



RELIEF CHART

Eligibility for Immigration Relief Despite Criminal Record Issues

By Kathy Brady and Alison Kamhi

RELIEF ¹	AGGRAVATED FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME, GMC and OTHER TIME REQUIREMENTS
NATURALIZATION² (Affirmative or with Request to Terminate Removal Proceedings) INA § 310, et seq., 8 USC § 1421, et seq.	AF is a permanent bar to GMC, and thus to naturalization, unless conviction is before 11/29/90 ³	Not a bar per se, but removable applicants may be referred to removal proceedings	Requires certain period (e.g., preceding three or five years) of good moral character. GMC bars include several crimes-grounds of inadmissibility plus some bars unique to GMC. ⁴
LPR CANCELLATION For Long-Time Lawful Permanent Residents⁵ INA § 240A(a), 8 USC § 1129b(a)	AUTOMATIC BAR (For AF convictions from before April 24, 1996, or arguably April 1, 1997, see § 212(c) Relief, below)	NOT A BAR	7 YEARS RESIDENCE since admission in any status; periods of unlawful status since admission count toward this. ⁶ The 7-year clock stops at whichever comes first: being served with a qualifying NTA ⁷ or committing an offense referred to in 212(a)(2). ⁸ Ninth Circuit held that some convictions before 4/1/97 do not stop clock. ⁹

RELIEF	AGGRAVATED FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME, GMC, and OTHER TIME REQUIREMENTS
<p>LPR CANCELLATION, cont'd</p> <p>INA § 240A(a), 8 USC § 1129b(a)</p>			<p>5 YEARS LPR STATUS. Clock starts with LPR status and stops only with final decision in removal case, not with NTA or commission of an offense.¹⁰</p>
<p>NON-LPR CANCELLATION¹¹</p> <p>INA § 240A(b)(1), 8 USC § 1229b(b)(1)</p>	<p>AGG FELONY is a bar</p>	<p>Barred by <i>conviction</i> of an offense described in crimes deportability or inadmissibility grounds.¹² A CIMT is a bar unless committed just one CIMT, 6 months or less imposed, with a potential sentence of <i>364 days</i> or less.¹³</p>	<p>Need ten years of physical presence, which ends with service of a qualifying NTA¹⁴ or committing an offense referred to in 212(a)(2)¹⁵ (or certain absences or departures¹⁶); ten years good moral character¹⁷; exceptional and extremely unusual hardship to USC or LPR parent, spouse or child.</p>
<p>ADJUST or RE-ADJUST STATUS TO LPR Based on family¹⁸ or employment visa</p> <p>INA § 245(a), (i), 8 USC § 1255(a), (i)</p>	<p>Not a <i>per se</i> bar, because there is no AF inadmissibility ground</p> <p>(But see below regarding AF as a bar to § 212(h) waiver for some LPRs).</p>	<p>Must be admissible, or if inadmissible must qualify for a waiver.¹⁹ Even a person who is admissible could be denied as a matter of discretion and have to consular process if convicted of a “dangerous or violent” offense.²⁰</p>	<p>NONE</p> <p>(But see below regarding the 7-year requirement for § 212(h) waiver for some LPRs)</p>

RELIEF	AGGRAVATED FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME, GMC, and OTHER TIME REQUIREMENTS
<p>§ 212(h) WAIVES INADMISSIBILITY²¹</p> <p>For one or more crimes involving moral turpitude (CIMT); prostitution; possession of 30 grams or less marijuana; & 2 or more convictions with 5 years or more aggregate sentence imposed.</p> <p>INA § 212(h), 8 USC § 1182(h)</p>	<p>If the waivable conviction (e.g., an inadmissible CIMT) <i>also</i> is an AF, that does not preclude 212(h) relief, unless the 212(h) “LPR bar” applies because the person was <i>convicted</i> of an AF <i>after</i> they were <i>admitted at a port of entry, as an LPR.</i>²²</p> <p>Admission at a port of entry does not include adjustment; does include admission after consular processing, and an LPR who at their return from a trip outside the U.S. was actually found to be seeking a new admission under INA 101(a)(13)(C) and then was admitted. An AF conviction after these events would prevent eligibility for 212(h).²³</p>	<p>§ 212(h) waives crimes grounds of inadmissibility listed to the left.</p> <p>The waiver can be applied for at the border; in consular processing; or with an adjustment application, either affirmative or in removal proceedings. The BIA held that there is no 212(h) waiver in removal proceedings without an adjustment application (possible argument for pre-6.30.13 convictions?).²⁴</p> <p>Very tough standard for discretionary grant of § 212(h) if conviction of a “dangerous or violent” offense.²⁵</p>	<p>No stop-time rule applies unless the person comes within the LPR bars (because they have been admitted, as an LPR, at a port of entry).</p> <p>If the LPR bar applies because of such a prior admission, then the applicant must have acquired 7 years’ continuous, lawful residence before an NTA is filed.</p> <p>Note that here, as opposed to LPR cancellation, the 7-year clock does not stop when the person commits certain offenses; it only stops upon the filing of an NTA.</p>
<p>ASYLUM Based on fear of persecution²⁶</p> <p>INA § 208, 8 USC § 1154</p>	<p>AGG FELONY is a bar as a particularly serious crime (unless asylum application <i>filed</i> before 11/29/90).</p>	<p>Barred by conviction of a “particularly serious crime.”²⁷</p> <p>Very tough to win as a matter of discretion if convicted of a “dangerous or violent” crime²⁸</p>	<p>Must show likelihood of persecution;</p> <p>Must apply for asylum within one year of reaching U.S., unless changed or exigent circumstances.</p>

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<p>ADJUST to LPR as ASYLEE OR REFUGEE²⁹</p> <p>Waiver at INA § 209(c), 8 USC § 1159(c)</p>	<p>Not a <i>per se</i> bar to adjustment, because there is no AF ground of inadmissibility. But the same offense also might come within a ground of inadmissibility, e.g., as a CIMT.</p>	<p>§ 209(c) waives any inadmissibility ground except “reason to believe” trafficking, but see tough standard, <i>supra</i>, if “dangerous or violent” crime.</p>	<p>Can apply to adjust after one year of admission as refugee or grant of asylee status, but in reality, greater wait.</p>
<p>WITHHOLDING³⁰</p> <p>INA § 241(b)(3), 8 USC § 1231(b)(3)</p>	<p>BARRED if total sentence of five years or more imposed for one or more AF’s</p>	<p>Barred by conviction of “particularly serious crime,” which includes almost any drug trafficking³¹</p>	<p>Must show clear probability of persecution.</p>
<p>CONVENTION AGAINST TORTURE³²</p>	<p>AGG FELONY NOT A BAR</p>	<p>OTHER GROUNDS NOT A BAR</p>	<p>Must show likely to be tortured by gov’t or groups it will not control;</p>
<p>TEMPORARY PROTECTED STATUS (TPS)³³</p> <p>INA § 244A, 8 USC § 1254a</p>	<p>AGG FELONY is a bar (as a “particularly serious crime” bar to asylum)</p>	<p>Inadmissible; or convicted of two misdemeanors or one felony; or comes within bars to asylum at INA 208(a)(2)(A) (including conviction of a “particularly serious crime”).</p>	<p>National of a country declared TPS, was in U.S. and registered for TPS as of specific dates. Go to www.uscis.gov to see what countries currently have TPS and what dates apply.</p>
<p>VOLUNTARY DEPARTURE</p> <p>INA § 240B(a)(1), 8 USC 1229c(a)(1)</p>	<p>AGG FELONY is a bar (but question whether AF conviction should bar an EWJ applicant for pre-hearing voluntary departure³⁴)</p>		<p>No other bars to <i>pre-hearing</i> voluntary departure</p> <p>Post-hearing voluntary departure requires one year presence in U.S. and five years good moral character</p>

RELIEF	AGGRAVATED FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME, GMC, and OTHER TIME REQUIREMENTS
<p>VAWA Self-Petition³⁵ & Adjustment INA § 204 (a)(1)(A)(iii), (B)(ii), 8 USC § 1154 (a)(1)(A)(iii), (B)(ii)</p>	<p>VAWA Self-Petition: AGG FELONY is a bar to establishing GMC unless the conviction was before Nov. 29, 1990</p> <p>VAWA Adjustment: Not per se bar</p>	<p>VAWA Self-Petition: None</p> <p>VAWA Adjustment: requires admissibility or waiver to cure inadmissibility. Relaxed requirements for INA 212(h) waiver for VAWA self-petitioners³⁶</p>	<p>VAWA Self-Petition: GMC³⁷ (three years), but if a conviction that is a bar to GMC would be waivable by INA § 212(h) and the offense is related to the abuse, GMC still can be found as a matter of discretion.</p> <p>VAWA Adjustment: None</p>
<p>VAWA Cancellation³⁸ INA § 240A(b)(2), 8 USC § 1229b(b)(2)</p>	<p>AGG FELONY is a bar</p>	<p>Inadmissible or deportable under the crimes grounds</p>	<p>Abused by qualifying USC or LPR family member</p> <p>Need 3 years of GMC³⁹ & 3 years of physical presence that stops with commission of inadmissible offense⁴⁰</p>
<p>Domestic Violence Deportability Waiver for Victims⁴¹ INA §§ 237(a)(7), 240A(b)(5), 8 USC §§ 1227(a)(7), 1229b(b)(5)</p>	<p>AGG FELONY is not a bar, but is a separate ground of deportability</p>	<p>Waive deportability under the DV ground, or a bar to non-LPR or VAWA cancellation based on DV ground (not including child abuse)</p>	<p>Person who is not the principal abuser in the relationship and can make other showings can apply for the waiver</p>
<p>Special Immigrant Juvenile⁴² INA § 101(A)(27)(J), 8 USC § 1101(A)(27)(F)</p>	<p>AGG FELONY is not technically a bar</p>	<p>Adjustment requires admissibility or waiver to cure inadmissibility. Only waiver for crimes grounds is INA § 212(h).</p>	<p>File applications as soon as possible. Try to obtain state court findings before applicant turns 18, but in any event before the state court loses jurisdiction over child client. One must submit the I-360 before the applicant turns 21.⁴³ The applicant should remain under juvenile court jurisdiction until the I-485 is granted, unless they “age out” of court jurisdiction.⁴⁴</p>

RELIEF	AGGRAVATED FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME, GMC, and OTHER TIME REQUIREMENTS
<p>U Visa⁴⁵ & U Adjustment INA § 101(a)(15)(U), 245(m) 8 USC §§ 1101(a)(15)(U), 1255(m)</p>	<p>AGG FELONY is not technically a bar</p>	<p>U visa: Waiver for almost all inadmissibility grounds, but criminal history can cause discretionary denial; consult with other practitioners.</p> <p>U Adjustment: Not barred by inadmissibility per se, but criminal history can cause discretionary denials.</p>	<p>U Visa has a wait list of many years, but note the possibility of more quickly obtaining deferred action and work authorization with a “bona fide determination.”⁴⁶</p>
<p>T Visa⁴⁷ & T Adjustment INA §§ 101(a)(15)(T), 245(I) 8 USC §§ 1101(a)(15)(T), 1255(I)</p>	<p>AGG FELONY is not technically a bar</p>	<p>T visa: Waiver for almost all inadmissibility grounds, but waivers for “violent or dangerous crimes” are only granted in “extraordinary circumstances” unless the crimes were caused by or incident to the trafficking.⁴⁸</p> <p>T Adjustment: 212(h) waiver available, or any other crimes ground can be waived if caused by or incident to victimization.⁴⁹</p>	<p>T visa: None</p> <p>T Adjustment: good moral character during T status until adjustment⁵⁰</p>
<p>DACA Deferred Action for Childhood Arrivals⁵¹</p>	<p>AGG FELONY that is not a significant misdemeanor is not technically a bar, although filing may be risky</p>	<p>Bars are one felony, three misdemeanors from separate incidents, or one “significant” misdemeanor. An “expungement” erases a conviction, at least currently.⁵²</p>	<p>Must have arrived in U.S. while under age 16 and by June 15, 2007, resided here since then, and been present in unlawful status and under age 31 as of June 15, 2012.</p>

RELIEF FOR OLDER CONVICTIONS	AGGRAVATED FELONY	DEPORTABLE/ INADMISSIBLE CRIME	STOP TIME, GMC, and OTHER TIME REQUIREMENTS
<p>§ 212(c) RELIEF For Long-Time Lawful Permanent Residents with pre-1997 Convictions⁵³</p> <p>INA § 212(c), 8 USC § 1182(c)</p>	<p>An AF conviction from before 4/24/96 is not a bar to 212(c) relief. However, 212(c) will not waive one or more AF convictions from on or after 11/29/90 for which the person <i>served</i> a total of five years or more.⁵⁴</p> <p>Arguably, 212(c) can waive an AF conviction from 4/24/96 to 4/1/97 for purposes of inadmissibility, e.g. for adjustment, admission.⁵⁵</p>	<p>A deportable or inadmissible conviction from before 4/24/96 can be waived. Under AEDPA amendments, only a limited group of removal grounds can be waived if the conviction/s occurred between 4/24/96 and 4/1/97.⁵⁶</p> <p>But arguably AEDPA amendments do not limit waivers of inadmissibility, even for convictions from 4/24/96 to 4/1/97</p>	<p>Need 7 years LPR status at time of filing the application (e.g., today), but it was not necessary to have the 7 years at the time of the conviction or before 4/1/97.</p> <p>Section 212(c) can be applied for with a § 212(h) waiver or an adjustment application, but not with cancellation of removal.</p>
<p>Ninth Circuit Only FORMER 10-YEAR SUSPENSION OF DEPORTATION⁵⁷</p> <p>INA § 244(a)(2) 8 USC § 1254(a)(2)</p>	<p>AGG FELONY is a bar unless the conviction was from before 11/29/90 (because a later AF conviction would be a permanent bar to GMC, which is required for this relief).⁵⁸</p>	<p>Deportable conviction from before 4/1/97 can be waived</p>	<p>Good for undocumented or documented persons.</p> <p>Need 10 years of good moral character following the conviction</p>

<p>ALWAYS CHECK:</p> <p>IS YOUR CLIENT A UNITED STATES CITIZEN WITHOUT KNOWING IT?</p> <p>Derived or Acquired Citizenship⁵⁹</p> <p>INA § 320, 8 USC § 1431</p>	<p>If the client answers yes to either of the following two threshold questions, investigate further.⁶⁰ They <i>might</i> have become a U.S. citizen automatically, without knowing it. <i>This is not affected by any criminal record issues.</i></p> <p>1. At the time of their birth, did they have a parent or grandparent who was a U.S. citizen?</p> <p style="text-align: center;">OR</p> <p>2. Did a parent with custody become a U.S. citizen before their 18th birthday? (Consider this even if the person was not an LPR before their 18th birthday⁶¹)</p>
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End Notes

¹ This chart was prepared by Kathy Brady, Alison Kamhi, and other staff of the Immigrant Legal Resource Center. Published December 17, 2021. For extensive discussion of forms of relief affected by criminal convictions, see Kesselbrenner and Rosenberg, *Immigration Law and Crimes* (www.thomsonreuters.com), and within the Ninth Circuit, see Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit: Consequences of Crimes under California and Other State Laws* (www.ilrc.org 2013). For a national discussion of a variety of forms of relief see books such as ILRC, *Removal Defense* and several others, available at www.ilrc.org/publications.

For two-page summaries of different forms of immigration relief and their criminal record bars, see ILRC, *Relief Toolkit for Defenders* (2018) at www.ilrc.org/chart.

² See resources at <https://www.ilrc.org/citizenship-and-naturalization>.

³ An aggravated felony conviction on or after 11/29/90 is a permanent bar to establishing good moral character. Immigration Act of 1990 § 509(a).

⁴ Bars to establishing good moral character appear at INA § 101(f). See further discussion of GMC and naturalization in ILRC, *Naturalization and U.S. Citizenship: The Essential Legal Guide* (2020) at www.ilrc.org/publications and see USCIS Policy Manual, Vol. 12, Part F at <https://www.uscis.gov/policy-manual/volume-12-part-f>

⁵ See resources at <https://www.ilrc.org/removal-defense> and see especially ILRC, *Eligibility for Relief: Cancellation of Removal for Permanent Residents* (Dec. 2020), <https://www.ilrc.org/eligibility-relief-cancellation-removal-permanent-residents-ina-%C2%A7-240aa>

⁶ The seven-year requirement is at INA § 240A(a)(1), and the stop-time rule at INA § 240A(d)(1). The seven years includes, e.g., admission on a tourist visa, followed by years of unlawful residence, followed by adjustment of status, followed by time as a lawful permanent resident. Where there was no admission at the border, the seven-year period can start with adjustment of status. See above resources.

⁷ In a case involving non-LPR cancellation, the Supreme Court held that a notice to appear (NTA) that does not provide information as to the place, date, and time of the hearing does not “stop the clock” under this section. This applies to LPR cancellation as well, which is governed by the same section, INA § 240A(d)(1). See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018), *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) and materials at <https://www.ilrc.org/removal-defense>

⁸ See *Barton v. Barr*, 140 S.Ct. 1442 (2020) interpreting INA § 240A(d)(1), and discussion at ILRC, *Eligibility for Relief: LPR Cancellation* (Dec. 2020), <https://www.ilrc.org/eligibility-relief-cancellation-removal-permanent-residents-ina-%C2%A7-240aa>; see also ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (June 2021), <https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude>.

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

¹⁰ Time continues to accrue until the decision is administratively final (BIA appeal waived or exhausted). *Matter of Bautista Gomez*, 23 I&N Dec. 893 (BIA 2006). If deportability was contested, consider arguing that the time continues through federal court appeal.

¹¹ See resources at <https://www.ilrc.org/removal-defense>.

¹² See INA § 240A(b)(1)(C), discussing offenses at INA §§ 212(a)(2), 237(a)(2). A person who entered without inspection (EWI), and therefore is not subject to the grounds of deportation because they have not been admitted, still is barred if convicted of an offense described in the deportation grounds. *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004). The effective date of a deportation ground applies, however, so that a person convicted of a domestic violence or child abuse offense from before 9/30/96 is not barred. *Matter of Gonzalez-Silva*, 24 I&N 218 (BIA 2007).

¹³ The BIA held that a single conviction of a crime involving moral turpitude (CIMT) that comes within the petty offense exception to the CIMT ground of inadmissibility is a bar to non-LPR cancellation if it carries a potential sentence of one year or more, but is not a bar if it carries a potential sentence of less than one year. *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010). In California, a “one-year” misdemeanor conviction that occurred on or after January 1, 2015, actually has a potential sentence of 364 days, and so is not necessarily a bar. But if the conviction occurred before that date, it has a potential sentence of one year, not 364 days, and so is a bar. See *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081 (9th Cir. 2021), discussing California Penal Code § 18.5(a). Several states

have changed their definition of a misdemeanor to carry a maximum 364 days, at least partly to protect immigrants; check current state law and effective date of any such change.

¹⁴ The Supreme Court held that a notice to appear (NTA) that does not provide information as to the place, date, and time of the hearing does not “stop the clock” under this section. See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018), *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) and materials at <https://www.ilrc.org/removal-defense>

¹⁵ See *Barton v. Barr*, 140 S.Ct. 1442 (2020) interpreting INA § 240A(d)(1), and discussion at ILRC, *Eligibility for Relief: LPR Cancellation* (Dec. 2020), <https://www.ilrc.org/eligibility-relief-cancellation-removal-permanent-residents-ina-%C2%A7-240aa>; see also ILRC, *All Those Rules About Crimes Involving Moral Turpitude* (June 2021), <https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude>.

¹⁶ INA § 240A(d)(2).

¹⁷ See INA § 101(f) for statutory bars to establishing good moral character. These include the inadmissibility grounds relating to drugs, prostitution, CIMT (unless it comes within the petty offense or youthful offender exceptions), and two or more convictions of any type of offense with a total sentence of five years or more imposed. They also include other bars such as spending 180 days in jail for a conviction during the time for which good moral character must be shown, being a habitual drunkard, and gambling.

¹⁸ See resources at <https://www.ilrc.org/family-based>.

¹⁹ An applicant who is deportable still may apply for adjustment (or re-adjustment) of status as a defense in removal proceedings as long as they are not admissible, or if inadmissible they receive a waiver. If adjustment is granted, the deportation ground is considered waived. *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992), *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005), *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); adjustment with a § 212(h) waiver discussed in *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008) (§ 212(h) waiver).

²⁰ See, e.g., *Torres-Valdivias v. Lynch*, 786 F.3d 1147 (9th Cir. 2015), upholding BIA’s decision to deny adjustment of status because the conviction, while not causing inadmissibility, was deemed a “dangerous or violent” offense.

²¹ See ILRC, *Eligibility for Relief: Waivers under INA § 212(h)* (Jan. 2021), <https://www.ilrc.org/eligibility-relief-waivers-under-ina-%C2%A7-212h>.

²² See INA § 212(h)(2). The BIA agreed with this rule in *Matter of J-H-J*, 26 I&N Dec. 563 (BIA 2015), withdrawing from the broader rule in *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012) and *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010).

²³ Permanent residents who adjust status and then take a trip outside the United States normally are not deemed to be seeking a new “admission” upon their return and are not subject to the grounds of inadmissibility. But they can be held to be seeking a new “admission” upon their return if the government proves that they come within an exception listed at INA § 101(a)(13)(C), for example because they committed an offense listed in INA § 212(a)(2) or were outside the United States for more than six months. Then the person either must prove they are admissible, or if inadmissible be granted a waiver. If the person did come within a § 101(a)(13)(C) exception but (mistakenly) was not challenged and forced to seek a new admission upon their return, legally they just were permitted to “enter” and so did not make an “admission” that triggers the LPR bar to § 212(h). (See, e.g., INA § 237(a)(1)(A), finding that a person is deportable who was inadmissible “at the time of entry.”) In that case, while the person may be deportable for having been inadmissible at last entry (INA § 237(a)(1)(A)), at least they should not be deemed subject to the § 212(h) bars because they were not “admitted” as an LPR at a port of entry – which is useful if they need to apply for adjustment of status with a § 212(h) waiver as a defense to removal.

²⁴ *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), overruling cases such as *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980) that had held that § 212(h) could be applied for *nunc pro tunc* in removal proceedings without an adjustment application. While federal courts have deferred to *Rivas* (see, e.g., *Mtoched v. Lynch*, 786 F.3d 1210, 1218 (9th Cir. 2015)), advocates can consider arguing that *Rivas* should not apply retroactively to pleas taken before it was published on June 20, 2013. See *Margulis v. Holder*, 725 F.3d 785, 789 (7th Cir. 2013) (ordering BIA to consider whether *Rivas* should be applied retroactively); and see e.g., *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947 (9th Cir. 2007) (regarding factors in prospective application of new administrative agency ruling). One should investigate the possibility of post-conviction relief to eliminate the conviction while making this untested argument.

²⁵ See requirement of extraordinary positive equities required for conviction of a dangerous or violent offense, at 8 CFR § 212.7(d); see also *Matter of Jean*, 23 I&N 373 (AG 2002), similar standard for asylum and asylee/refugee adjustment.

²⁶ See resources at <https://www.ilrc.org/asylum>.

²⁷ See INA § 208(b)(2)(A). The general definition of a particularly serious crime appears in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) and cases following. This determination is not subject to the categorical approach. For purposes of asylum, but not withholding, an aggravated felony is automatically a particularly serious crime.

²⁸ See *Matter of Jean*, *supra*.

²⁹ See resources at <https://www.ilrc.org/asylum>.

³⁰ See *id.*

³¹ The general definition of a particularly serious crime appears in *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) and cases following. This determination is not subject to the categorical approach. When the Attorney General held that virtually any drug trafficking offense is a “particularly serious crime,” the Ninth Circuit upheld his right to make the ruling but found that it could not be applied retroactively to plea bargains before May 2, 2002. *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950-51 (9th Cir. 2007).

³² See 8 CFR §§ 208.16–208.18.

³³ See resources at <https://www.ilrc.org/tps>.

³⁴ The statute states the pre-hearing voluntary departure is barred to persons who are “deportable” under the aggravated felony bar, meaning who were convicted of an aggravated felony after admission. But the regulation bars persons who merely were “convicted” of an aggravated felony, which also applies to persons who never were admitted. Compare INA § 240B(a)(1), 8 USC § 1229c(a)(1) with 8 CFR § 1240.26(b)(1)(i)(E). In a situation where it is beneficial to the client, immigration counsel may want to appeal this issue on the grounds that the regulation is *ultra vires*; at the same time, investigate the possibility of post-conviction relief.

³⁵ For information on VAWA self-petitioning and cancellation, see <https://www.ilrc.org/u-visa-t-visa-vawa> and see Abriel & ILRC Attorneys, *The VAWA Manual: Immigration Relief for Abused Immigrants* (2020) (www.ilrc.org/publications), and see <https://asistahelp.org/>.

³⁶ The VAWA self-petitioner does not need to show extreme hardship to an LPR or USC family member. See INA § 212(h)(1)(C), 8 USC § 1182(h)(1)(C).

³⁷ See INA § 101(f).

³⁸ VAWA cancellation is for victims of abuse by a USC or LPR spouse or parent; in some cases the children or (non-abusive) parent of the VAWA applicant also can apply.

³⁹ See INA § 101(f).

⁴⁰ INA § 240A(d)(1) and see discussion of stop-time rule under *Barton v. Barr*, 140 S.Ct. 1442 (2020), above.

⁴¹ A person who was convicted of a deportable crime of domestic violence or stalking, or was the subject of a civil or criminal court order finding a violation of certain sections of a domestic violence protective order (essentially, of violating a “stay-away” order), may qualify for a waiver of the domestic violence deportation ground, or the bar to non-LPR or VAWA cancellation of removal, if they can prove that they are not the primary perpetrator of abuse in the relationship and can make other showings.

⁴² See ILRC, *Special Immigrant Juvenile Status and Other Options for Immigrant Youth* (2021) at www.ilrc.org/publications and see free information and resources on Special Immigrant Juvenile Status at <https://www.ilrc.org/immigrant-youth>.

⁴³ If the petition is received by USCIS before the applicant’s 21st birthday they will remain eligible for SIJS even after they turn 21. See *USCIS Policy Manual*, Vol. 6, Part J.2(B) at <https://www.uscis.gov/policy-manual/volume-6-part-j>.

⁴⁴ See 8 CFR 204.11(c)(5), 8 CFR 205.1(a)(3)(iv)(C).

⁴⁵ See information at <https://www.ilrc.org/u-visa-t-visa-vawa> and see ILRC, *The U Visa: Obtaining Status for Victims of Crime* (2019) at www.ilrc.org/publications.

⁴⁶ See 3 USCIS-PM 5, <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (listing certain arrests and convictions that may prevent grant of BFD), and materials on BFD at <https://www.ilrc.org/u-visa-t-visa-vawa>, including ILRC, *Practice Advisory: Overview of the New U Visa Bona Fide Determination* (Dec. 2021).

⁴⁷ INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T). For information on T visas, see resources at <https://www.ilrc.org/u-visa-t-visa-vawa> and see ILRC, *T Visas: A Critical Immigration Option for Survivors of Human Trafficking* (2019); see also groups such as CAST at <https://www.castla.org/>.

⁴⁸ 8 CFR 216.16(b)(3).

⁴⁹ 8 CFR 212.18.

⁵⁰ INA § 245(l)(6). Good moral character bars are listed at INA § 101(f).

⁵¹ DACA may continue, and at this writing proposed regulations for DACA have been published, <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>. See updates at www.ilrc.org/daca and see USCIS DACA Frequently Asked Questions at <https://www.uscis.gov/archive/frequently-asked-questions#renewal%20of%20DACA>.

⁵² See, e.g., www.unitedwedream.org and www.ilrc.org/daca and government information at www.uscis.gov. A “significant misdemeanor” is a federal, state, or local misdemeanor that (a) relates to domestic violence, sexual abuse or exploitation, firearms, drug sales, burglary, or DUI, or (b) any other misdemeanor for which the jail sentence was more than 90 days, excluding suspended sentences. A misdemeanor is an offense with a potential sentence of more than 5 days but not more than 365 days. Currently “expungements” and other rehabilitative relief can eliminate a conviction for DACA purposes. However, a 2021 proposed DACA regulation appeared to erase the effectiveness of expungements, but groups are pushing back at this.

⁵³ Section 212(c) was eliminated as of April 1, 1997 but it remains available in removal proceedings today to waive convictions from before operative dates in 1996 and 1997. See *INS v. St. Cyr*, 121 S.Ct. 2271 (2001); *Judulang v. Holder*, 132 S.Ct. 476 (2011); *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). These cases overturn prior precedent such as *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and the several federal cases that had followed it. For further discussion see NIPNLG and IDP, “*Matter of Abdelghany*: Implications for LPRs Seeking § 212(c) Relief” (2014) at <http://nipnl.org/practresources.html>.

⁵⁴ See discussion in *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003).

⁵⁵ Arguably, because AEDPA only limited the grounds of *deportability* that could be waived, § 212(c) can waive *inadmissibility* for any type of conviction, including drug crimes and aggravated felonies, that was received up until April 1, 1997. (In contrast, AEDPA provides that § 212(c) can waive only a few grounds of deportability if the conviction was received between April 24, 1996 and April 1, 1997.) This might help returning LPRs applying for § 212(c) at the border, and possibly persons applying for adjustment of status as a defense to removal, to waive convictions of a drug offense, aggravated felony, etc., that occurred during that nearly one-year period. However, the BIA and the Second Circuit have ruled against this argument as it applies to adjustment (*Matter of Gonzalez-Camarillo*, 21 I&N Dec 937 (BIA 1997), *Ruiz-Almanzar v. Ridge*, 485 F.3d 193 (2nd Cir. 2007)), although these cases might be reconsidered in light of *Judulang v. Holder*, 132 S.Ct. 476 (2011).

An LPR who takes a “brief, casual, and innocent” trip outside the country, and who is inadmissible *only* due to convictions from before April 1, 1997, should not be held to be seeking a new admission under INA 101(a)(13)(C); instead, the older definition of “entry” applies. See *Vartelas v. Holder*, 566 U.S. 257 (2012).

⁵⁶ A charge of deportability based upon conviction between April 24, 1996 and April 1, 1997 comes under AEDPA rules governing § 212(c) for that period. Deportation grounds that cannot be waived include conviction of an aggravated felony, conviction of controlled substance offense, and the “miscellaneous” deportation ground that includes conviction of espionage, sabotage, treason, certain military service problems, etc. AEDPA § 212(c) will not waive conviction of two moral turpitude offenses, *both* of which carry a potential sentence of a year or more. Advocates can argue that AEDPA did not limit *inadmissibility* grounds that can be waved under § 212(c), however; see above endnote.

⁵⁷ A documented or undocumented immigrant can apply in removal proceedings arising in Ninth Circuit states for the former 10-year suspension of deportation in order to waive a conviction by plea (or arguably by trial) from before 4/1/97, the date the former suspension was eliminated. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006).

⁵⁸ Suspension requires a showing of good moral character, and an aggravated felony conviction on or after 11/29/90 is a permanent bar to establishing good moral character. IMMACT 1990 § 509(a), and *Lopez-Castellanos, supra*.

⁵⁹ See ILRC, *Acquisition and Derivation Quick Reference Charts* (2021) at <https://www.ilrc.org/acquisition-derivation-quick-reference-charts>.

⁶⁰ See *id.* Defenders should note that many immigration nonprofits can handle this type of case.

⁶¹ There is currently a circuit split on whether former INA § 321(a)(5)’s requirement that a child “reside permanently” in the United States means that the child must be an LPR. The Eleventh Circuit and the BIA have held that this language requires the child to have become an LPR before they turned 18 in order to obtain derivative citizenship. See *U.S. v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010); *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008). But there are a growing number of circuits holding that a child may derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried even if the child was not an LPR. See *Cheneau v. Garland*, ___ F.3d ___, 2021 WL 1916947 (9th Cir. 2021); *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013); see also *Thomas v. Lynch*, 828 F.3d 11 (1st Cir. 2016) (discussing the issue without deciding, finding that the non-LPR client before the court had not shown that he had begun to “reside permanently” even if it were interpreted to include something other than lawful permanent residence); *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012) (declining to interpret “reside permanently” but recognizing multiple interpretations). Note that anyone born on or after 2/27/01 does have to show that they were an LPR before they turned 18 to derive, regardless of circuit, because of the different language in the Child Citizenship Act of 2000. INA § 320.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.