

# 7-Year Cancellation of Removal: INA § 240A(a)

## Requirements for filing Form EOIR-42A

- (1) Must have been a lawful permanent resident for 5 years at the time the application is filed
- (2) Must have continuous residence in the United States for at least 7 years after being admitted in any status and before the stop-time rule is triggered (see below)
- (3) Cannot have any aggravated felony conviction

It is important to note that cancellation of removal does not require a showing of any particular level of hardship, either to the applicant or his or her family. However, more serious crimes require more substantial equities to warrant cancellation. Immigration Judges will consider length of residence in the United States, family and community ties here, community service work, participation in clubs or religious organizations, language ability in the country of proposed removal, work history, timely filing of taxes, and especially acceptance of responsibility for the crime and proof of rehabilitation.

## Stop-Time Rule: INA § 240A(d)(1)

Accrual of the necessary 7 years of residence stops when a Notice to Appear (NTA) is served on the individual, or when the individual commits a crime that triggers the stop-time rule. Note that accrual of the 5 years of permanent resident status is not subject to the stop-time rule.

In order to trigger the stop-time rule, the offense must be “referred to in section 212(a)(2).” This section most commonly applies to any offense relating to a controlled substance, and with certain crimes involving moral turpitude (CIMT). It does not apply to a single, first-offense misdemeanor involving moral turpitude where the sentence (including any suspended portion) is no more than six months. See Matter of Deanda-Romo, 23 I&N Dec. 597 (BIA 2003) (a crime coming within the “petty offense” exception of INA § 212(a)(2)(A)(ii)(II) does not stop time for cancellation purposes); Matter of Garcia-Hernandez, 23 I&N Dec. 590, 594-96 (BIA 2003) (“petty offense” exception available to people with multiple convictions, as long as only one crime involves moral turpitude). The stop-time rule also is not triggered by commission of a firearms offense (as long as no moral turpitude is involved) or by commission of other non-drug, non-CIMT offenses. See Matter of Campos-Torres, 22 I&N Dec. 1289 (BIA 2000). Finally, the Ninth Circuit has held that a conviction resulting from a guilty or no contest plea entered before September 30, 1996, generally does not trigger the stop-time rule. See Sinotes-Cruz v. Gonzales, 468 F.3d 1190 (9<sup>th</sup> Cir. 2006).

If the crime is a petty offense, but the NTA was issued within seven years of the individual’s admission to the United States, consider applying to **re-adjust the person’s status**. See Matter of Rainford, 20 I&N Dec. 598 (BIA 1992) (re-adjustment of status without any waiver of inadmissibility is available as relief from a criminal ground of deportability, where no ground of inadmissibility is triggered by the conviction). Of course, you must have a visa petition with a current priority date or filed by an immediate relative to pursue this form of relief.

## Converting a Conviction into a Petty Offense to Avoid Triggering the Stop-Time Rule

Please see the handout on “Cal. Penal Code § 17(b)(3): Turning a Case into a Petty Offense.”

# Waiver of Inadmissibility under INA § 212(h)

## **Situations in which a § 212(h) Waiver is Useful to Permanent Residents**

Where relief under INA § 212(c) or 240A(a) is not available, a waiver of inadmissibility under INA § 212(h) may be of use. This occurs chiefly where the person was convicted of a crime involving moral turpitude after the repeal of § 212(c) and also did not accrue the seven years of continuous residence needed for cancellation purposes. **The application form is an I-601** (one page only).

## **Bars to Relief**

This waiver is not available to lawful permanent residents (LPRs) who have been convicted of an aggravated felony after acquiring their LPR status, or whose removal proceedings have been initiated within seven years of taking up lawful residence in the United States. Moreover, the waiver is not available for drug offenses other than a single simple possession of 30 grams or less of marijuana.

## **Special Stop-Time Rule for § 212(h)**

Section 212(h) has its own stop-time rule, in which the clock starts when the person begins lawfully residing in the United States and stops when a removal proceeding is filed at the Immigration Court.

## **Requirement of Concurrent Application for Admission**

The waiver can only be granted when the person is making a concurrent application for admission to the United States, which many people think of as being limited to an application for adjustment of status. In reality, the application may also simply be a returning permanent resident's request for admission at a port of entry. See *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007); *Matter of Sanchez*, 17 I&N Dec. 218, 222-23 (BIA 1980) (“Aliens who become inadmissible after an original lawful entry may later be excluded from the United States if they depart and seek to reenter, and they may also at such later date be eligible for various waivers of excludability. Hence, the fact that the respondent was not inadmissible at the time of his original entry does not bar him from seeking 212(h) relief.”).

## **“Extreme Hardship” and Equities**

Use of § 212(h) is generally limited to those with qualifying relatives (USC or LPR spouse, parent, son, or daughter) who would experience “extreme hardship” if the waiver is not granted.<sup>1</sup> Extreme hardship is set at a level substantially above that which the average family member would experience under the same circumstances. Thus mere sadness at separation, the inconvenience of relocating the family, or loss of some portion of the family's income would not in themselves be sufficient. However, if there are children who do not speak the language in the country the family would move to, or if the parents are divorced and a custody order prevents the children from the leaving the country (thus preventing them from seeing their deported parent), or if a family member is ill and needs care or would lose health coverage, these types of situations could rise to the level of “extreme hardship.” See *Matter of Kao & Lin*, 23 I&N Dec. 45 (BIA 2001) (discussing “extreme hardship” criteria in various contexts and effect on U.S.-born children). If extreme hardship is shown, the Immigration Judge will move on to consider the same equitable factors that apply to 212(c) and 240A(a) cancellation applications.

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<sup>1</sup> Certain exceptions apply if the offense was committed more than 15 years ago. See INA § 212(h)(1)(A).

# Relief under Former INA § 212(c) and *St. Cyr*

## Development of 212(c)

Prior to November 29, 1990, former INA § 212(c) permitted Immigration Judges to grant relief from deportation or exclusion for any criminal offenses analogous to the exclusion grounds at INA § 212, so long as the applicant had been a lawful permanent resident for at least seven years by the time of the application. Between November 29, 1990, and April 24, 1996, this relief continued to be available so long as the applicant had not yet served 5 years cumulatively for any aggravated felony convictions. On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act crippled § 212(c), and on April 1, 1997, the effective date for much of the Illegal Immigration Reform and Immigrant Responsibility Act, § 212(c) was entirely repealed.<sup>2</sup>

## The *St. Cyr* Decision

In 2001, the Supreme Court held that Congress had not fully eliminated access to the powerful relief available under former INA § 212(c). In *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), the Court held that “212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.”

## Benefits and Limitations of 212(c)

212(c) relief remains available today for people who were permanent residents at the time of their plea, so long as the offense was within the scope of 212(c) relief at that time. The chief significance today is that because **212(c) has no stop-time rule**, it can be used even when several offenses were committed within the first 7 years; and it is available in some cases even when a person has been convicted of an aggravated felony.<sup>3</sup> However, it cannot be used to cure post-1997 convictions, and it has never been available to cure the firearms ground of deportation, because firearms offenses are not mentioned in § 212(a)(2).<sup>4</sup> Nonetheless, 212(c) relief remains a useful tool for many older convictions. The factors considered by the Immigration Judge are the same as for cancellation of removal under § 240A(a).

## Application: Form I-191

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<sup>2</sup> Please see below, “A Technicality About Pleas Taken Between April 24, 1996, and March 31, 1997,” for more information about 212(c) relief for pleas entered during this period.

<sup>3</sup> Generally, these aggravated felonies must either involve moral turpitude or controlled substances, in order to be analogous to the § 212(a)(2) grounds of inadmissibility. Under *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), an aggravated felony provision must be closely analogous to a ground of deportability (such as drug trafficking) in order for 212(c) alone to cure the problem. Returning permanent residents charged with inadmissibility under INA § 212 can still use 212(c); the *Blake* problem arises when people are charged under INA § 237(a)(2)(A)(iii). Note 4, below, deals with this.

<sup>4</sup> Note that in certain firearms and aggravated felony cases, it may be possible to apply for adjustment of status, either alone (if a deportable offense does not trigger inadmissibility), see *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992) (adjustment of status available to cure pure firearms ground of deportability); *Matter of Torres-Varela*, 23 I&N Dec. 78, 86 (BIA 2001) (adjustment of status available to cure aggravated felony conviction that does not trigger inadmissibility); or in conjunction with a 212(c) waiver (if the offense does trigger inadmissibility), see *Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005) (reaffirming this practice).

## **A Technicality About Pleas Taken Between April 24, 1996, and March 31, 1997**

Between April 24, 1996 and March 31, 1997 INA § 212(c), as amended by AEDPA § 440(d) and IIRIRA § 306(d), read as follows:

Aliens 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 provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in him under section 211(b). This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

As explained in *Matter of Fortiz*, 21 I&N Dec. 1199, 1202 (BIA 1998), “the AEDPA rendered ineligible for a section 212(c) waiver any alien who has two or more criminal convictions that are grounds of deportability as crimes involving moral turpitude, as set forth in section 241(a)(2)(A)(i)(II). . . . Prior to the AEDPA, section 241(a)(2)(A)(i)(II) covered offenses for which an alien was either actually sentenced to, or confined for, a period of 1 year or longer. The AEDPA expanded that definition to include offenses ‘for which a sentence of one year or longer may be imposed.’”

Certain California offenses, particularly petty theft, are punishable by a maximum of six months in jail. See Cal. Penal Code § 490. The plain language of 212(c) does not disqualify a respondent from relief unless “both predicate offenses” are punishable by one year or more, so a person who pleaded guilty during the relevant time period to one petty theft and one other non-aggravated felony CIMT of any sort can still obtain 212(c) relief.

## 10-Year Cancellation of Removal: INA § 240A(b)(1)

This is a form of relief from removal for those who are not legal permanent residents.

### **Requirements for filing Form EOIR-42B**

- (1) Must have a lawful permanent resident or United States citizen spouse, parent, or child under age 21 who will suffer exceptional and extremely unusual hardship if the applicant is deported
- (2) Must have sufficient proof of continuous physical presence in the United States for at least 10 years before the stop-time rule is triggered (see below); individual absences of up to 90 days are permitted, so long as the total is no more than 180 days
- (3) Cannot have any criminal conviction that renders the applicant deportable or inadmissible
- (4) Cannot have any other activities that, when reviewing the record as a whole, would tend to show that the applicant lacked good moral character during the 10 years before the hearing

### **Stop-Time Rule: INA § 240A(d)(1)**

Accrual of the necessary 10 years of continuous physical presence stops when a Notice to Appear (NTA) is served on the individual, or when the individual commits a crime that triggers the stop-time rule. In order to trigger the stop-time rule, the offense must be “referred to in section 212(a)(2).” This section most commonly applies to any offense relating to a controlled substance, and with certain crimes involving moral turpitude (CIMT). It does not apply to a single, first-offense misdemeanor involving moral turpitude where the sentence (including any suspended portion) is no more than six months. *See Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003) (a crime coming within the “petty offense” exception of INA § 212(a)(2)(A)(ii)(II) does not stop time for cancellation purposes); *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 594-96 (BIA 2003) (“petty offense” exception available to people with multiple convictions, as long as only one crime involves moral turpitude).

### **Converting a Conviction into a Petty Offense to Avoid Triggering the Stop-Time Rule**

Please see the handout on “Cal. Penal Code § 17(b)(3): Turning a Case into a Petty Offense.”

### **Difficulty of Showing Sufficient Hardship to Qualifying Relatives**

The “exceptional and extremely unusual hardship” standard is very demanding. Most Immigration Judges find it to be met where the qualifying relative has a serious medical condition for which treatment is unavailable in the applicant’s home country. Other situations may qualify. For examples of those that do and do not meet the standard, *see Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

# **Adjustment of Status under INA § 245**

This application may be made affirmatively to U.S. Citizenship & Immigration Services when the applicant is not in removal proceedings, or defensively before an Immigration Judge in removal proceedings. If approved, the applicant becomes a lawful permanent resident based on sponsorship by a family member or employer.

## **Requirements for Filing Form I-485**

- (1) In the case of a U.S. citizen's spouse, parent, or child under age 21, a visa petition has been or is being filed by the U.S. citizen, and the beneficiary either entered the United States legally or was stopped at a port of entry and is physically present in the United States.
- (2) In all other cases, a family or employment-based visa petition has been approved and has a current priority date (has reached the top of the State Department's waiting list), and the applicant either entered the country legally and is not out of status, or was a principal or derivative beneficiary of a visa petition or labor certification filed by April 30, 2001 and was physically present in the U.S. on December 21, 2000 (unless the qualifying petition was filed by January 14, 1998).
- (3) In family-based cases, the petitioner signs a binding affidavit of financial support (Form I-864) and demonstrates financial ability to support the applicant, and if necessary a joint sponsor who is a U.S. citizen or permanent resident also signs an affidavit of support.
- (4) The applicant has no history of committing crimes of moral turpitude (other than one petty offense), any drug offenses, or any immigration fraud, and has not departed the country after being present for more than 180 days without permission, or the applicant is eligible for an appropriate waiver under INA § 212(a)(9)(B)(v), 212(c), 212(h) or 212(i).

This is a very simplified summary of the many technical requirements, and does not cover a number of less commonly encountered situations.

## **Asylum**

Just a note that even a lawful permanent resident (LPR) may apply for asylum under INA § 208 if they have a well-founded fear of persecution in their country of nationality on account of race, religion, political opinion, nationality, or membership in a particular social group. Normally, an LPR would not seek asylum status if eligible for other relief from removal that would allow continued LPR status. However, asylum may be useful where the various stop-time rules block access to 212(h) waivers and cancellation of removal, but where the applicant has a conviction or convictions that are not aggravated felonies. Note that the usual asylum filing deadline (within one year of arriving in the United States) does not apply where a person held valid immigration status until shortly before filing the application. See 8 CFR § 1208.4(a)(5)(iv). Even where an applicant does have an aggravated felony conviction or is filing an application with an exemption from the one-year filing deadline, he or she may qualify for withholding of removal under INA § 241(b)(3), or withholding or deferral of removal under the Convention Against Torture. See 8 CFR § 1208.16-1208.18.

# Practical Tips

## **Filing Applications for Relief**

At the master calendar hearing, the Immigration Judge will set a filing deadline for the application for relief. The filing procedures are laid out in a set of instructions the Immigration and Customs Enforcement attorney will hand you at the hearing.

## **Filing Documents**

A cover sheet is required for all court filings, listing the party's name and A-number, the attorney's name, address, and phone, the name of the judge, the next hearing date, and the type of hearing that is scheduled. Documents ("exhibits") must be accompanied by a cover sheet with a list describing each item and briefly explaining its relevance if that is not immediately obvious. The Court prefers lettered lists and bottom-edge, lettered exhibit tabs. Exhibits are to be filed 15 days prior to an individual hearing, and 10 days prior to a master calendar hearing, unless the court orders otherwise.

## **Witness Lists**

A list naming all proposed witnesses must be submitted at least 15 days prior to the individual hearing. The list must include the person's name, A-number if any, a brief summary of the topic they will be addressing, and the expected length of the testimony. You do not have to list the applicant himself. Judges prefer (and some will specifically require) that you submit a sworn affidavit for each witness, laying out what they want to say to the court.

## **Proof of Service**

Every filing at the Immigration Court must be accompanied by a certificate of service: a sworn, signed statement that the government's Office of the Chief Counsel has been provided with an exact copy of the submission. The only exception is for documents provided to the court and the government counsel on the record at a hearing.

## **Fingerprinting**

Fingerprinting is required for many applications. All fingerprinting is done at an Application Support Center. If you file an application by mail at the Texas Service Center and pay the \$70 "biometrics" fee, you will receive an appointment notice. Otherwise, you may get the client fingerprinted using the fingerprinting notice provided by the court. Fingerprints take several weeks or more to get results back where there's a criminal record, so it's important to get them done in time, at least one month before the hearing. Once prints have been taken, they are valid for 15 months.

## **Local Operating Procedures**

The San Francisco Immigration Court has its own set of local rules, spelling out many of the items above. These are available at:

<http://www.usdoj.gov/eoir/eoia/ocij/localop/SFR.pdf>

# Documents to Show Favorable Equities

A copy of the front and back of the green card, U.S. citizenship certificate or U.S. passport (for all family members that are in U.S.: spouse, children, parents, brothers and sisters, etc.)

A copy of the birth certificates of any children born in the U.S.

A copy of the marriage certificate if currently married

Copies of any tax returns filed. See <http://www.irs.gov/faqs/faq1-6.html> if you need to obtain copies.

Proof of attendance and completion of any counseling

If any restitution, counseling fee, or fine has been paid, copies of receipts or other proof of payment

Proof of successful completion of probation or parole, or a current report, if still on probation/parole

Statements from family members and close friends describing why you should stay in the United States, which state at the beginning, "I swear under penalty of perjury that the following statement is true." Be sure to include the person's name, address, and phone number.

Social Security annual statement, which will show reported earnings each year in the US. To request one, go to <https://s044a90.ssa.gov/apps6z/iss/main.html> or file Form SSA-7004, available at <http://www.ssa.gov/online/ssa-7004.html>

Letter of recommendation from job/training (reliable, responsible, hard-working, cheerful, pleasant to work with, etc.)

School attendance records or transcripts

Letter from church, temple, or mosque if attending regularly

Medical records if any physical or mental condition, including a description of its treatment, and prognosis, for self or close family

Military service/discharge records, including any service awards

Records of any other community service or volunteer work

Proof of property ownership, if any

Proof of payment of child support, if applicable

Any other documentation that shows long-term residence, family or community ties, rehabilitation, etc.