug offenses.

Some but not all lawful permanent residents (LPRs) are not eligible for § 212(h). This is a two-part test. First, is the LPR subject to § 212(h) bars? Only an LPR who was “admitted” at a port of entry as an LPR is subject to the bars.⁶³ Second, if the LPR is subject to the bars, does a bar actually apply? An LPR who is subject to the bars because they were admitted as an LPR at a port of entry cannot apply for § 212(h) if (1) they were convicted of an aggravated felony *after* that admission; or (2) they did not accrue seven years of lawful continuous residence before issuance of an NTA. For further discussion of § 212(h), see ILRC resources.⁶⁴

M. When Can a CIMT Conviction be Waived Under INA § 212(c)?

A permanent resident who was convicted of certain offenses before April 1, 1997 may be able to apply for relief in removal proceedings under INA § 212(c), 8 USC § 1182(c). This is a defense against a charge of deportability, or of inadmissibility if an LPR is seeking admission under INA § 101(a)(13)(C) or in conjunction with an application for adjustment of status. For further discussion of § 212(c) in general, see, e.g., *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014); online practice advisories;⁶⁵ and the ILRC manual, *Removal Proceedings* (www.ilrc.org, 2020).

If the conviction/s occurred before April 24, 1996, any inadmissible or deportable CIMT can be waived. If at least one conviction occurred between April 24, 1996 and April 1, 1997, then AEDPA legislation restricts the deportation grounds that can be waived: § 212(c) will waive a charge of deportability based on conviction of two CIMTs, unless *both* carry a potential sentence of one year. (Again, for California misdemeanors, Pen C § 18.5(a) provides that the maximum possible sentence is 364 days, regardless of the date of conviction, but the BIA in *Matter of Velasquez-Rios* has refused to apply this rule to convictions from before January 1, 2015. See Part 1, above.) Advocates can explore whether § 212(c) might be available to waive the CIMT ground of *inadmissibility* for any conviction/s before April 1, 1997, even if there are two convictions that both have a potential sentence of at least a year, since the AEDPA restrictions are tied to grounds of deportability, not inadmissibility.

End Notes

¹ Many thanks for their valuable comments to Carter Sears, Avantika Shah, and Bernice Espinoza, Offices of the Public Defender in Fresno, Alameda, and (formerly) Sonoma Counties respectively, and Erin Quinn and Alison Kamhi, ILRC.

² See *Matter of Guzman-Martinez*, 25 I&N Dec. 845 (BIA 2012); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

³ See definition of conviction at INA § 101(a)(43)(A), 8 USC 1101(a)(48)(A) (requires a plea or finding of guilt); *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018) (conviction on appeal); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (conviction vacated for cause); and *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) (juvenile disposition).

⁴ See, e.g., *Matter of Pickering*, above. However, an “expungement” or other rehabilitative relief will eliminate a conviction as an automatic bar to DACA. See materials at www.ilrc.org/daca. In immigration proceedings in the Ninth Circuit only, it will eliminate a conviction of a qualifying minor drug offense if the conviction occurred on or before July 14, 2011. See *Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011) and practice advisory at www.ilrc.org/crimes.

⁵ See citations and further discussion in ILRC, *What Qualifies as a Conviction for Immigration Purposes* (April 2019) at <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>

⁶ INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i).

⁷ Many thanks to Carter Sears of the Fresno County Office of the Public Defender for valuable information and insights about the effect of Pen C § 17(b)(3).

⁸ To determine whether a California offense is an alternative felony/misdemeanor (“wobbler”), find the code section that describes the punishment for the offense. A wobbler will have language such as “punishable by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170,” or “by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year...” (emphasis added)

⁹ *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 846 (9th Cir. 2003) (Pen C § 17(b)(3) reduction has effect for immigration purposes), partially overruled on other grounds by *Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014) (en banc).

¹⁰ See discussion in ILRC, *Practice Advisory: Matter of Thomas and Matter of Thompson* (October 2019) at <https://www.ilrc.org/practice-advisory-ag-overturms-sentence-modification-rule-matter-thomas-matter-thompson> and (now out of date) ILRC, *Practice Advisory: Matter of Velasquez-Rios* (October 2018) at <https://www.ilrc.org/matter-velasquez-rios-and-364-day-misdemeanors>.

¹¹ Proposition 47 was passed by the voters on Nov. 4, 2014. Besides changing potential sentence for offenses prospectively, which will be given immigration effect, it provided a way to change prior felony convictions to misdemeanors. See PC 1170.18.

¹² *Matter of Gordon*, 20 I&N Dec. 52, 56 (BIA 1989); *Matter of Balderas*, 20 I&N Dec. 389, 393 (BIA 1991).

¹³ *Matter of Khourn*, 21 I&N Dec. 1041 (BIA 1997); *Molina-Amezcuca v. INS*, 6 F.3d 646 (9th Cir. 1993); *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991).

¹⁴ *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).

¹⁵ See discussion of admissions in ILRC, *Practice Advisory: Immigration Risks for Legalized Marijuana* (2018, 2021 update forthcoming) available at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana> and see discussion in Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, §§ 3.2-3.6.

¹⁶ See INA § 212(a)(2)(A)(i)(I), (II), inadmissibility grounds.

¹⁷ In April 2019, USCIS amended its *Policy Manual*, Volume 12, Chapter 5, Part C.2 to adopt this approach to legalized marijuana. See <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5>

¹⁸ Go to <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana> for a Practice Advisory (2021 update forthcoming), community flyer alerts in English, Spanish, and Chinese, and other materials on immigration and marijuana. For information on controlled substances and immigration, see *N.8 Controlled Substances* at www.ilrc.org/chart.

¹⁹ 8 USC § 1182(a)(2)(A)(i)(I), INA § 212(a)(2)(A)(i)(I) (emphasis supplied).

²⁰ See 8 CFR § 316.10(b)(2)(i), (iv).

²¹ *Matter of R-*, 1 I&N Dec. 118 (BIA 1941); (*Matter of M-*, 1 I&N Dec. 229 (BIA 1942); *Matter of D-S-*, 1 I&N Dec. 553 (BIA 1943); 22 CFR § 40.21(a).

²² *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955); *Matter of A-*, 3 I&N Dec. 168 (BIA 1948); *Matter of Espinosa*, 10 I&N Dec. 98 (BIA 1962). *Matter of G-M-*, 7 I&N Dec. 40 (AG 1956); *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956).

²³ See, e.g., *Matter of K-*, 9 I&N Dec. 715 (BIA 1962); *Matter of K-*, 7 I&N Dec. 594, 597 (BIA 1957) *Matter of G-*, 6 I&N Dec. 9 (BIA 1953); *Matter of G-*, 1 I&N Dec. 225 (BIA 1942); *Matter of M-C-*, 3 I&N Dec. 76 (BIA 1947).

²⁴ *Matter of E.V.*, 5 I&N Dec. 194 (BIA 1953); *Matter of G*, 1 I&N Dec. 96 (BIA 1942) (dismissal pursuant to Texas statute); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968) (case placed “on file” under Massachusetts statute); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980) (state counterpart of federal first provisions, no conviction).

²⁵ *Matter of C.Y.C.*, 3 I&N Dec. 623, 629 (BIA 1950) (dismissal of charges overcomes independent admission); *Matter of E.V.*, *supra*, note 6 (expungement under PC § 1203.4 controls even where admission made to immigration judge). But see *Matter of I*, 4 I&N Dec. 159 (BIA, AG 1950) (independent admission supports exclusion where alien convicted on same facts of lesser offense not involving moral turpitude).

²⁶ For more information on the definition of conviction, see discussion in Overview, above, and see ILRC, *Practice Advisory: What Qualifies as a Conviction for Immigration Purposes?* (April 2019) at <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>

²⁷ *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (admission by adult of activity while a minor is not an admission of committing a crime involving moral turpitude triggering inadmissibility).

²⁸ *Matter of Devison*, 22 5 I&N Dec. 1362 (BIA 2000)(*en banc*), citing *Matter of C.M.*, 5 I&N Dec. 327 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

²⁹ See, e.g., *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010) (petty offense exception means the CIMT is not “referred to” in § 212(a)(2); 8 CFR § 316.10(b)(2)(i) (good moral character bar accepts these exceptions).

³⁰ INA § 212(a)(2)(A)(ii)(I), 8 USC § 1182(a)(2)(A)(ii)(I).

³¹ It also stops if the person commits an offense referred to in § 212(a)(2) that renders the person deportable under the terrorism grounds, INA § 237(a)(4). This advisory does not address the terrorism grounds.

³² But see ILRC, NIPNLG, IDP, *Practice Alert: Effect of Barton v. Barr on Eligibility for Cancellation of Removal* (May 2020) at <https://www.ilrc.org/practice-alert-impact-barton-v-barr-eligibility-cancellation-removal> and see forthcoming in-depth analysis to be posted at www.ilrc.org/crimes.

³³ *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018), overturned by *Barton*. See also dissent to *Barton* by Justice Sotomayor.

³⁴ *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).

³⁵ *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006).

³⁶ See *Sinotes-Cruz v. Gonzalez*, 468 F.3d 1190, 1203 (9th Cir. 2006), *Jaghoori v. Holder*, 772 F.3d 764, 771 (4th Cir. 2014), *Jeudy v. Holder*, 768 F.3d 595 (7th Cir. 2014), but see *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), and see discussion in ILRC, *Eligibility for Relief: LPR Cancellation* (December 2020) at <https://www.ilrc.org/eligibility-relief-cancellation-removal-permanent-residents-ina-%C2%A7-240aa>

- ³⁷ See materials at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana>.
- ³⁸ Note that the person becomes inadmissible as of the date DHS gains reason to believe, not the date the person committed the offense. *Matter of Casillas-Topete*, 25 I&N Dec. 317 (BIA 2010); *Gomez-Granillo v. Holder*, 654 F.3d 826 (9th Cir. 2011). Advocates can explore arguments that the clock does not stop until DHS gains reason to believe, although DHS will argue that, as with a conviction, it stops as of the date the offense was committed.
- ³⁹ *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000).
- ⁴⁰ See the petty offense and youthful offender exceptions at § 212(a)(2)(A)(ii).
- ⁴¹ See ILRC, *What Qualifies as a Conviction for Immigration Purposes* (April 2019) at <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>
- ⁴² In *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018), the Ninth Circuit had held that an admission of a drug offense did not stop the clock, because it did not make the person deportable. *Barton* overturned *Nguyen*. While *Barton* did not discuss the facts of *Nguyen*, it alluded to inadmissible convictions and admissions. *Barton*, 140 S. Ct. at 1450.
- ⁴³ See, e.g., discussion in ILRC, *Practice Advisory: Immigration Risks for Legalized Marijuana* (2018, 2021 update forthcoming) available at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana> and see a comprehensive discussion in Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, §§ 3.2-3.6.
- ⁴⁴ See INA § 240A(b)(1), 8 USC § 1229b(b)(1) and see ILRC, *Non-LPR Cancellation of Removal* (June 2018) available at https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf
- ⁴⁵ INA § 240A(b)(1)(C), 8 USC § 1229b(b)(1)(C).
- ⁴⁶ See, e.g., *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000).
- ⁴⁷ See, e.g., discussion in ILRC, *Practice Advisory: Immigration Risks for Legalized Marijuana* (2018, 2021 update forthcoming) available at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana> and see a comprehensive discussion in Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, §§ 3.2-3.6.
- ⁴⁸ See online materials at www.ilrc.org/u-visa-t-visa-vawa and <https://asistahelp.org/resource-library/vawa-resources/> or see the brief summaries of relief at *N.17 Immigration Relief Toolkit* at www.ilrc.org/chart. See also ILRC, *The VAWA Manual* (2017) at <https://www.ilrc.org/vawa-manual>.
- ⁴⁹ See INA § 240A(b)(5), referring to waiver at INA § 237(a)(7) for persons who became deportable under the domestic violence ground but in fact were primarily the victims in the relationship, and meet other requirements. This appears to be limited to the domestic violence as opposed to the CIMT removal ground, although advocates can consider arguments.
- ⁵⁰ Compare VAWA cancellation crimes bars, INA § 240A(b)(2)(A)(iv), to 10-year cancellation bars, INA § 240A(b)(1)(C).
- ⁵¹ INA § 240A(b)(2)(A)(ii), 8 USC § 1229b(2)(A)(ii).
- ⁵² See, e.g., *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000).
- ⁵³ See, e.g., discussion of admissions in ILRC, *Practice Advisory: Immigration Risks for Legalized Marijuana* (2018; 2021 update forthcoming), https://www.ilrc.org/sites/default/files/resources/marijuana_advisory_jan_2018_final.pdf and see comprehensive discussion in Kesselbrenner and Rosenberg, *Immigration Law and Crimes*, §§ 3.2-3.6.
- ⁵⁴ See INA § 204(a)(1)(A), and for further information in general see websites such as <https://www.ilrc.org/u-visa-t-visa-vawa> and <https://asistahelp.org/vawa-self-petition/>.
- ⁵⁵ See USCIS Interoffice Memorandum: Determinations of Good Moral Character in VAWA-Based Self-Petitions Purpose (January 19, 2005) available at <https://asistahelp.org/wp-content/uploads/2018/10/USCIS-Memo-Determination-of-GMC-in-VAWA-January2005.pdf> and materials cited above.
- ⁵⁶ *Matter of Devison*, 22 I&N 1362 (BIA 2000)(*en banc*).
- ⁵⁷ *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (admission by adult of activity while a minor does not trigger inadmissibility).

⁵⁸ See advisories and manuals at <https://www.ilrc.org/immigrant-youth> and in see ILRC, *What are the Consequences of Delinquency?* (March 2020) at

https://www.ilrc.org/sites/default/files/resources/imm_consequences_of_delinq_3.30.20.pdf

⁵⁹ See INA § 236(c)(1)(A), 8 USC § 1226(c)(1)(A).

⁶⁰ See INA § 236(c)(1)(B), (C), 8 USC § 1226(c)(1)(B), (C).

⁶¹ See *Rodriguez v. Marin*, No. CV 07-3229 (March 5, 2018).

⁶² See ILRC, *How to Avoid Mandatory Detention* (November 2020) at www.ilrc.org/crimes.

⁶³ *Matter of J-H-J-*, 26 I&N 563 (BIA 2015).

⁶⁴ See, e.g., the manual *Removal Proceedings* (www.ilrc.org, 2020), and see ILRC, *Eligibility for Relief: Waivers under INA § 212(h)* (January 2020) available at <https://www.ilrc.org/eligibility-relief-waivers-under-ina-%C2%A7-212h>

⁶⁵ See advisories by the National Immigration Project of the National Lawyers Guild at www.nipnlg.org/practice.html.



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About the Immigrant Legal Resource Center

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