ELIGIBILITY FOR RELIEF

Update on Cancellation of Removal for Lawful Permanent Residents, INA § 240A(a)

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I. Introduction

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

1. Inadmissibility waivers under INA § 212(h), 8 USC § 1182(h)

2. Cancellation of removal for lawful permanent residents under INA § 240A(a), 8 USC 1229b(a) ("LPR cancellation"), and

3. Waivers under INA § 212(c), 8 USC § 1182(c), the predecessor to LPR cancellation.

This advisory will focus on eligibility for LPR cancellation. It has been updated to reflect the rule governing the seven years of residence set out in *Barton v. Barr*, --U.S.--, 140 S.Ct. 1442 (2020). It also will briefly discuss relief under INA § 212(c). For a discussion of waivers under INA § 212(h), see Practice Advisory.[1]

For a more comprehensive discussion of the effect of *Barton v. Barr* on the required seven years, see IDP, ILRC, NIPNLG, *Practice Advisory: Avoiding the Stop-Tim Rule After Barton v. Barr* (June 2020).[2]

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

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

Always consider the possibility of obtaining post-conviction relief to eliminate the conviction/s making the person removable. You or a different practitioner can pursue this option in criminal court, at the same time that the § 240A(a) case is proceeding in immigration court. See online resources at https://www.ilrc.org/helping-immigrant-clients-post-conviction-legal-options-guide-legal-services-providers.

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

A. You obtained LPR status lawfully and do not fall within certain categories.

You must not have become an LPR through fraud or mistake.[3] You must not come within certain categories, including persecutors and terrorists.[4]

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

The immigration statute designates certain types of crimes as "aggravated felonies." If the person was convicted of an aggravated felony at any time, it is a bar to LPR cancellation of removal.[5]

If the aggravated felony does not involve drugs, check to see if the person might be eligible for relief under INA § 212(h).[6] If the aggravated felony conviction occurred in the 1990's or earlier, check for eligibility for a waiver under INA § 212(c), discussed below. For other options, see the ILRC *Relief Toolkit* at www.ilrc.org/chart.

C. You have been an LPR for at least five years.

The applicant must have "been an alien lawfully admitted for permanent residence for not less than 5 years." INA § 240A(a)(1). The five years of LPR status includes time spent as a conditional permanent resident.[7] Children cannot use their parent's time, for either the five-year LPR or seven-year continuous residence requirement.[8]

The accrual of five years of LPR status is not subject to the "stop-time" rule set out at INA § 240A(d)(1), discussed below.[9] The five years as an LPR continue to accrue through the removal proceedings until there is an administrative denial (meaning throughout the BIA appeal, if there is one).

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

D. You have accrued seven years of continuous residence in the United States since admission in any status.

The applicant must have "resided in the United States continuously for 7 years after having been admitted in any status." INA § 240A(a)(2). As discussed below, a complex "stop-time" provision governs when the seven years cease to accrue based on commission of certain offenses, under INA § 240A(d)(1)(B).

1. What starts the accrual of the seven years?

The seven-year "clock" starts with any admission, e.g., as an LPR, visitor, border crossing card-holder, student, etc., including if the person fell out of status for some period before they adjusted.[10] If the person never was admitted, adjustment of status to LPR will count as the admission that starts the seven years. The Fifth and Ninth Circuits held that admission includes a person who was "waved through" at a port of entry, but the BIA will apply this rule only in cases arising within the Fifth and Ninth Circuit.[11]

Advocates can assert that in some cases a grant of status within the United States constitutes an admission for purposes of the seven years. A grant of a T, U, or V visa should be so held.[12] Advocates can consider arguments that an admission for this purpose includes a grant of Temporary Protected Status (TPS) (in the Fifth, Eighth, and Ninth Circuits)[13] or of Special Immigrant Juvenile Status (in the Ninth Circuit).[14] As always with untried arguments, at the same time they should explore other defense strategies, including post-conviction relief to vacate the removable conviction/s.

A grant of Family Unity, or merely applying for asylum or adjustment, or being granted asylum, is not an admission.[15]

2. What ends the accrual of seven years: Served with a Qualifying Notice to Appear (NTA)

Under the "stop-time" provision in INA § 240A(d)(1), the seven years since admission cease to accrue:

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

The Supreme Court ruled that for service of the notice to appear (NTA) to stop the accrual of time under § 240A(d)(1)(A), the NTA must contain the place, date, and time of the proceedings. See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018). While *Pereira* and other cases concern non-LPR cancellation under INA § 240A(b)(1), the definition at INA § 240A(d)(1)(A) applies to both LPR and non-LPR cancellation.

In many LPR cancellation cases the *Pereira* issue is not important, because the person committed an offense that stopped the clock before the NTA was served. See Part #7, below. But the issue can be determinative in LPR cancellation if (a) the seven-year clock was not already stopped before issuance of the NTA, and (b) the NTA that purports to stop the clock did not contain the place, date and time of the proceedings. If that is the case, advocates must dive into the multiple BIA and federal court cases that have varying interpretations of *Pereira*.[16]

The Supreme Court will decide a key issue, in *Niz-Chavez v. Barr*, 789 Fed. Appx. 523 (6th Cir. 2019), cert. granted, (June 8, 2020). If the government prevails, SCOTUS likely would uphold the BIA's position that the stop-time rule is triggered when the subsequent service of a Notice of Hearing perfects a deficient NTA. If Niz-Chavez prevails, the stop-time rule would never be triggered by government service of additional documents where the NTA itself failed to list the time and place of proceedings, because an NTA must be a single document and cannot be "perfected" by the subsequent service of other document(s).

3. What ends the accrual of seven years? Rendered inadmissible under INA § 212 (a)(2), under *Barton v. Barr*

The seven-year period also ends when the applicant "has committed an offense referred to in section 212(a)(2) that renders the alien (*sic*) inadmissible to the United States under section 212(a)(2) or removable [deportable] from the United States under section 237(a)(2) or 237(a)(4)." See INA § 240A(d)(1)(B).

The Supreme Court addressed § 240A(d)(1)(B) in *Barton v. Barr*, --U.S.--, 140 S.Ct. 1442 (2020). The Ninth Circuit had interpreted the provision to mean that to stop the accrual of seven years, an offense always must be referred to in INA § 212(a)(2), but whether it must "render" the person inadmissible versus deportable is determined by the posture of the case. If the LPR has been admitted (and thus is being charged with being deportable under INA § 237(a)), the LPR is not subject to the grounds of inadmissibility and therefore legally cannot be "rendered" inadmissible. In those removal proceedings, an offense stops the seven-year clock only if it is referred to in § 212(a)(2) and renders the person *deportable* under § 237(a)(2) or (4). *Nguyen v. Sessions,* 901 F.3d 1093 (9th Cir. 2018). Mr. Nguyen had admitted that he committed a drug offense (but was not convicted of it) before reaching his seven years. A qualifying admission of a drug offense is referred to in INA § 212(a)(2), but it does not make one deportable; that requires a conviction. The Ninth Circuit found that Mr. Nguyen's admission did not meet the requirements of § 240A(d)(1)(B) and did not stop the time accruing toward his seven years.

In *Barton,* the Supreme Court rejected the Ninth Circuit's analysis, and interpreted § 240A(d)(1)(B) to mean that the seven years cease to accrue when the person has committed an offense referred to in § 212(a)(2) that renders them inadmissible under § 212(a)(2). In an opinion by Justice Kavanaugh, the Court held that a noncitizen could be "rendered" inadmissible under § 240A(d) even if they were not subject to the inadmissibility grounds. Writing for the dissent, Justice Sotomayor criticized the majority's interpretation for failing to give effect to the "two-track" system of inadmissibility and deportability in immigration law, and for rendering sections of the statute superfluous. *Barton* is discussed more below, but the bottom line is that:

- If any LPR cancellation applicant is described in the criminal *inadmissibility* grounds at INA § 212(a)(2), the clock stops as of the date that the person committed the relevant offense.

- If the LPR is *not* described in § 212(a)(2), then the offense does *not* stop the clock, even if it made them deportable.

For a more comprehensive discussion of the effect of *Barton v. Barr* on the seven years, see IDP, ILRC, NIPNLG, *Practice Advisory: Avoiding the Stop-Time Rule After Barton v. Barr* (July 2020).[17]

Advocates should keep abreast of advisories about *Barton* and possible new defenses, and always should investigate post-conviction relief to erase a harmful conviction. Here are the key points to remember.

a. The clock stops as of the date the offense was committed, but the person also must be "rendered" inadmissible via a conviction, admission, or other requirement under § 212(a)(2)

In Mr. Barton's case, the Court held that the clock stopped because he was rendered inadmissible under the crimes involving moral turpitude (CIMT) ground, which requires that the person either was convicted of, or

admitted committing, a CIMT that does not fall within certain exceptions. Mr. Barton's clock stopped *as of* the date he committed the offense (this is a long-established rule). The Court explained:

> "*First,* cancellation of removal is precluded if a noncitizen *committed* a § 1182(a)(2) offense during the initial seven years of residence, even if (as in Barton's case) the *conviction* occurred after the seven years elapsed....
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> "*Second*, the text of the law requires that the noncitizen be rendered "inadmissible" as a result of the offense. For crimes involving moral turpitude, which is the relevant category of § 1182(a)(2) offenses here, § 1182(a)(2) provides that a noncitizen is rendered "inadmissible" when he is convicted of or admits the offense. § 1182(a)(2)(A)(i). As the Eleventh Circuit explained, "while only commission is required at step one, conviction (or admission) is required at step two."
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> *Barton v. Barr*, 140 S.Ct. at 1450 (emphasis in original, internal citations deleted)

PRACTICE TIP. An LPR is not "rendered inadmissible" under the **controlled substance and CIMT grounds** unless they were convicted of, or made a qualifying admission that they committed, the offense. The government's suspicion, allegation, or evidence that the person committed the offense is not enough to render them inadmissible and stop their clock, without a conviction or admission of conduct.

- If a conviction is vacated based on legal error so that it is eliminated for immigration purposes,[18] then commission of the offense did not stop the clock because the person never was legitimately "rendered inadmissible." (Of course, where it is possible a more direct option is to vacate the *deportable* conviction/s that are the bases for removal, and terminate the proceedings.)
- If there was no conviction and an LPR refuses to admit the conduct to DHS, they are not rendered inadmissible and the clock does not stop. See discussion of admitting conduct on the stand at subpart f, below.

b. What types of offenses do <u>not</u> stop the clock?

An offense that does not bring the person within INA § 212(a)(2), the crimes grounds of inadmissibility, *never* stops the seven-year clock.

1) An offense that makes one deportable, but is not referred to in § 212(a)(2), does not stop the clock.

   The crimes deportation grounds are referred to in INA § 237(a)(2), not § 212(a)(2). The fact that a conviction brings the person within the firearms, domestic violence, or CIMT deportation grounds does not alone stop the clock.[19] (But if the deportable offense also happens to be an offense "referred to" in § 212(a)(2), for example because it was an inadmissible CIMT, then it would stop the clock on that basis. See next bullet point.)

2) A CIMT conviction or qualifying admission that comes within the petty offense or youthful offender exception does not stop the clock.

An offense that comes within these exceptions to the CIMT inadmissibility ground is not referred to in § 212(a)(2). The clock will stop as of the date the person commits a second CIMT.[20] See subpart d, below, for more on the petty offense exception.

3) The clock is not stopped if the person comes within an inadmissibility ground other than INA § 212(a)(2), e.g., the health grounds at INA § 212(a)(1) or the alien smuggling grounds at INA § 212(a)(6).

Example. Tim was admitted as an LPR in 2011. In 2016 he pled guilty to committing misdemeanor California Penal Code § 273.5, domestic battery with injury. He was sentenced to 15 days in jail. He was placed in removal proceedings in 2020, charged with being deportable under the domestic violence ground. He also admitted to ICE that in 2017 he had tried to bring his cousin illegally across the border. Does Tim have the seven years required for LPR cancellation?

Yes, he does. The § 273.5 conviction is a deportable crime of domestic violence, but that alone does not stop his clock because that is a deportation ground, which is not "referred to" in INA § 212(a)(2). The conviction would stop his clock if it made him inadmissible under the CIMT ground. However, even if we assume that § 273.5 is a CIMT (and this is debatable[21]), Tim's conviction is not referred to in § 212(a)(2) because it comes within the CIMT petty offense exception. (This is because it is his only CIMT offense, the potential sentence is not more than a year, and the sentence imposed is not more than six months. See subpart d, below.) Therefore the conviction made him deportable, but it did not stop the clock.

If Tim were found to have been "rendered inadmissible" for trying to smuggle his cousin across the border, that also would not stop the clock. Inadmissible smuggling appears at § 212(a)(6), not § 212(a)(2).

4) The clock only stops if the person is actually "rendered inadmissible."

If a conviction or an admission of conduct, or sufficiently substantial "reason to believe," is required to make the person inadmissible under the § 212(a)(2) subsection, but this has not occurred, the clock does not stop because the person is not "rendered inadmissible." See *Barton*, 140 S.Ct. at 1450.

c. Which kinds of offenses stop the clock?

According to *Barton*, the clock stops as of the day that the person committed an offense that ultimately resulted in them being rendered inadmissible under (described in) INA § 212(a)(2). This includes:

1) A conviction of, or qualifying admission of committing, a single CIMT, ***unless*** it comes within the petty offense or youthful offender exceptions. If the first CIMT comes within one of those exceptions, the second CIMT will stop the clock. See subparts d, f below.

2) A conviction of, or qualifying admission of committing, a controlled substance offense.

- This includes a conviction or simply an admission of possessing any amount of *marijuana*, even if this was permitted under state law.[22] While the deportation ground has a statutory

exception for possessing 30 grams or less of marijuana, the inadmissibility does not. See subparts e, f, below.

3) Conviction of two or more offenses of any kind, other than purely political 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 or commercialized vice.

5) Immigration authorities have ***reason to believe*** 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.

d. The Petty Offense and Youthful Offender Exceptions

The petty offense exception to the CIMT inadmissibility ground applies if the person committed just one CIMT, the potential sentence was one year or less, and any sentence imposed was six months or less.[23] 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). This is true even if the conviction made the person deportable.

The youthful offender exception to the CIMT inadmissibility ground applies if the person committed just one CIMT; they did this while under the age of 18 but they were convicted as an adult; and the conviction or release from resulting imprisonment occurred at least five years before the current application.[24] This has the same immigration benefits as the petty offense exception.

If a person comes within one of these exceptions, but later is convicted of or admits committing 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. This conviction makes Fiona deportable, because she was convicted of a CIMT with a potential sentence of one year that she committed within 5 years of her admission. It comes within the petty offense exception to the inadmissibility ground. In 2018, Fiona committed and was convicted of a second CIMT. Did Fiona accrue the seven years residence since admission required for LPR cancellation?
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> 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*. But by 2018, she had accrued more than the seven years of residence she needed since 2009.

See free ILRC resources for more information on all the rules involving CIMTs, especially as they apply to California offenses.[25]

e. Conviction for Possessing Any Amount of Marijuana

One or more convictions that arise from a single incident involving possession of 30 grams or less of marijuana for personal use is not a deportable offense, but it *is* an offense described in § 212(a)(2). A conviction or a qualifying admission of conduct will stop the clock.[26]

> *Example*: LPR Laura was admitted to the United States in 2009, and was convicted of possessing 20 grams of marijuana in 2013. She was convicted of a deportable crime of child abuse in 2019 and placed in removal proceedings. She is applying for LPR cancellation. Does she have the required seven years?
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> No. The 2013 conviction did not make her deportable, because the deportation ground has an exception for a single incident involving possession of 30 grams or less of marijuana for personal use. However, the inadmissibility grounds at § 212(a)(2) do *not* have that exception, so the conviction rendered her inadmissible and her clock stopped as of the day she committed the offense.[27] She needs to consider post-conviction relief.

f. Admitting a CIMT or Drug Offense – Including "Legal" Marijuana – on the Stand or Elsewhere

Even if there is no conviction, a qualifying *admission* that one committed certain controlled substance offenses (including possession of marijuana) can render the person "admissible" under § 212(a)(2) and stop the clock. In *Barton,* the Supreme Court abrogated *Nguyen v. Sessions,* 901 F.3d 1093 (9th Cir. 2018) and held that simply admitting commission of an inadmissible drug offense stopped the seven-year clock. ICE may try to elicit this admission from your client at the hearing or before. A qualifying admission of a CIMT also will stop the clock, unless it comes within the petty offense exception.

> Example*:* Leon was admitted to the United States as an LPR in 2009. He committed and was convicted of CIMT offenses in 2018 and 2019. He was placed in removal proceedings and applied for LPR cancellation. At his cancellation hearing, the ICE attorney asked if he ever had tried marijuana. Leon admitted that he had used it a few times in Colorado in 2015, after it became legal. Does Leon have the required seven years?
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> ICE will assert that he does not. Although using marijuana was permitted under Colorado law, possessing marijuana is a federal offense. ICE will assert that because Leon has admitted committing a federal drug crime, he is rendered inadmissible under INA § 212(a)(2), and his seven-year clock has stopped as of the date of the admitted conduct in 2014. Because at that time he had only accrued five years since admission, Leon is no longer eligible to apply for cancellation.

We hope to avoid this situation, but there is no guarantee and the best defense is preparation (see below). But if this did happen, Leon's advocate can argue that Leon's statement did not bring him within § 212(a)(2), because it was not a qualifying admission of a crime. To cause inadmissibility, an admission of conduct must meet certain requirements. [28]

- The DHS official or IJ must set out all of the elements of the offense in an understandable manner, before the person admits each element.
- The person must admit to conduct that is a crime in the jurisdiction where it was committed. (Note that conduct that meets the definition of a federal drug offense – including taking marijuana under a doctor's care -- is an actual federal offense if it was committed anywhere in the United States, i.e., it does not require a traditional federal jurisdictional element such as crossing state lines or federal property.[29])
- The admission must be voluntary.
- The BIA has held that if conduct was charged as a crime in court and the end result was less than a conviction (e.g., the charges were dismissed, or the resulting conviction was vacated), then the person cannot be held inadmissible for admitting to the same conduct – either for the guilty plea or other admission at the criminal court hearing, or any other time, e.g., to an immigration official or IJ now.[30]

Was Leon's statement a qualifying admission?

- We can argue that it was not, because the ICE attorney did not set out all of the elements of the offense in an understandable manner before asking Leon to admit each of them.
- We can argue that *use* of marijuana is distinct from *possession,* and federal law only penalizes possession of a controlled substance; therefore admitting to one or multiple incidents of using marijuana is not admitting a federal offense.[31] Because use of marijuana was neither a Colorado nor a federal crime, Leon did not admit to conduct that was a crime under the jurisdiction where it was committed.

However, ***by far the best strategy would have been to carefully prepare with Leon before the hearing.*** Advocates and clients should work together to make sure that the client is not surprised by any ICE question. Also, is the client sure of the facts and the date? Did they know what the substance was when they decided to use it? The client must understands the risks and consider how to withstand questioning.

In some cases, you may decide together that the client should decline to answer certain questions and assert the Fifth Amendment right to silence.[32] The risk is that the judge might decide to deny the cancellation application if the respondent fails to answer a question, asserting that declining to answer is "failure to prosecute" their case. Advocates can consider how best to persuade the judge that that is unwarranted.

- An applicant has the burden to demonstrate eligibility for relief. INA § 240(c)(4)(A). If the government provides sufficient evidence of facts that a mandatory bar to relief applies, the applicant must provide evidence to show that the bar does not apply. 8 CFR 1240.8(d).

  The CIMT and drug inadmissibility grounds are more like grounds based on a conviction than grounds based on conduct. The bar is not triggered by a finding that the person engaged in conduct or committed an offense. It is triggered only by certain legal events: either a conviction of, or a legally qualifying

admission to immigration authorities of committing, an inadmissible offense. Evidence that the client engaged in conduct, for example testimony from another person, does not go to prove this.

- An applicant has the duty to provide information that the judge needs in order to decide the application, according to substantive requirements and as a matter of discretion. INA § 240(c)(4)(B). Here, the applicant does not need to hide or contest the underlying facts. If the judge wants to know about this, there may be ways other than the applicant's formal admission to provide this information, including declining to contest ICE's assertion of the underlying facts. An applicant can state that they went through a bad period and describe how they are better. Advocates could even consider having a family member describe the facts to the judge, if that would be helpful.

For further discussion of defense strategies, see IDP, ILRC, NIPNLG, *Practice Advisory: Avoiding the Stop-Time Rule After Barton v. Barr* (June 2020) and other on-line materials.[33]

g. Convictions from Before September 30, 1996 (or April 1, 1997) May Not Stop the Clock

In the Ninth Circuit, conviction of an offense before September 30, 1996 (the enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 or IIRIRA[34]) does not stop the seven-year clock if the person was eligible for relief under INA § 212(c) as of April 1, 1997 (the enactment date of IIRIRA). See *Sinotes-Cruz v. Gonzalez*, 468 F.3d 1190, 1203 (9th Cir. 2006).[35] The *Sinotes-Cruz* requirement of being "eligible" for relief as of April 1, 1997 should mean that the person had a conviction that qualified for INA § 212(c) relief, not that the person already had accrued the seven years required for INA § 212(c). See also *Valencia-Alvarez v. Gonzales,* 469 F.3d 1319, 1329 (9th Cir. 2006) (the clock did stop because the person never was eligible for relief under INA § 212(c)).

Courts are split on this issue: the BIA and some courts rule against any limit to stopping the clock based on IIRIRA, while the Fourth and Seventh Circuit provide a limit but under somewhat different standards.[36]

III. What is the standard for granting LPR cancellation as a matter of discretion?

This advisory focuses on statutory eligibility to apply for relief. But like most forms of relief, cancellation has a key discretionary component. It is absolutely critical to provide a strong case to support a positive exercise discretion. The standards for discretion under LPR cancellation are the same as for relief under INA § 212(c).[37]

IV. Once cancellation has been granted, can the conviction or conduct harm immigration status in the future?

Once relief has been granted to waive certain grounds, the person cannot be charged with being deportable or inadmissible based solely on the conviction or conduct.[38] But a conviction that occurred after admission and that was waived by a grant of some relief still can be joined to a *new, subsequent* conviction to create an immigration penalty such as being deportable for two CIMT convictions.[39] If the issue is inadmissibility, both the older, waived ground and the new ground must be waived in an application for adjustment of status. The BIA found that where LPR cancellation had been used to waive a prior conviction for possession of cocaine, and the LPR later became deportable for new CIMT convictions, he was not eligible to adjust status as a defense to removal: he was inadmissible both for the new CIMT and for the old cocaine

convictions, and he could not waive the cocaine conviction using INA § 212(h). The BIA noted, however, that a previously waived inadmissible conviction would not trigger INA § 101(a)(13)(C)(v) for an LPR returning from a trip, according to its terms.[40]

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

If your LPR client is inadmissible or deportable for a conviction from before April 24, 1996, or in some cases before April 1, 1997, they might be eligible to apply for a waiver today under former INA § 212(c). This can be combined with a INA § 212(h) waiver, but not with LPR cancellation. See *Matter of Abdelghany,* 26 I&N Dec. 254 (BIA 2014); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); and online practice advisory.[41]

If your LPR client is charged with seeking an admission at the border pursuant to INA § 101(a)(13)(C), or charged with being deportable for having been inadmissible at last entry, INA § 237(a)(1), solely because they traveled outside the United States after one or more convictions of inadmissible offenses that occurred before April 1, 1997, they may have a defense. See *Vartelas v Holder*, 566 U.S. 257 (2012) (employing the old *Fleuti* definition of entry in this context) and online practice advisory.[42]

For more in-depth information, see books such as ILRC, *Removal Defense* (www.ilrc.org, 2020 edition), or Kesselbrenner and Rosenberg, *Immigration Law and Crimes* (https://www.thomsonreuters.com/en/products-services/legal.html).

End Notes

[1] See ILRC, *Eligibility for Relief: Waivers under INA § 212(h)* (January 2020) at https://www.ilrc.org/eligibility-relief-waivers-under-ina-%C2%A7-212h.

[2] See *Barton v. Barr* advisory at https://www.ilrc.org/practice-advisory-avoiding-stop-time-rule-after-barton-v-barr

[3] See, e.g., *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003).

[4] See categories at INA § 240A(c).

[5] The person must not have been "convicted of" an aggravated felony. INA § 240A(a)(3). For definitions of aggravated felonies, see INA § 101(a)(43), and see ILRC, *Practice Advisory: Aggravated Felonies* (April 2017) at www.ilrc.org/crimes. To see if a particular offense is an aggravated felony, check references such as the California *Chart* (sign up at https://calchart.ilrc.org/registration/).

[6] See ILRC, *Eligibility for Relief: Waivers under INA § 212(h)* (January 2020) at https://www.ilrc.org/eligibility-relief-waivers-under-ina-%C2%A7-212h.

[7] See generally *Gallimore v. Attorney Gen. of U.S.,* 619 F.3d 216 (3d Cir. 2010).

[8] *Holder v. Martinez-Gutierrez*, 566 U.S. 583 (2012).

[9] See, e.g., *Sinotes-Cruz v. Gonzales,* 468 F.3d 1190, 1197 (9th Cir. 2006).

[10] See, e.g., *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002).

[11] See *Saldivar v. Sessions, 877 F.3d 812 (9th Cir. 2017), Tula-Rubio v. Lynch*, 787 F.3d 288, 291-96 (5th Cir. 2015), finding that a waive-through is an admission, but see *Matter of Castillo Angulo*, 27 I&N Dec. 194, 199-202 (BIA 2018) (disagreeing

and holding that outside of that jurisdictions the person must prove they possessed some form of lawful immigration status at the time of admission to meet the "any status" requirement).

[12] In unpublished opinions, the BIA has held that a grant of a U visa (*Matter of Alejandro Garnica Silva*, A098 269 615 (BIA June 29, 2017)), a T visa (*Matter of E-A-M-Z-,* AXXX XXX 207 (BIA June 4, 2019)), or a V visa (Matter of A-M-U-, AXXX XXX 567 (BIA Nov. 8, 2018) is an admission for purposes of determining whether the person was subject to inadmissibility or deportability grounds, based on language in those provisions. Unpublished opinions are accessible, among other places, at the Immigrant and Refugee Appellate Center, www.irac.net.

[13] Advocates can explore the following argument. As always with untried arguments, at the same time they should explore other defense strategies, including post-conviction relief to vacate the removable conviction/s. Under INA § 244A(f)(4), 8 USC § 1254(f)(4), a grant of Temporary Protected Status (TPS) means that "for purposes of adjustment of status under [INA § 245] and change of status under [INA § 248], the alien (sic) shall be considered as being in, and maintaining, lawful status as a nonimmigrant." The Sixth, Eighth, and Ninth Circuits have held that under the plain language of this section, a grant of TPS is an admission for purposes of adjustment. See *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), *Velasquez v. Barr*, --F.3d-- 2020 WL 6290677 (8th Cir. Oct. 27, 2020), and *Ramirez v. Brown*, 852 F.3d 954, 960 (9th Cir. 2017). While § 244A(f)(4) specifically references adjustment, advocates may consider arguments that it also applies to INA § 240A(d)(1). As the Ninth Circuit noted, "Under the immigration laws, an alien who has obtained lawful status as a nonimmigrant has necessarily been 'admitted.' The statutory provisions refer to '[t]he *admission* to the United States of any alien as a *nonimmigrant*…'" *Ramirez* p. at 960. See further discussion at *Enriquez v. Barr*, 969 F.3d 1057, 1061 (9th Cir. 2020) (summarizing the law, noting that a grant of a VAWA I-360 is not an admission for purposes of LPR cancellation under the *Ramirez* TPS decision, as VAWA lacks statutory language similar to that TPS). The BIA will reject this argument, so the case must go to a federal appeals court: outside of the Sixth, Eighth, and Ninth Circuits, the BIA holds that TPS is not an admission even for purposes of adjustment. *Matter of Padilla Rodriguez*, 28 I&N Dec. 164 (BIA 2020), *Matter of H-G-G-,* 27 I&N Dec. 617 (AAO 2019).

[14] See *Garcia v. Holder*, 659 F.3d 1261 (9th Cir. 2011) (grant of Special Immigrant Juvenile Status (SIJS) is an admission for this purpose, distinguishing SIJS "parole" under INA § 245(h) and parole under INA §212(d)(5)), but see dicta in *Alanniz v. Barr*, 924 F.3d 1061, 1065-66 (9th Cir. 2019) (stating that the Ninth Circuit withdrew from *Garcia* in *Medina-Nunez v. Lynch*, 788 F.3d 1103, 1104 (9th Cir. 2015)). As always with untried arguments, at the same time as pursuing this, advocates should explore other defense strategies including post-conviction relief to vacate the removable conviction/s.

The *Garcia* holding on SIJS is not secure because it was based partly on the Ninth Circuit's prior holding that Family Unity was an admission for this purpose, and because Family Unity and SIJS shared salient characteristics, SIJS also was an admission. The court later withdrew from its Family Unity holding, deferring to the BIA's finding that Family Unity does not meet the definition of admission at INA § 101(a)(13). See *Medina-Nunez v Lynch, supra,* deferring to *Matter of Reza-Murillo*, 25 I. & N. Dec. 296 (BIA 2010)). However, *Garcia* had an additional independent basis for its holding, which is unique to SIJS. The SIJS statute provides that the person is deemed paroled in under INA § 245(h). The definition of admission at INA § 101(a)(13)(B) provides that admission does not include a noncitizen who is paroled in under INA § 212(d)(5). "Congress did not include SIJS-parolees in its express preclusion of § 1182(d)(5) parolees from admission eligibility. Under the doctrine of expressio unius est exclusio alterius, the statute's express preclusion of parolees under § 1182(d)(5) from admission, while remaining silent on the admission status of other parolees, could indicate that Congress intended not to preclude non-specified parolees from being considered to be admitted." *Garcia v. Holder,* 659 F.3d at 1269.

SIJS was not addressed in either *Matter of Reza-Murillo* or *Medina-Nunez v. Lynch, supra.* Neither was SIJS at issue in *Alanniz.* Arguably, the panel in *Alanniz* was incorrect when it stated in dicta that in *Medina-Nunez*, the Ninth Circuit withdrew from its holding in *Garcia*.

[15] See, e.g., Matter of V-X-, 26 I&N Dec. 147, 150-52 (BIA 2013) (grant of asylum is not an admission for this purpose); *Matter of Reza-Murillo*, 25 I. & N. Dec. 296 (BIA 2010) (Family Unity is not an admission for this purpose), *Medina-Nunez v. Lynch*, 788 F.3d 1103, 1104 (9th Cir. 2015) (same, deferring to the BIA).

[16] See BIA decisions on *Pereira* in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018); *Matter of Mendoza-Hernandez and Matter of Capula Cortes*, 27 I&N Dec. 520, 529 (BIA 2019); *Matter of Pena Mejia*, 27 I&N Dec. 546 (BIA 2019); *Matter of Miranda Cordiero*, 27 I&N Dec. 551 (BIA 2019); and *Matter of Rosales Vargas*, 27 I&N Dec. 745 (BIA 2020). This advisory does not discuss the many Court of Appeals decisions construing the above BIA decisions. The Supreme Court will address some of these issues in *Niz-Chavez v. Barr,* cited in the text. Note that this is a rapidly changing area of law and practitioners must constantly look for new developments, conducting their own research and consulting more in-depth practice advisories such as *Practice Advisory: Strategies and Considerations in the Wake of Pereira v. Sessions*, CLINIC, Jan. 27, 2020,

https://cliniclegal.org/resources/removal-proceedings/practice-advisory-strategies-and-considerations-wake-pereira-v and *Featured Issue: The Pereira Ruling and Resulting Fake NTAs*, AILA Doc. No. 19082210, 8/13/2020, https://www.aila.org/advo-media/issues/all/the-pereira-ruling.

[17] See *Barton v. Barr* advisory at https://www.ilrc.org/practice-advisory-avoiding-stop-time-rule-after-barton-v-barr

[18] See, e.g., *Khan v. Attorney Gen. of United States*, --F.3d-- (3d Cir. Nov. 3, 2020) 2020 WL 6437969) (Mr. Khan's seven-year clock stopped as of the date of commission of the offense despite the fact that the conviction was "vacated," because the vacatur did not eliminate the conviction for immigration purposes under *Pickering*: it was not based on legal error but was part of new state laws legalizing certain uses of marijuana and treating past convictions for it.)

[19] *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000), interpreting INA § 240A(d), 8 USC § 1229b(d).

[20] *Matter of Deando-Roma*, 23 I&N Dec. 597 (BIA 2003), *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010).

[21] The Ninth Circuit held that § 273.5 is overbroad as a CIMT, because the level of force it requires, when committed against a former co-habitant, is not a CIMT. *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009). Advocates can argue that this means that *no* conviction of § 273.5 is a CIMT, because under the categorical approach § 273.5 is not "divisible" between the several listed types of relationships. See ILRC, *How to Use the Categorical Approach Now* (2019 version forthcoming) at www.ilrc.org/crimes.

[22] Possessing and growing even a small amount of marijuana, and even when needed for medical reasons, remains a federal offense even when it is lawful under the governing state law. Therefore making a qualifying admission of this conduct can make a noncitizen inadmissible. See materials including a Practice Advisory at https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana.

[23] See the petty offense and youthful offender exceptions at § 212(a)(2)(A)(ii).

[24] INA§ 212(a)(2)(A)(ii).

[25] See ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (June 2020) and ILRC, *Flow Charts on Penalties for Crimes Involving Moral Turpitude* (June 2020) at www.ilrc.org/crimes.

[26] The controlled substances deportation ground has a specific statutory exception for conviction of possessing 30 grams or less of marijuana for personal use. See INA § 237(a)(2)(B)(i), 8 USC § 1227(a)(2)(B)(i). There is no such exception in the inadmissibility ground at INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II) (although a discretionary waiver under INA § 212(h), 8 USC § 1182(h), may be available). See materials including a Practice Advisory at https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana.

[27] See, e.g., *Khan v. Attorney Gen. of United States*, --F.3d-- (3d Cir. Nov. 3, 2020) 2020 WL 6437969) (Because the vacatur of the cancellation applicant's marijuana conviction did not meet the *Pickering* test for eliminating a conviction for immigration purposes, Mr. Khan's accrual of time still stopped as of the date of commission of the offense.)

[28] For a discussion of what constitutes a qualifying admission to an immigration official, see, e.g., ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (June 2020), Part 3, at https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude and see discussion in Kesselbrenner and Rosenberg, *Immigration Law and Crimes* (https://www.thomsonreuters.com/en/products-services/legal.html).

[29] See *Gonzales v. Raich*, 545 U.S. 1 (2005).

[30] See, e.g., *Matter of E.V.,* 5 I&N Dec. 194 (BIA 1953); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968), M*atter of Seda,* 17 I&N Dec. 550 (BIA 1980).

[31] See discussion at ILRC, *Practice Advisory: Immigration Risks of Legalized Marijuana* (2018), p. 7, at https://www.ilrc.org/sites/default/files/resources/marijuana_advisory_jan_2018_final.pdf. While possession of marijuana is a federal offense, use is not. Because using or being under the influence of a drug does not contain the essential elements of the federal offense of possession, admission of such use is not admission of a federal offense. See, e.g., *Rice v. Holder*, 597 F.3d 952, 956 (9th Cir. 2010) (use, under the influence are not federal offenses), overturned on other grounds by *Nunez-Reyes v. Holder*, 646 F.3d 684, 695 (9th Cir. 2011) (which noted that being under the influence is not a possession offense or a lesser included offense to possession). See the on-point discussion in *Hernandez-Munoz v. Sessions*, No. 14-72542 (9th Cir. Nov. 6, 2017) (unpublished), where the court held that an applicant for adjustment who admitted to having used marijuana on several occasions was not inadmissible for having admitted the elements of the federal offense of possession, citing cases holding that use of a drug is at most circumstantial evidence of possession. Neither should admission of use shift the burden to the person to prove that he or she did not possess the marijuana.

[32] Respondents in removal proceedings can assert the Fifth Amendment right to silence rather than answer a question regarding conduct for which they could be criminally charged. *Matter of Guevara*, 20 I&N Dec. 238, 241-42 (BIA 1990) (collecting cases); see also *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) ("In a deportation hearing there is no prohibition against drawing an adverse inference when a petitioner invokes his Fifth Amendment right against self-incrimination."). Clients themselves, rather than the attorney, must be prepared to invoke the Fifth Amendment after every question, but they can ask to consult with their attorney. See, e.g., *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1019 (9th Cir. 2006), overruled on other grounds by *Medina-Nunez v. Lynch,* 788 F.3d 1103, 1105 (9th Cir. 2015).

[33] See *Barton v. Barr* advisory at https://www.ilrc.org/practice-advisory-avoiding-stop-time-rule-after-barton-v-barr and see, e.g., ILRC Practice Advisory on marijuana, discussed above, and books such as books such as ILRC, *Removal Defense* (www.ilrc.org, 2020 edition), or Kesselbrenner and Rosenberg, *Immigration Law and Crimes* (https://www.thomsonreuters.com/en/products-services/legal.html).

[34] Pub.L. 104–208, 110 Stat. 3009-546.

[35] Under a reliance theory, the court found that the seven years did not cease to accrue for an applicant "who pled guilty before the enactment of IIRIRA and was eligible for discretionary relief at the time IIRIRA became effective" on April 1, 1997. *Sinotes-Cruz*, 468 F.3d at 1203.

[36] See also *Jaghoori v. Holder*, 772 F.3d 764, 771 (4th Cir. 2014) and *Jeudy v. Holder*, 768 F.3d 595 (7th Cir. 2014), in accord. Other courts hold that convictions from before April 1, 1997 do stop the clock. See, e.g., *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006); *Martinez v. Mukasey*, 523 F.3d 365 (2nd Cir. 2008), *Briseno-Flores v. Att'y Gen. of the United States*, 492 F.3d 226 (3rd Cir. 2007), *Heaven v. Gonzales*, 473 F.3d 167 (5th Cir. 2006).

[37] See *Matter of C-V-T*, 22 I&N Dec. 7 (BIA 1998), referring to the discretionary standards set out in *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984).

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

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

[40] *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)

[41] See advisories on *Matter of Abdelghany,* 26 I&N Dec. 254 (BIA 2014) and on *Judulang v. Holder,* 565 U.S. 42 (2011) at http://www.nipnlg.org/practice.html

[42] See practice advisory on *Vartelas v. Holder, supra,* at http://www.nipnlg.org/practice.html

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