

## All Those Rules About Crimes Involving Moral Turpitude and Relief<sup>1</sup>

1. What starts the five-year clock for the CIMT deportation ground?
2. What is the “petty offense” exception to the CIMT inadmissibility ground?
3. When does a CIMT conviction stop the clock for LPR cancellation?
4. When is a CIMT conviction a bar to non-LPR cancellation?
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6. When is a CIMT conviction a bar to establishing good moral character?
7. When does a CIMT conviction trigger mandatory detention?
8. What is the effect of a CIMT finding in delinquency proceedings?
9. When can a CIMT conviction not be waived under INA § 212(h)?
10. When can a CIMT conviction be waived under § 212(c) AEDPA rules?
11. What is the “youthful offender” exception to the CIMT inadmissibility ground?

### ***1. What starts the five-year clock for the CIMT deportation ground?***

*Summary:* If the immigrant’s current period in the U.S. started with an admission in any status, that starts the five years; a subsequent adjustment of status to permanent residency does not “re-start” the clock. If the immigrant’s current period started with an entry without inspection (EWI), the subsequent adjustment of status starts the five years.

*Discussion.* A noncitizen is deportable based upon conviction of a single crime involving moral turpitude that carries a potential sentence of a year or more, *if* the person committed the offense within five years “after the date of admission.”<sup>2</sup> Recently the BIA reversed past decisions and made a good rule for when an adjustment of status to permanent residency will or will not start the five-year clock. See *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), partially overturning *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005). For further discussion, see Advisory on *Matter of Alyazji* at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

In *Alyazji* the Board discussed different scenarios according to when the “admission” starting the five-year clock occurs. In each of the following examples, assume that the person is *convicted* of a crime involving moral turpitude (CIMT) with a *potential sentence of at least one year*. Therefore 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 U.S. on a visitor’s visa in 2001 and overstays. In 2006 she adjusts status to lawful permanent residence based on marriage. She commits the CIMT in 2007. Her “date of admission” for purposes of the five years is the date she was admitted as a tourist in 2001. Since that was more than five years before she committed the offense in 2007, she is not deportable. See *Alyazji*, *supra* at 408. The result would be the same if Alice had not fallen out of status before adjusting.

*Example 2.* Ben enters the U.S. without inspection in 2001. In 2006 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 2006 date of adjustment. *Id.* p. 401. If he commits the CIMT in 2009, he will be deportable.

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<sup>1</sup> Compiled by Kathy Brady, Immigrant Legal Resource Center, September 2011.

<sup>2</sup> INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i).

*Example 3.* Cory is admitted to the U.S. as a permanent resident in 2002. In 2008 he leaves the U.S. for a few weeks just to visit his mother. Upon his return he does not make a new “admission,” pursuant to INA § 101(a)(13)(C).<sup>3</sup> In 2009 he commits the CIMT. While *Alyazji* does not address this situation, counsel should argue that under the *Alyazji* test the date of admission for purposes of the five years is 2002, not 2008, because his 2008 return was neither an admission nor an adjustment.

## **2. What is the petty offense exception to the CIMT inadmissibility ground?**

Generally a noncitizen who is convicted of, or formally admits committing, one CIMT is inadmissible. A noncitizen can avoid being inadmissible under the moral turpitude ground, however, by coming within the petty offense exception.<sup>4</sup> Further discussion of the exception appears in legal texts,<sup>5</sup> but the basic requirements are: (1) The noncitizen must have committed only one CIMT (ever); (2) The noncitizen must not have been “sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed)”<sup>6</sup> and (3) The offense must have a maximum *possible* sentence of one year.

A person who comes within the petty offense exception is not inadmissible under the CIMT ground, although he may be deportable. Note, however, that the statute provides that the CIMT inadmissibility ground “*shall not apply to an alien who*” comes within the petty offense exception. This strong language – interpreted to mean that a CIMT that fits within the petty offense exception simply is not listed in the CIMT inadmissibility ground – is the basis for some important defenses. (The same benefits apply to the less commonly used “youthful offender exception” that is discussed at Part 11, below.)

## **3. When does a CIMT conviction stop the clock on the seven-years residence for LPR cancellation?**

*Summary:* A CIMT that comes within the petty offense exception does not stop the seven-year clock, even if the conviction also makes the noncitizen deportable. If the person receives a second CIMT conviction, the clock stops as of the date of commission of the second conviction, not the first.

*Discussion.* To qualify for LPR cancellation the applicant must have accrued seven years residence since admission in any status before *either* (a) removal proceedings are begun, or (b) the applicant commits an offense that is “referred to” in INA § 212(a)(2) and that makes her deportable or inadmissible.<sup>7</sup> For further discussion of this rule see Brady et al., *Defending Immigrants in the Ninth Circuit*, §11.1(A) (www.ilrc.org, 2011).

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<sup>3</sup> A lawful permanent resident who travels outside the United States is not considered to be seeking a new admission upon her return, unless she comes within one or more exceptions set out in INA § 101(a)(13)(C), 8 USC § 1101(a)(13)(C), such as being inadmissible under the crimes ground, or remaining outside the United States for more than six months.

<sup>4</sup> INA § 212(a)(2)(A)(ii)(II), 8 USC § 1182(a)(2)(A)(ii)(II).

<sup>5</sup> See, e.g., Brady et al., *Defending Immigrants in the Ninth Circuit* ([www.ilrc.org](http://www.ilrc.org), 2011), § 4.2.

<sup>6</sup> For an explanation of what constitutes a sentence, see *Defending Immigrants in the Ninth Circuit*, *supra* at Chapter 5, or see “Sentence Solutions,” available at [http://www.ilrc.org/files/cal\\_chart\\_notes\\_04.pdf](http://www.ilrc.org/files/cal_chart_notes_04.pdf)

<sup>7</sup> See LPR seven-year requirement at INA § 240A(d), 8 USC § 1229b(d), regarding offenses “referred to” in INA § 212(a)(2), 8 USC § 1182(a)(2).

The BIA found that a conviction that comes within the petty offense exception is not “referred to” in the CIMT inadmissibility ground at § 212(a)(2). Therefore the conviction cannot stop the seven-year clock – even if it *also* makes the person deportable. *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010). If a person is convicted of a CIMT that comes within the petty offense exception, and then later is convicted of a second CIMT offense, the seven-year clock stops on the date of commission of the second CIMT, not the first. *Matter of Deando-Roma*, 23 I&N Dec. 597 (BIA 2003).

**Example:** Enrique was admitted as a tourist in 2003 and adjusted to LPR in 2006. In 2007 he committed and was convicted of his first-ever CIMT, which has a potential sentence of one year. He was sentenced to three days in jail as a condition of probation, and three years probation. This means his “sentence” for immigration purposes is three days.<sup>5</sup> This conviction does not make him inadmissible, because it comes within the petty offense exception to the CIMT inadmissibility ground: it is his first CIMT offense, it has a potential sentence of not more than one year, and a sentence imposed of six months or less. It does make him deportable, however: Enrique committed the CIMT offense within five years of his admission as a tourist in 2003, and the conviction has a potential sentence of a year. However, under *Matter of Garcia, supra*, the conviction at least does not “stop the clock” on the seven years he will need for cancellation.

In 2011 Enrique commits and is convicted of another CIMT. Now he no longer comes within the petty offense exception. His seven-year clock stops as of the date he committed the second offense, under *Matter of Deando-Roma, supra*. Fortunately for him that was in 2011, more than seven years after his initial admission in 2003, so he remains statutorily eligible for LPR cancellation.

#### 4. *When does a CIMT conviction bar an applicant for non-LPR cancellation?*

**Summary:** The BIA held that a CIMT conviction is a bar unless the person committed just one CIMT, the sentence imposed was six months or less, and the potential sentence was *less than* one year. Note that this differs from the petty offense exception to the moral turpitude ground of inadmissibility, which requires a potential sentence of a year or less.

**Discussion.** An applicant for non-LPR cancellation under INA § 240A(b)(1) is subject to a uniquely worded statutory bar, based on conviction of an offense “under” the crimes grounds of inadmissibility or deportability.<sup>8</sup> The BIA held that an offense that comes within the petty offense exception to the CIMT inadmissibility ground and has a potential sentence of *less than one year* is not a bar to § 240A(b)(1) cancellation under this provision. However, if the petty offense has a potential sentence of *one year*, it is a bar. *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010).

**Example:** If we assume that all of the following convictions come within the petty offense exception to the moral turpitude inadmissibility ground, which conviction is a bar to non-LPR cancellation?

- 1) Misdemeanor grand theft, with a potential sentence of one year;
- 2) *Attempted* misdemeanor grand theft, with a potential sentence of six months;
- 3) Petty theft, with a potential sentence of six months

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<sup>8</sup> INA § 240A(d)(1), 8 USC § 1229b(d)(1).

The first conviction is a bar, because it has a potential sentence of one year. Neither of the next two convictions, which each have a possible sentence of six months, is a bar. This applies regardless of whether the noncitizen entered without inspection or was admitted on a visa. (Compare this to VAWA cancellation, next section.)

Note that the BIA is not re-defining the petty offense exception here. It is making up a hybrid standard for a particular statutory bar to § 240A(b)(1) cancellation. The BIA applies the bar based on conviction “under” a deportation ground even to noncitizens who never have been admitted (EWI), even though the grounds of deportation do not apply absent an admission. For further discussion of the standard and the controversy it has created, see *Defending Immigrants in the Ninth Circuit*, *supra* at § 11.4.

#### **5. When does a CIMT conviction bar an applicant for VAWA non-LPR cancellation?**

An applicant for VAWA cancellation under INA § 240A(b)(2) is barred if he is actually inadmissible or deportable under the crimes grounds. Therefore an applicant for VAWA cancellation who entered without inspection should not be held barred based upon conviction an offense described in the deportation ground, because the deportation grounds do not apply to someone who has not been admitted.<sup>9</sup> For that reason, the “hybrid” CIMT test set out in *Matter of Cortez* and *Matter of Pedroza*, for (b)(1) cancellation above, should not apply to VAWA (b)(2) cancellation applicants. (In addition, a § 212(h) waiver should be held to cure a bar based on CIMT inadmissibility.)

**Example:** Gina entered the U.S. without inspection in 2005. She married a U.S. citizen, who abused her. She was convicted of a CIMT that she committed in 2009, that has a potential sentence of one year. She received 10 days in jail. She is not barred from VAWA cancellation. She is not inadmissible for CIMT because she qualifies for the petty offense exception, and she can’t be found “deportable” for CIMT, because she entered without inspection.

#### **6. When is a CIMT 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, she is convicted of or admitted committing a single CIMT. INA § 101(f)(3), 8 USC § 1101(f)(3). If the conviction comes within the petty offense or youthful offender exception to the inadmissibility ground, however, the person is not statutorily barred.<sup>10</sup>

The fact that a person is deportable for CIMT is not a statutory bar to establishing good moral character. Of course, whether the person is deportable still is a crucial consideration. A deportable non-citizen – even one with good moral character -- can be referred to removal proceedings if he submits an affirmative application, and being deportable for crimes serves as an absolute bar to some kinds of relief.

#### **7. What is the effect of a CIMT finding in delinquency proceedings?**

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<sup>9</sup> See the deportation grounds at INA § 237(a), 8 USC § 1227(a) (referring to any alien “in and admitted to the United States”)

<sup>10</sup> See, e.g., 8 CFR § 316.10(b)(2), specifically applying exceptions to good moral character requirement for naturalization.

A disposition in juvenile delinquency proceedings is not a “conviction” for immigration purposes. This is in keeping with consistent holdings of the Board of Immigration Appeals “that acts of juvenile delinquency are not crimes ... for immigration purposes.”<sup>11</sup> In a few cases an admission of a CIMT might also have consequences under non-CIMT grounds, for example, admitting working as a prostitute, or admitting acts that might show one has a mental disorder that poses a current threat to self or others.

Being deportable for CIMT requires a conviction. A person can be found inadmissible under the CIMT ground for admitting having committed a CIMT, or acts that make up a CIMT, even if there is no conviction.<sup>12</sup> However, an admission made by a minor -- or by an adult about a CIMT committed while a minor – should not trigger inadmissibility under this ground, because the admission was of committing the civil offense of juvenile delinquency, not a crime.<sup>13</sup> Note that in an application for DACA, Deferred Action for Childhood Arrivals, the adjudicator may consider a delinquency disposition.

#### **8. When does a CIMT conviction trigger mandatory detention?**

Under the mandatory detention provisions of INA § 236(c), 8 USC §1226(c), a noncitizen who is subject to mandatory detention can be detained and denied a bond hearing before an immigration judge, if he or she has certain criminal dispositions. The dispositions must have occurred after October 8, 1998, and at least in some jurisdictions, the person must have been taken into immigration custody directly from criminal custody. See more information at [www.ilrc.org/enforcement](http://www.ilrc.org/enforcement).

What dispositions trigger mandatory detention depends upon whether the person will be charged in removal proceedings with inadmissibility (e.g., a person who entered without inspection) or deportability (e.g., a person who was admitted in any status, or who adjusted status to LPR).

A person charged with “inadmissibility” can be subject to mandatory detention if *inadmissible* under grounds relating to moral turpitude (which does not include someone who comes within the petty offense or youthful offender exception), as well as drug conviction, drug trafficking, prostitution, miscellaneous convictions, diplomatic immunity, and terrorist activities.<sup>14</sup>

A person charged with deportability may be subject to mandatory detention if he or she is *deportable* under any of the following grounds: conviction of one crime of moral turpitude

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<sup>11</sup> *Matter of Devison*, Int. Dec. 3435 (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). In *Devison* the Board held that this longstanding rule was not changed by the 1996 enactment of a statutory definition of conviction at 8 USC § 1101(a)(48)(A), INA § 101(a)(48)(A).

<sup>12</sup> INA § 212(a)(2)(A), 8 USC § 1182(a)(2)(A).

<sup>13</sup> *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); but see *United States v. Gutierrez-Alba*, 128 F.3d 1324 (9<sup>th</sup> Cir. 1997) (without discussion of the issue of admission of juvenile delinquency, the court found that juvenile’s guilty plea in adult criminal proceedings constitutes admission, regardless of whether adult criminal court prosecution was ineffective due to defendant’s minority status).

<sup>14</sup> INA § 236(c)(1)(A) and (D).

committed within five years after admission if a sentence of one year or more imprisonment was *imposed* (as opposed to a potential sentence), conviction of two crimes of moral turpitude, an aggravated felony, a drug offense, a firearms offense or miscellaneous crimes (sabotage, espionage), drug abuse/addiction, or terrorist activities. This does not include deportability under the domestic violence ground, relating to domestic violence and child abuse.<sup>15</sup>

**9. When can a CIMT conviction not be waived under INA § 212(h)?**

A qualifying non-citizen can waive multiple CIMT convictions under INA § 212(h), 8 USC § 1182(h). The only exception would be if the CIMT also is an aggravated felony; the permanent resident applicant is subject to the LPR bars to § 212(h); and the person was convicted of the aggravated felony after admission at the border as an LPR. In general, if the person became a permanent resident by consular processing she always is subject to the bars, and if she became a permanent resident by adjustment she might well not be. See Brady, “LPR Bars to § 212(h): To Whom Do They Apply” at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

**10. When can a CIMT conviction be waived under AEDPA § 212(c)?**

A permanent resident who pled guilty to certain offenses before April 1, 1997 may apply for the former INA § 212(c) relief in removal proceedings to defend against a deportation charge, or in connection with an affirmative or defensive application for adjustment of status. However, AEDPA restricts the deportation grounds that can be waived under § 212(c) if the plea was taken between April 24, 1996 and April 1, 1997. In that case § 212(c) will not waive a charge of *deportability* based on conviction of two CIMTs if both carry a potential sentence of one year. Section 212(c) still is available to waive the CIMT ground of *inadmissibility* for any CIMT conviction before April 1, 1997. See discussion in *Defending Immigrants in the Ninth Circuit*, *supra* at § 11.1(B).

**11. What is the youthful offender exception to the CIMT inadmissibility ground?**

The CIMT inadmissibility ground has two exceptions: the petty offense exception and the less-well known “youthful offender” exception. Under the youthful offender exception, a noncitizen will not be found inadmissible under the moral turpitude ground based on a conviction in adult court if he or she committed only one CIMT, while under the age of eighteen, and if the commission of the offense and the release from any resulting imprisonment occurred over five years before the current application.<sup>16</sup>

This exception is not aimed at a juvenile court disposition regarding a CIMT, which is not a conviction. See Part 7, above. Rather, this is for young people who were tried as adults for a single CIMT, even for a serious offense (note there is no maximum sentence). The youthful offender exception should bring the same multiple immigration benefits as the petty offense exception.

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<sup>15</sup> INA § 236(c)(1)(B) and (C).

<sup>16</sup> INA § 212(a)(2)(A)(ii)(I), 8 USC § 1182(a)(2)(A)(ii)(I).