

IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDERS

How to Quickly Spot Possible Immigration Relief for Noncitizen Defendants

The Immigrant Legal Resource Center (www.ilrc.org) first created this toolkit on behalf of the Defending Immigrants Partnership, a national consortium that supports criminal defenders in their task of competently representing noncitizen clients. The ILRC last updated this Toolkit in July 2018.

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§ 17.1 HOW AND WHY SHOULD I USE THIS TOOLKIT?

Why Should I Use This Toolkit?

Many of your noncitizen clients are already deportable (“removable”). This includes all undocumented people, as well as lawful permanent residents (green card-holders) who have become deportable because of a conviction. If immigration authorities find these clients—which is very likely to happen—they will be deported *unless* they are granted some kind of immigration relief.

For these defendants, staying eligible to apply for immigration relief is their most important immigration goal, and may be their highest priority in the criminal defense. It can mean the difference between remaining in the U.S. with their family, and being deported to another country for the rest of their lives. The Supreme Court has recognized that preserving eligibility for relief from removal is “one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” *Padilla v. Kentucky*, 559 U.S. 356, 357 (2010), citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

The purpose of this Toolkit is to help defenders or paralegals to spot a defendant’s *possible* immigration relief *relatively quickly*. If you determine that your client might be eligible for specific relief, this will help inform your criminal defense goals, and you can tell your client that it is especially important for him or her to get immigration counsel.

How Can I Use This Toolkit to Represent My Client?

For a review of the steps needed to represent any noncitizen defendant, see materials such as § *N.1 Overview* in the *California Quick Reference Chart and Notes* at www.ilrc.org/crimes, or see similar materials at www.defendingimmigrants.org.

Regarding relief, first confirm that the defendant really is a removable noncitizen. Might the client unknowingly be a U.S. citizen—despite multiple past deportations? See § 17.3. Is the permanent resident client really deportable? Use immigration analysis tools cited above to analyze the permanent resident’s past conviction/s and current plea proposal/s. If the person might not be deportable yet, one of your goals is to not make her deportable now.

Second, if the client is or might be removable, work with her to complete the *Client Screening Questionnaire* that appears at § 17.2. Answering these questions will identify *possible* relief. It will let you know if the client is even in the ballpark to qualify for some immigration application. A paralegal or attorney may be able to complete the form with the defendant in 10–20 minutes. (A shorter version of a questionnaire also appears at § *N.16 Client Questionnaire*, in the *California Quick Reference Chart and Notes* at www.ilrc.org/chart.)

Third, if the client answers “yes” to any question, the form will direct you to an *Eligibility/Information* sheet about the particular form of relief. See §§ 17.3–17.26. If you and the client review this short (usually two pages) material, you should get a real sense of whether the person may be eligible. If the client *might* be eligible for any relief, advise her to try hard to obtain expert immigration counsel on the case. Advise the client that in some cases—for example citizenship or family visa matters—a nonprofit immigration agency may be a good free or low-cost option. Where a private immigration office is needed, often the attorney will agree to do an analysis of eligibility for relief for a few hundred dollars, or will work out a fee payment schedule to take the whole case. (Note that not all immigration attorneys are experts in crimes. A resource center may be able to provide local recommendations to keep on file; see www.defendingimmigrants.org.) The client (and where appropriate, the client’s family) should be fully involved in these important discussions, and receive copies of the relevant materials.

Regarding the criminal defense, the *Eligibility/Information* sheet will describe the type of convictions that destroy eligibility for that form of relief. Now use your criminal defense skills to identify a realistic plea that will not destroy eligibility, and try to get the disposition. Of course, in some cases it will not be possible to negotiate a plea that maintains the client’s eligibility for relief—but at least you will have

advised your client of the real cost of the proposed disposition, and the client can make an informed choice. As you know, some noncitizen clients would do almost anything, including take a risky case to trial or accept additional criminal penalties, to remain in the U.S. with their families. Other noncitizen clients will only be interested in getting the least criminal penalty.

If the client will need to leave the U.S., advise him or her of the significant benefits of departing under voluntary departure rather than removal, and the serious consequences to illegal re-entry into the U.S. after removal. See § 17.25. Document your efforts in your file.

As with any criminal case involving a noncitizen, the best practice is to have an expert in crimes and immigration consult to confirm the immigration case analysis and defense goals. This could be expert immigration counsel retained by the client, “crim/imm” experts used by your office, or your own research, if you are willing and able to put in the time. Extensive free resources are available to defenders at websites such as www.ilrc.org/crimes, www.ilrc.org/chart, www.nipnlg.org, www.defendingimmigrantsproject, and www.nortontooby.com.

§ 17.2 IMMIGRANT DEFENDANT QUESTIONNAIRE

“USC” stands for U.S. Citizen and “LPR” stands for Lawful Permanent Resident (green card)

| Attorney name, email | Defendant’s name | Defendant’s A# if any |
|----------------------|------------------|-----------------------|
| | | |

| Def’s Country of Birth | Def’s Date of Birth | In custody? | ICE detainer or interview? |
|------------------------|---------------------|--|--|
| | | <input type="checkbox"/> Yes <input type="checkbox"/> No | <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don't Know |

1. Entry

| Date first entered US | Visa type (or none) | Departures from U.S. (approximate OK; append list) |
|-----------------------|---------------------|--|
| | | Date/s and length of departure/s: |

2. Immigration Status and Relatives

| a. Lawful permanent resident (“green card”) | b. Other Immigration status |
|---|--|
| <input type="checkbox"/> Yes <input type="checkbox"/> No Date Obtained? _____ On what basis (e.g. family visa, refugee): _____ Check one. To obtain LPR status, D: --Went to an interview in the home country <input type="checkbox"/> --Processed (“adjusted status”) here in U.S. <input type="checkbox"/> Possible U.S. citizenship (LPRs): Before D’s 18 th birthday, was D an LPR and at least one of D’ parents a USC? <input type="checkbox"/> Yes <input type="checkbox"/> No (Stepparents do not qualify.) | <input type="checkbox"/> Undocumented <input type="checkbox"/> Doesn’t know <input type="checkbox"/> Has “Employment Authorization” but unsure of status <input type="checkbox"/> Refugee <input type="checkbox"/> Asylee <input type="checkbox"/> Temporary Protected Status <input type="checkbox"/> U visa <input type="checkbox"/> Deferred Action Childhood Arrivals (DACA) Other: |
| c. Possible U.S. citizenship (all persons): Grandparent or parent may have been USC at time of D’s birth. (Stepparents do not qualify.) <input type="checkbox"/> Yes <input type="checkbox"/> No Comments: _____ | d. Parent, Spouse, Child, Significant Other is LPR or USC? <input type="checkbox"/> Yes <input type="checkbox"/> No List each relationship (including stepparents) and say whether the person is an LPR or USC. Include the age of each child. (Possible family immigration/relief) |
| | BE SURE TO PHOTOCOPY ANY IMMIGRATION CARD OR DOCUMENT! |

3. Prior Removal / Deportation / Voluntary Departure

| Was D ever deported or got voluntary departure? | Saw an immigration judge? | Describe what happened, to extent possible (Just signed form before leaving U.S.? Caught at the border?) | Where? When? For each deportation or voluntary departure |
|---|---|--|--|
| <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Don’t know | <input type="checkbox"/> Yes <input type="checkbox"/> No | _____ | _____ |

IMMIGRANT DEFENDANT QUESTIONNAIRE, p. 2

Attorney name:

Client name or case number:

NOTE: Checking the box means the client *might* be eligible for the relief. To see a two-page summary of each relief plus the crimes bars, see *N.17 Defenders Relief Toolkit* at www.ilrc.org/chart.

1. ***Has your LPR client lived in the U.S. for at least seven years?*** (LPR cancellation) Yes No
2. ***Has your undocumented client lived in the U.S. for at least ten years, and does he or she have a parent, spouse or unmarried child under age 21 who is a USC or LPR?*** (Non-LPR cancellation) Yes No
3. ***Has client or a family member been abused by a spouse, parent, or adult child?*** Yes No
 - a. Client, or client's parent or child, may have been abused (including emotional abuse) by a USC or LPR spouse, parent, or adult child. (VAWA) Yes No
 - What is the relationship between abuser and abused: _____
 - What is the abuser's immigration status: _____
 - b. Client under age 21 lives with just one parent. (Special Immigrant Juvenile) Yes No
 - c. Client is charged with a DV or stalking offense, or has a conviction, but in fact is the primary victim in the relationship. (Domestic Violence Waiver) Yes No
4. ***Has your client been a victim of a crime, or of human trafficking?*** Yes No
 - a. Victim of a crime including, but not limited to, DV, assault, false imprisonment, extortion, stalking, labor-related, sexual abuse, etc., and was or would be willing to cooperate in investigation or prosecution of the crime. (U visa) Yes No
 - b. Victim of (a) sex trafficking of persons (if under age 18, victim could have consented), or (b) labor trafficking, e.g., forced to work by threat, fraud, coercion, etc. (T visa) Yes No
5. ***Is your client afraid to return to his or her home country for any reason?*** Yes No
(Asylum, refugee, withholding, Convention Against Torture, Temporary Protected Status)
6. ***Did your client, or their parent or spouse, live in the U.S. in the 1980's or 1990's?*** Yes No
(Amnesty, Family Unity, NACARA, HRIFA)
7. ***Is your client or their spouse, parent, or child a U.S. veteran or serviceperson?*** Yes No
(Possible naturalization or adjustment benefits)

IMMIGRANT DEFENDANT QUESTIONNAIRE, p. 3

Attorney name:

Client name or case number:

Information on Prior Conviction/s from any jurisdiction:

Include additional page if needed

| Code section | F/M | Offense Date | Conviction Date | Sentence | Post-Con relief (PC 17, etc.) |
|--------------|-----|--------------|-----------------|----------|-------------------------------|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

Information on Current Charges

Include additional page if needed

| <u>Code sec.</u> | <u>F/M, strike, etc.</u> | <u>Date committed</u> | <u>Other info</u> |
|------------------|--------------------------|-----------------------|-------------------|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

Current Plea Offer/s if Any

Include additional page if needed

| Code sec | F/M, strike, etc. | Sentence | Other info: DA flexibility, priorities; Your comments |
|----------|-------------------|----------|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

§ 17.3 MIGHT YOUR CLIENT ALREADY BE A U.S. CITIZEN?

Some people who believe that they are undocumented in fact may be U.S. citizens—including people who have been repeatedly deported. If the answer to any of the Quick Test questions is “yes”, refer the client for counseling or research the issue yourself. Many immigration non-profits can help with this kind of case.

See further discussion at Part B, and in the *USCIS Official Policy Manual* (hereafter *USCIS Manual*) at <http://www.uscis.gov/policymanual/HTML/PolicyManual.html> at Volume 12: Citizenship and Naturalization, Part H. For in-depth information see books such as Immigrant Legal Resource Center, *Naturalization and U.S. Citizenship: The Essential Legal Guide* (www.ilrc.org).

A. QUICK TEST: Might the Client Be a U.S. Citizen or National?

1. *Was the client born in the United States or its territories or possessions?* If so, the person is almost surely a U.S. citizen or national. See Part B.
2. *At the time of the client’s birth in another country, did he or she have a parent or grandparent who was a U.S. citizen (not including stepparents)?* If so, it is possible that the client acquired U.S. citizenship at birth. See Part B.
3. *Did the following events occur, in either order, before the client’s 18th birthday: the client became a permanent resident,¹ and a parent (not including stepparents) with custody of the client became a naturalized citizen or was a citizen through other means?*

Or, in the case of an adopted child, did these events occur in any order: (1) the child became a permanent resident before age 18, and (2) the child was legally adopted by a U.S. citizen before reaching the age of 16, and resided at any time in the legal custody of the citizen for two years?

If the answer to either question is “yes”, the client may have obtained citizenship. See **Subsection B**.

B. ADDITIONAL FACTS About U.S. Citizenship

Overview. These categories identify persons who already are U.S. citizens. They became U.S. citizens automatically by operation of law, when certain events occurred. They do not need to submit an application for naturalization, establish good moral character, or meet any other requirements. They will benefit from obtaining documentation from the government that *confirms* their U.S. citizenship, however. If the client is out of criminal and immigration custody, the best way to do this is to apply to the U.S. Passport Agency for a passport. A client in custody may have to apply to DHS for a certificate of citizenship by filing an N-600 application, and/or raise the citizenship issue before an immigration judge. A passport and a certificate of citizenship are equally valid documentation that the person is a U.S. citizen. See *USCIS Manual, supra*, Vol. 12, Part H for further explanation.

Effect of U.S. Citizenship. U.S. citizenship is a complete bar to removal from or denial of admission to the U.S. This is true even if the person has been deported in the past. See, e.g., *Rivera v. Ashcroft*, 394 F.3d 1129, 1136 (9th Cir. 2005) (partly overruled on other grounds). It is a complete defense to any crime for which alienage is an element, for example illegal re-entry into the U.S. after removal, 8 USC § 1326.

Born in the U.S. or Its Territories. Any person born in the United States is a U.S. citizen, except for certain children of foreign diplomats. Persons born in Puerto Rico, Guam and U.S. Virgin Islands, as well

¹ If the child was born before February 28, 1983, it is possible that he or she derived citizenship even without being a lawful permanent resident, if both parents naturalized before the child turned 18. While the Ninth and Eleventh Circuit rejected this interpretation, the Second Circuit upheld it (*Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013)) and the Fifth Circuit acknowledged that there are multiple interpretations (*United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012)).

as those born after November 4, 1988, and in many cases before, in the Northern Mariana Islands also are U.S. citizens. INA §§ 301-308, 8 USC § 1401-1407.

Persons born in American Samoa and Swains Islands are U.S. nationals. INA §§ 101(a)(29), 308(1), 8 USC §§ 1101(a)(29), 1408(1). A national is not a U.S. citizen, but cannot be deported.

U.S. Citizen Parents at Time of Client's Birth Abroad (Acquisition of Citizenship). Some children born outside of the United States to a U.S. citizen acquired U.S. citizenship at birth. 8 USC § 1401. Whether the individual became a U.S. citizen depends upon several factors, such as date of birth (because different rules have applied at different periods), how long the citizen parent has resided in the U.S., whether the child was born in wedlock, etc. Whether a grandparent was a U.S. citizen is relevant because the grandparent might have unknowingly passed on citizenship to the parent, who in turn might have passed it on to the child. In that case counsel must analyze whether both the parent and the child acquired citizenship.

To determine whether a client actually did acquire citizenship at birth, refer the client to a competent immigration attorney or non-profit organization. Or, consult ILRC charts summarizing the rules at different time periods at <http://www.ilrc.org/resources/acquisition-derivation-quick-reference-charts>.

Before Client's 18th Birthday, at Least One Parent Was a U.S. Citizen and Client Was a Permanent Resident (Derivation of Citizenship). Different rules apply depending on the person's date of birth. A person born on or after February 28, 1983 automatically becomes a U.S. citizen if before her 18th birthday, the following events occur in either order: (a) at least one parent who has legal and physical custody of the child is a U.S. citizen by birth or naturalization, and (b) the child is a lawful permanent resident (LPR). See, e.g., *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001), discussing the Child Citizenship Act of 2000 and 8 USC § 1431, INA § 320. A person automatically becomes a U.S. citizen through adoptive parents if she was born on or after February 28, 1983 and (a) she was legally adopted by a U.S. citizen before age 16, and (b) he or she became an LPR, and resided in the legal custody of the citizen parent for two years, before age 18. *Ibid.*

Slightly different versions of the law apply to persons born before February 28, 1983, depending on the period in which the child became an LPR and/or the parents naturalized. Generally, both parents had to naturalize to U.S. citizenship, or the child had to be in the legal custody of the citizen parent if there had been divorce or separation. See additional information on these rules at the ILRC charts cited above.

Stepchildren and Adopted Children. For this purpose, an adoptive relationship is recognized if the adoption was legally concluded by the child's 16th birthday, and the child lived in the physical and legal custody of the parent for two years at any time. A step relationship is not recognized under any of these rules, so that children never derive or acquire citizenship through a stepparent. (A step relationship is recognized in many other immigration contexts, however, including family immigration. See § 17.7.)

PRACTICE TIP FOR JUVENILE DEFENDERS: When representing a permanent resident who is under the age of 18, counsel can advise the family that the minor will automatically become a citizen—and therefore be immune to deportation—if one parent with lawful custody naturalizes to U.S. citizenship before the minor's 18th birthday. See discussion of derivation of citizenship, above. This is true regardless of the client's juvenile or adult criminal record. Timing is crucial: the parent should file the application early because the naturalization process might take several months or more. See § 17.4 on naturalization.

§ 17.4 NATURALIZATION TO U.S. CITIZENSHIP

For official statements and information on naturalization, see the *USCIS Official Policy Manual* at www.uscis.gov/policymanual/HTML/PolicyManual.html (hereafter *USCIS Manual*), at Volume 12: Citizenship and Naturalization. For further information, see books such as Immigrant Legal Resource Center, *Naturalization and Citizenship: The Essential Legal Guide* (www.ilrc.org).

A. QUICK TEST: Is the Person Eligible?

1. *Is the Person Serving in the Military or Reserves, or a Military Spouse, or a Veteran?*

Veterans of U.S. armed forces during certain armed conflicts (which include World War II, the Korean, Vietnam, and Gulf Wars, and the period from September 11, 2001 to the present), and who if separated from the armed forces were honorably discharged, enjoy benefits in naturalizing. Good moral character need be shown only for a “reasonable period of time,” and the person can be deportable. A person who enlisted while within the United States may not even need to be an LPR. Some benefits also apply to spouses. See 8 USC § 1440. The rest of the “Quick Test” questions apply to persons who do not come within this category.

A person who ever has served in the military for an aggregate one year, and who has not been less than honorably discharged, also has some advantages including the ability to naturalize while deportable. See 8 USC § 1439. But if the person qualifies for the armed conflict category described in the above paragraph, that is preferable. See *USCIS Manual, supra*, Vol. 12, Part I for more information.

2. *Has the Person Been an LPR for Five Years, or Been an LPR Married to a USC for Three Years?*

The person can file a naturalization application up to three months before reaching the five- or three-year mark. For the three-year category, the person must both have been an LPR and married to a USC for the entire three-year period. See 8 USC §§ 1427, 1430.

3. *Can the Person Establish Good Moral Character During This Time Period?*

A naturalization applicant must demonstrate good moral character for the same five years or three years as permanent residence. Military applicants must show a “reasonable period” of good moral character. Conviction of an aggravated felony after November 29, 1990 is a permanent bar to establishing this and thus a bar to naturalization. See Part B.

4. *Is the Person Deportable?*

While being deportable is not technically a bar to citizenship, as a practical matter it is likely to prevent it. With the exception of some military personnel, one cannot naturalize while in removal proceedings. It is possible that the immigration judge and ICE will agree to terminate removal proceedings for an LPR who, while deportable for an older offense, can establish the requisite, recent good moral character required for naturalization, but the person must have very strong humanitarian equities. See Part B. If the person is not deportable yet, advise him or her to consult an immigration person and consider applying for naturalization.

B. ADDITIONAL FACTS About Naturalization to U.S. Citizenship

Naturalization is complex, and ideally cases should be referred to an immigration attorney or non-profit. For comprehensive information on naturalization, see works such as Immigrant Legal Resource Center, *Naturalization: A Guide for Legal Practitioners and Other Community Advocates* (www.ilrc.org).

Establishing Good Moral Character (GMC). A naturalization applicant must have been a person of “good moral character” (“GMC”) during the required period (i.e., five or three years, or a “reasonable period”) that immediately precedes the date of the filing of the application, and continuing up to the time of taking the oath of allegiance for citizenship. 8 USC § 1427(a)(3).

To establish GMC the applicant must show that she does not come within one of the statutory bars at 8 USC 1101(f). In addition, the applicant must persuade the authorities to find as a matter of discretion that she really has shown good moral character during the required time. Conviction of an aggravated felony after Nov. 29, 1990 is a permanent bar to GMC. See discussion of GMC in general at § 17.26.

Some additional GMC requirements apply only to naturalization applicants. A person cannot be granted naturalization while he or she is still on probation or parole in a criminal case. 8 CFR 316.10(c)(1). The applicant may apply to naturalize while on probation or parole, so long as it has ended by the time of the naturalization interview. However, authorities might decline to count the period of probation or parole following commission of a barring offense toward the required period of GMC. In addition, willful failure to pay child support, failure to file taxes, or commission of immoral unlawful acts (such as adultery that destroys a marriage, prostitution, or incest) may prevent a finding of GMC. 8 CFR 316.10(b). Males who knowingly and willfully failed to register for selective service while between the ages of 18-26 years of age may not be able to establish good moral character during that period. In that case the person must start accruing the GMC period beginning from the last date he could have registered, so that, e.g. a person who needs five years of GMC would not have it until age 31. In some cases an applicant who now is over 26 years old and failed to register can demonstrate that he was not aware of the requirement. See information in *USCIS Manual*, Vol. 12, Chapter 7, Part D.

Some classes of persons are permanently barred from naturalization. These include subversives (8 USC § 1424); some noncitizens who deserted the military or fled the country to avoid wartime service (8 USC § 1425, but violators from most wars have been pardoned; see INS Interpretation 314.2); and noncitizens who received an exemption or discharge from U.S. military service based on alienage (8 USC § 1426).

Application for naturalization by an LPR who is deportable. A noncitizen who is in removal proceedings, or who has an outstanding final finding of deportability pursuant to a warrant of arrest, may not naturalize. 8 USC § 1429. As described in Part A.1, there is an exception for certain persons who served honorably in the U.S. military during periods of conflict, including since September 11, 2011 (8 USC § 1440) or persons who have honorable military service aggregating one year at any time (8 USC § 1439).

Apart from the military exception, in order to naturalize the LPR must either avoid, or be released from, removal proceedings. An LPR who is deportable for a crime but not yet in removal proceedings needs extensive counseling from a local, experienced immigration attorney before deciding to go to DHS to affirmatively apply for naturalization. Depending on the crime, DHS may or may not choose to put the naturalization applicant in removal proceedings. Some naturalization applicants with more serious convictions have been arrested and detained from the naturalization interview.

An LPR who is in removal proceedings can ask the immigration judge to terminate the proceedings to permit her to pursue a filed naturalization application. 8 CFR § 1239.2(f). The person should have extremely strong humanitarian equities, and must have the required good moral character and be eligible to apply for naturalization but for the deportable offense. *Id.* For example, an LPR who is deportable for an offense based on a ten-year-old conviction, who has shown good moral character for the past five years, and who is supporting U.S. citizen dependents, especially if any have special needs or illness, is a likely candidate. Significantly, the immigration judge only may terminate proceedings on this basis if ICE (the immigration prosecutors) agrees to it. See, e.g., *Hernandez v. Gonzales*, 497 F.3d 927, 933-34 (9th Cir. 2007).

Practice Tip. If it appears that the defendant will not become deportable, advise him or her to go to an immigration attorney or non-profit and ask about applying for naturalization. This could protect the person from being deported, in case he or she ever is charged with a criminal offense again.

§ 17.5 LPR CANCELLATION OF REMOVAL, 8 USC § 1229b(a)

A. QUICK TEST: Is the LPR Defendant Eligible?

1. **Has the lawful permanent resident (LPR) ever been convicted of an aggravated felony?** If so, she is not eligible for LPR cancellation. (But if the conviction was before 4/1/97, see § 17.6 Former § 212(c).)
2. **Has the person been an LPR for five years, or fairly close to it?** Date became LPR: _____
She will need to reach five years as an LPR during her removal case. But because she will continue to accrue the five years while in jail and immigration detention, four years or even less may be enough.
 - **The remaining questions determine whether the defendant has the required seven years “continuous residence.”** You will need the person’s criminal history and some immigration information.
3. **Start-date for the seven years:** The seven-year period starts on the date the person was first admitted to the U.S. on any kind of visa (e.g. tourist, refugee, and even if the person went out of status later), or on the date the person became a lawful permanent resident—*whichever came first*.
4. **End-date for the seven years:** In the Ninth Circuit, no conviction from before April 1, 1997 stops the seven-year clock.² For convictions after that date, the offense (a) must be referred to in the crimes inadmissibility grounds, INA § 212(a)(2), and (b) also must render the person deportable or inadmissible. This can be a complex analysis; don’t hesitate to get help. The first step is to see if the offense is referred to in any of the below *inadmissibility* grounds from INA § 212(a)(2).
 - a. Conviction/admission of an offense relating to a controlled substance
 - b. Conviction/admission of one crime involving moral turpitude (CIMT). *Exception:* A single CIMT conviction that comes within the petty offense or youthful offender exceptions will not stop the clock.³ A second CIMT stops the clock, as of the date of commission of the second CIMT.⁴
 - c. Conviction of two or more offenses of any type with an aggregate sentence imposed of five years or more
 - d. Probative evidence of engaging in prostitution, meaning sexual intercourse for a fee
 - e. Probative evidence of drug trafficking (this category might not apply; consult an expert)

Coming within a deportation ground *alone* (e.g., the child abuse ground) does not stop the seven years; the offense also must be referred to in the above inadmissibility grounds.⁵ If the LPR avoids the above grounds, the seven years continue to accrue until person is served with a notice to appear (“NTA,” the charging document in removal proceedings) that contains the place, date, and time of the proceedings.⁶ If the LPR *is* described in one of the above inadmissibility grounds, the clock still does not stop unless the person also is “rendered” deportable or inadmissible. LPRs charged with deportability in removal proceedings should argue that the offense must be referred to in § 212(a)(2)

² *Sinotes-Cruz v. Gonzalez*, 468 F.3d 1190 (9th Cir. 2006).

³ The person must have committed just one CIMT. The petty offense exception applies if the maximum possible sentence for the CIMT is one year or less, and sentence imposed is six months or less. Reduction to a misdemeanor meets the one-year requirement. *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999). The youthful offender exception applies if the person committed the CIMT while under age 18 but was convicted as an adult, and the conviction or resulting jail ended at least 5 years before filing the application. See 8 USC § 1182(a)(2)(A)(ii) and § *N.7 Crimes Involving Moral Turpitude* at www.ilrc.org/chart.

⁴ *Matter of Deando-Roma*, 23 I&N Dec. 597 (BIA 2003).

⁵ See *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000), interpreting INA § 240A(d), 8 USC § 1229b(d).

⁶ Without this information, the NTA might not stop the clock. See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018).

and also render them *deportable*, not inadmissible. The Ninth Circuit upheld this reasoning, while the Fifth Circuit did not.⁷

5. **Calculate the seven years.** The client needs at least seven years between the start date from Question 3 and the stop date, if any, from Question 4. See also Case Example, below.

B. ADDITIONAL FACTS about Cancellation of Removal for LPRs, 8 USC § 1229b(a)

What Are the Benefits of Winning LPR Cancellation? Do Many Applicants Actually Win? Winning a cancellation case allows a lawful permanent resident (LPR) who is in removal proceedings to keep his LPR status and end the proceedings. If the LPR is eligible to apply for cancellation there is a real chance that the immigration judge will grant it, based on factors such as the person’s remorse and rehabilitation, or potential for it. It may well be worth applying even if the person must wait months or more in immigration detention for the full hearing. The person should try hard to retain immigration counsel.

What are the bars to eligibility for LPR cancellation? An LPR cannot apply if they:

- Ever were convicted of an *aggravated felony*;
- Received a prior grant of cancellation of removal, suspension of deportation, or § 212(c) relief;
- Persecuted others or come within the terrorism bars to immigration; or
- Fail to reach the required seven years of “continuous residence” after admission, or five years of lawful permanent resident status. See “Is the Defendant Eligible?” at Part A, above.

Case Example: Calculating John’s Five and Seven Years. Refer to the eligibility rules in Part A, above. John was admitted to the U.S. on a tourist visa in July 2010. He overstayed the permitted time and lived in the U.S. in unlawful status until 2013, when he adjusted status to become an LPR.

In 2014 John was convicted of Cal PC § 273a(a). Assume that this made him deportable under the child abuse ground, but it was not a crime involving moral turpitude (CIMT). (See *California Chart*). In 2018 he faces a charge of felony Cal PC § 273.5, based on an incident in 2016. Section 273.5 will be charged as a CIMT (although immigration advocates can contest this), and it is a deportable crime of domestic violence. The DA demands eight months’ jail time.

Is John deportable? Yes, he is deportable under the child abuse ground based on the 2014 conviction.

Has John had a green card for five years? If not yet, he will soon, since it is 2018 and he became an LPR in 2013. The five-year period keeps accruing during jail and removal proceedings; see A.2, above.

Does he have the seven years’ lawful continuous residence? Let’s check. See Parts A.3–A.5, above.

When did John’s seven-year period start? On the date of his admission as a tourist in July 2010.

Did it end when he was convicted of the child abuse offense? No. Being deportable under INA § 237(a)(2), without more, does not stop the seven-year clock. The offense also must be referred to in the inadmissibility grounds, INA § 212(a)(2). This is not. See categories in Part A.4, above.

Will it end if he is convicted of the current charge? If this conviction brings John within a category at INA § 212(a)(2), his seven years will cease to accrue as of 2016, when he committed the offense—and he won’t have the seven years he needs. This is where informed pleading can save the day.

Assume for now that PC § 273.5 is a CIMT. A *first* CIMT is not “referred to” in the inadmissibility ground at § 212(a)(2) if it comes within the petty offense exception: it has a potential sentence of one year or less, with no more than a six-month sentence imposed. See A.4(b), above. For this, John needs the § 273.5 to be designated a misdemeanor, and to get a sentence of no more than six months (perhaps by taking pre-hearing time in jail and then waiving credit for time served in exchange for a shorter sentence).

⁷ Compare *Nguyen v. Sessions* (9th Cir. August 23, 2018) with *Calix v. Lynch*, 784 F.3d 1000 (5th Cir. 2015).

Or, he could try to plead to a comparable offense that is not a CIMT, e.g., Cal PC § 243(e). See discussion of alternatives in the *California Chart*. But if he is convicted of *felony* § 273.5, the conviction will both be referred to in 212(a)(2) (CIMT ground with no petty offense exception), *and* render him deportable under § 237(a)(2) (domestic violence ground). The clock will stop at six years, and he will not be eligible to apply for LPR cancellation.

§ 17.6 FORMER § 212(C) RELIEF: LPRS WITH OLDER CONVICTIONS

A lawful permanent resident (LPR) whose convictions pre-date April 1, 1997 might be eligible for the former 8 USC § 1182(c), INA § 212(c), even if the conviction(s) are aggravated felonies.

This area of the law is complex, and defenders mainly should be alert to this scenario: If an LPR has a conviction from before April 24, 1996 (or in some cases, April 1, 1997), they might be able to get a waiver of deportability for the old conviction/s—even for one or more drug trafficking or very violent offenses. But if the person pleads to a new deportable offense, the remedy may be destroyed. Get expert advice.

A. QUICK TEST: Is the Client Eligible?

1. *Is The Client an LPR Who Is Deportable Based on One or More Convictions for Any Deportable Offense, Including an Aggravated Felony, That Occurred Before April 24, 1996?*

If so, the person might be eligible to apply for a waiver under § 212(c). This is true for convictions by trial as well as by plea. *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014).

2. *Is the Client an LPR Who Is Deportable Based on Conviction(s) That Occurred Between April 24, 1996 and April 1, 1997?*

The more complex rules governing § 212(c) and newer offenses are beyond the scope of this article. See resources listed below. In sum: Section 212(c) is available to waive some deportability grounds for convictions from between April 24, 1996 and April 1, 1997, but it operates under the extreme “AEPDA” limits. For a conviction from this period, § 212(c) cannot waive the aggravated felony, controlled substance, firearms, or “miscellaneous” (conviction of espionage, sabotage, treason, certain military service problems, etc.) deportation grounds. In addition, AEDPA § 212(c) will not waive conviction of two moral turpitude offenses if *both* carry a potential sentence of a year or more—in California, two felonies—although it can waive other CIMTs. In California, reducing one or more felonies to misdemeanors should address this bar, pursuant to Pen C § 18.5(a).

The AEPDA limits—which concern deportation grounds—should not apply to admissions at the border. In that case, a waiver of inadmissibility should be available for any conviction received up until April 1, 1997. Immigration advocates might argue that AEDPA limits also should not apply to adjustment of status applications, although the BIA ruled against this.⁸

3. *Is the LPR Client Deportable Based on Conviction(S) from Before and After April 1, 1997?*

A more recent deportable conviction may make the § 212(c) case for an older conviction impossible. An applicant cannot apply for both § 212(c) (for the old conviction/s) and cancellation of removal (for a new one/s). 8 USC § 1229b(c)(6). But a person at the border, or one who can apply to re-adjust status through

⁸ Under AEPDA, § 212(c) is limited in that it cannot be used to cure *deportability* if the conviction was received between April 24, 1996 and April 1, 1997. LPRs applying for admission at the border are not deportable, as they are not subject to deportation grounds. Arguably, the same should apply to people applying for adjustment of status as a defense to a deportation charge; they should be able to use § 212(c) to waive *inadmissibility* based on convictions of a drug offense, etc., that occurred during that 1996-1997 period. However, the BIA and the Second Circuit have ruled that § 212(c) cannot be used for adjustment of status in this way (*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). Sections 212(c) and 212(h) can be applied for in the same case.

a relative, *can* use waivers under both §§ 212(h) (for the new conviction/s, if that is sufficient) and 212(c) (for the old conviction/s). Consult an immigration attorney, and see discussion of family immigration at § 17.7.

4. Was the Client Convicted of One or More Aggravated Felonies After November 29, 1990, for Which He or She Served an Aggregate Sentence of Five or More Years?

This is a bar to § 212(c) relief. See, e.g., *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003).

B. ADDITIONAL FACTS About § 212(c) Waivers

The former INA § 212(c), 8 USC § 1182(c), permitted an LPR with seven years of lawful domicile to waive most crimes grounds of inadmissibility and deportability, including aggravated felonies. As of April 24, 1996, Congress reduced the reach of § 212(c), so that it could not be used by a person *deportable* for most offenses other than certain crimes involving moral turpitude (although it still waived all inadmissibility grounds). As of April 1, 1997, Congress abolished § 212(c) altogether, and substituted LPR cancellation of removal for it. 8 USC § 1229b(a). Unlike § 212(c), LPR cancellation cannot be used to waive an aggravated felony conviction, and it has a complex stop-time provision. See § 17.5.

Section 212(c) is not dead, however. The Supreme Court held that an LPR can apply today for § 212(c) to waive one or more qualifying convictions that occurred before the 1996 or 1997 dates. *INS v. St. Cyr*, 533 U.S. 289 (2001); *Judulang v Holder*, 132 S. Ct. 476, 479 (2011); *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). Thus, a qualifying LPR who is put into removal proceedings in 2018 may be able to apply for the former § 212(c) waiver to waive a deportable aggravated felony conviction—for example, for drug trafficking—from before April 24, 1996. In the Ninth Circuit, this is true whether the conviction was by plea or trial. The applicant did not have to have the seven years' residence by 1997, but only when the application is filed (now). 8 CFR § 1212.3(f)(2).

Section 212(c) is not available if the person was sentenced to an aggregate five years of custody for conviction/s occurring on or after November 29, 1990 for one or more aggravated felonies. See *Abdelghany*.

While § 212(c) cannot be applied for in conjunction with an application for LPR cancellation, it can be applied for in conjunction with a waiver under INA § 212(h) [8 USC § 1182(h)]. See, e.g., *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). The § 212(h) waiver *could* address a conviction from after the applicable 1996 or 1997 date, while § 212(c) could address convictions from before that date.

The rules governing § 212(c) are complex. If your client *might* be eligible, consult an immigration expert before entering a plea to a new deportable offense. For a detailed discussion of current § 212(c) eligibility requirements, see practice advisories at the websites of the National Immigration Project of the National Lawyers Guild (www.nipnlg.org) and the American Immigration Law Foundation (www.aifl.org).

§ 17.7 IMMIGRATION THROUGH FAMILY

Is the Defendant Eligible? Is It a Defense Against Deportation? Some noncitizens may be able to get a green card through a U.S. citizen or lawful permanent resident parent, spouse or child (or very rarely, a USC sibling)

1. What kind of status does one obtain from immigrating through a family member?
2. What crimes destroy eligibility for family immigration?
3. Which spousal and parent/child relationships qualify for immigration benefits?
4. Which noncitizens can “adjust status” through a family visa, and thereby avoid deportation?
5. If my client can’t adjust status, is a family visa petition still worth anything?
6. What will happen next to my client? How long will family immigration take?
7. How can I keep my client admissible, or if inadmissible at least eligible for a waiver? (Table)

Family visas are complex, and the defendant should get immigration help to complete the process. A non-profit agency may be able to handle the case if the criminal issues are not complex, or if they have expert staff. But criminal defense counsel will provide a tremendous service and might prevent a family from being destroyed if they can spot this potential relief, avoid pleading the defendant to a disqualifying (inadmissible and unwaivable) offense, and provide some basic advice. For further information, go to www.uscis.gov and click on “Green Card Through Family” or “Family,” or see, e.g., *Families & Immigration: A Practical Guide* (www.ilrc.org).

A. What Kind of Status Does One Obtain from Immigrating Through a Family Member?

Lawful permanent resident status (LPR, a green card). To “immigrate” means to become an LPR.

B. What Crimes Destroy Eligibility for Family Immigration?

To immigrate through family the person must be “admissible.” That means either they must not come within any of the grounds of inadmissibility at 8 USC § 1182(a), or *if* they come within one or more inadmissibility grounds, they must qualify for and be granted a waiver of the ground(s). To determine whether your client is inadmissible, see the table at Question #7 below, and see other detailed materials. Note that any conviction relating to a federally-defined controlled substance is an absolute bar to family immigration. The exception is that in some cases one can apply for a waiver of a first conviction for simple possession of 30 grams or less of marijuana (or of being under the influence of, or possessing paraphernalia specifically to use with, marijuana).

If your client *might* be eligible for family immigration and you can avoid making them inadmissible, you have done a great job. If possible, use the following information to further help them by determining if they really are eligible, and if so whether they can use this eligibility to fight deportation (“removal”).

C. Which Spousal, Parent/Child, or Sibling Relationships Qualify for Immigration Law Benefits?

All family visas, and all other immigration benefits based on family, require a qualifying spousal or parent/child relationship as defined under immigration law. The USC or LPR who is applying to immigrate their noncitizen family member is called the “petitioner,” and the noncitizen family member is called the “beneficiary.” In some cases, family members can still benefit from a filed petition after the petitioner dies. Widow(er)s of U.S. citizens additionally benefit from special provisions that allow them to file a new petition on their own for up to two years after the death of the U.S. citizen spouse.

Spouse. See 8 CFR § 204.2. The only requirement is that the marriage was bona fide (not a fraud) and legally valid in the jurisdiction in which it was performed. This includes same-sex marriages that were legal where they were performed. (Note that the definition of “spouse” is slightly broader for persons applying for VAWA relief due to abuse by a USC or LPR spouse; see § 17.8.)

Parent, Child, Son, Daughter, Sibling. See 8 USC § 1101(b)(1). A parent/child relationship for immigration purposes includes a child born in wedlock, a biological child of a mother, and in some cases a father's biological child born out of wedlock. A stepparent relationship is recognized if the parents married before the child's 18th birthday. An adoptive relationship is recognized if the adoption was finalized before the child's 16th birthday (or the child's 18th birthday, if a sibling was also adopted by age 16) and the child has resided in lawful custody with the parent for two years at any time. If the biological parent's rights were terminated, that parent/child relationship is no longer recognized for immigration purposes. A "child" is defined as a person with a relationship described above, who is under age 21 and unmarried. "Unmarried" includes marriage ended in death, divorce or annulment. A "son or daughter" is a person who once was a child under the above definition but no longer is, because the person is age 21 or older, or under age 21 and married. Siblings are two people who have or had the same "parent," according to the definition above.

D. Which Noncitizens Can "Adjust Status" Through a Family Visa, and Thereby Avoid Deportation?

To avoid deportation the defendant must be eligible for family immigration through *adjustment of status*. "Adjustment of status" is a technical term that means that the person can process the green card application at a local DHS office, without having to leave the U.S. A person who doesn't qualify to adjust status still can apply for a family visa, but they must go back to the home country to process through a U.S. consulate there—and that trip alone can create other legal problems. If instead the defendant can adjust status, they will become an LPR, the removal proceedings will end, and they will not have to leave the U.S.

A person who is undocumented or has almost any immigration status can apply for adjustment of status through a family visa as a defense to removal (deportation), if they meet the following requirements:

- The defendant has a U.S. citizen (USC) spouse, or a USC son or daughter age 21 or older, or the defendant is an unmarried child under the age of 21 of a USC parent, *and*
 - The defendant was inspected or paroled and admitted into the U.S. on any kind of visa, border-crossing card, lawful permanent resident card, or other document, even if later they were in unlawful status. This is called a regular adjustment or "245(a) adjustment." See INA § 245(a), 8 USC § 1255(a).

OR

- The defendant is the beneficiary of a family visa petition that was submitted before April 30, 2001 and that can be used now, based on any qualifying family relationship (see # 4, below.) This is called "245(i) adjustment." See INA § 245(i), 8 USC § 1255(i). If a pre-April 30, 2001 petition exists, the defendant should seek immigration counsel.

With a few technical exceptions, any noncitizen in any status (e.g., undocumented, TPS, student visa, etc.) who meets the above requirements can apply for adjustment. A qualifying **LPR who has become deportable for crimes** can apply for adjustment of status as a defense to removal. The deportable LPR must have the USC relatives described in the first bullet point above, and must either be admissible or be granted a waiver of the inadmissibility ground.⁹ In this process, the LPR loses their current green card and then applies to re-adjust status and get a new green card, all in the same proceeding. They are not ordered removed, and do not leave the U.S. (Note that some LPRs are not eligible for a waiver of inadmissibility under § 212(h). See § 17.10 regarding the § 212(h) waiver.)

⁹ *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).

Increasingly ICE is charging that a person who has been convicted of a “dangerous or violent” offense should be denied adjustment as a matter of discretion, and forced to go through consular processing. The Ninth Circuit has upheld this position.¹⁰

E. If the Client Cannot Adjust Status, Is a Family Visa Petition Still Worth Anything?

Yes! The person will have to leave the U.S. and process the application for a green card through a U.S. consulate in their home country. This is called “consular processing.” If the application is granted, they can return to the U.S. as an LPR pursuant to the family visa.

This process carries more risks, however, than getting the green card through adjustment of status. Depending on various factors, the person could have to remain outside the U.S. for just a few weeks, or some years. The problem is that people who have lived without lawful status in the United States become inadmissible under the “unlawful presence” grounds the moment that they set foot outside the United States. (This is why it is so valuable to be able to adjust status instead. Because the person does not physically leave the U.S. before getting the green card, they are able to avoid triggering the “unlawful presence” grounds). These grounds can bar people from getting a green card until they have resided outside of the U.S. for three or ten years. Fortunately, family waivers are available for the three- and ten-year bars, but in order to be able to apply for a waiver, you must have certain qualifying family members with lawful immigration status—spouse or parents. Some people only have children with immigration status, and children do not qualify them for the waiver, no matter how old they are. People who left the U.S. after more than one year of unlawful presence and then re-entered illegally may be subject to the so-called “permanent” bar, and this is far more serious. Unlike the three- and ten-year bars, that can be overcome with an approved waiver so that the person does not have to wait out the three or ten years, with the permanent bar the person *must* wait ten years before they can apply to try to come back to the U.S.; there is no waiver that will let them skip the ten years outside the country.¹¹

While consular processing can be risky, please do not inform a defendant that they should give up on family immigration, and do not abandon the goal of keeping the person admissible. As criminal defense attorneys, we are not expert in the nuances, possible defenses, and near-constant updates in this area. But we should tell defendants that they must consult with a skilled immigration nonprofit or private attorney before going through consular processing. This step might save them a lot of heartache.

Defenders have two criminal defense goals. First, *try hard to avoid a conviction that makes the defendant inadmissible*. See #7, below. Defendants who can avoid being inadmissible for a crime and have an approved visa petition might qualify for a “stateside waiver” of the three/ten-year unlawful presence bars, which would cut down on the time and risk of the trip abroad to consular process.¹² Of course, many defendants already have criminal records that preclude this, but where it is possible it is a huge advantage.

Second, if the person cannot avoid becoming inadmissible, try to plead to a ground that might be waived, so that the person still can get a green card. See # 7, below. If the person is in removal proceedings now, advise them to consult with immigration counsel to see if voluntary departure is a good option, and/or if they might get released on bond based on the availability of a family visa petition. See § 17.25.

F. What Will Happen to My Client? How Long Will This All Take?

Your client can be detained despite being eligible for a family visa. If they can adjust status, their family should get help to get the papers filed with the court. If they are not subject to “mandatory detention,”

¹⁰ *Torres-Valdivias v. Lynch*, 786 F.3d 1147 (9th Cir. 2015).

¹¹ See discussion of the inadmissibility grounds based on unlawful presence plus travel outside the United States at ILRC, *I-601A Provisional Waiver Process Practice Advisory* (January 2017), available at <https://www.ilrc.org/i-601a-provisional-waiver-process-practice-advisory>.

¹² See information at <https://www.uscis.gov/family/family-us-citizens/provisional-unlawful-presence-waivers> and see ILRC, *I-601A Provisional Waiver Process Practice Advisory*, above.

they might well win release from detention. If they aren't released, they will apply for adjustment in removal proceedings held in the detention facility.

If they can immigrate through family but are ineligible to adjust status, or the judge denies adjustment as a matter of discretion, they must request voluntary departure and go through consular processing in the home country. Before leaving, they need legal counseling about the consequences of leaving the U.S. and the waivers they will need to apply for if they are ever to return on the family visa. See #5, above.

How Long Does It Take to Immigrate (Get the Green Card)? This depends on the noncitizen's country of birth, when the application for a family visa petition was filed, and especially on the type of family visa. There are two types of family visas: **immediate relative** visas, which have *no* legally mandated waiting period (although processing the application may take some months), and **preference category**, which may legally require a wait of months, years, or even decades before the person can immigrate, because only a certain number of these types of visas are made available to each country each year. The categories are:

1. Immediate relative: Noncitizen is the spouse of a USC; the unmarried child under 21 years of age of a USC; or the parent of a USC who is at least 21 years old.
2. First preference: Noncitizen is the unmarried son or daughter (at least 21 years old) of a USC.
3. Second preference: Noncitizen is the spouse or unmarried son or daughter (any age) of an LPR.
4. Third preference: Noncitizen is the married son or daughter (any age) of a USC.
5. Fourth preference: Noncitizen is the brother or sister of an adult USC. A sibling relationship exists for immigration purposes if the two people each have been the "child" of the same parent. This category may have a legally mandated waiting period of 15 years or more.¹³

How can one tell how long the wait is for a preference visa? The online "Visa Bulletin" provides some help. See the Visa Bulletin and instructions at <http://travel.state.gov> (select "U.S. Visas" and then "Check the Visa Bulletin"). To read it, you will need the client's "priority date" (the date that their relative first filed the visa petition), to compare with the current date for their preference category (see above), and country of origin. Look at "Family-Sponsored Preferences" and Chart A, Final Action Dates. When the person's priority date comes up on the chart in their category (or is *earlier* than the date listed), the visa is available and the person can apply for the green card. Note, however, that the Bulletin categories do *not* progress on real time. In next month's Bulletin, the priority date in the client's category will not necessarily have advanced by one month: it might have leapt ahead three months, stayed the same, or even regressed to an earlier date. Consult an immigration lawyer to get a realistic time estimate for when the client might immigrate.

G. How Can I Keep My Client from Becoming Inadmissible, or at Least Eligible for a Waiver?

Below is a chart showing common crimes grounds.

Note that apart from drug cases, immigrants applying for a family visa who are inadmissible usually can apply for a highly discretionary waiver called the § 212(h) waiver. See 8 USC § 1182(h). But if the person admits or is convicted of an offense that involves a federally-defined controlled substance, or if the government has "reason to believe" they trafficked in such a drug, they cannot apply for the waiver and will not qualify for a green card through family. The one exception is that the § 212(h) waiver can waive certain offenses that relate to a single incident involving simple possession of 30 grams or less of marijuana or hashish. See § 17.10 for more on § 212(h).

For more information on inadmissibility grounds see other *Notes* at www.ilrc.org/chart, advisories at www.ilrc.org/crimes, and manuals at www.ilrc.org/publications and elsewhere.

¹³ See 8 USC §§ 1151(b), 1153(a) [INA §§ 201(b), 203(a)].

| Crimes Ground of Inadmissibility: 8 USC § 1182(a)(2) | Waiver? |
|---|---|
| Convicted of/admitted a first simple possession of 30 gms or less marijuana, or being under the influence, or possessing paraphernalia; includes hashish | § 212(h) waiver [8 USC § 1182(h)] |
| Convicted of/admitted any other offense relating to federally-defined controlled substance | No waiver |
| Immigration authorities have “reason to believe” person was involved in trafficking in a federally-defined controlled substance at any time | No waiver |
| Current drug abuser or addict (§ 1182(a)(1)) | No waiver |
| Convicted of/admitted one crime involving moral turpitude (CIMT) Client is not inadmissible and § 212(h) waiver is not needed if: <ul style="list-style-type: none"> ✓ Petty offense exception (only one CIMT, maximum possible sentence = 1 yr or less, sentence imposed = 6 months or less) ✓ Youthful offender exception (convicted as adult of one CIMT, committed while under age 18, conviction and any imprisonment ended at least 5 years before this application) | § 212(h) waiver |
| Engaged in prostitution, meaning sexual intercourse for hire | § 212(h) waiver |
| Conviction of 2 or more offenses of any type with aggregate sentence imposed of at least 5 years | § 212(h) waiver |
| An aggravated felony conviction is not a ground of inadmissibility <i>per se</i> , but the conviction might cause inadmissibility under the CIMT or drug grounds. | Bars some LPRs from § 212(h) |
| Prior deportation or removal. Emergency: Client probably <i>illegally re-entered</i> after being removed. Client is at high risk for referral for federal prosecution for 8 USC § 1326. Try to get client out of jail. Family visa is <i>not</i> an option while client is in the U.S. | No waiver for illegal re-entry while in the U.S.; very limited waiver once outside the U.S. |

§ 17.8 RELIEF UNDER VAWA: ABUSED BY USC OR LPR FAMILY MEMBER

Under the Violence Against Women Act (VAWA), if a noncitizen or his or her child or parent is the victim of abuse (including emotional abuse) by certain U.S. citizen or lawful permanent resident family members, the noncitizen and victims may be able to apply for lawful permanent residence (green card) under VAWA. VAWA benefits are available to male and female victims.

Extensive resources exist to help VAWA applicants. Some Legal Aid offices and non-profit immigration agencies have funding to handle indigent persons' applications. The government provides a good summary of basic information at www.uscis.gov/batteredspouseschildrenandparents. See also materials at websites such as www.ilrc.org/info-on-immigration-law/vawa and www.nipnlg.org, and for comprehensive information, see Immigrant Legal Resource Center, *The VAWA Manual* (www.ilrc.org).

A. QUICK TEST: Is the Client Eligible?

1. *Is the Client Either the Spouse or the Child (Including Stepchild or Adopted Child) of a Lawful Permanent Resident (LPR) or U.S. Citizen (USC) Who Has Abused Him or Her? Or, Is the Client Abused by an Adult USC Son or Daughter?*

These relationships are eligible for VAWA. In addition, if the noncitizen's child or parent, rather than the noncitizen, was the victim, the noncitizen still may qualify for VAWA.

2. *Is the Family Relationship with the Abuser One That Is Recognized for Immigration Purposes?*

Immigration law recognizes only certain marital or parent/child relationships. See Part B.

3. *Does the USC or LPR Relative's Action Amount to "Extreme Cruelty" for This Purpose? If Based on Abuse by a Spouse, Did the Abuse Take Place During the Marriage and in the United States?*

For VAWA purposes, extreme cruelty is broadly defined to include physical and/or psychological abuse. Various forms of evidence may establish extreme cruelty, and a police report or hospital record is not required. See 8 CFR § 204.2(c)(1)(i)(H)(vi), (c)(2)(v).

4. *If Your Client Is a Victim of Domestic Violence Who Does Not Qualify for VAWA, Consider the U Visa*

Unlike VAWA, the U visa does not require that the abuser was a USC or LPR, or that a family relationship was legally valid or existed at all. See discussion of U Visas at § 17.6, *infra*.

B. ADDITIONAL FACTS About the Violence Against Women Act (VAWA)

The VAWA immigration provisions were enacted to prevent abusive U.S. citizens (USCs) and lawful permanent residents (LPRs) from using their immigration status as a means of holding their spouse, child, or parent (of an adult) hostage, e.g., by refusing to help them immigrate, or threatening to call ICE on them if they try to leave. VAWA gives the noncitizen a means of becoming an LPR that is independent of the abuser, through either of two methods: VAWA self-petitioning or VAWA cancellation of removal.

VAWA Self-Petitioning. An immigrant abused spouse, child, or parent can "self-petition," meaning file a visa petition for him or herself, without sponsorship by his USC or LPR relative. The self-petitioner must meet the definition of a "spouse," "child," or "parent" of the USC or LPR under immigration law, but some expanded definitions apply for VAWA self-petitioners. Regarding a spouse, the marriage must be legal in the jurisdiction where it was performed. This now includes same-sex marriages that meet that requirement. For VAWA only, a marriage can include one that is legally invalid because the USC or LPR spouse did not divulge the existence of a prior marriage. "Spouse" can include a spouse who was divorced within the last two years if there is a connection between the divorce and the abuse, or a spouse whose abusive USC spouse died within the last two years, or a spouse whose abusive LPR spouse lost their

status within two years of self-petitioning due to an incident of domestic violence. If the noncitizen's USC or LPR spouse abused the noncitizen's child, the noncitizen may self-petition even if she was not abused. An abused spouse can include in her self-petition any of her children, even if the children were not abused, are not related to the abuser, and do not reside in the United States. See 8 CFR § 204.2(c).

For children, an adoptive relationship is recognized if the adoption was finalized before the child's 16th birthday (or the child's 18th birthday, if a sibling was adopted by age 16) and the child has resided in lawful custody with the parent for two years at any time. A stepparent relationship is recognized if the parents married before the child's 18th birthday. See 8 USC § 1101(b)(1) and family visas at § 17.7. Children who qualify for VAWA while under age 21 will not lose benefits after they turn 21 years old, and some children may petition for VAWA up to age 25 if they can show that the abuse was one reason for not filing before turning 21. See 8 CFR § 204.2(e).

The self-petitioner must establish that the abuser is or was a USC or LPR; that the self-petitioner has been subject to battery or "extreme cruelty" during the marriage (if based on marriage to the abuser); and that the self-petitioner resided with the abuser in the United States. Extreme cruelty is broadly defined to include emotional abuse, isolating the person, etc. A fairly wide range of evidence, including affidavits, will be considered. 8 CFR § 204.2(c).

The person must prove good moral character for some period of time, and may be required to submit police clearance records showing their own criminal history or lack thereof for the last three years. 8 CFR § 204.2(c)(1)(i)(F), (c)(2)(v). See discussion of good moral character at § 17.26. The rules are relaxed somewhat for VAWA self-petitioners: if a bar to good moral character is an offense that also could be waived under INA § 212(h)—for example, if it is one or more convictions of a crime involving moral turpitude—and the offense was connected to the abuse, the bar may be forgiven. INA § 204(a)(1)(C), 8 USC § 1154(a)(1)(C). See also Novak, Dir., Vermont Services Center, *Determinations of Good Moral Character in VAWA Applications*, (Jan. 19, 2005), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files/Memoranda/Archives%201998-2008/2005/gmc_011905.pdf.

Once the self-petition is granted, the petitioner receives deferred action, which provides temporary protection from deportation and work authorization. The self-petitioner can then adjust status to an LPR if he or she is not inadmissible under the crimes-based grounds, or if inadmissible, if he or she obtains a waiver. Special VAWA provisions eliminate the need to show hardship to an LPR or USC family member as a requirement for certain waivers. See, e.g., INA § 212(h)(1)(C), 8 USC § 1182(h)(1)(C).

VAWA Cancellation. Noncitizens who have been battered or subjected to extreme cruelty by a USC or LPR spouse or parent also may apply for VAWA cancellation, a form of non-LPR cancellation. INA § 240A(b)(2), 8 USC § 1229b(b)(2). This relief extends to children of abused parents as well as parents of abused children. 8 USC § 1229b(b)(4). The VAWA applicant must have three years of physical presence in the United States and three years of good moral character, immediately preceding the application. The person must not be inadmissible under grounds relating to crimes or terrorism/national security (8 USC §§ 1182(a)(2) or (3)), and must not be deportable under grounds relating to crimes, marriage fraud, failure to register, document fraud, false claim to U.S. citizenship, security and related grounds (8 USC §§ 1227(a)(1)(G), (2), (3), or (4)). However, a client who receives a waiver of the domestic violence deportation ground is not barred from VAWA cancellation. See discussion of 8 USC § 1227(a)(7)(A) at § 17.11. A noncitizen convicted of an aggravated felony is not eligible for VAWA cancellation. 8 USC § 1229b(b)(2)(A)(iv).

§ 17.9 SPECIAL IMMIGRANT JUVENILE STATUS (SIJS)

Children who are under the jurisdiction of almost any court may qualify to apply for lawful permanent resident status as a “special immigrant juvenile,” if the court makes certain findings concerning parental abuse, neglect or abandonment. Once the child can file an application for adjustment of status (a green card), the child will gain employment authorization and a government-issued ID card.

A. QUICK TEST: Is the Client Eligible?

1. *Is the client unmarried (including divorced) and under age 21? Is he or she under the jurisdiction of a delinquency, dependency, family, probate, or other “juvenile” court?*
2. *Would the judge find that the child cannot be returned to at least one parent due to abuse, neglect or abandonment, and that it is not in the child’s best interest to be returned to the home country?*

If the answer to both questions is “yes,” counsel should investigate special immigrant juvenile status.

B. ADDITIONAL FACTS About Special Immigrant Juvenile Status (SIJS)

SIJS came into being in 1990, but it was substantially broadened and clarified by the Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA). Because the regulation still has not been updated (8 CFR § 204.11), at this point accurate information comes from the text of the statute and practice advisories. See INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J), as amended by TVPRA. See advisories and materials at <https://www.ilrc.org/immigrant-youth>, and for a comprehensive manual, see Immigrant Legal Resource Center, *Special Immigrant Juvenile Status and Other Remedies for Children and Youth* (www.ilrc.org). See also basic information at www.uscis.gov (search for “special immigrant juvenile”)

What Order Must the Court Make? The court must make a finding, and sign an order to be submitted with the SIJS petition, that (a) the child cannot be reunified with one or both parents because of abuse, neglect, abandonment or a similar basis under state law, and (b) it is not in the child’s best interests to be returned to the home country.

What Kind of Court Can Make This Order? A juvenile court, broadly defined to include any court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles, makes the order. Depending on the state, the court might be called family, delinquency, dependency, probate, orphans’, or other. A child who has been legally committed by the court to the custody of a state agency, department, entity, or individual by such a court also is eligible.

Can the Child Be in a Parent or Guardian’s Custody? Yes, the court may legally commit the child to the custody of an individual, for example the non-abusive parent or a guardian.

What Requirements Must the Child Meet? The child must be under age 21 on the date of filing, and must be unmarried. To get permanent residency, the child must be admissible. There are discretionary SIJS waivers for many grounds of inadmissibility. INA § 245(h), 8 USC § 1255(h). However, if the child is inadmissible because the government may have “reason to believe” he or she trafficked in drugs, this is a dangerous situation and counsel should not proceed without expert counseling. The same is true for youth with convictions in adult court that may cause inadmissibility. See chart on inadmissibility and SIJS at www.ilrc.org/files/inadmissibility_2009.pdf. To get permanent residency, the child must also have a visa available. Currently, there is a backlog of visas for youth applying for a green card based on SIJS from El Salvador, Guatemala, Honduras, and Mexico, meaning youth from these countries may have to wait several years before they can receive a green card. For more information, see ILRC’s advisory about the visa backlog at <https://www.ilrc.org/update-special-immigrant-juvenile-status-what-visa-availability>.

§ 17.10 § 212(H) WAIVER OF INADMISSIBILITY

A. QUICK TEST: Is the Defendant Eligible for Relief Under INA § 212(h), 8 USC § 1182(h)?

1. Which Immigrants Can Apply for a § 212(h) Waiver?

The person must be an LPR already, or must be applying to become an LPR based on a family visa, VAWA (see below), or an employment visa. The person must either:

- a. Be the spouse, parent, or child of a U.S. citizen or lawful permanent resident (USC or LPR) who would suffer extreme hardship if the person was deported, *or*
- b. Have been convicted (or engaged in the conduct) at least 15 years ago, *or*
- c. Be inadmissible only for prostitution, *or*
- d. Be applying for VAWA relief due to abuse by a USC or LPR family member; see § 17.8.

2. Which Inadmissibility Grounds Can Be Waived Under § 212(h)?¹⁴

- a. Conviction of one or more crimes involving moral turpitude (CIMT). But the person is not inadmissible and the waiver is not needed if there is only one CIMT conviction that comes within:
 - The petty offense exception. The person must have committed just one CIMT, which carries a maximum possible sentence of a year or less (including a misdemeanor wobbler in California), where the sentence imposed was six months or less; *or*
 - The youthful offender exception. The person was convicted as an adult of one CIMT, committed while under age 18, and conviction/jail will have ended at least 5 years before the current application is filed.
- b. Two convictions of any type of offense, with aggregate sentence imposed of at least five years
- c. Engaging in prostitution (sexual intercourse for a fee, with or without a conviction).
- d. No drug crimes can be waived, *except* arising from a single incident involving possession of 30 grams or less of marijuana, as well as: possession of an amount of hashish comparable to 30 gm or less of marijuana, using marijuana or hash, possessing paraphernalia for use with 30 grams or less of marijuana, and in the Ninth Circuit attempt to be under the influence of THC.¹⁵

3. How Likely Is It That the Waiver Will Be Granted?

The waiver is granted as a matter of discretion and it is crucial to get immigration counsel. Winning can be difficult if the person must show “extreme hardship” to a family member (see #1.a., above). Conviction of a vaguely defined “violent or dangerous” offense cannot be waived absent “exceptional and extremely unusual hardship” or national security concerns.¹⁶ Thus, it will be far easier to waive a conviction for theft or fraud than one for robbery or serious assault.

B. ADDITIONAL FACTS About the § 212(h) Crimes Waiver

Because § 212(h) is used in combination with other immigration law provisions, the analysis might be especially challenging for criminal defenders. Do not hesitate to seek expert advice. Additional articles on § 212(h) are available at www.ilrc.org/crimes, or see publications such as *Removal Defense* (2017) at www.ilrc.org/publications.

When Is the § 212(h) Waiver Generally Used? Usually with an application to become an LPR via a family visa or VAWA application, or to help an inadmissible LPR get back into the U.S. after a trip abroad.

¹⁴ See 8 USC § 1182(h)(1), INA § 212(h) referring to certain grounds at 8 USC § 1182(a)(2), INA § 212(a)(2).

¹⁵ See, e.g., *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993) (use); INS General Counsel Legal Opinion 96-3 (April 23, 1996) (comparable amount of hashish); *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (THC).

¹⁶ 8 CFR § 1212.7(d). See discussion of same standard in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

Example: Erin was admitted to the U.S. on a tourist visa and overstayed. Now she wants to become an LPR through her U.S. citizen husband, but she is inadmissible because of a CIMT conviction. She can submit an application for adjustment of status along with a § 212(h) application to waive the CIMT. If it is granted, she will become an LPR.

Example: Tim became an LPR in 2010 but later was convicted of a CIMT that made him inadmissible. In 2016 he took a trip outside the U.S. Upon his return, he was stopped at the airport and charged with being an arriving alien who was inadmissible for CIMT. He can apply for a § 212(h) waiver. If he wins, he can keep his green card and be re-admitted into the U.S.

For many years, the BIA held that an LPR who should have been stopped at the border and charged with being inadmissible for a conviction, but was mistakenly permitted to enter, and then was charged with being deportable based on the conviction, could apply for a § 212(h) inadmissibility waiver “nunc pro tunc” (as if at the border) as a defense to deportability, even without an application for adjustment of status. In *Matter of Rivas*, the BIA abruptly overruled these cases and held that an adjustment application is required. While courts are tending to uphold the BIA’s rule, advocates can consider arguing that at least it should not apply retroactively to convictions from before the date *Rivas* was published, which was June 20, 2013.¹⁷

Sometimes § 212(H) Can Waive a (Non-Drug) Aggravated Felony Conviction. Some crimes involving moral turpitude (CIMTs) also qualify as aggravated felonies. Except for some LPRs (see below), the fact that the CIMT also is an aggravated felony is not a bar to applying for § 212(h), although it might make it harder to win the case. (But conviction of a “dangerous or violent” crime will be very difficult to waive regardless of whether it is an aggravated felony. See A.3, above.)

Special Restrictions Apply to Some LPRs. Section 212(h) [8 USC § 1182(h)] sets out two bars to eligibility, which apply only to certain LPRs. The bars do not apply to undocumented persons or anyone other than these LPRs. An LPR subject to the bars cannot apply for a § 212(h) waiver if they (a) have been convicted of an aggravated felony since being admitted at a border as an LPR, or (b) failed to complete a continuous seven years in the U.S. in some lawful status before removal proceedings were begun.¹⁸

Who is subject to the bars? People who were *previously physically “admitted” as an LPR or conditional permanent resident*¹⁹ at a U.S. border or other port of entry. This includes anyone who became an LPR by admission to the U.S. after consular processing. However, becoming an LPR by adjusting status within the U.S. does not trigger the bars, because there was no physical admission at the border.²⁰ A person who traveled outside the U.S. while an LPR *may or may not* have become subject to the bars; it may depend on whether the person technically was seeking a new “admission” upon their return.²¹

¹⁷ See *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013). See also *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 a new rule announced by BIA precedent).

¹⁸ If the Notice to Appear did not provide a date, time, and place, it might not stop the seven-year clock. See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018) and practice advisory at www.nipnl.org, and consult an immigration expert.

¹⁹ *Matter of Paek*, 26 I&N Dec. 403 (BIA 2014) (bar applies to conditional residents).

²⁰ *Matter of J-H-J-*, 26 I&N 563 (BIA 2015). See discussion of adjustment of status at § 17.7, above.

²¹ An LPR who travels outside the U.S. is not considered to be seeking admission upon her return, unless she comes within an exception at 8 USC § 1101(a)(13)(C). For example, an LPR whom the government proves is inadmissible for crimes, or who stayed outside the U.S. for 180 continuous days, is seeking admission, but one who does not might not be. See discussion in immigration texts such as ILRC, *Removal Proceedings* (2017) at www.ilrc.org/publications and/or get expert assistance.

§ 17.11 WAIVER OF DOMESTIC VIOLENCE AND STALKING

A noncitizen is deportable if convicted of stalking or of a “crime of domestic violence,” or if found in criminal or civil court to have violated certain provisions of a domestic violence protection order. INA § 237(a)(2)(E), 8 USC § 1227(a)(2)(E). Sometimes a person who actually is the victim of domestic violence in the relationship ends up being cross-charged and gets one of these deportable dispositions. The purpose of this waiver is to help that type of person. If the person makes certain showings, an immigration judge may waive deportability under this ground. The waiver also can preserve eligibility for non-LPR cancellation. See below. The waiver appears at INA § 237(a)(7)(A), 8 USC § 1227(a)(7)(A).

A. QUICK TEST: Is the Client Eligible?

1. *Is the Client Someone Who Needs to Avoid Deportability, e.g., a Permanent Resident, Refugee, or an Undocumented Applicant for Non-LPR Cancellation (Including VAWA Cancellation)?*

This waiver protects against a deportable offense. If granted, it will prevent an LPR, refugee, or other person with lawful status from being deported for domestic violence or stalking.

This waiver also will prevent an applicant for either “ten year” or VAWA cancellation for non-LPRs. Without the waiver, a conviction that triggers deportability under the domestic violence ground is a bar to eligibility for non-LPR cancellation. See §§ 17.3, 17.8 and see INA § 240A(b)(5), 8 USC § 1229b(b)(5).

Example: Marta is an LPR who is being abused by her boyfriend. After one altercation, she is convicted of a deportable crime of domestic violence. In removal proceedings, she applies for the domestic violence waiver and shows that she is primarily the victim in the relationship, and that her offense was connected to the abuse and did not result in serious bodily injury. (See other possible showings in #3.) If the waiver is granted, she can keep her green card and not be deported. If instead Marta were undocumented and applying for “ten year” cancellation, she could apply for the same waiver. If she won, she would not be disqualified from non-LPR cancellation by having a deportable conviction.

2. *Is the Client Deportable for a Conviction of a “Crime of Domestic Violence” or “Stalking,” or a Finding of Violation of a Domestic Violence Protection Order Provision Such as a Stay-Away Order?*

The waiver will excuse deportability under the domestic violence ground based on these offenses. It will not excuse deportability under the domestic violence ground based on conviction of a crime of child abuse, neglect or abandonment. Also, it does not excuse deportability under other grounds, e.g. if the offense also is a crime involving moral turpitude or aggravated felony.

3. *Is the Client Not the Primary Perpetrator of Violence in the Relationship, and Can the Client Make Certain Showings?*

The client must be someone “who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship.” INA § 237(a)(7)(A), 8 USC § 1227(a)(7)(A). In addition, the client must show one of the following: (1) that the client was acting in self-defense; (2) that the client was found to have violated a protection order intended to protect him or her; *or* (3) that the client committed, was arrested for or convicted of a crime that did not result in serious bodily injury, and that was connected to him or her having been battered or subjected to extreme cruelty. *Ibid.* In making this determination, an immigration judge can look at any relevant, credible evidence, and is not limited to the reviewable record of conviction. INA § 237(a)(7)(B), 8 USC § 1227(a)(7)(B).

§ 17.12 DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

Deferred Action for Childhood Arrivals (“DACA”) grants work authorization and protection from removal to certain young people who came to the United States as children. On November 20, 2014 President Obama tried to expand the DACA program, but the expansion was stalled in a lawsuit. In 2017 President Trump tried to end the DACA program, but that also is stalled in lawsuits.

As of this July 2018, USCIS is accepting renewal applications from all individuals who were previously granted DACA at some time. There is a pending case considering whether initial DACA applications also must be accepted by USCIS. Before advising anyone, be sure to check for the latest information at, e.g., www.ilrc.org/daca, www.unitedwedream.org, and www.adminrelief.org.

A. QUICK TEST: Is the Client Eligible for DACA? Rules as of July 2018.

1. Was Your Client Previously Granted DACA?

Applicants are eligible to apply for DACA if they had DACA but it expired at any time, or had DACA but it was terminated by USCIS or ICE. Please note that applicants will have to submit an application as an “initial” if their DACA expired or was terminated on or before September 5, 2016. These applicants will have to meet all initial requirements and submit evidence showing they continuously resided in the United States since June 15, 2007. See *USCIS 2018 DACA Preliminary Injunction FAQs*.²² To meet the general initial DACA requirements, the applicant:

- a. Must be at least 15 years old at the time of filing his or her request. However, a youth who is currently in removal proceedings, or has a final order of removal or voluntary departure, can request DACA while under the age of 15.
- b. Must have come to the United States before his or her 16th birthday;
- c. Must have continuously resided in the United States since June 15, 2007 to the present time, and was physically in the U.S., undocumented, and under age 31 as of June 15, 2012;
- d. Must either be in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- e. Must not have been convicted (as an adult) of a felony, significant misdemeanor, or three or more other misdemeanors, and Must not pose a threat to national security or public safety. See Part B.

2. Can a Client Who Has an Immigration Hold or Is in Removal Proceedings Apply for DACA?

Yes. If a client in these circumstances meets the guidelines for DACA, they can request deferred action. Keep in mind that current guidelines only permit applications from renewals. See above.

3. What Happens if the DACA Application Is Denied?

The person might be referred to removal proceedings, depending upon the type of criminal convictions or charges. See policy at www.uscis.gov/NTA. People with a criminal record or any history of gang involvement should get counseling before applying.

²² See USCIS 2-18 *DACA Preliminary Injunction FAQs*, updated February 22, 2018 at <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

B. ADDITIONAL INFORMATION About DACA: Crimes Bars

The Government's "Frequently Asked Questions"²³ memoranda ("FAQ") provide official information about DACA requirements. Bars to DACA include:

One Felony Conviction. A felony is defined as any local, state or federal offense that has a potential jail sentence of over one year. *FAQ*, Question 61.

One "Significant Misdemeanor" Conviction. For DACA, a significant misdemeanor is an offense punishable by imprisonment for more than five days but not more than one year. It also must be either (a) a conviction, regardless of sentence imposed, of domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence; or (b) a conviction for any offense if the person was sentenced to more than 90 days, excluding suspended sentences or time spent pursuant to an immigration hold. *FAQ*, Question 62.

Three "Non-Significant" Misdemeanor Convictions Not Arising from a Single Incident. A non-significant misdemeanor conviction must meet the federal definition of misdemeanor (punishable by imprisonment for more than five days but not more than one year) and not be a "significant" misdemeanor. While three misdemeanor convictions generally are a bar, multiple convictions that occur on the same day and arise out of the same act, omission, or scheme of misconduct are treated as just one offense for the purpose of the three misdemeanors. Minor traffic offenses such as driving without a license, and convictions of state immigration offenses, will not be considered. *FAQ*, Questions 63-64, 66. For example, a person who was convicted of two misdemeanors from the same incident, one misdemeanor from a different incident, and one misdemeanor driving without a license, does not have three misdemeanors for this purpose.

Note: Misdemeanor Possession or Under the Influence of a Controlled Substance. While immigration law usually punishes even minor drug offenses, a misdemeanor possession conviction alone is not a bar to eligibility for DACA, unless a sentence of 91 days or more was imposed. (However, it will make the person inadmissible and probably unable to get permanent residency in the future, should that option become available. For more on this issue see § N.8 *Controlled Substances* at www.ilrc.org/chart.)

Juvenile Adjudications and Expunged Convictions. Juvenile delinquency adjudications are not convictions and are not absolute bars to DACA. A juvenile convicted in adult court will have an adult conviction for DACA purposes. *FAQ*, Question 67. In contrast to the rest of immigration law, DACA recognizes to some extent a withdrawal of plea pursuant to "rehabilitative relief," such as expungement, deferred adjudication, etc. "Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted." *Ibid*.

Discretionary Denials, Allegations of Gang Participation. Even if the person avoids all of the above, CIS retains the right to deny the DACA application as a matter of discretion, based on the totality of the circumstances. *FAQ*, Question 62. Further, CIS will not grant DACA if it determines that the applicant poses a threat to national security or public safety. "Indicators that [someone] pose[s] such a threat include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States." *FAQ*, Question 65.

In particular, DACA will be denied based on even flimsy evidence of tenuous gang associations, and in many cases the applicant then is referred to removal proceedings. Any person who might be on a gang database or list, or with any record of gang associations, should get expert counseling before applying.

²³ See the "Criminal Convictions" section of the government's *DACA Frequently Asked Questions*, updated March 8, 2018, at <https://www.uscis.gov/archive/frequently-asked-questions#renewal%20of%20DACA>.

§ 17.13 “10-YEAR” CANCELLATION FOR NON-LPR’S

Undocumented persons or others who have lived in the U.S. for at least ten years, and are not deportable or inadmissible for crimes, might be able to apply for a green card as a defense to removal. INA 240A(b)(1), 8 USC § 1229b(b)(1).

A. QUICK TEST: Is the Defendant Eligible?

1. *Has the Defendant Lived in the U.S. for Ten Years, or Nearly That? See Part B for more information on calculating the ten-year period.*
2. *Does Defendant Have a U.S. Citizen or Lawful Permanent Resident Parent, Spouse, or Unmarried Child Under 21? If yes, note the name/s and relationship/s of qualifying relative/s:*
3. *If Time Permits, Get Brief Answers from the Defendant to These Questions Regarding Hardship; Use Additional Sheet as Needed. If You Don’t Have Much Time, Skip This Question.*
 - Do these relative/s suffer from any medical or psychological condition; if so, what is it?
 - Is there any other reason that the defendant’s deportation would cause these relative/s to suffer exceptional, unusual hardship if the defendant were deported?
4. *Crimes Disqualifiers. The Defendant Will Be Barred if He or She Comes Within Any of the Following Categories. Check any bars that apply and give date of conviction and code section.*

Convicted at any time of:

- An aggravated felony;
- An offense relating to a controlled substance (as defined under federal law);
- A firearms offense (as defined under federal law, excluding several California offenses (see § N. 12 Firearms at www.ilrc.org/chart);
- A crime involving moral turpitude (CIMT), *unless* it has a maximum possible sentence of *less* than one year, sentence imposed is six months or less, and the person committed just one CIMT (if the person committed the offense while under age 18 but was convicted as an adult, get help);
- Two or more offenses of any type with an aggregate sentence imposed of at least five years;
- Prostitution (sexual intercourse for a fee);
- High speed flight from checkpoint, some federal immigration offenses, federal failure to file as a sex offender; *or*
- Stalking, a crime of domestic violence, violation of a DV protective order prohibiting violent threats or repeat harassment, or a crime of child abuse, neglect or abandonment (but not if these convictions occurred before September 30, 1996).

Event within about the last ten years (see next page regarding exact time):

- Defendant engaged in prostitution, regardless of conviction;
- DHS has “reason to believe” that the person is or helped a drug trafficker;
- Defendant spent or will spend more than 180 days physically in jail as a penalty for a conviction;
- Defendant engaged in alien smuggling or lied under oath to get a visa or immigration benefit; or
- Defendant was a ‘habitual drunkard’ (e.g., multiple DUI’s) or convicted of gambling offenses.

B. ADDITIONAL FACTS About Cancellation of Removal for Non-LPRs

What Status Does the Client Get if She Is Granted Non-LPR Cancellation? An undocumented person (or an applicant of any status) who wins cancellation for non-LPRs will become a lawful permanent resident (LPR or “green card” holder). See 8 USC § 1229b(b)(1), INA § 240A(b)(1).

Do Many Applicants Actually Win? Only a limited number do. An applicant must convince the immigration judge that a U.S. citizen or LPR parent, spouse, or unmarried child under age 21 will suffer “exceptional and extremely unusual hardship” if the applicant is deported. Hardship to the applicant him- or herself does not count. This is a high standard and most grants are based upon a qualifying relative’s significant physical or mental health problems, although other situations also can support a grant.²⁴ (Compare this to LPR cancellation, which generally is easier to win.)

So, Is It Worthless? No! The person will get their day in court and some do win. Also, eligibility is a positive factor in winning release from ICE detention. Defenders should try hard to keep the defendant from being convicted of an offense that destroys eligibility for non-LPR cancellation.

What if the Person Was Granted Cancellation or Other Relief Before? The applicant must not have received a prior grant of cancellation, suspension of deportation, or § 212(c) relief, nor have a J-1 visa.

When Does the Ten-Year Period Run? The required ten years of continuous physical presence will stop when the person is served with a Notice to Appear (NTA) in immigration court, *unless* the NTA failed to state the date, time, and place of the hearing.²⁵ (It also stops with the commission of certain crimes, but most of these are absolute bars to relief in any event.) The person must also show good moral character for ten years up to the time the judge makes a final decision in the case. The exact ten-year periods can be complex in rare situations; seek expert advice if dates are close, or urge the family to do so.

What Are the Crimes Bars to Non-LPR Cancellation? Basically, the applicant cannot have been *convicted at any time* of an offense that is described in the crimes inadmissibility or deportability grounds.²⁶ See list at Part A, Question 4, “Convicted at any time.” This relief has a unique definition relating to crimes involving moral turpitude (CIMT): a single CIMT conviction is a bar unless a sentence of no more than six months was imposed, and the CIMT carries a *maximum possible sentence of less than one year*, e.g. carries a maximum six-month or 364-day sentence. (This BIA-created standard is slightly different from the CIMT “petty offense exception,” which requires a maximum possible sentence of one year or less.²⁷) States such as California, Washington, Nevada, and New Mexico define a misdemeanor to have a maximum 364 days, but other states have a maximum one year. There, a plea to “attempt” to commit a one-year misdemeanor may result in a maximum possible sentence of less than a year. Conviction of a deportable crime of domestic violence, stalking, or violation of certain provisions of a domestic violence protection order will disqualify an applicant, unless he or she qualifies for a domestic violence waiver; see § 17.11.

The applicant also must be able to establish good moral character for the last ten years. Significantly, the person must not have spent six months or more in jail as a result of one or more convictions during that time. See Part A.4 above, and see further discussion of good moral character at § 17.27.

²⁴ See, e.g., discussion of hardship in *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 (BIA 2001).

²⁵ See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018) and see practice advisory at www.nipnl.org.

²⁶ See 8 USC §§ 1182(a)(2), 1227(a)(2) [INA §§ 212(a)(2), 237(a)(2)].

²⁷ 8 USC § 1182(a)(2)(A). See *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).

Ninth Circuit Relief for Persons with Pre-April 1, 1997 Conviction(s). In proceedings arising within Ninth Circuit states, a person whose relevant convictions pre-date April 1, 1997 might qualify for a better form of relief, suspension of deportation, despite being deportable or inadmissible.²⁸ See § 17.14, below.

§ 17.14 SUSPENSION OF DEPORTATION FOR UNDOCUMENTED CLIENTS WITH OLDER CONVICTIONS

This relief might permit an undocumented person with old convictions—even old drug convictions—to become a lawful permanent resident. This is a defense under pre-1997 deportation proceedings that can be applied for in removal proceedings arising in the *Ninth Circuit Court of Appeals*; other circuit courts of appeals may not have considered the issue. For further discussion of this relief, see Brady et al., *Defending Immigrants in the Ninth Circuit*, § 11.4(B) (www.ilrc.org).

A. QUICK TEST: Is the Client Eligible?

1. *Are the client's deportable convictions all from before April 1, 1997? If the client was convicted of an aggravated felony, did the conviction occur before November 29, 1990? and*
2. *Since receiving the above conviction(s), has the client maintained good moral character?*

If so, the client may be able to apply for the former “suspension of deportation.” See discussion of good moral character at § 17.25.

B. ADDITIONAL FACTS About the Former Suspension of Deportation

Suspension of Deportation and Cancellation of Removal. Before April 1, 1997 an immigration judge had the discretion to “suspend the deportation” of certain undocumented persons who had resided illegally in the U.S. for several years. If the judge did grant suspension, the person could adjust to lawful permanent residence. This included “ten-year” suspension of deportation, where the person became deportable for a crime, but then had established ten years of good moral character immediately after. The person had to demonstrate exceptional hardship to himself, and/or to a USC or LPR family member. See former INA § 244(a)(2), 8 USC § 1254(a)(2).

As of April 1, 1997, Congress eliminated suspension of deportation and replaced it with cancellation of removal for non-permanent residents (see § 17.14). Many noncitizens are barred from cancellation because they are inadmissible or deportable for crimes, or they do not have a USC or LPR family member. However, the Ninth Circuit indicated that a noncitizen still may apply for suspension of deportation today in removal proceedings, if he was convicted of a deportable offense before April 1, 1997. The court used the same reliance analysis on eligibility for suspension that the U.S. Supreme Court used in considering the former § 212(c) relief, in *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853 (9th Cir. 2006), *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 935 (9th Cir. 2007).

Specific Convictions. Under the former ten-year suspension, a person who is deportable under one of the crime-related grounds, such as the moral turpitude, controlled substances, or aggravated felony grounds, must show ten years of continuous physical presence and good moral character immediately following the event that rendered him or her deportable. Former 8 USC § 1254(a)(2). Thus, even clients who have a serious conviction in the distant past may still be eligible for this form of suspension, if they are able to establish the required good moral character beginning after that. Because the last conviction that would qualify for relief would have happened on March 31, 1997, today's clients will have had the ten years to try to establish good moral character.

²⁸ See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006) and discussion in *Defending Immigrants in the Ninth Circuit*, § 11.4 (www.ilrc.org).

Conviction of an aggravated felony is a *permanent* bar to establishing good moral character if it occurred after November 29, 1990. Murder is a permanent bar to establishing good moral character in all cases. See *Lopez-Castellanos, supra* at 851, and see § 17.25 **Good Moral Character**, below.

§ 17.15 THE “T” VISA: VICTIMS OF ALIEN TRAFFICKERS

The “T” visa provides temporary and potentially permanent lawful status to victims of “a severe form of alien trafficking.” The person must be in the United States or at a port of entry because of the trafficking, and must show they would suffer “extreme hardship involving unusual and severe harm” if removed from the United States. It is important to note that a T visa applicant can be recruited after entering the country, the trafficking need not be the reason they initially came to the United States. A “T” visa applicant who is 18 years old or older must also show compliance with any reasonable law enforcement agency request for assistance in the investigation or prosecution of acts of trafficking. See INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T), and 8 CFR §§ 212.16, 214.11, and 245.23.

A. QUICK TEST: Is the Client Eligible?

1. *Has the Client Been a Victim of Labor Trafficking?*

Severe trafficking includes recruiting or obtaining persons for labor or services through the use of force, fraud, or coercion. 22 USC § 7102(8). This includes being promised a certain type of job, but the reality is something different, or being unable to leave the situation. It can also involve being paid in food or shelter instead of money or having to work without compensation to pay off the debt from the trip to the United States. Trafficking can occur in many sectors, such as a factories or sweatshops, the agricultural industry, domestic work, construction, or the restaurant industry.

2. *Or, Is the Client a Victim of Sex Trafficking?*

Severe trafficking also includes “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” See definition at 22 USC § 7102(9). If the person is under 18, he or she is still eligible for a T visa even if the sexual act was voluntary; if the person is over 18, he or she must show the sexual act was committed by force, fraud, or coercion. Sex trafficking may include work at strip clubs and brothels, spas and massage parlors, or with escort services.

3. *Is the Client a Parent, Spouse or Child of Someone Who Is Eligible for, or Has, a T Visa?*

Certain relatives of a trafficking victim may be eligible for immigration relief as a derivative of the case. See 8 CFR § 214.11(a), (o).

B. ADDITIONAL INFORMATION About T Visas

The “T” visa is a nonimmigrant visa that allows the noncitizen to work and live legally in the United States for four years. After three years in this status, the “T” visa-holder can apply to obtain lawful permanent residency (a “green card”). The person must comply with any reasonable request for assistance in the investigation or prosecution of trafficking, or be less than 18 years of age, and must show that if removed, he or she would suffer “extreme hardship involving unusual and severe harm.” 8 CFR § 214.11(b).

Other than the national security (terrorist, etc.) grounds, all grounds of inadmissibility, including criminal acts and convictions, are waivable for T visa applicants. Furthermore, trafficking victims are not subject to the public charge or unlawful presence grounds, if the unlawful presence was the result of the trafficking. There are two types of waivers available to T visa applicants. First, INA § 212(d)(13) provides a waiver if the applicant can show the inadmissibility was ‘caused by or incident’ to their victimization. This is the most generous waiver and should be sought if there is a connection with the trafficking. Next, a general, discretionary waiver is available pursuant to INA § 213(d)(3) where factors such as risk of harm to society, seriousness of immigration or criminal violations, and need to remain in

the United States will be considered. If the offense can be linked to the victimization, it might be helpful for defense counsel to put a statement explaining that in the record.

Resources to assist in filing the T visa application are available at:

- Coalition to Abolish Slavery & Trafficking (CAST) <http://www.castla.org/training>
- Freedom Network USA <https://freedomnetworkusa.org/>
- KIND (Kids in Need of Defense) <https://supportkind.org/>

See government materials at www.uscis.gov (“Humanitarian” category). Contact these or other non-profit organizations or bar associations to see if it may be possible to obtain pro bono assistance for your client. A large firm also might be willing to take on such a case.

§ 17.16 THE U VISA: CRIME VICTIM WHO MAY ASSIST PROSECUTION

U nonimmigrant status (the “U visa”) provides temporary lawful status and a path to permanent lawful status to survivors of certain crimes who are, or were, willing to cooperate in investigation or prosecution of the offense. See INA §§ 101(a)(15)(U), 245(m); 8 USC §§ 1101(a)(15)(U), 1255(m); 8 CFR §§ 212.17, 214.14, and 245.24.

A. QUICK TEST: Is the Client Eligible?

1. *Did the Person Suffer “Substantial Physical or Mental Abuse” as a Result of Having Been the Victim of Certain Types of Crimes, Committed in the United States?*

Physical or mental abuse means “injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim.” 8 CFR § 214.14(a)(8).

The abuse must be a result of certain offenses, outlined by regulation: “Qualifying crime or qualifying criminal activity includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States: Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; stalking, fraud in foreign labor contracting; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. The term ‘any similar activity’ refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.” See 8 CFR § 214.14(a)(9). Regarding offenses such as witness tampering or obstruction, see § 214.14(a)(14)(ii).

2. *Can the Person Obtain Certification from Authorities That She Has Been, Is Being, or Is Likely to Be Helpful to Federal, State, or Local Authorities Investigating or Prosecuting the Criminal Activity?*

The person must obtain a certificate completed by a certifying agency confirming that the person is helping officials already, or is willing and likely to be helpful in the future. A certifying agency is broadly defined to include “a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.” 8 CFR § 214.14(a). The certification may be made by an employee empowered to take such action.

In California, Penal Code § 679.10 (effective January 1, 2016) mandates California law enforcement, prosecutors, judges, and other parties designated by federal law to respond to all certification requests,

creates a rebuttable presumption of helpfulness, and requires them to keep records of the number of requests they have granted and denied.

If the victim is a child under the age of 16, then the parent, guardian or next friend of the child victim may possess the information and indicate the willingness to be helpful in lieu of the victim. 8 CFR § 214.14.

3. Or, Is the Client a Relative of a Victim Eligible for a U Visa?

A qualifying family member who was not a victim of the crime may be able to get a derivative U visa. If the victim eligible for a U visa is age 21 or older, the spouse or child(ren) may qualify. If the victim eligible for a U visa is under age 21, the spouse, child(ren), parents, and unmarried siblings under the age of 18 may qualify. 8 CFR § 214.14(f). At the time that the U visa recipient adjusts status to permanent residence, qualifying family members may be able to adjust. See Part B.

B. ADDITIONAL INFORMATION About U Visas

Procedure and Benefits. The U visa begins as an application for a temporary, non-immigrant visa that allows the noncitizen to work and live legally in the United States for four years. Qualifying family members (defined in Part A, above) also may apply for a U visa. See 8 CFR § 214.14(c) and resource materials cited below for information on application procedure for the U visa.

After three years in this status, U visa-holders can apply to obtain lawful permanent residency (a “green card”). Permanent residency will be granted for humanitarian, family unity or public interest purposes. The applicant must have maintained continuous presence in the United States for three years, and must not have unreasonably refused to participate in an investigation or prosecution. The spouse and children of the crime victim (and parents of a child victim) may be granted permanent residency if authorities consider it necessary to avoid extreme hardship. 8 CFR § 245.24.

There is a limit of 10,000 U visas granted a year. In recent years, this has created a lengthy backlog, which means current applicants will not have their cases adjudicated for many years. U visa applicants who are prima facie approvable will get placed on a waitlist, and if they are in the United States, they will receive deferred action. However, there is currently a multi-year wait even to be placed on the waitlist.

Crimes Bars. When applying for a U visa, all grounds of inadmissibility except the national security grounds are potentially waivable. INA § 212(d)(14), 8 USC § 1182(d)(14). However, in the case of U-visa applicants inadmissible on criminal grounds, the regulation states that discretionary waivers for those convicted of “violent and dangerous crimes” will only be granted “in extraordinary circumstances.” U visa holders seeking to adjust status through the U visa are not subject to the majority of inadmissibility grounds, including the crimes grounds. Nevertheless, the adjustment process is an incredibly discretionary process, and criminal and immigration violations can cause a denial as a matter of discretion.

Resources. See government information at www.uscis.gov, at “Humanitarian” and then “Victims of Trafficking and Other Crimes.” For more resources, go to <http://www.ilrc.org/info-on-immigration-law/u-visas>. Among other resources, this provides downloadable materials in English and Spanish to give to clients, including clients in detention. For a comprehensive manual, see Immigrant Legal Resource Center, *The U Visa: Obtaining Status for Immigrant Victims of Crime* (www.ilrc.org). Search online, or contact non-profit organizations, bar associations, or resource centers, to see if it may be possible to obtain pro bono assistance for your client, for example in Los Angeles by the Legal Aid Foundation of Los Angeles (www.lafla.org), in San Francisco by the Immigrant Center for Women and Children (www.icwclaw.org), and in San Diego by various organizations.

§ 17.17 THE “S” VISA: KEY INFORMANTS

Certain informants or witnesses who supply “critical reliable information” or other critical help relating to terrorism or organized crime may qualify for a non-immigrant “S” visa. Only 250 of these visas potentially can be distributed each year, and they are difficult to win. 8 USC §§ 1101(a)(15)(S), 1184(k), 8 CFR §§ 214.2(t), 236.4.

A. QUICK TEST: Is the Client Eligible?

1. *Does the client have critical, reliable information relating to terrorism or organized crime (even if the client herself has committed serious crimes)?*
2. *Is an interested federal or state law enforcement authority willing to support the application?*

If the answer to both questions is “yes,” consider the possibility of applying for an “S” Visa. Understand, however, that this may be a long process and a long shot, as the applications go through an extensive vetting procedure and few are available. See generally 8 CFR § 214.2(t).

B. ADDITIONAL INFORMATION About “S” Visas

Criteria. Regarding information about organized crime, an alien may receive an “S-5” non-immigrant visa if “in the exercise of discretion pursuant to an application on Form I-854 by an interested federal or state law enforcement authority (“LEA”), it is determined by the Commissioner that the alien: (i) Possesses critical reliable information concerning a criminal organization or enterprise; (ii) Is willing to supply, or has supplied, such information to federal or state LEA; and (iii) Is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise.” 8 CFR § 214.2(t)(i).

Regarding information about terrorism, an alien may receive an “S-6” non-immigrant visa if “it is determined by the Secretary of State and the Commissioner acting jointly, in the exercise of their discretion, pursuant to an application on Form I-854 by an interested federal LEA, that the alien: (i) Possesses critical reliable information concerning a terrorist organization, enterprise, or operation; (ii) Is willing to supply or has supplied such information to a federal LEA; (iii) Is in danger or has been placed in danger as a result of providing such information; and (iv) Is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956, 22 U.S.C. 2708(a).

Benefits. An “S” visa is a non-immigrant visa providing temporary lawful status, admission into the U.S. if needed, and employment authorization. Similar visas may be available to the recipient’s spouse, married or unmarried children, and parents. 8 CFR § 214.2(t)(3). All grounds of inadmissibility, except Nazis and genocide, can be waived. 8 USC § 1182(d)(1). Under some circumstances the S visa holder and family can adjust status to permanent residence. 8 CFR § 245.11.

A noncitizen who adjusted on an S visa is subject to strict removal conditions. 8 CFR §§ 236.4, 208.22(b). The person will be found deportable for one moral turpitude conviction if the offense was committed within 10 years after admission. 8 USC § 1227(a)(2)(A)(i). If you represent such a person, consult an expert before entering a plea.

§ 17.18 APPLYING FOR ASYLUM OR WITHHOLDING OF REMOVAL

An individual who establishes a fear of persecution if returned to the home country may gain potentially permanent lawful status if granted asylum (INA § 208, 8 USC § 1158) or temporary lawful status if granted withholding of removal (INA § 243(b)(3), 8 USC § 1231(b)(3)).

These applications are legally challenging and require expert immigration counsel. Criminal defense counsel can perform a vital service, however, by spotting possible cases. If your client is from a country where there are human rights abuses, you could ask if the person would like to have a *confidential* conversation about any worries they might have about returning. Note that it may take some time to gain the client's trust and get the whole story. In some areas, non-profits or bar association groups represent asylum applicants pro bono, and might be willing to interview a defendant. Or, an attorney or non-attorney staff person from your office who is fluent in the client's language might work with the client. The client's story also might assist in the criminal case: in some instances, evidence of persecution may help persuade a judge or prosecutor to be flexible. Note: if you are representing a person who *already* has been granted asylum or refugee status, see § 17.21 Refugees and Asylees.

A. QUICK TEST: Is the Client Eligible for Asylum or Withholding of Removal?

1. *Does the client reasonably fear that if returned to the home country, he or she will be persecuted based on race, religion, national origin, political views, or social group?*

As a non-expert, your threshold question is simply, are there human rights abuses in the country and might the client have a serious problem or subjective concern about harm? For defenders interested in more information: the case will depend upon the client's ability to prove that they come within the technical terms in the above question. The client must show possible persecution due to membership in one of the above groups. The client can prove the case by evidence of past persecution and/or fear of future persecution, and must support their story with some documentation of human rights abuses. A recent case limited asylum based upon domestic abuse and gang violence; get assistance with this.²⁹ Some persons have won asylum from Mexico based on threats from the drug cartels that the government is unable or unwilling to control.

2. *Can the client qualify for asylum, or just for withholding of removal?*

Asylum is preferable, because after one year the person can apply for lawful permanent residence. INA § 209(b), 8 USC § 1159(b). An asylum applicant (a) must submit the application within one year of entering the U.S., absent extenuating or changed circumstances, (b) faces stricter bars based upon criminal convictions, (c) can be denied asylum as a matter of discretion, and (d) only needs to prove a "well-founded fear" of persecution (interpreted as a 10% likelihood).

A person granted withholding receives permission to live and work in the U.S., but it can be revoked if country conditions change and it does not enable the person to apply for permanent residence. A withholding applicant (a) may apply at any time, (b) has somewhat less strict criminal bars, (c) cannot be denied withholding as a matter of discretion, if the person qualifies under the statute, and (d) must prove a "reasonable probability" of persecution (interpreted as more than a 50% likelihood).

B. ADDITIONAL INFORMATION: Crimes That Bar Eligibility

Conviction of a "Particularly Serious Crime": Aggravated Felony. Both asylum and withholding are barred if the person is convicted of a broadly defined "particularly serious crime" ("PSC"). Aggravated felonies are treated differently as PSC's in asylum than in withholding. For asylum purposes, any aggravated felony conviction, including, e.g. a nonviolent theft offense with a one year suspended sentence, automatically is a PSC and therefore a bar to asylum. 8 CFR 208.13(c)(2)(D). For withholding purposes, an aggravated felony is a PSC if the person was sentenced to at least five years in the aggregate

²⁹ See discussion of *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018) at, e.g., <https://cgrs.uchastings.edu/A-B-Action>

for one or more aggravated felonies. 8 USC § 1231(b)(3)(B)(iii). Without the five-year sentence, an aggravated felony conviction is not necessarily a PSC for withholding; it will be considered on a case-by-case basis (see next paragraph). For example, the Board of Immigration Appeals found that despite the fact that it was an aggravated felony, a federal conviction of alien smuggling was not a PSC for purposes of withholding when in that case there was no violence or serious injury, and a sentence of three months was imposed. But as an aggravated felony, it was a PSC for purposes of asylum. *Matter of L-S-*, 22 I&N Dec. 645 (BIA 1999).

Conviction of a PSC: Other Offenses. Other than the five-year sentence aggravated felony bar, determining whether an offense is a PSC is done on a case-by-case basis. The adjudicator may look beyond the record of conviction, at least to some extent. Factors include, e.g., whether the offense involved violence against people, the extent of injury, the length of sentence. See *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982), *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007). The Ninth Circuit held that the BIA is not permitted to decline to consider mental illness in this determination. *Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018). Generally, a misdemeanor that is not an aggravated felony is not a PSC. *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988).

The Attorney General created a very strong presumption that a conviction for drug trafficking is a PSC. There is a narrow exception for an immigrant who was peripherally involved in a transaction involving a small amount of drugs and money, where violence did not occur and minors were not affected. *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002). The Ninth Circuit held that this presumption applies only to convictions received on or after the date of publication of *Matter of Y-L*, which was May 5, 2002. *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 947 (9th Cir. 2007).

Based on the individual circumstances of the case, the Board of Immigration Appeals found the following convictions were not of PSCs: burglary with intent to commit theft of an unoccupied house (*Frentescu, supra*), and alien smuggling with a three-month sentence (an aggravated felony) (*Matter of L-S-*, 22 I&N Dec. 645,651 (BIA 1999)). The following were held to be PSCs: residential burglary with aggravating factors (*Matter of Garcia Garrocho*, 19 I&N Dec. 423 (BIA 1986)); robbery and assault with a deadly weapon (*Matter of Rodriguez-Coto*, 19 I&N Dec. 208 (BIA 1985), (*Matter of L-S-J-*, 21 I&N Dec. 973 (BIA 1997)), a nonconsensual sexual act involving threat with a knife (*Matter of N-A-M-, supra*), and possession of child pornography (*Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012)). The Ninth Circuit found that a conviction of mail fraud to defraud victims of two million dollars was a PSC. *Arbid v. Holder*, 700 F.3d 379 (9th Cir. 2012). The Ninth Circuit remanded a case to the BIA to provide more justification for its unpublished finding that driving under the influence is a PSC. *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011)(en banc), see Reinhardt, J, *concurring* at 1111-1112

Discretionary Denials of Asylum; “Dangerous and Violent” Offenses. An application for asylum can be denied as a matter of discretion for various reasons, including criminal convictions that are less serious than a PSC. In addition, absent extraordinary circumstances asylum will be denied as a matter of discretion if the applicant was convicted of a “violent or dangerous” offense. *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002). There is no more specific definition of this term, but wherever possible counsel should plead to an alternate offense that does not involve serious violence against persons. In discretionary findings, however, a judge is not limited to the record of conviction.

Additional Bars to Asylum and Withholding. Under 8 USC §§ 1158(b)(2)(A) and 1231(b)(3)(B), immigration authorities may deny asylum or withholding to an applicant based on the following: the applicant ordered or participated in the persecution of another person; there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the U.S.; there are reasonable grounds to believe that the alien is a danger to the security of the United States; or the applicant is inadmissible or removable for terrorist activities (see 8 USC §§ 1182(a)(3)(B)(i), 1227(a)(4)(B)).

§ 17.19 CONVENTION AGAINST TORTURE (CAT)

A. QUICK TEST: Is the Client Eligible for Relief under CAT?

1. Does the Client Fear That He or She Will Be Tortured if Returned to the Home Country?

The U.S. implemented the international Convention Against Torture (CAT), which prohibits a nation from sending a noncitizen to a country where he or she will be tortured. See 8 CFR §§ 208.16–208.17.

An applicant for CAT must establish that it is more likely than not that he or she will be tortured upon return to the home country. 8 CFR § 208.16(c). The definition of torture is severe pain, whether emotional or physical, intentionally inflicted upon a person for any of various reasons, such as to obtain information, punish, or coerce. 8 CFR § 208.18(a). There is no requirement that the torture be on account of the person’s race, religion, or other categories required for asylum or withholding. In fact, CAT was granted to an Iranian Christian who submitted extensive evidence that he would be tortured partly due to his U.S. conviction for drug trafficking. *Matter of G-A-*, 23 I&N 366 (BIA 2002) (en banc). But see *Matter of M-B-A-*, 23 I&N 474 (BIA 2002) (en banc) where this argument failed for a Nigerian who was held to have submitted insufficient documentary evidence that traffickers would be tortured. See also #4 below, regarding the limited relief available to applicants convicted of a particularly serious crime.

2. Is the Threat That Either the Government Itself Will Torture the Person, or That the Government Will Turn a Blind Eye to a Third Party Who Will Torture the Person?

According to the Ninth Circuit, either of these options will suffice. Under 8 CFR § 208.18(a)(1), the feared torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” This does not mean, however, that a government official must agree with or support the torture. It is enough that the official is aware of the practice and turns a “blind eye” to it, due to a lack of ability or will to intervene. *Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003) (informant’s reasonable fear that Chinese “snakehead” smugglers would torture him is sufficient for CAT, without proof that Chinese officials approve of the torture), disapproving *Matter of S-V-*, 22 I&N 1306 (BIA 2000) (although the guerrillas controlled a significant part of Colombia, torture by the guerilla forces did not qualify for protection under the CAT because the government did not support the torture).

3. Can the Person Document the Practice of Torture in the Home Country?

While legally an applicant’s consistent and credible testimony can be sufficient (8 CFR § 208.16(c)), in practice it will be crucial to present documentary evidence of the practice of torture of similarly situated persons, from e.g., human rights reports, news articles, scholarly articles, expert affidavits, etc.

4. What Is the Effect of Conviction of a Particularly Serious Crime (“PSC”)?

A conviction will not bar relief under the CAT, which is why the CAT is a good alternative when asylum or withholding is barred by a conviction. See § 17.19 **Asylum and Withholding**. However, a conviction may severely limit relief. There are two different forms of status under the CAT. A noncitizen who has not been convicted of a PSC and does not come within the other bars to withholding may seek CAT *withholding of removal*. The person will be released from detention and provided with employment authorization. 8 CFR § 208.16(b)(2). In contrast, a noncitizen who is convicted of a PSC may only apply for CAT *deferral of removal*. This person might not be released from immigration detention, and could be removed to a third country if one would accept him or her. 8 CFR § 208.17(a), (b). For CAT purposes, the definition of PSC includes one or more aggravated felony convictions for which an aggregate sentence of five years or more was imposed. 8 CFR § 208.17(a).

§ 17.20 DEFENDING ASYLEES AND REFUGEES

Asylees and refugees were granted lawful status because they showed that they would be persecuted if returned to the home country. They want to keep this lawful status. They also want to apply to adjust their status to lawful permanent residence. For more information on asylum, see § 17.19, *supra*, online resources, or manuals such as Immigrant Legal Resource Center, *Essentials of Asylum Law* (www.ilrc.org).

A. QUICK TEST: Can Client Keep Asylee/Refugee Status? Apply for Adjustment to LPR?

1. Confirm: Is the Defendant Really an Asylee or Refugee?

Photocopy any document. Note that some people may think they have asylee status when they only have a pending asylum application plus employment authorization. Did the person have an interview, and/or a hearing before a judge? What happened?

→ **KEEP DEFENDANT OUT OF REMOVAL PROCEEDINGS.** While the law is complex, assume that to stay out of removal proceedings refugees and asylees need to avoid a conviction of a “particularly serious crime,” and refugees also need to avoid a deportable conviction.

2. Is an Asylee Already, or About to Be, Convicted of a “Particularly Serious Crime”?

If “yes,” the person can be put in removal proceedings.

A particularly serious crime (PSC) includes conviction of any aggravated felony, or of any drug trafficking offense, or other offenses on a case-by-case basis (usually those involving threat or force against persons, and not a single misdemeanor). See next page.

3. Is a Refugee Already, or About to Be, Convicted of An Offense That Will Make Him or Her Deportable? YES/NO

If “yes,” it appears that the person can be put in removal proceedings.

4. List, or Attach Sheet with Prior Convictions and Current Charges That May Be Deportable Offenses or PSC’s. Include Code Section and Sentence.

→ **KEEP DEFENDANT ELIGIBLE FOR ADJUSTMENT OF STATUS.** A year after the person was admitted to the U.S. as a refugee or granted asylum in the U.S., she can apply for adjustment of status to a lawful permanent resident. To do this she must be admissible, or if inadmissible she must be eligible for a special waiver—meaning she should not come within Question 6 or 7, below. Qualifying for adjustment of status is a top priority; among other things, it is a defense to removal. See next page.

5. Is the Person Inadmissible? YES/NO

6. Does ICE Have “Reason to Believe” That She Ever Participated in Drug Trafficking?

If “yes,” she cannot get the waiver and cannot adjust status to LPR as a refugee or asylee. However, if she was not *convicted* for drug trafficking, and she is not otherwise convicted of a PSC (and, if a refugee, also is not deportable) she might be able to keep her asylee or refugee status.

7. Was the Person Convicted of a “Violent Or Dangerous” Offense?

If “yes,” the waiver of inadmissibility will not be granted *unless* she shows exceptional equities. See next page.

B. ADDITIONAL FACTS About Asylee And Refugee Status

1. How Does a Person Become an Asylee or Refugee?

A refugee is a person from a *country designated by the U.S.* who was granted refugee status after showing a reasonable fear of persecution in the home country due to race, religion, national origin, political opinion or social group. She was admitted into the U.S. as a refugee.

An asylee is a person who entered the U.S. from *any* country, legally or illegally, and was granted asylee status here after making the same showing of fear of persecution. The person may have made this showing to an asylum officer in an affirmative application, or to an immigration judge as a defense to removal. The person had to submit the application for asylum within one year of entering the U.S., unless there were extenuating circumstances.

2. How Long Can the Person Remain in That Status? What Puts Them in Removal Proceedings?

Asylee or refugee status remains good until it is terminated; it can last for years. Conviction of a “particularly serious crime” is a basis for termination of asylee status and institution of removal proceedings. The BIA held that refugees can be placed in removal proceedings for a deportable offense.³⁰ In some cases a change in conditions in the home country is a basis for termination of status.

3. What Is a Particularly Serious Crime (PSC)?

A PSC includes conviction of any aggravated felony, or of any drug trafficking offense (with the exception of a very small drug transaction in which the person was peripherally involved³¹). Other offenses are evaluated as PSC’s on a case-by-case basis depending on whether people were harmed/threatened, length of sentence, and other factors; in many cases the adjudicator may look beyond the record of conviction.³² Conviction of major mail fraud and of possession of child pornography have been held to be PSCs. Generally, a misdemeanor that is not an aggravated felony is not a PSC.³³ See further discussion in § 17.19 **Asylum and Withholding**, above.

4. In an Application to Adjust Status as an Asylee or Refugee, What Convictions Can Be Waived?

A year after either admission as a refugee or a grant of asylum, the person can apply to adjust status to lawful permanent residence. Even an asylee or refugee who is in removal proceedings and subject to termination of status can apply for adjustment, as a defense to removal. The adjustment applicant must be “admissible,” or if inadmissible must be eligible for and granted a discretionary, humanitarian waiver created for asylees and refugees, at INA § 209(c), 8 USC § 1159(c). This waiver can forgive *any* inadmissible crime, with two exceptions. First, it cannot waive inadmissibility based upon the government having “reason to believe” the person has participated in drug trafficking.³⁴ Second, the waiver will not be granted if the person was convicted of a “violent or dangerous” crime, unless the person shows “exceptional and extremely unusual hardship” or foreign policy concerns.³⁵ None of these terms has been specifically defined. In some cases medical hardship for family or applicant has been sufficient hardship for a waiver. Apart from those two exceptions, the waiver can forgive any offense, including an inadmissible conviction that also is an aggravated felony, for example for theft or fraud, or a non-trafficking drug offense.

³⁰ See 8 USC § 1158(c)(2)(B) (asylee), *Matter of D-K-*, 25 I&N 761 (BIA 2012) (refugee).

³¹ See *Matter of Y-L-*, 23 I.&N. Dec. 270 276-77 (AG 2002). Try to put such positive facts in the criminal record.

³² *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982).

³³ *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988) (absent extraordinary circumstances, misdemeanor is not PSC).

³⁴ 8 USC § 1182(a)(2)(C), INA § 212(a)(2)(C).

³⁵ See *Matter of Jean*, 23 I.&N. Dec. 373, 383-84 (A.G. 2002).

§ 17.21 TEMPORARY PROTECTED STATUS (TPS)

A. QUICK TEST: Is the Defendant Eligible?

Noncitizens from certain countries that have experienced a devastating natural disaster, civil war or other unstable circumstances may be able to obtain Temporary Protected Status (TPS).

For more information, see online resources or see *A Guide for Immigration Advocates* (www.ilrc.org).

1. Is the Client a National of a Country That the U.S. Has Designated for TPS?

In what country was the client born? _____

To see which countries currently are designated for TPS, go to <https://www.uscis.gov/humanitarian/temporary-protected-status>. If the person is not from one of the few designated countries, TPS is not an option. This country list can change at any time so it is important to consult the USCIS website; see most recent list as of July 2018 on the next page.

2. If YES: Did, or Can, the Client Meet the TPS Requirements for Nationals of His or Her Country, in Terms of Date of Entry into the U.S. and Date of Registration for TPS?

Required date of entry into U.S.: _____ Client's date of entry _____

Deadline for registration/re-registration: _____ Client's reg. date, if any _____

It may be difficult to tell what dates apply to the client by looking at the USCIS on-line materials. A nonprofit immigration agency or an immigration attorney can help with this. See next page.

3. Can the Client Avoid Convictions That Are Bars to Eligibility for TPS?

Try to avoid the following automatic disqualifiers. Circle if client has a prior or is charged with:

- ✓ Any felony conviction (an offense with a potential sentence of more than a year).³⁶
- ✓ Any two misdemeanor convictions (offenses with a potential sentence of a year or less).³⁷
- ✓ Conviction of an offense relating to a controlled substance.
- ✓ Immigration authorities have substantial evidence that the person ever has been or helped a drug trafficker, even if no conviction.
- ✓ Evidence that the person was a prostitute (sex act for a fee), even if no conviction.
- ✓ Conviction of a crime involving moral turpitude (CIMT), *unless* it comes within the petty offense or youthful offender exceptions.
 - Petty offense exception: client committed only one CIMT, which carries a potential sentence of a year or less, and a sentence of no more than six months was imposed
 - Youthful offender exception: client committed only one CIMT while under age of 18 and conviction and resulting jail ended at least five years ago.

B. ADDITIONAL FACTS About Temporary Protected Status (TPS)

1. What Is Temporary Protected Status? What Benefits Does the Client Get From It?

The Secretary of Homeland Security may designate Temporary Protected Status (TPS) for any foreign country encountering catastrophic events such as ongoing armed conflict, earthquake, flood, drought, or other extraordinary and temporary conditions.

³⁶ In California, a “wobbler” felony/misdemeanor conviction will be a misdemeanor for this purpose if it is designated as or reduced to a misdemeanor. See, e.g., *LaFarga v. INS*, 170 F.3d 1213 (9th Cir 1999).

³⁷ A conviction of an offense classed as an “infraction” or other offense that is less than a misdemeanor should not be considered a misdemeanor for this purpose.

Nationals of that country who are granted TPS will be protected from deportation and permitted to remain legally in the U.S. for a certain period of time, and will receive employment authorization.³⁸ TPS is usually granted for about a year, but it can be renewed multiple times as long as the country's designation continues. TPS is not permanent resident status (green card).

2. What Are the Requirements for Temporary Protected Status?

- National of a country that was designated for TPS;
- Continuous presence in U.S. since the date required for nationals of that country;
- Registered and/or re-registered on time, or eligible to late-register;
- Admissible (not inadmissible for crimes);
- Not convicted of a felony or two or more misdemeanors; and
- Not barred from “withholding of removal” (has not persecuted others, not convicted of “particularly serious crime”).

3. Which Countries Currently Are Designated for TPS?

The list changes frequently. To see which countries currently are designated for TPS and special requirements for each country's nationals, consult <https://www.uscis.gov/humanitarian/temporary-protected-status>. **As of July 2018: Somalia, South Sudan, Syria, and Yemen** were designated for TPS. Usually the designation is for a year at a time, when it is either extended or terminated. For as long as the designation is extended, eligible applicants can renew their TPS status.

4. What Are the “Physical Residence” and “Registration” Requirements?

When it announces the TPS designation of a country, the U.S. will set a date by which the nationals of the country must have resided in the U.S. in order to qualify. The U.S. also will set a deadline for nationals of that country to “register” (apply for TPS). If TPS is extended again past the first period, the person must re-register by a certain date. In some cases late registration is permitted. For example, where an eligible person did not apply because they had another pending immigration application, or for certain relatives of persons granted TPS. See <https://www.uscis.gov/humanitarian/temporary-protected-status>.

5. What Is the Downside and the Upside to Applying for TPS?

The downside is that an applicant for TPS is giving DHS her contact information and acknowledging she is here without lawful status. If a person's application for TPS is denied or the TPS designation of their country is terminated, they could be at risk of being placed in removal proceedings. The upside is that in some cases, TPS has resulted in lawful status for a few years to well over a decade, allowing the person to remain in the U.S. lawfully with employment authorization. TPS status, in some cases, can also help people who are eligible to seek permanent residence through a family member complete the process in the United States rather than have to return to their country of origin.

³⁸ INA § 244A, 8 USC § 1254a, added by IA90 § 302(b)(1).

§ 17.22 NACARA FOR NATIONALS OF EL SALVADOR, GUATEMALA, AND THE FORMER SOVIET BLOC

Certain nationals from El Salvador, Guatemala, or former Soviet bloc countries who applied for asylum or similar relief in the early 1990's are eligible to apply for lawful permanent resident status (a green card) under the 1997 Nicaraguan Adjustment and Central American Relief Act (NACARA). See 8 CFR § 240.60-65. They can apply for a special form of suspension or cancellation of removal now, under the more lenient suspension of deportation standards that were in effect before April 1, 1997. Persons who became deportable or inadmissible for a criminal offense more than ten years before applying for NACARA can apply under the lenient rules governing the former "ten-year" suspension (see § 17.15), except that an aggravated felony conviction is an absolute bar to NACARA. See 8 CFR §§ 240.60–61, 65. Family members of these persons also may be eligible to apply. For more information, go to www.uscis.gov and search for "NACARA eligibility" and other NACARA topics.

Specifically, the following persons may be eligible for NACARA. Salvadoran nationals are eligible if they (1) first entered the U.S. on or before September 19, 1990 and registered for benefits under the *ABC v. Thornburgh*, 60 F. Supp. 796 (N.D. Cal. 1991), settlement agreement on or before October 31, 1991 (either by submitting an *ABC* registration or by applying for temporary protected status (TPS)), unless apprehended at the time of entry after December 19, 1990, or (2) filed an application for asylum with the INS on or before April 1, 1990. Guatemalan nationals are eligible if they (1) first entered the U.S. on or before October 1, 1990 and registered for *ABC* benefits on or before December 31, 1991, unless apprehended at the time of entry after December 19, 1990, or (2) filed an application for asylum with the INS on or before April 1, 1990. Regarding the former Soviet Union, noncitizens are eligible if they entered the U.S. on or before December 31, 1990, applied for asylum on or before December 31, 1991, and at the time of application were nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia or any state of the former Yugoslavia.

§ 17.23 HRIFA RELIEF FOR HAITIANS AND DEPENDENTS

Before 2000, about 50,000 Haitian nationals in the U.S. were granted relief under HRIFA, the Haitian Refugee and Immigrant Fairness Act (1998). Today, some dependents of these HRIFA grantees still can apply for lawful permanent resident status (a green card). A person who is the spouse or unmarried child under 21 of a grantee may be eligible, as well as an unmarried son or daughter over age 21 who has lived in the U.S. since December 31, 1995. The applicant must be admissible, but waivers are available. See 8 CFR § 245.14(d), (e), and for more information go to www.uscis.gov and search for HRIFA. See also Temporary Protected Status at § 17.21, which more recently provided some relief to Haitians.

§ 17.24 THE AMNESTY PROGRAMS OF THE 1980'S AND FAMILY UNITY

In the 1980's and 1990's, a few million persons became lawful permanent residents through two amnesty programs under the 1986 IRCA. In the Legalization Program, persons who had lived in the U.S. from 1982 to 1986 applied first for lawful temporary residency, and then for lawful permanent residency. INA § 245A, 8 USC § 1255a; 8 CFR § 245a. In the Special Agricultural Worker (SAW) program, persons who had worked as farmworkers for certain time periods applied for lawful temporary residence, and automatically became lawful permanent residents as of December 1, 1989 or December 1, 1990. INA § 210, 8 USC § 1160; 8 CFR § 210.

Some spouses and children of amnesty recipients did not qualify for amnesty, but did qualify for the Family Unity program, as the spouse or the child under 21 years old (as of May 5, 1988) of a noncitizen legalized through amnesty, who entered the U.S. (and in case of a spouse, married) by May 5, 1988. See 8 CFR §§ 236.10-236.18. Family Unity provided temporary lawful status and work authorization, as a bridge until the recipient could immigrate through the relative who had become an LPR under amnesty. Today most people have moved on from these programs, but you may encounter some clients who either still are processing old amnesty applications, or still have Family Unity status.

QUICK TEST: Is the Client Still Processing an Amnesty Application?

1. *Does the client have, or believe he had, a "Lawful Temporary Resident" card?*
2. *Does the client believe he is participating in a class action suit arising from the Legalization and SAW programs of the 1980's?*

If the answer to either question is "yes," refer the client to immigration counsel. For information on the amnesty class actions, see, e.g., www.nationalimmigrationreform.org/Late%20Amnesty.html.

Goal: Try to avoid a plea to one felony or three misdemeanors (any offense), or an offense that will make the person inadmissible. These are bars to continuing in the Legalization program.

QUICK TEST: Does the Client Still Have Family Unity Status?

1. *Does the client have a current or recent Family Unity employment authorization card? Or, does the client state that he or she has Family Unity status?*
2. *Regardless of Family Unity, the client might be eligible for regular family immigration if the marriage still exists. Complete the Relief Questionnaire with this in mind.*

Photocopy the person's employment authorization card and consult with an immigration attorney. Consider the possibility of family immigration.

Goal: To avoid bars to Family Unity, try to avoid a plea to one felony or three misdemeanors, a "particularly serious crime" (see Withholding at § 17.19, below), or a deportable offense. If while a minor the person pled guilty to "an act of juvenile delinquency which if committed by an adult" would be a felony involving violence or the threat of physical force, Family Unity can be terminated. 8 CFR §§ 236.13, 236.18. Try to avoid an inadmissible conviction, or at least remain eligible for a waiver, in case family immigration is possible.

§ 17.25 VOLUNTARY DEPARTURE INSTEAD OF REMOVAL

Clients who are detained and must leave the United States may gain crucial benefits from leaving under a grant of voluntary departure rather than under a removal order. Leaving under voluntary departure may make it more likely that a client can return legally. In addition, it will make it less likely that a client who returns illegally will be federally prosecuted for illegal re-entry. Detained clients may need to advocate vigorously for themselves to get voluntary departure; see “Practice Tip for Clients” at the end of this section. A non-detained client should get expert advice before applying for voluntary departure.

The client may apply for a grant of voluntary departure from an immigration judge (8 CFR § 1240.26) or, if not in removal proceedings, from a DHS official (8 CFR § 240.25).

1. *Pre-Hearing Voluntary Departure: Aggravated Felony Bar*

If the client has no possible relief from, or defense against, removal, they may want to skip the full removal hearing and go home. This client should consider applying for “pre-hearing” voluntary departure. Authorities may grant voluntary departure “in lieu of being subject to [removal proceedings] or prior to the completion of such proceedings.”³⁹

To qualify, the person must be willing and able to depart the United States, and must not be deportable under the aggravated felony ground (8 USC § 1227(a)(2)(A)(iii) and 8 USC § 1101(a)(43)) or under the terrorist grounds (8 USC § 1227(a)(4)(B)). The person may also need to pay for transportation to the home country. Keep in mind that even a person who meets all of these requirements may be denied voluntary departure as a matter of discretion.

An aggravated felony may not be a bar for some immigrants. The voluntary departure regulation, created by DHS, bars persons who are “convicted of” an aggravated felony. However, the voluntary departure statute, created by Congress, only bars persons who are “deportable under” the aggravated felony ground.⁴⁰ The difference is that a person who has not been admitted to the United States, for example who entered without inspection, cannot be found “deportable” for a crime.⁴¹ Therefore, despite the regulation, a person who entered without inspection ought to be eligible for pre-hearing voluntary departure even with an aggravated felony conviction. In practical terms, however, a noncitizen would be denied voluntary departure by the immigration judge and have to appeal this argument to a federal court in order to receive it, likely while remaining in detention.

2. *Post-Hearing Voluntary Departure Has Several Requirements*

Voluntary departure may also benefit clients who will be able to apply for relief in removal proceedings (e.g., adjustment of status, cancellation, asylum or VAWA), or contest that they are deportable. They can apply for voluntary departure “in the alternative,” in case the immigration judge denies their primary application to stay in the United States. Whether a non-detained person should apply for voluntary departure in the alternative can be a complex question in immigration practice because there are harsh consequences for failing to leave if the application is granted. However, as a criminal defense attorney it is best to preserve the alternative for the client if possible.

To receive voluntary departure, the client must meet several requirements. Similar to pre-hearing voluntary departure, the person must not be deportable under the aggravated felony or terrorist grounds, and must be willing and able to depart voluntarily. In addition, the person must establish five years of good moral character, must establish at least one year of presence in the United States before removal proceedings were begun, and must post a bond.⁴²

³⁹ See INA § 240B(a)(1), 8 USC § 1229c(a)(1).

⁴⁰ Compare 8 CFR § 1240.26(b)(1)(i)(E) with 8 USC § 1229c(a)(1).

⁴¹ See INA § 237(a)(2), 8 USC § 1227(a)(2).

⁴² INA § 240B(b)(2), 8 USC § 1229c(a)(1), 8 CFR § 1240.26(b).

3. Advantages of Voluntary Departure Instead of Removal

There are several benefits to leaving the United States under voluntary departure. If the person is not in immigration detention, he or she may be granted a period of some months before leaving under voluntary departure. This will provide the person time to make arrangements to leave behind life in the United States. Detained persons benefit from voluntary departure as well.

A noncitizen who re-enters the United States illegally after being ordered removed has committed a federal felony. See 8 USC § 1326(b). This is a very commonly prosecuted federal felony, and sentences for the illegal re-entry commonly run to 30 months or more. In contrast, a first conviction for illegal re-entry not after removal is a federal misdemeanor with a maximum six-month sentence. 8 USC § 1325. In other words, if the client might end up trying to return illegally to the United States, obtaining voluntary departure rather than removal now may prevent them from spending years in federal prison later on.

Voluntary departure also is valuable because a person who is ordered removed cannot re-enter the United States legally for a period of 10 years, unless they obtain a discretionary waiver of inadmissibility. See INA § 212(a)(9)(A)(ii), (iii), 8 USC § 1182(a)(9)(A)(ii), (iii). Therefore someone who hopes to return, for example on a family visa, will benefit from not having been “removed,” but having left voluntarily.

Finally, voluntary departure allows the person to depart for any country that will permit them to enter, whereas removal is to a designated country.

4. Practice Tip for Clients: How to Get Voluntary Departure While in Detention

Immigration officers at detention facilities are authorized to grant pre-hearing voluntary departure.⁴³ Unfortunately, some officers commonly offer detainees the opportunity to sign a paper agreeing to “voluntary removal,” while leaving detainees with the impression that this is a “voluntary departure.” Voluntary removal qualifies as a “removal” (deportation) and carries none of the advantages of voluntary departure discussed above. The one advantage it carries is that they can get out of detention faster by just signing the paper, rather than fighting to get voluntary departure. While this advantage may be very tempting for detainees who wish to leave detention as soon as possible, they may bitterly regret the decision if they intend to return to the United States in the future.

The only sure way for motivated detainees to receive voluntary departure is to request it and refuse to sign anything else offered by DHS officials. The detainee must read any offered paper very carefully and get assistance from a lawyer or other advocate in evaluating the paper. The detained individual can also wait to see an immigration judge for a master calendar hearing—which could take a month or longer.

Since you, the criminal defense attorney, are likely to be the last lawyer a detainee ever sees, try to help the client to understand how to obtain voluntary departure, and why it may be important to consider this information before they come into contact with DHS officials.

⁴³ 8 CFR § 240.25

§ 17.26 ESTABLISHING “GOOD MORAL CHARACTER” (GMC)

A. Overview

Several forms of immigration relief, as well as naturalization to U.S. citizenship, require the applicant to establish that they have been a person of “good moral character” during a certain period of time leading up to making the application. This section will discuss good moral character (“GMC”). Bars to establishing GMC appear at INA § 101(f), 8 USC § 1101(f); see also 8 CFR § 316.10.

What Forms of Relief Require Good Moral Character? Applicants must establish that they have been a person of good moral character for the preceding five years, three years, or a “reasonable time” in order to apply for naturalization (see § 17.4); the preceding ten years to apply for cancellation of removal for non-lawful permanent residents (§ 17.14); the preceding seven or ten years for NACARA or the former suspension of deportation (§§ 17.15, 17.23), the preceding three years or some reasonable period to apply for relief under VAWA (§ 17.8); or the preceding five years to apply for voluntary departure *after* removal proceedings (§ 17.26).

Immigration benefits that do not require good moral character include family immigration; adjustment of status; asylum, withholding and the Convention Against Torture; Temporary Protected Status; LPR cancellation; the former § 212(c) relief; Special Immigrant Juvenile status; DACA; the T, U, and S visas; and voluntary departure *before* removal proceedings are concluded.

What Is the Difference Between Statutory Bars to, and Discretionary Findings of, GMC? The immigration statute defines good moral character in the negative, by setting out factors that will bar a finding, rather than setting out factors that establish good moral character. See list at 8 USC § 1101(f), discussed below. The task of criminal defense counsel is to keep the client from coming within one of these statutory bars. That is the focus of these materials.

Note, however, that if you and the client succeed in avoiding the statutory bars, the client still has a second job: they will need to convince the immigration judge to make a discretionary, affirmative finding that they actually were of good moral character during the period. In that determination, the judge must consider all positive factors relevant to the evaluation of the person’s character, as well as negative factors (including criminal history and underlying facts). *Matter of Sanchez-Linn*, 20 I&N Dec. 362, 365 (BIA 1991). In practice, positive statements by probation officers, sentencing judge, or even defense counsel may be quite helpful in winning a discretionary case.

Calculating the Time for Which Good Moral Character Must Be Established. Good moral character need only be established for a certain period of time for each remedy, e.g. the preceding five years for naturalization. Usually one counts backwards from the date of filing the application. A new period of GMC starts the day after the event that is a bar. If a conviction is a bar, the period starts the day after commission of the offense, not conviction.⁴⁴

Example: Elsa pled guilty on January 14, 2013, to an allegation that she committed a moral turpitude offense on January 1, 2013. The conviction made her inadmissible and was a bar to establishing good moral character. She potentially may establish five years of good moral character starting on January 2, 2018, five years after the date she committed the offense. At that time, even if the conviction still exists and she still is inadmissible, she will not be statutorily barred from establishing good moral character. (She still will need to persuade the judge to find as a matter of discretion that she actually showed good moral character.)

⁴⁴ See, e.g., *Matter of Awaijane*, 14 I&N Dec. 117 (BIA 1972), 8 CFR § 316.10(b)(2).

B. Statutory Bars to Establishing Good Moral Character

Bars Based on Inadmissibility Grounds. Some of the bars to establishing good moral character reference crimes grounds of inadmissibility.⁴⁵ A person is barred who is described in these grounds:

- crimes involving moral turpitude (except for an offense that comes within the petty offense or youthful offender exception);
- conviction or admission of a drug offense (except for a single conviction of simple possession of 30 grams or less of marijuana);
- immigration authorities' "reason to believe" the person is a drug trafficker;
- total of five years' sentence to confinement imposed for two or more convictions;
- engaging in prostitution (sexual intercourse for a fee) or commercialized vice;
- alien smuggling, and
- polygamy.

Bars Unique to the Good Moral Character Statute. Other bars to establishing GMC don't refer to inadmissibility grounds, and only appear at 8 USC § 1101(f), parts (4)-(7). The bars apply to a person:

- whose income is derived principally from illegal gambling, or who has been convicted of two or more gambling offenses during such period;
- who has given false testimony to obtain any benefits under this chapter;
- who has during the GMC period been confined as a result of conviction to a penal institution for an aggregate period of 180 days or more, regardless when the offense was committed;

The bar based on 180 days' confinement refers to *actual* time served in jail. This is different from the definition of sentence imposed ("term of imprisonment") at 8 USC § 1101(a)(48)(B). This does not count suspended sentences of any kind. If a one-year sentence is imposed but the person is released for any reason after 170 days, the person has not been confined for 180 days. The nature of the offense does not matter, and it does not matter when the offense(s) were committed, as long as the time in jail occurs during the GMC period.⁴⁶ The confinement must be "as a result of a conviction" under the immigration definition, e.g. not as a result of a delinquency disposition. The 180 days does not include pre-sentencing detention *unless* that is claimed as credit for time served. One defense strategy to avoid the 180-day (or other sentencing) consequence is to put off the sentencing hearing until the person has served some time in custody, and then bargain to waive credit for the time served in exchange for a shorter "sentence."

Permanent Bars: Aggravated Felony After November 29, 1990, and Murder. A conviction of murder at any time, and a conviction of an aggravated felony after November 29, 1990, will permanently bar a finding of GMC.⁴⁷ For example, an LPR—including a military veteran—who was convicted of an aggravated felony in 1991 never will be permitted to naturalize, because they never will be able to establish good moral character. Some additional permanent bars to establishing good moral character apply only to naturalization, for example, desertion from military duty. See § 17.4.

Other Bars. Federal regulation and instructions pertaining to naturalization (which might also be considered in other applications) provide that, absent extenuating circumstances, failure to support dependents, having an extramarital affair that destroys a marriage, or "committing unlawful acts" that adversely reflect on his character, may bar good moral character. Being on *probation or parole* during the GMC period might or might not prevent a finding of GMC. The person must not be on probation at the time of a naturalization interview. See 8 CFR § 316.10(b), (c) and see § 17.4, above.

⁴⁵ 8 USC § 1101(f)(3), referencing inadmissibility grounds at 8 USC § 1182(a)(2), (6)(E), (9)(A).

⁴⁶ See, e.g., *Matter of Piroglu*, 17 I&N Dec. 578, 580 (BIA 1980).

⁴⁷ 8 USC § 1101(f)(8); 8 CFR § 316.10(b)(1)(ii); *U.S. v. Hovsepien*, 359 F.3d 1144 (9th Cir. 2004) (*en banc*).

**§ 17.27 Eligibility for Immigration Relief Despite Criminal Record,
Including Ninth Circuit-Only Rulesⁱ**

| RELIEF | AGG FELONY | DEPORTABLE/ INADMISSIBLE CRIME | STOP TIME RULE and OTHER TIME REQUIREMENTS |
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| <p align="center">LPR CANCELLATION For Long-Time Lawful Permanent Residents INA § 240A(a), 8 USC § 1129b(a)</p> | <p align="center">AUTOMATIC BAR</p> | <p align="center">NOT A BAR</p> | <p>7 YRS RESIDENCE since admission in any status; periods of unlawful status count.ⁱⁱ Clock stops at whichever comes first: being served with a qualifying NTAⁱⁱⁱ or committing an offense referred to in 212(a)(2) that renders the person inadmissible under 212(a)(2) or deportable under 237(a)(2). Argue that if proceedings are brought under 237, the offense must be referred to in 212(a)(2) and cause <i>deportability</i> under 237(a)(2).^{iv} 9th Cir: Conviction before 4/1/97 does <i>not</i> stop clock.^v</p> <hr/> <p>5 YRS LPR STATUS. Clock stops only with final decision in removal case.^{vi}</p> |
| <p align="center">§ 212(c) RELIEF For Long-Time Lawful Permanent Residents with pre- 1997 Convictions Former INA § 212(c), 8 USC § 1182(c)</p> | <p>Pre-4/24/96 agg felony conviction is not a bar to waiving DEPORTATION charge if the conviction also would cause inadmissibility; see <i>Judulang v. Holder</i>^{vii} Arguably, a pre-4/1/97 agg felony conviction is not a bar to waiving inadmissibility, e.g. in an application for adjustment or admission.^{viii} An agg felony with 5 yrs served is a BAR to 212(c) unless the plea was before 11/29/90.^{ix}</p> | <p>DEPORT. CHARGE Not a bar if convicted before 4/24/96, or in some cases before 4/1/97^x FIREARMS deport ground should be waivable if conviction also would cause inadmissibility^{xi} INADMISSIBILITY (apply for adjustment or admission) Not a bar if convicted before 4/1/97</p> | <p>NEED 7 YEARS LPR STATUS AT TIME OF APPLICATION; But don't need 7 yrs before conviction or before 4/1/97 WON'T WAIVE CONVICTIONS RECEIVED AFTER 4/1/97, or in many cases 4/24/96; Can be applied for with § 212(h) or an adjustment application, but not with cancellation</p> |
| <p align="center">§ 212(h) WAIVES INADMISSIBILITY^{xii} for: Moral turpitude; prostitution; possession of 30 gms or less marijuana; & 2 or more convictions w/ 5 yrs aggregate sentence imposed INA § 212(h), 8 USC § 1182(h)</p> | <p>If the 212(h)-type conviction (CIMT, prostitution, etc.) <i>also</i> is an aggravated felony, it still can be waived unless the LPR bar applies. LPR Bar: This bar applies only to persons who previously were <i>admitted at the border as LPRs</i> (including admission after consular processing); it is not triggered simply by adjustment of status to LPR.^{xiii} Some but</p> | <p>§ 212(h) waives inadmiss. grounds, listed to the left. BIA only permits use at the border, in consular processing, or with adjustment; does not permit nunc pro tunc application as a defense to a deportation charge (at least to post-6.30.13</p> | <p>NO STOP-TIME RULE UNLESS LPR BAR APPLIES <i>IF</i> LPR bar applies because of a prior admission at the border as an LPR (see aggravated felony discussion to the left): Then the applicant must have acquired 7 years' lawful continuous residence before NTA was filed.</p> |

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| | not all travel after adjustment results in a new “admission” at the border. ^{xiv} If the LPR bar applies, § 212(h) is barred if the AF conviction occurred <i>after</i> the admission at the border as an LPR. | convictions). ^{xv} Very tough standard for discretionary grant of § 212(h) if a “dangerous or violent” offense. ^{xvi} | |
| RELIEF | AGG FELONY | DEPORTABLE/ INADMISSIBLE CRIME | STOP TIME RULE and OTHER TIME REQUIREMENTS |
| ADJUST or RE- ADJUST STATUS TO LPR Based on family or employment visa INA § 245(a), (i) 8 USC § 1255(a), (i) | Not a <i>per se</i> bar, because there is no AF inadmissibility ground; but see agg felony bar to § 212(h) for LPR’s | Must be admissible or if inadmissible must qualify for a waiver. ^{xvii} Could be denied for conviction of a “dangerous or violent” offense even if the person is admissible ^{xviii} | NONE, but see 7 yr requirement for § 212(h) for some LPR’s |
| NON-LPR CANCELLATION INA § 240A(b)(1) 8 USC § 1229b(b)(1) | AUTOMATIC BAR | Barred by conviction of offense described in crimes deportability or inadmissibility grounds, ^{xix} but special rule for CIMTs ^{xx} | Must have ten years’ physical presence and good moral character ^{xxi} ; show extraordinary hardship to USC or LPR parent, spouse or child. |
| Ninth Circuit only- FORMER 10-YEAR SUSPENSION Former INA § 244(a)(2), 8 USC § 1254(a)(2)^{xxii} | Aggravated felony is not a bar if conviction was before 11/29/90 ^{xxiii} | Conviction before 4/1/97 can be waived | Good for undocumented or documented persons. Only waives pleas from before 4/1/97; need 10 years’ good moral character following conviction |
| ASYLUM Based on fear of persecution INA § 208 8 USC § 1154 | AUTOMATIC BAR | BARRED by “particularly serious crime.” ^{xxiv} Very tough to win if convicted of a “dangerous or violent” crime ^{xxv} | Must show likelihood of persecution; Must apply within one year of reaching U.S., unless changed or exigent circumstances |
| ADJUST to LPR for ASYLEE OR REFUGEE Waiver at INA § 209(c), 8 USC § 1159(c) | Not a <i>per se</i> bar, because no agg fel ground of inadmissibility | § 209(c) waives any inadmissibility ground except “reason to believe” trafficking, but see tough standard, <i>supra</i> , if “dangerous or violent” crime | Can apply within one year of admission as refugee or grant of asylee status, but in reality, greater wait |
| WITHHOLDING INA § 241(b)(3), 8 USC § 1231(b)(3) | BARRED only if total sentence of five years or more imposed for one or more AF’s | Barred by conviction of “particularly serious crime,” includes almost any drug trafficking ^{xxvi} | Must show clear probability of persecution; No time requirement |

| RELIEF | AGG FELONY | DEPORTABLE/ INADMISSIBLE CRIME | STOP TIME RULE and OTHER TIME REQUIREMENTS |
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| CONVENTION AGAINST TORTURE ^{xxvii} | AGG FELONY NOT A BAR | OTHER GROUNDS NOT A BAR | Must show likely to be tortured by gov't or groups it will not control; No time requirements |
| TEMPORARY PROTECTED STATUS (TPS) INA § 244A, 8 USC § 1254a | AGG FELONY is not technically a bar | INADMISSIBLE; or convicted of two misdos or one felony or a particularly serious crime. | Must be national of a country declared TPS, and have been present in U.S. and registered for TPS as of specific dates. Go to www.uscis.gov to see what countries currently are TPS and what dates apply. |
| VOLUNTARY DEPARTURE INA § 240B(a)(1) 8 USC 1229c(a)(1) | AGG FELONY IS A BAR (but question whether AF conviction should bar an EWI applicant for pre-hearing voluntary departure) ^{xxviii} | No other bars to <i>pre-hearing</i> voluntary departure Post-hearing VD requires 5 years good moral character | Post-hearing voluntary departure requires one year presence in U.S. and five years good moral character |
| NATURALIZATION (Affirmative or with Request to Terminate Removal Proceedings) | AGG FELONY IS A BAR UNLESS CONVICTION IS BEFORE 11/29/90 ^{xxix} | DEPORTABLE applicants may be referred to removal proceedings | Requires certain period (e.g., three or five years) of good moral character. GMC bars includes several crimes-grounds of inadmissibility ^{xxx} |
| IS THE PERSON A U.S. CITIZEN ALREADY? Derived or acquired citizenship | If the client answers yes to either of the following two threshold questions, investigate further. ^{xxxi} She <i>might</i> have become a U.S. citizen automatically, without knowing it. 1. At the time of her birth, did she have a parent or grandparent who was a U.S. citizen? OR 2. Did the following two events happen, in either order, before her 18 th birthday? She became an LPR, and a parent with custody of her naturalized to U.S. citizenship. | | |
| VAWA Cancellation ^{xxxii} | VAWA is for victims of abuse by a USC or LPR spouse or parent. VAWA cancellation is barred if inadmissible or deportable for crimes; also need 3 yrs good moral character. | | |
| VAWA Self-Petition ^{xxxiii} | Good moral character is required for I-360. Section 212(h) waiver can cure bar to GMC where offense is related to abuse. Adjustment requires admissibility or waiver to cure inadmissibility. | | |
| Domestic Violence Deportability Waiver for Victims ^{xxxiv} | Waiver of deportability for persons convicted of DV offense who primarily are DV victims. | | |
| Special Immigrant Juvenile ^{xxxv} | Minor in proceedings with jurisdiction over juveniles, whom court won't return to parent/s due to abuse, neglect, or abandonment can apply to adjust to LPR. Adjustment requires admissibility; some waivers available, but none for "reason to believe" trafficking or adult convictions. | | |
| T Visa ^{xxxvi} | Victim/witness of "severe alien trafficking" (but not if person also becomes trafficker) | | |
| U Visa ^{xxxvii} | Victim/witness of certain types of crime (assault, DV-type offenses, etc.). For T and U Visas, all convictions, including aggravated felonies, are potentially waivable. | | |

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| DACA: Deferred Action for Childhood Arrivals | Temporary work authorization and protection against removal. Seek online updates as to how and whether DACA will continue under the Trump administration. Eligibility: 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. Must have pursued or be now pursuing education or military. Crimes bars are one felony, three misdemeanors from separate incidents, or one “significant” misdemeanor. Online sources provide info and assistance. ^{xxxviii} |
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ⁱ This chart was prepared by Katherine Brady of the Immigrant Legal Resource Center and updated in 2018 by ILRC staff. 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* (2017) and ILRC, *Remedies and Strategies for Permanent Resident Clients* (2017), available at www.ilrc.org/publications.

ⁱⁱ This includes, e.g., admission on a tourist visa followed by years of unlawful residence. Where there was no actual admission at the border, the “admission” clock can start with adjustment of status.

ⁱⁱⁱ 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 ought to apply to LPR cancellation as well. See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018) and Advisory at www.nipnl.org.

^{iv} An LPR in removal proceedings charged with being deportable is not subject to the grounds of inadmissibility and never can be “rendered” inadmissible. Therefore, the seven-year clock will not stop unless the offense is referred to in 8 USC § 1182(a)(2) and renders the person *deportable* under 8 USC § 1227(a)(2) or (3). Some immigration judges have accepted this argument. The Fifth Circuit rejected it in *Calix v. Lynch*, 784 F.3d 1000 (5th Cir. 2015) while the Ninth Circuit upheld it in *Nguyen v. Sessions* (9th Cir. August 23, 2018).

^v *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).

^{vi} Time continues to accrue until the decision is administratively final (BIA appeal waived or exhausted) or, where deportability was contested, through federal court appeal.

^{vii} Section 212(c) was eliminated in the 1990’s, 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>.

^{viii} 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, § 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, etc., that occurred during that 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).

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

^x A charge of deportability based upon conviction by plea taken between April 24, 1996 and April 1, 1997 comes under the AEDPA rules governing § 212(c) for that period. Deportation grounds that cannot be waived under AEDPA § 212(c) 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. In addition, AEDPA § 212(c) will not waive conviction of two moral turpitude offenses, *both* of

which carry a potential sentence of a year or more. AEDPA did not limit *inadmissibility* grounds that can be waived under § 212(c), however.

^{xi} The firearms deportation ground was treated like the aggravated felony deportation ground, and so the firearms ground may benefit under the reasoning of *Judulang*. Authorities had held that deportability based on the firearms ground cannot be waived under § 212(c), because there is no sufficiently analogous inadmissibility ground. Similar to *Blake*, this problem can be averted by applying for adjustment of status so that the applicant is attempting to waive a ground of inadmissibility (e.g., if the firearms offense also is a crime involving moral turpitude) and not deportability. See, e.g., *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993). Now, a charge of deportability under the firearms ground also might be waived under § 212(c), if the conviction also would cause inadmissibility.

^{xii} For more information in general see Brady, “Update on § 212(h) Strategies” (2011) at www.ilrc.org/crimes.

^{xiii} The BIA agreed with this rule in *Matter of J-H-J*, 26 I&N Dec. 563 (BIA 2015), withdrawing *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012) and *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), after several federal courts imposed the rule. See *Medina-Rosales v. Holder*, 778 F.3d 1140 (10th Cir. 2015); *Husic v. Holder*, 776 F.3d 59 (2d Cir. 2015); *Stanovsek v. Holder*, 768 F.3d 515 (6th Cir. 2014); *Negrete-Ramirez v. Holder*, 741 F.3d 1047 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013); *Leiba v. Holder*, 699 F.3d 346 (4th Cir. 2012); *Hanif v. Att’y Gen. of U.S.*, 694 F.3d 479 (3d Cir. 2012); *Lanier v. U.S. Att’y Gen.*, 631 F.3d 1363 (11th Cir. 2011); *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008).

^{xiv} Permanent residents who adjust status, leave the U.S., and then return could be held to be seeking a new “admission” if they come within an exception listed at 8 USC § 1101(a)(13)(C). If they did come within the exception but (mistakenly) were not challenged and then “admitted” at the border, arguably they have not actually made the kind of admission that triggers this bar.

^{xv} *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), overruling cases such as *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980). While federal courts have deferred to *Rivas*, advocates can argue that at least it 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 rule)

^{xvi} 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 (A.G. 2002), similar standard for asylum and asylee/refugee adjustment.

^{xvii} An applicant who is deportable still may apply for adjustment (or “re-adjustment”) of status, if she or he is not inadmissible. *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992). Or, a deportable *and* inadmissible applicant may apply if she or he is eligible for a waiver of inadmissibility. See, e.g., adjustment with a § 212(c) waiver discussed in *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) (waiver of an offense that also is an aggravated felony in connection with adjustment does not conflict with the holding in *Matter of Blake*, *supra*); *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).

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

^{xix} See 8 USC §§ 1182(a)(2), 1227(a)(2); 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 she has 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).

^{xx} The Board 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 a 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). See discussion of the CIMT issue in Brady, “*Matter of Almanza-Arenas*: Defense Strategies” at www.ilrc.org/crimes.

^{xxi} See 8 USC § 1101(f), INA § 101(f) for statutory bars to establishing good moral character. These include the inadmissibility grounds relating to drugs, prostitution, moral turpitude (unless it comes within the petty offense or youthful offender exceptions), and two convictions of any type of offense with a 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. See § 17.26 for more information.

^{xxii} 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 from before 4/1/97, the date the former suspension was eliminated. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006). Because good moral character is required, the person cannot have an aggravated felony conviction from on or after 11/29/90. See discussion in *Defending Immigrants in the Ninth Circuit*, § 11.4 (2011, www.ilrc.org).

^{xxiii} 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*.

^{xxiv} 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. See discussion in *Defending Immigrants in the Ninth Circuit*, §§ 11.14, 11.15 (2011, www.ilrc.org). In asylum, but not in withholding, an aggravated felony is automatically a particularly serious crime.

^{xxv} See *Matter of Jean, supra*.

^{xxvi} 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. See discussion in *Defending Immigrants in the Ninth Circuit*, §§ 11.14, 11.15 (2011, www.ilrc.org). 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).

^{xxvii} See 8 CFR §§ 208.16–208.18.

^{xxviii} 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. 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*. Compare INA § 240B(a)(1), 8 USC § 1229c(a)(1) with 8 CFR § 1240.26(b)(1)(i)(E), and see discussion in *Defending Immigrants in the Ninth Circuit*, § 11.22 (2011 www.ilrc.org).

^{xxix} An aggravated felony conviction on or after 11/29/90 is a permanent bar to good moral character. See IA90 (Immigration Act of 1990) § 509(a).

^{xxx} See IA90 (Immigration Act of 1990) § 509(a).

^{xxxi} See ILRC, *Acquisition and Derivation Quick Reference Charts* (2018) at <https://www.ilrc.org/acquisition-derivation-quick-reference-charts>.

^{xxxii} VAWA cancellation is at INA § 240A(b)(2), 8 USC § 1229b(b)(2). For further information on self-petitioning and cancellation, see <https://www.ilrc.org/u-visa-t-visa-vawa> and see Abriel & Kinoshita, *The VAWA Manual: Immigration Relief for Abused Immigrants* (2017) (www.ilrc.org/publications).

^{xxxiii} See VAWA information, *supra*.

^{xxxiv} A person who is the primary victim of domestic violence in the relationship but who was found guilty of domestic violence may qualify for a waiver of the domestic violence deportation ground under INA § 237(a)(7), 8 USC § 1227(a)(7).

^{xxxv} See information and resources on special immigrant juvenile status at www.ilrc.org under remedies for children and youth, and see *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth* (www.ilrc.org).

^{xxxvi} INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T). For information on T visas, see Lee & Parker, *Representing Survivors of Human Trafficking* (ILRC 2011) at www.ilrc.org, and several websites including www.uscis.gov.

^{xxxvii} INA § 101(a)(15)(U), 8 USC § 1101(a)(15)(U). See information at www.ilrc.org/immigration-law/vawa-and-u-visas.php and see *The U Visa: Obtaining Status for Victims of Crime* (www.ilrc.org).

^{xxxviii} 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.