



Federal Bar
Association

IMMIGRATION LAW CONFERENCE

May 17–18, 2019

AT&T Conference Center • Austin, TX

REMOVABILITY AND RELIEF: A BROAD OVERVIEW

Moderator:

Lauren Anselowitz, Harlan York and Associates - Newark, NJ

Speakers:

James Rust, Assistant Chief Counsel - Arlington, VA

Ginger Jacobs, Jacobs & Schlesinger - San Diego, CA

Carmen Boykin, Boykin Law Firm - Alexandria, VA



Federal Bar
Association

Overview - Grounds of Removal

INA § 240(a)(2): Inadmissibility vs. Deportability

- ▶ “An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a)”

INA § 240(a)(2): Inadmissibility vs. Deportability

▶ § 212(a)

- ▶ Arriving Aliens
- ▶ Aliens present without admission or parole

▶ § 237(a)

- ▶ Aliens previously admitted to the United States

Burdens of Proof:

- ▶ **Deportable Aliens charged in § 237:**

- ▶ Government must prove by clear and convincing evidence that the respondent is deportable as charged.
INA § 240(c)(3); 8 C.F.R. § 1240.8(a)

- ▶ **Arriving aliens charged in § 212:**

- ▶ Respondent must prove he or she is “clearly and beyond a doubt” entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2)(A);
8 C.F.R. § 1240.8(b)

Burdens of Proof:

- ▶ **Aliens present in the US without being admitted or paroled charged in § 212:**
 - ▶ 1. Government has initial burden to establish alienage of the respondent
 - ▶ 2. Once alienage is established, burden shifts to Respondent to demonstrate:
 - ▶ That he or she is clearly and beyond a doubt entitled to be admitted to the US and is not inadmissible as charged OR
 - ▶ By clear and convincing evidence that he or she is lawfully in the U.S. pursuant to a prior admission
- ▶ INA § 240(c)(2); 8 C.F.R. § 1240.8(c)

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(2)(A)(i)(I): Conviction for a “crime involving moral turpitude”**
- ▶ Note exception for single conviction INA § 212(a)(2)(A)(ii):
 - ▶ Alien under 18 when crime committed, and committed more than 5 years before application for visa or admission
OR
 - ▶ Maximum possible penalty didn’t exceed imprisonment for one year, AND alien not sentenced to more than 6 months.

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(2)(A)(i)(II): A controlled substance violation**
 - ▶ Must relate to a federally controlled substance as defined at 21 USC § 802
 - ▶ Note that unlike the corresponding charge in § 237, there is NO exception for small amounts of marijuana in § 212

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(2)(B): Multiple convictions**
 - ▶ Alien convicted of 2 or more offenses with an aggregate sentence to confinement of 5 years or more
 - ▶ Doesn't matter whether offenses were CIMT's, single scheme, or that sentence was suspended

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(3)(A): National Security**
 - ▶ Includes aliens who violate export controls or who have engaged in terrorist activity

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(4)(A): Public charge**
 - ▶ Aliens who are “likely at any time to become a public charge”
 - ▶ Public charge is someone likely to become primarily dependent on government for subsistence
 - ▶ NOTE: USCIS is considering proposed regulation to interpret § 212(a)(4)(A).

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(6)(A): Aliens present without admission or parole**
 - ▶ “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”
 - ▶ This constitutes the vast majority of § 212(a) charges.

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(6)(C)(i): Material misrepresentation**
 - ▶ “An alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.”
 - ▶ ***Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017):**
A misrepresentation is material if it tends to shut off a line of inquiry that is relevant to the alien’s admissibility and that would predictably have disclosed other facts relevant to his eligibility for a visa, other documentation, or admission to the United States.

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(6)(C)(ii): False claim to US Citizenship**
 - ▶ “Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.”
 - ▶ *Matter of Richmond*, 26 I&N Dec. 779 (BIA 2016): a false claim to US citizenship exists where there is direct or circumstantial evidence that the false claim was made 1) with the subjective intent of obtaining a purpose or benefit under the act or any other Federal or State law, and 2) where United States citizenship actually affects or matters to the purpose or benefit sought

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(7)(A): Lack of documentation for Intending Immigrants**
 - ▶ Applies to an intending immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other entry document, and a valid unexpired passport or other suitable travel document.
 - ▶ Usually seen charged in connection with arriving aliens who express fear of return

Notable Grounds of Inadmissibility:

- ▶ **INA § 212(a)(7)(B): Lack of documentation for nonimmigrants**
 - ▶ Applies to a nonimmigrant who is not in possession of a valid nonimmigrant visa or border crossing identification card.

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(1)(A): Inadmissible at time of Entry or Adjustment**
 - ▶ “Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”
 - ▶ Refers back to a 212(a) ground of inadmissibility
 - ▶ Charging document will specify which 212(a) ground applies and provide factual basis in allegations

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(1)(B): Present in Violation of Law**
 - ▶ “Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa... has been revoked under section 221(i) is deportable”
 - ▶ Note that most visa revocations are prudential, not retroactive, and don’t make an alien removable under this section so long as the alien has complied with all other conditions of admission

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(1)(C): Nonimmigrant status violators**
 - ▶ “Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status, is deportable”
 - ▶ Common scenario- student on F1 who fails to maintain complete courseload or who withdraws from program

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(1)(D): Conditional Permanent Residence terminated**
 - ▶ Applies to any alien whose permanent residence on a conditional basis is terminated

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(2)(A)(i): Crime Involving Moral Turpitude**
 - ▶ Convicted of a CIMT within 5 years of admission AND for which a sentence of one year or longer may be imposed
 - ▶ Note differences between 237 and 212

Notable Grounds of Deportability:

► INA § 237(a)(2)(A)(ii): Multiple Convictions

- “Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, *not arising out of a single scheme of criminal misconduct*, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable”
- ***Matter of Adetiba*, 20 I&N Dec. 506, 509, 511 (BIA 1992):**
“[W]hen an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct... That is, the statutory exception refers to acts, which although separate crimes in and of themselves, were performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct.”

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(2)(A)(iii): Aggravated felonies**
 - ▶ An alien convicted of an aggravated felony at any time after admission is deportable
 - ▶ Aggravated felonies are defined at INA § 101(a)(43)(A) - (U)
 - ▶ Common aggravated felonies include: §§ 101(a)(43)(A)- murder, rape, sexual abuse of a minor; 101(a)(43)(B)- illicit trafficking in a controlled substance; 101(a)(43)(D)- money laundering of more than \$10K; 101(a)(43)(E)(ii)- certain firearms offenses; 101(a)(43)(F)- a crime of violence with at least 1 year imprisonment; 101(a)(43)(G)- a theft or burglary offense with at least 1 year imprisonment; 101(a)(43)(M)- an offense involving fraud or deceit in which the loss to the victim(s) exceeds \$10K; 101(a)(43)(R)- forgery; 101(a)(43)(S)- obstruction, perjury with at least 1 year imprisonment; 101(a)(43)(U)- any attempt or conspiracy to commit an aggravated felony

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(2)(B): Controlled Substances**
 - ▶ Convicted of a violation of any law relating to a federally controlled substance (as defined in 21 USC § 802)
 - ▶ EXCEPTION (only in § 237): a *single* offense involving *possession for one's own use of thirty grams or less of marijuana*.

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(2)(C): Firearms offenses**
 - ▶ Alien convicted of any firearms offense
 - ▶ Note that the categorical approach applies, so check state definition of firearm to ensure it matches or is not overbroad for 18 USC § 921(a) definition of federal firearm
 - ▶ ***Matter of Flores-Abarca*, 26 I&N Dec. 922 (BIA 2017):** Ground is broadly construed to encompass all types of firearms offenses, even in that case for ‘transporting’ despite the word ‘transporting’ not appearing in the INA.

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(2)(E)(i): Domestic Violence, Child Abuse, Stalking**
 - ▶ Alien convicted of a crime of domestic violence, Child abuse, or stalking
 - ▶ Domestic violence:
 - ▶ Must be a crime of violence under 18 USC § 16 and
 - ▶ “against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(2)(E)(i): Violation of a Protection Order**
 - ▶ An alien who violates a protection order (conviction not necessary)
 - ▶ Protection order must have involved protection against credible threats of violence, repeated harassment, or bodily injury
 - ▶ ***Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017)**
categorical approach doesn't apply (even if a conviction supports the charge)- instead the IJ should consider the probative and reliable evidence regarding what a state court determined about the alien's violation.

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(3)(D): False Claim to Citizenship**
 - ▶ Same as § 212(a)(6)(C)(ii).

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(4)(A): National Security Grounds**
 - ▶ Evasion of export controls, engaged in terrorist activities, etc.

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(5): Public Charge**

- ▶ “Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.”
 - ▶ Note that statute refers to entry, not admission

Notable Grounds of Deportability:

- ▶ **INA § 237(a)(6): Unlawful Voting**
 - ▶ “Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.”

Remedies for Removable Lawful Permanent Residents

Remedies for Removable Lawful Permanent Residents

- ▶ Overview:
 - ▶ Cancellation for Lawful Permanent Residents (INA 240A(a))
 - ▶ Section 212(c) Relief
 - ▶ 237(a)(1)(H) Waiver
 - ▶ Section 212(h) Relief
 - ▶ Re-adjustment of status

Cancellation for Lawful Permanent Residents (INA 240A(a))

- ▶ In order for a lawful permanent resident to qualify for cancellation of removal, they must show that they:
 - ▶ Have been an alien lawfully admitted for permanent residence for not less than 5 years;
 - ▶ Have resided in the United States continuously for 7 years after having been admitted in any status; and
 - ▶ Have not been convicted of any aggravated felony.
- ▶ **Relief is discretionary.**
- ▶ Cancellation is available for permanent residents who are either inadmissible or deportable. See 8 U.S.C. § 1229b(a) (stating that “[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States”); see also Vasquez-Hernandez v. Holder, 590 F.3d 1053, 1055 (9th Cir. 2010).

“Have been an alien lawfully admitted for permanent residence for not less than 5 years”

- ▶ Lawfully admitted for permanent residence is defined as "the status of having been accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." INA §101(a)(20). (In other words, either through AOS or CP.)
- ▶ A person who obtains lawful permanent residence by fraud or mistake is deemed to have not been "lawfully admitted for permanent residence" and is ineligible for Cancellation of Removal. (During COR proceedings, be prepared for DHS to attack the underlying basis of client's LPR grant.)
- ▶ A child of an LPR may not impute the parent's years of lawful permanent residency in order to achieve the five year requirement.
- ▶ There is no "stop time rule" for the five years permanent residence requirement. Thus, an LPR continues to accrue time for "5 year" purposes during the course of the removal proceedings.

“Have resided in the United States continuously for 7 years after having been admitted in any status”

- ▶ An “admission” is the lawful entry of a noncitizen into the United States after inspection and authorization by an immigration officer.
 - ▶ Includes admission as a temporary resident, a non-immigrant, or parole as a special immigrant juvenile.
 - ▶ A *Quilantan* Entry, also known as a “Wave through Entry,” qualifies as “admission in any status” for purposes of establishing seven years of continuous physical presence for cancellation of removal in the 9th and 5th Circuits only. Matter of CASTILLO ANGULO, 27 I&N Dec. 194 (BIA 2018).
 - ▶ To meet the continuous residence requirement, maintenance of lawful status after the admission is not required. See De Rodriguez v. Holder, 724 F.3d 1147, 1150-51 (9th Cir. 2013).
 - ▶ **Exception:** The continuous residence requirement does not apply to an LPR who has served 24 months in active-duty status in the U.S. armed forces, was in the U.S. at the time of enlistment or induction, and was honorably discharged.
- ▶ The 7-year residence period must be continuous. (Analogous to continuous residence rules for naturalization.)

“Stop Time Rule” relating to 7-year continuous residence requirement

- ▶ The 7-year period is deemed to end when:
 - ▶ The person is served with a Notice to Appear. (See also *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 & n.3 (2018) (explaining the stop-time rule as set forth in § 1229b(d)(1));

OR

- ▶ The person has committed an offense that renders them inadmissible (under INA § 212(a)(2)) or removable (under INA §§ 237(a)(2) or 237(a)(4)).
 - ▶ The stop-time period begins with the **commission** of a crime, not the date of conviction of the crime.

Stop-time rule hypothetical:

- ▶ On January 15, 2010, a noncitizen was admitted to the U.S. with a B1/B2 visa with an I-94 valid for six months. They did not extend their B1/B2 status and did not leave the U.S.
- ▶ On May 30, 2011, the noncitizen married a U.S. citizen.
- ▶ On June 1, 2012, the noncitizen adjusted to Lawful Permanent Residency.
- ▶ On February 1, 2017, the noncitizen was arrested for possession of cocaine.
- ▶ On March 15, 2017, the noncitizen pled guilty for possession of cocaine.
- ▶ On April 15, 2018, the noncitizen was served with a Notice to Appear.

Question 1: Does the individual have seven years of continuous residence?

Question 2: Does the individual have five years of LPR status?

Question 3: How do the answers change if the individual did not become an LPR until June 1, 2013?

“Has not been convicted of any aggravated felony”

- ▶ A lawful permanent resident is deportable if convicted of an aggravated felony at any time after admission.
- ▶ The classes of crimes defined as aggravated felonies are found in 8 U.S.C. § 1101(a)(43).
- ▶ Conviction of an aggravated felony constitutes a mandatory ground for denial of relief. Where an alien's conviction indicates that one or more of the grounds for mandatory denial of the application for relief may apply, **the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply**

Discretionary Factors: Positive

- ▶ When exercising discretion in an LPR Cancellation of Removal case, an IJ may consider positive factors. The Board described the following positive factors in *Matter of C-V-T*, 22 I. & N. Dec. 7 (BIA 1998):
 - ▶ Family ties within the U.S.;
 - ▶ Residency of long duration in the U.S.;
 - ▶ Evidence of hardship to the respondent and family if deportation occurs;
 - ▶ Service in Armed Forces;
 - ▶ History of employment;
 - ▶ Existence of property or business ties;
 - ▶ Existence of value and service to the community;
 - ▶ Proof of genuine rehabilitation if a criminal record exists; and
 - ▶ Evidence attesting to a respondent's good character.

Discretionary Factors: Negative

When exercising discretion in an LPR Cancellation of Removal case, an IJ may also consider negative factors such as:

- ▶ Nature and underlying circumstances of grounds of removal;
- ▶ Additional significant immigration violations;
- ▶ Existence of criminal record; and
- ▶ Other evidence of bad character or undesirability.

Section 212(c) Relief: General Idea

- ▶ Former INA § 212(c), [8 U.S.C. § 1182\(c\)](#) (repealed 1996), allowed certain long-time permanent residents to obtain a discretionary waiver for certain grounds of excludability and deportability. See [INS v. St. Cyr, 533 U.S. 289, 294-95 \(2001\)](#) (providing history of former § 212(c) relief).
- ▶ Former § 212(c) provided that “[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, **may be admitted in the discretion of the Attorney General without regard to the provision of subsection (a) [classes of excludable aliens].**”
- ▶ If former § 212(c) relief was granted, the deportation proceedings would be terminated, and the alien would remain a lawful permanent resident. See [United States v. Ortega-Ascanio, 376 F.3d 879, 882 \(9th Cir. 2004\)](#).

Section 212(c) Relief: Eligibility Requirements

- ▶ To be eligible for discretionary relief from deportation under former § 212(c), an applicant must have accrued **seven years of lawful permanent residence status**. An applicant could continue to accrue legal residency time for the purpose of relief while pursuing an administrative appeal. See *Foroughi v. INS*, 60 F.3d 570, 572 (9th Cir. 1995)
- ▶ The IJ or BIA must balance the favorable and unfavorable factors when determining whether an applicant is entitled to former § 212(c) relief. A showing of good moral character or hardship is not specifically required. See the positive and negative factors listed above under 240A(a) COR.
- ▶ Previously, an applicant in deportation proceedings had to show that their ground of deportation had an analogous exclusion ground. However, the Supreme Court held in *Judulang v. Gonzales*, 565 U.S. 42 (2012) that the BIA's comparable-ground approach was arbitrary and capricious.

Section 212(c) Relief: Who Can Benefit Now?

- ▶ Former § 212(c) relief applies in deportation proceedings that commenced before the April 1, 1997 effective date of IIRIRA even if the proceedings include deportation charges based on post-IIRIRA offenses. Pascua v. Holder, 641 F.3d 316, 317 (9th Cir. 2011).
 - ▶ These rarely surface now, but it could surface in an MTR context or a case that has bounced up and down the chain of appeals and remands multiple times.
- ▶ Applicants who were convicted pursuant to plea agreements and trials before AEDPA and IIRIRA (i.e., before April 1, 1997), and who were eligible for former § 212(c) relief at the time of their convictions, remain eligible to apply for former § 212(c) relief. INS v. St. Cyr, 533 U.S. 289, 326 (2001); see also 8 C.F.R. § 1003.44 (setting forth procedure for special motion to seek former § 212(c)); 8 C.F.R. § 1212.3(h) (setting forth continued availability of former § 212(c) relief); and Matter of Abdelghany, 26 I&N Dec. 254 (BIA 2014).

Section 212(c) Relief: Who Can't Benefit Now?

- ▶ Immigrants with pre-November 29, 1990 plea agreements/convictions: Subject to the original limited bars for waiving certain grounds of inadmissibility relating to national security or former persecutors in Nazi Europe. [Note: no restrictions relating to aggravated felonies.]
- ▶ LPRs removable or deportable based on a plea agreement/conviction that occurred on or after November 29, 1990, but before April 24, 1996: Same as above PLUS new bar for one or more aggravated felonies for which the immigrant has served a term of imprisonment of at least 5 years. New bar for international child abductors.
- ▶ LPRs removable or deportable based on a plea agreement/conviction that occurred on or after April 24, 1996, but before April 1, 1997: Same as above PLUS new bars for any aggravated felony, controlled substance offense, certain firearm offenses, or two or more crimes involving moral turpitude committed within five years of entry for which the sentence of imprisonment was one year or longer.

237(a)(1)(H) Waiver

- ▶ Waiver available to individuals who gained an immigrant visa or adjustment of status by fraud or misrepresentation. Only a person in **removal proceedings** can apply for it. Very narrow waiver; intended to ameliorate ground of deportability for aliens who were inadmissible at the time they were admitted because of fraud/misrepresentation.
- ▶ Section 237(a)(1)(H) waives not only the exclusion ground but also the underlying fraud and renders the waiver recipient an LPR status (green card) **from the time of his initial entry**.
- ▶ Often arises in the course of a naturalization proceeding when USCIS detects fraud or misrepresentation at the time of original grant of LPR status. Commonly used in cases where adult son or daughter of LPR adjusted or received immigrant visa, but was married and that marriage was not detected.

237(a)(1)(H) Waiver

To qualify for 237(a)(1)(H) an applicant for this waiver:

- ▶ was granted LPR status (either immigrant visa or AOS);
 - ▶ was inadmissible under section 212(a)(6)(C)(i) at the time of being granted LPR status;
 - ▶ is the spouse, parent, son or daughter of a U.S. citizen or LPR (No hardship to the relative or applicant has to be demonstrated); and
 - ▶ was otherwise admissible when granted LPR status “except for those grounds of inadmissibility that were a direct result of that fraud or misrepresentation.”
- ▶ Also available to VAWA self-petitioners.
 - ▶ Waiver is discretionary. Keep in mind that a finding of marriage fraud will always weigh heavily against the granting of a waiver. Discretionary factors are same as for COR and 212(c) relief.

Section 212(h) Relief

- ▶ Discretionary waiver available to inadmissible LPRs who have accrued at least seven years of lawful continuous residence before the start of removal proceedings.
- ▶ By its terms, INA § 212(h) **will only waive the inadmissibility grounds** relating to:
 - ▶ Crimes involving moral turpitude (no limit to the number of offenses);
 - ▶ Engaging in prostitution;
 - ▶ A single conviction for simple possession or being under the influence of 30 grams or less of marijuana;
 - ▶ Conviction of two or more offenses of any kind with an aggregate sentence imposed of at least five years; or
 - ▶ Asserting immunity against prosecution of a serious crime.

Section 212(h) Relief

- ▶ The § 212(h) applicant must be:
 - ▶ A spouse, parent, son or daughter of a U.S. citizen or permanent resident who will face **extreme hardship** if the applicant is removed;
 - ▶ A VAWA self-petitioner;
 - ▶ Inadmissible only under the prostitution ground; **or**
 - ▶ Inadmissible based upon a conviction or event that took place more than 15 years before the current application.

In these last two categories the applicant must prove that they are rehabilitated and their admission is not contrary to U.S. interests.

Section 212(h) relief

- ▶ Stand-alone 212(h)??
 - ▶ A stand-alone waiver is only available to arriving aliens seeking re-admission; all others are eligible for a 212(h) waiver only if also applying for adjustment of status. (Look at NTA carefully to see if how your client is being charged! Only an “arriving alien” seeking to waive a ground of inadmissibility can benefit from a stand-alone 212(h)).
- ▶ LPRs through AOS have a different rule:
 - ▶ If LPR was admitted with immigrant visa obtained through consular processing, they may not avail themselves of Section 212(h) relief if they committed an aggravated felony after admission as an LPR.
 - ▶ However, a 212(h) waiver is still available to persons who have committed an aggravated felony even if they are permanent residents just as long as they were not “admitted as an LPR.” Persons who later adjust their status to that of an LPR are not subject to this 212(h) waiver prohibition. See Matter of J-H-J, 26 I&N Dec. 563 (BIA 2015).

Readjustment of Status

- ▶ An alien subject to deportation proceedings may also apply for adjustment of status before the Immigration Judge and, if inadmissible under section 212(a) of the Act, may also apply for a waiver of the ground of inadmissibility. See 8 C.F.R. § 242.17(a).
- ▶ In Matter of MENDEZ, 21 I&N Dec. 296 (BIA 1996), the Board held that already having LPR status does not preclude an individual who is removable from the United States from applying for AOS under INA §245(a).

Only some LPRs will be eligible to readjust status.

- ▶ Some LPRs would be eligible to re-adjust status in removal proceedings. Immediate relative of USC, for example. Others would not - i.e., LPR who adjusted through marriage in the past, but is now divorced and is not the immediate relative of a USC.
- ▶ If your LPR client is not eligible for a stand-alone 212(h) waiver, but they are immediately eligible to re-adjust status, consider AOS plus 212(h) waiver in removal proceedings.
- ▶ Some deportable offenses, such as certain crimes classified as deportable grounds for child abuse, are not CIMTs, and your client may be able to AOS without a waiver. (For example, California Penal Code Section 273a(a) conviction for child endangerment, as a felony. Deportable under INA § 237(a)(2)(E)(i). Not a CIMT, because minimum conduct required is akin to negligence.)

Humanitarian and Other Relief for Non-LPRs

Forms of Relief from Removal

Once removability has been established, the noncitizen has the burden of establishing relief from removal. 8 C.F.R. § 1240.8(d)

- ▶ Relief Before the Immigration Court:
 - ▶ Asylum, Withholding of Removal, and Convention Against Torture (CAT)
 - ▶ Cancellation of Removal for Non-LPRs
 - ▶ Adjustment of Status
 - ▶ NACARA Cancellation or Suspension, VAWA Cancellation of Removal, and TPS
- ▶ Relief Outside of Immigration Court:
 - ▶ Special Immigrant Juvenile Status
 - ▶ DACA, VAWA, U Visa, and T visa

Asylum, Withholding of Removal, and CAT (Form I-589)

- ▶ Asylum - INA § 101(a)(42):
 - ▶ Meet the definition of a refugee:
 - ▶ well-founded fear of persecution
 - ▶ on account of race, religion, nationality, political opinion, or membership in a particular social group
 - ▶ Asylum requires a “reasonable possibility” of persecution
 - ▶ Discretionary form of relief
 - ▶ Must file for asylum within one-year of last arrival to U.S. unless applicant meets an exception. See INA § 208(a)(2)(B), (D)
- ▶ Withholding of Removal - INA § 241(b)(3):
 - ▶ Must show that “life or freedom would be threatened” in country of origin on account of race, religion, nationality, political opinion, or membership in a particular social group
 - ▶ Withholding requires a “Clear Probability” of persecution

Asylum, Withholding of Removal, and CAT (Form I-589)

- ▶ Protection under the Convention Against Torture - 8 C.F.R. § 208.18(a)
 - ▶ Must establish that it is “more likely than not” (51% chance or more) that applicant would be tortured by or with the consent or acquiescence of a government official if removed to the proposed country of removal

Bars to Asylum and Withholding Eligibility

- ▶ Firm resettlement - INA § 208(b)(2)(A)(vi)
- ▶ Persecution of others - INA § 208(b)(2)(A)(i)
- ▶ Particularly serious crime - INA § 208(b)(2)(A)(ii)
 - ▶ Aggravated felonies bar asylum
 - ▶ Aggravated felonies with aggregate 5 year sentence bar withholding
 - ▶ Aggravated felonies involving trafficking in controlled substance is a presumptive bar
- ▶ Reason to believe that applicant has committed a nonpolitical crime outside of the U.S. - INA § 208(b)(2)(A)(iii)
- ▶ Terrorist Related Grounds - INA § 208(b)(2)(A)(v)

Non-LPR Cancellation of Removal (Form EOIR-42B)

Requirements:

- ▶ 10 years of continuous physical presence (prior to issuance of NTA)
- ▶ Not convicted of a crime under INA Section 212(a)(2), 237(a)(2), or 237(a)(3)
- ▶ Good moral character for 10 years
- ▶ Exceptional and extremely unusual hardship to a USC or LPR spouse, parent, or child
- ▶ Favorable exercise of discretion

Non-LPR Cancellation of Removal (Form EOIR-42B)

Continuous Physical Presence

- ▶ Stop-time rule - INA § 240(d)(1)
 - ▶ Upon service of NTA
 - ▶ *Pereira v. Sessions*, 585 U.S. __, 138S. Ct. 2105 (2018)
 - ▶ Commit an offense under section 212(a)(2) that renders applicant inadmissible under 212(a)(2) or removable under 237(a)(2) or 237(a)(4)
 - ▶ Absences or departures breaks in continuous physical presence - INA § 240A(d)(2)

Non-LPR Cancellation of Removal (Form EOIR-42B)

Good Moral Character

- ▶ Bars
 - ▶ Conviction or admission of a drug offense, except a single conviction of possession of marijuana < 30 grams
 - ▶ Conviction or admission of a CIMT
 - ▶ Two or more convictions with total sentence of 5 years or more
 - ▶ Reason to believe applicant is or was a drug trafficker
 - ▶ Habitual drunkard
 - ▶ 180 days or more spent in jail/prison
 - ▶ Aggravated felony
- ▶ Discretion

VAWA Cancellation (Form EOIR-42A)

- ▶ Been battered or subjected to extremely cruelty in the U.S. by USC or LPR spouse or parent OR noncitizen's child was subjected to such abuse by her USC or LPR parent
- ▶ 3 years continuous physical presence (prior to NTA)
- ▶ Good moral character during last 3 years
- ▶ Not inadmissible under INA section 212(a)(2) or 212(a)(3)(security related grounds), not deportable under 237(a)(1)(G)(marriage fraud), or 237(a)(2)-(4)(criminal, fraud, security related grounds), and not convicted of an aggravated felony
- ▶ Removal would result in extreme hardship to you or your child who is the child of a USC or LPR
- ▶ Favorable exercise of discretion

NACARA (Form I-881)

- ▶ NACARA § 203 - special rule cancellation for certain applicants from El Salvador, Guatemala, and former Soviet bloc countries (Form I-881)
 - ▶ Eligibility requirements include:
 - ▶ 1st entry to U.S. on or before certain date in 1990, applied for asylum by certain date, not apprehended at any time after entry, not convicted of aggravated felony
 - ▶ Family member of individual in category may qualify
 - ▶ Spouse/child battered or subject to extreme cruelty by someone falling into this class may be eligible for NACARA
 - ▶ Must show:
 - ▶ 7 years of continuous presence in U.S.
 - ▶ Good moral character during those 7 years
 - ▶ Not removable under certain criminal grounds
 - ▶ Deportation or removal cause extreme hardship to you or LPR/USC parent, spouse, or child
 - ▶ Generally: If entered on or before 1990 or 1991 and filed for asylum or registered for “ABC” benefits, they may apply for special form of cancellation of removal.
- ▶ NACARA § 202- Adjustment of status for certain Nicaraguan and Cuban nationals

Temporary Protected Status “TPS” (Form I-821)

- ▶ The Secretary may designate a country for TPS due to temporary conditions in the country (i.e. armed conflict, environmental disaster)
- ▶ Eligibility Requirements:
 - ▶ Be a national of a country designated for TPS, or a person without nationality who last habitually resided in the designated country;
 - ▶ File during the open initial registration or re-registration period, or you meet the requirements for late initial filing during any extension of your country’s TPS designation
 - ▶ Have been continuously physically present in the United States since the effective date of the most recent designation date of your country; and
 - ▶ Have been continuously residing in the United States since the date specified for your country.
 - ▶ Exceptions: brief, casual, and innocent departures

U Visa and T Visa

▶ U Visa Eligibility:

- ▶ Victim of qualifying criminal activity.
- ▶ Have suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.
- ▶ Have information about the criminal activity.
- ▶ Were helpful, are helpful, or are likely to be helpful to law enforcement in the investigation or prosecution of the crime.
 - ▶ Requirements certification from Federal, State, or Local law enforcement
- ▶ The crime occurred in the United States or violated U.S. laws.
- ▶ Admissible to the United States
 - ▶ Otherwise can apply for an inadmissibility waiver on Form I-192

U Visa Qualifying Criminal Activity

- ▶ Abduction
- ▶ Abusive Sexual Contact
- ▶ Blackmail
- ▶ Domestic Violence
- ▶ Extortion
- ▶ False Imprisonment
- ▶ Female Genital Mutilation
- ▶ Felonious Assault
- ▶ Fraud in Foreign Labor Contracting
- ▶ Hostage
- ▶ Incest
- ▶ Involuntary Servitude
- ▶ Kidnapping
- ▶ Manslaughter
- ▶ Murder
- ▶ Obstruction of Justice
- ▶ Peonage
- ▶ Perjury
- ▶ Prostitution
- ▶ Rape
- ▶ Sexual Assault
- ▶ Sexual Exploitation
- ▶ Slave Trade
- ▶ Stalking
- ▶ Torture
- ▶ Trafficking
- ▶ Witness Tampering
- ▶ Unlawful Criminal Restraint

U Visa and T visa

▶ T Visa Eligibility:

- ▶ Are or were a victim of a severe form of human trafficking
- ▶ Are in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry due to trafficking;
- ▶ Comply with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking
- ▶ Demonstrate that you would suffer extreme hardship involving unusual and severe harm if you were removed from the United States; and
- ▶ Admissible to the United States
 - ▶ Otherwise can apply for an inadmissibility waiver on Form I-192

Special Immigrant Juvenile Status “SIJS” (Form I-360)

As amended, a child is SIJS eligible if:

- ▶ The child is declared a dependent of the court or is placed in the custody of a state
- ▶ The court finds reunification with one or both parents is not viable due to abuse,
- ▶ Neglect or abandonment or a similar basis under state law; and
- ▶ The court has finds it is not the child’s best interest to be returned to the child or
- ▶ Parent’s country of nationality or last habitual residence.

SIJS (Form I-360)

- ▶ In order to qualify for SIJS with federal immigration authorities, the immigrant youth must obtain a specialized order from a state court which consolidates findings consistent with the SIJS statutory definition.
- ▶ This order, sometimes referred to as a Special Findings Order or a “best interest order,” must be signed by the judge and submitted with the youth’s SIJS petition to federal immigration authorities.
- ▶ Federal immigration authorities make the ultimate decision on whether to approve an immigrant youth for SIJS and lawful permanent residency.

SIJS (Form I-360)

- ▶ The family court order is a prerequisite to SIJS relief, but immigration authorities determine if SIJS or permanent resident status is granted.
- ▶ One huge benefit afforded to SIJS petitioners is the ability to adjust status without returning to the home country for an interview with the U.S. consulate. 8 U.S.C. § 1255(h).
- ▶ SIJS immigrants are barred from filing a visa petition for a parent in the future.

VAWA (Form I-360)

- ▶ **Certain immigrants who are /have been in abusive relationships can self-petition under the Violence Against Women Act (VAWA)**
 - ▶ Spouse or child of citizen or LPR
 - ▶ Bona fide relationship
 - ▶ Lived with abuser
 - ▶ Subjected to physical or mental abuse
 - ▶ Residing in US when application filed
 - ▶ Good moral character
 - ▶ Extreme hardship if deported

DACA (Form I-821)

- ▶ Due to federal court orders, USCIS has resumed accepting requests to renew a grant of deferred action under DACA.
- ▶ USCIS is not accepting requests from individuals who have never before been granted deferred action under DACA.
- ▶ Does not provide a pathway to lawful status

DACA (Form I-821)

► Who Can Renew:

- Did not depart the United States on or after Aug. 15, 2012, without advance parole;
- Have continuously resided in the United States since you submitted your most recent DACA request that was approved; and
- Have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

Adjustment of Status (Form I-485)

- ▶ Family and Employment Visas:
 - ▶ I-130
 - ▶ I-140
- ▶ Self-Petitions:
 - ▶ VAWA
 - ▶ U and T Visas
 - ▶ SIJS

Adjustment of Status (Form I-485)

- ▶ Who is eligible:
 - ▶ Immigrants who qualify under section 245(a):
 - ▶ Entered lawfully and maintain lawful status
 - ▶ Entered lawfully and are the immediate relatives of US citizens
 - ▶ Immigrant visa must be immediately available
 - ▶ Immigrants who qualify under section 245(i):
 - ▶ Entered without inspection
 - ▶ Must have a family based or employment based petition filed before 4/30/3001
 - ▶ Subject to a \$1,000 penalty

Applicable Waivers

- ▶ INA 212(a)(2)(A)(ii): Petty Offense Exception for CIMT
- ▶ INA 212(h): Multiple criminal convictions, prostitution
- ▶ INA 212(g): Health issues and drug user or addict
- ▶ INA 212(d)(12) - Arriving alien previously removed within last 5 years or within 20 years (on Form I-212)
- ▶ INA 212(a)(9)(B)(v):
 - ▶ Unlawfully present more than 180 days but less than a year
 - ▶ Unlawfully present for more than one year
- ▶ I-212 (10 year permanent bar)**:
 - ▶ Unlawfully present in the US for more than a year in the aggregate after 4/1/1997, then leaves and returns without permission
 - ▶ Ordered removed from the US, then leaves and returns

** I-212 Waiver only available after 10 years outside of the U.S. unless VAWA (entry/departure abuse related) or U visa applicant