



ELIGIBILITY FOR RELIEF

Waivers Under INA § 212(h)

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I. Overview

Three forms of immigration relief are designed specifically to waive criminal record issues: waivers under INA § 212(h), cancellation of removal for permanent residents under INA § 240A(a) (“LPR cancellation”), and the predecessor to LPR cancellation, waivers under the former INA § 212(c).

This Advisory will focus on § 212(h) relief. It will set out basic eligibility criteria and direct you to further resources.

For any client with a criminal record that makes them deportable and/or ineligible for relief, it is a good idea to start from scratch to see if one or more forms of relief might be available. Any noncitizen, regardless of immigration status, should consider eligibility for § 212(h) relief. For permanent residents who do not qualify for LPR cancellation due to an aggravated felony conviction or lack of the required seven years of continuous residence, or even those who do qualify, see if the person is eligible under § 212(h). A waiver under § 212(h) may be preferable because it can be applied for multiple times, while cancellation can only be granted once.

If the applicant is deportable based on any conviction from before April 1, 1997, consider whether § 212(c) could resolve it – alone or combined with § 212(h). Section 212(h) also can be combined with LPR cancellation (with an adjustment application), or other waivers of inadmissibility, e.g., § 212(i). In this way, too, § 212(h) waivers may offer more options, as cancellation cannot be applied for with, or if there was a prior grant of, an application for the former suspension of deportation or § 212(c) relief. See INA § 240A(c)(6).

See the Chart comparing § 212(h) and § 240A(a) relief at the end of this advisory, and see the companion advisory, ILRC, *Eligibility for Relief: LPR Cancellation of Removal, INA § 240A(a)* (November 2019) at www.ilrc.org/crimes.

II. You Can Apply for a § 212(h) waiver of inadmissibility if

A. You are applying to become a lawful permanent resident (LPR) under certain categories (e.g., family visa, VAWA self-petitioner, employment), or you are already an LPR.

B. Your crime is described in inadmissibility grounds at INA § 212(a)(2) based on:

- One or more crimes involving moral turpitude (CIMTs),
- Engaging in prostitution,
- Two or more convictions with a total sentence imposed of five or more years, and/or
- A single incident involving possession of 30 grams or less of marijuana or a few related marijuana offenses¹—*but no other drug offense*.

Problem offenses: Conviction of a waivable offense that also is an aggravated felony is not necessarily a bar to § 212(h),² except for certain LPRs. See Subpart 5, below. But admitting to, or being convicted of, murder or criminal acts amounting to torture, or attempt or conspiracy to commit those offenses, is a bar. See § 212(h)(2). Conviction of a waivable offense that is deemed a “dangerous or violent” offense triggers an extremely high bar for discretion. See Subpart 6, below.

C. You come within one of these four categories, set out in INA § 212(h)(1). Note that only the first category requires the difficult “extreme hardship” showing.

1. You have a USC or LPR parent, spouse, son, or daughter whom you can establish would suffer extreme hardship if you were removed;
2. The inadmissible incident/s occurred at least 15 years ago, and you can show that you are rehabilitated and your admission is not contrary to national interests;
3. You are inadmissible only under the prostitution ground, and you can show that you are rehabilitated and your admission is not contrary to national interests; or
4. You are a VAWA self-petitioner, and you can show that the waiver should be granted as a matter of discretion.

D. Procedurally, you come within one of the following categories:

1. Applicant for immigrant visa (LPR status) through consular processing;
2. Immigrant visa holder, who seeks admission at a port of entry following consular processing;
3. LPR applying for admission into the United States who is deemed to be seeking a new admission upon their return, pursuant to INA § 101(a)(13)(C). No application for adjustment of status is required here;³
4. Applicant for adjustment of status affirmatively; or

5. Applicant (including an LPR) for adjustment of status as a defense to deportability, in INA § 237 removal proceedings.
6. Question: Can an LPR apply for a § 212(h) waiver as a defense to deportability, in INA § 237 removal proceedings, if they are *not* also able to file an adjustment application?
 - a. The Board of Immigration Appeals (BIA) said no. It found that § 212(h) is only available at the border, or with an application for adjustment or consular processing. See *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013).
 - b. *Argument*: Advocates can explore arguments that an LPR in § 237 removal proceedings *can* file for § 212(h) as a defense, without an adjustment application, if the inadmissible conduct or conviction/s at issue occurred before *Matter of Rivas* was published on June 20, 2013 (or arguably, even after), and if the person had traveled outside the United States after the conduct or conviction/s (or arguably, even if not).⁴

If a green card application in conjunction with a § 212(h) waiver is granted, deportation grounds based on the waived offense, or based on an offense that does not also cause inadmissibility, are excused.⁵ This means that a person cannot later be found deportable for conduct that was explicitly waived under § 212(h). But § 212(h) will not waive these convictions for other purposes. For example, the convictions may still be a bar to establishing good moral character (other than for VAWA self-petitioners) or a bar to eligibility for cancellation of removal.⁶

E. You must not be an LPR who (a) is subject to the § 212(h) LPR bars, and (b) actually comes within an LPR bar. See § 212(h)(2). These bars only affect selected LPRs and conditional permanent residents.⁷ They do not apply to immigrants in other types of status or to undocumented people.

1. As an LPR, you are *subject* to the bars only if you:
 - previously (in an event before the current application)
 - were actually “admitted” into the United States
 - as an LPR (not as a tourist, etc.)
 - at the border (at a port of entry; not an adjustment of status).

This results in the following findings:

- ✓ All LPRs who were admitted to the United States on an LPR visa after consular processing are subject to the LPR bars. But adjustment of status alone does not subject an LPR to the bars, because it is not an admission at a port of entry.⁸
- ✓ An LPR who returns from a trip abroad and is found to be seeking a new admission under § 101(a)(13)(C)⁹ can apply for a § 212(h) waiver of inadmissibility at the border. They are not subject to the LPR bars at this admission, unless they have some other, *prior* admission at the border as an LPR, such as after consular processing. When submitting a § 212(h) waiver at the border, they do not need to also apply for adjustment of status.¹⁰ (Being “at the border” here includes LPRs who are paroled into the United States physically, but placed in removal

proceedings under INA § 212(a) and charged with inadmissibility.) If they succeed in being granted a waiver and being “admitted” as an LPR at the border, they will be subject to the LPR bars if they need to apply for § 212(h) again sometime in the future.

- ✓ In contrast, an LPR who returns from a trip abroad and is permitted to “re-enter” the United States, with no § 101(a)(13)(C) finding, has not been “admitted” and therefore ought not to be subject to the bars based on that event.

Arguably this is true even if the person *could have been found* to come within § 101(a)(13)(C), but was mistakenly allowed to re-enter rather than being required to seek admission. For example, say that an LPR traveled while they were inadmissible for crimes, but CBP did not realize this and simply permitted the LPR to re-enter as a returning immigrant. The person was not “admitted” to the United States; they were permitted to “re-enter” without having to face the grounds of admissibility. This incident can make them *deportable* for having been inadmissible at last “entry,” under INA § 237(a)(1). However, it should not be deemed an admission that makes them *subject to the LPR bars*, if they need to apply for § 212(h) in the future.

- ✓ ICE might charge that admission and adjustment as a refugee results in an admission that triggers the bars, but argue against this.¹¹ Also, the Ninth Circuit held that admission at the border after becoming an LPR by fraud does subject one to the bars.¹²
2. *If you are subject to the LPR bars, you still can apply for § 212(h) unless you actually come within one of the bars. You come within a bar if either:*
- You were convicted of an aggravated felony *after* being admitted at the border as an LPR, or
 - You did not continuously lawfully reside in the United States for seven years before the NTA was filed.
- ✓ *Compare the § 212(h) and the LPR cancellation seven-year periods.* An LPR who can’t reach the required seven years for one form of relief might reach it for the other.

A § 212(h) applicant who is subject to the LPR bars must have resided *lawfully and continuously* for seven years immediately preceding the application. Lawful and continuous residence does not include time spent as an applicant for relief, but – as long as there was no interruption of lawful status – it does include time on a non-immigrant visa, permanent residence, asylee or refugee status, and arguably Family Unity, TPS, or even time with an approved SIJS I-360 or with DACA.¹³ No admission is required to start the seven years, and the years cease to accrue only when the NTA is filed, not when the person commits certain offenses. See § 212(h)(2). Compare this to LPR cancellation, which requires seven years of continuous residence following an admission. On the downside, an admission is required to start the seven years for LPR cancellation, and the seven-year period ends on the date that the NTA was served or the person committed certain offenses, whichever happened first. On the upside, here the seven years continue to accrue after any admission, even if the person spent time without lawful immigration

status. See § 240A(a), (d) and see ILRC, *Eligibility for Relief: LPR Cancellation*, INA § 240A(a) (November 2019) at www.ilrc.org/crimes.

F. If you qualify to apply for § 212(h) based on having certain relatives, you must be able to establish that they would face “extreme hardship” if you were removed.

For many people, in order to win a grant of § 212(h) relief they must establish that a denial would result in “extreme hardship” to their USC or LPR spouse, parent, son, or daughter. INA § 212(h)(1).

Proving extreme hardship often is the most difficult part of the § 212(h) case. It requires careful thought and extensive preparation, especially if the relative does not suffer from an obvious illness or disability. USCIS provides useful guidance on extreme hardship in their *Policy Manual* found at <https://www.uscis.gov/policy-manual/volume-9-part-b>. Also, see ILRC resources that discuss how to establish extreme hardship, such as webinars,¹⁴ practice advisories,¹⁵ and the ILRC manual, *Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal*.¹⁶

Note that there are three other ways to qualify under INA § 212(h)(1) that do not require establishing extreme hardship. They are: if the applicant is a VAWA self-petitioner, or is only inadmissible under the prostitution ground, or if the inadmissible incident/s occurred at least 15 years ago. See INA § 212(h)(1) and see Subpart 2 of this advisory, above.

Finally, remember that § 212(h) potentially involves proving two kinds of hardship. First, some applicants have to establish “extreme hardship” to a qualifying USC or LPR relative, in order to meet the basic requirements for § 212(h). Second, if any § 212(h) applicant is found to have been convicted of a “dangerous or violent” offense, they must establish “extraordinary and extremely unusual hardship.” Proof of this higher level of hardship is not restricted to hardship to qualifying relatives; it can be hardship to the applicant as well, and arguably others. See Subpart 7.

G. You must be granted § 212(h) relief as a matter of discretion. Watch out for “violent or dangerous” offenses.

Generally. Like most immigration relief, § 212(h) is granted as a matter of discretion. Cases have interpreted this as requiring the adjudicator to employ a balancing test. In other words, the question is whether the applicant can show that the positive equities outweigh any negative factors.¹⁷

Dangerous or violent offense. A different standard applies if the § 212(h) applicant was convicted of a “violent or dangerous” offense. Then the person must prove extraordinary circumstances “such as” national security or foreign policy, or a clear demonstration that denial will result in “exceptional and extremely unusual” hardship. In some cases, even that showing will not be enough to win a discretionary grant of § 212(h). See 8 CFR 212.7(d), 1212.7(d) and see, e.g., *Matter of C-A-S-D*, 27 I&N Dec. 692, 699-701 (BIA 2019). The Ninth Circuit found that this regulatory requirement, which goes beyond the “extreme hardship” standard set out in § 212(h), is permissible, and can be applied retroactively to convictions received before the regulation was adopted.¹⁸

One defense strategy is to argue that the conviction is not of a “violent or dangerous” offense, based on the facts of the case. Precedent decisions have identified only extremely serious crimes as meeting the “violent or dangerous” definition. In the seminal case *Matter of Jean*, the “violent or dangerous” offense was causing

a baby's death by striking and violently shaking it and failing to seek medical care when it lost consciousness. The Attorney General stated, "In my judgment, that balance will nearly always require the denial of a request for discretionary relief from removal where an alien's criminal conduct *is as serious as that of the respondent.*" *Matter of Jean*, 23 I&N Dec. 373, 383 (AG 2002) (emphasis added). A grant would require "extraordinary circumstances" and even then might not be sufficient. *Id.* In *Matter of Jean* the Attorney General provided another example of a crime that would meet that definition: participating in a burglary where a mother was shot to death in front of her children. *Id.* at 382. The Ninth Circuit upheld a finding that sexual battery against a young child had been a "violent or dangerous" offense. *Torres-Valdivias v. Lynch*, 787 F.3d 1147 (9th Cir. 2015) (upholding denial of adjustment of status, where applicant was admissible). The BIA held that conviction under New Jersey law of robbery, false imprisonment, and attempt to injure was a "violent or dangerous" offense, where during a home invasion the defendant had bound the victim, wrapped nearly his whole head in duct tape, and pushed him down the stairs causing him to suffer many broken bones, and where a prison sentence of nine and a half years was imposed. *Matter of C-A-S-D*, 27 I&N Dec. 692, 699 (BIA 2019) (denying a waiver under INA § 209(c)).

Another defense strategy is to argue even if there is a "violent or dangerous" offense, the applicant can show exceptional and extremely unusual hardship or national interest. For this purpose, the regulation does not restrict the hardship to certain qualifying relatives, or to any particular group. Consideration of hardship to the applicant must be considered. *Rivera-Peraza v. Holder*, 684 F.3d 906 (9th Cir. 2012). Arguably, extraordinary hardship to any individual, or to the community, can be considered. Note that some applicants may need to prove two levels of hardship. Many people meet the requirements of § 212(h)(1) by showing that a qualifying USC or LPR family member will suffer "extreme hardship" if the applicant is removed. See Subpart 6, above. If they also are found to have been convicted of a "violent or dangerous" offense, they also must establish "extraordinary and extremely unusual hardship" to themselves and/or others.

III. Conviction of a New Offense After Winning § 212(h) (or §§ 240A(a)(1), 212(c))

Once a waiver has been granted, the person cannot be charged with being deportable or inadmissible based solely on the waived conviction.¹⁹ But a conviction that occurred after admission and that was waived by some relief still can be joined to a *new, subsequent* conviction to make the person deportable. For example, if a person was convicted of one crime involving moral turpitude (CIMT) after admission, that conviction was waived under § 212(h), and later the person was convicted of a new CIMT, the person could be charged with being deportable for conviction of two CIMTs after admission.²⁰

If the issue is inadmissibility, both the older, waived ground/s and the new ground/s must be waived in an application for adjustment of status. The BIA found that where LPR cancellation had been used to waive a prior conviction for possession of cocaine, and the LPR later became deportable for new CIMT convictions, he was not eligible to adjust status as a defense to removal: he was inadmissible both for the new CIMT and the old cocaine convictions, and he could not waive the cocaine conviction using § 212(h). The BIA noted, however, that a previously waived inadmissible conviction would *not* trigger INA § 101(a)(13)(C)(v) for an LPR returning from a trip, according to the terms of the statute.²¹

RESOURCES. For more in-depth coverage of § 212(h) and other relief, consult books such as ILRC, *Removal Defense* (www.ilrc.org 2019) and especially ILRC, *Remedies and Strategies for Permanent Resident Clients* Chapter 6 (www.ilrc.org 2017) and ILRC, *Hardship in Immigration Law: How to Prepare Winning Applications*

for *Hardship Waivers and Cancellation of Removal* (www.ilrc.org 2017). These manuals offer critical help; don't give up on a case without researching it intensively. For quick information on any form of relief, use the free ILRC guide, *N.17 Relief Toolkit* (2018) at www.ilrc.org/chart.

Chart: Compare INA § 212(h) Waiver with LPR Cancellation, INA § 240A(a)

Characteristics	LPR Cancellation, INA § 240A(a)	Waiver of Inadmissibility, INA § 212(h)
Aggravated Felony (AF)	Conviction of an AF is an absolute bar	Not a bar if the AF is otherwise waivable under § 212(h), but see rule below for LPRs who are subject to the LPR bars
Waivable Grounds	Almost all removal grounds, except AF	Common crimes inadmissibility grounds, except the drug waiver is limited to possession 30 gm or less marijuana
Current or prior relief	Absolute bar if prior grant of cancellation, suspension, or 212(c) relief	Prior grants of relief are not a bar; § 212(h) can be applied for repeatedly and in conjunction with other relief
Seven years	-Need seven years after any admission; -Unlawful status after admission counts; -Ends with service of NTA or commit certain crimes	This requirement only applies to those subject to the LPR bars. In that case: -Need 7 years continuous lawful status; -Don't need an admission to start -Ends with filing NTA, but not commission of a crime
Stand-alone remedy	Yes	Yes if applying for admission, but BIA says if charged with deportability, must have an application for adjustment. (Contest this rule, or more realistically, argue it does not apply to pre-6/20/13 convictions)
Must show	Remorse, rehabilitation; not too difficult to show	Rigorous "extreme hardship to family" standard, <i>unless</i> conviction/incident is 15 years old, only involves prostitution, or applicant is a VAWA self-petitioner
Discretion; Violent offenses	Balance equities. More egregious offense requires greater positive equities	Similar to LPR cancellation, except: conviction of a "violent or dangerous" offense requires national interest or extraordinary and extremely unusual hardship.
LPR status and bars	Must be an LPR to apply for LPR cancellation	People with any or no lawful status can apply for 212(h). But LPRs and conditional LPRs are subject to the LPR bars if they already have a prior admission, at a port of entry, as an LPR. Consular processing subjects them to bars; adjustment alone does not. <i>If</i> subject to the bars, the LPR (a) must not have an AF conviction after the triggering admission, and (b) must have 7 years continuous lawful residence before NTA is issued.

End Notes

¹ Other marijuana offenses that can be waived under INA § 212(h) include possession of paraphernalia for use with marijuana (*Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007)) and possession of an equivalent amount of hashish (INS General Counsel Legal Opinion 96-3 (Apr. 23, 1996), 21 USC § 802(16)). The BIA held that “simple possession of 30 grams or less of marijuana” does not include possession in a prison or a school drug-free zone. *Matter of Moncada-Servellon*, 24 I&N Dec. 62 (BIA 2007), *Matter of Martinez-Zapata*, *supra*. The Ninth Circuit held that it does include under the influence, but the BIA has said that it does not. Compare *Flores-Arellano*, 5 F.3d 360 (9th Cir. 1993); *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) with *Matter of Martinez-Zapata*, *supra*.

The BIA held that the amount of marijuana is a fact-based inquiry that is circumstance specific and not subject to the categorical approach. The § 212(h) applicant has the burden of producing any evidence to show that the amount was 30 grams or less, while the government would have the burden to prove deportability by showing that the amount was more than 30 grams. See *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012); *Matter of Dominguez Rodriguez*, 26 I&N Dec. 408 (BIA 2014) (*Moncrieffe* does not change the result in *Davy*). See helpful discussion of defense strategies at Zota, *Practice Advisory: Matter of Davy and the Categorical Approach* (2013) at <http://www.nipnl.org/practice.html>.

² See, e.g., *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998); *Matter of Kanga*, 21 I&N 1206 (BIA 2000).

³ Section 101(a)(13)(C) of the INA states that an LPR “shall not be regarded as seeking an admission into the United States for purposes of the immigration laws” unless the LPR comes within one of six stated exceptions. Common exceptions are that immigration authorities can prove that the person is inadmissible for crimes or that the person was outside the United States for more than six months. If the government proves the LPR comes within one of the exceptions, the LPR is treated like any other noncitizen seeking admission: they face all of the inadmissibility grounds. An LPR applying for § 212(h) at the border does not need to submit an application for adjustment. *Matter of Abosi*, 24 I&N Dec. 204, 205-206 (BIA 2007).

⁴ Before *Matter of Rivas*, 26 I&N Dec. 130 (BIA June 20, 2013), it was common practice to permit LPRs to apply for § 212(h) as a defense to deportability, not in conjunction with an application for adjustment, in the following situation: The LPR became inadmissible for crimes and then traveled abroad. Upon their return, they could have applied for a § 212(h) waiver of inadmissibility at the border, with no requirement that they also apply for adjustment, if they had been correctly identified as an LPR who was seeking a new admission under INA § 101(a)(13)(C). Instead, however, they were mistakenly permitted to “re-enter,” despite § 101(a)(13)(C). Later they were put in removal proceedings under INA § 237, charged with being deportable for having been inadmissible at last entry (INA § 237(a)(1)) and/or because their inadmissible convictions also made them deportable (INA § 237(a)(2)). Before *Rivas*, as a defense to deportability, they were permitted to apply for § 212(h) *nunc pro tunc*, meaning as if they were still at the border, with no requirement of an adjustment application.

When *Matter of Rivas* in 2013 held that these *nunc pro tunc* applications no longer were permitted – based on its new interpretation of the Immigration Act of 1990, which had been passed 13 years earlier – it set out a new rule that imposed adverse consequences on past decisions, such as past decisions to plead guilty. Arguably, *Rivas* cannot be applied retroactively to convictions from before it was published on June 20, 2013. See *Margulis v. Holder*, 725 F.3d 785, 789 (7th Cir. 2013) (BIA must consider whether or not *Rivas* can be applied retroactively to convictions from before its publication date); see also *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007) and *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1292 (9th Cir. 2018) on factors that support requiring prospective-only application of a new rule set out in a BIA decision.

In addition, counsel at least can argue that even an LPR who has not left the United States should be permitted to apply for a § 212(h) waiver as a defense to deportability, without an application for adjustment. It should be treated like the former § 212(c) relief, where no travel was required. This defense has been disapproved of by the BIA and will have to win at the Ninth Circuit; it should be viewed as a long shot. While pursuing this, counsel should consider other defenses including investigating the possibility of obtaining post-conviction relief.

For further discussion see Michael Vastine, *The Status of Stand-Alone INA § 212(h) Waivers in 2013: Can Matter of Rivas Withstand Constitutional Scrutiny?* 2013 Emerging Issues 7039, (LEXIS) (July 2013), and see Kate Aschenbrenner Rodriguez, *Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers*, 69 Okla. L. Rev. 111 (2017), <http://digitalcommons.law.ou.edu/olr/vol69/iss2/1>.

⁵ *Matter of Rainford*, 20 I&N Dec. 598 (BIA 1992), *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993).

⁶ *Matter of Y-N-P-*, 26 I&N Dec. 10 (BIA 2012); *Matter of Bustamante*, 25 I&N Dec. 564 (BIA 2011). For VAWA self-petitioners who must prove good moral character to qualify for the I-360 petition, see INA § 204(a)(1)(C), 8 USC § 1154; 8 CFR 204.2(c)(1)(i)(F), (c)(2)(v).

⁷ *Matter of Paek*, 26 I&N Dec. 403 (BIA 2014), *aff'd Paek v. Atty Gen.*, 793 F.3d 330 (3d Cir. 2015) (includes conditional residents).

⁸ *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015). A person who goes through consular processing, becomes deportable, and adjusts status as a defense to deportability still is subject to the bars. *Matter of Vella*, 27 I&N Dec. 138 (BIA 2017).

⁹ See n. 3, above, regarding INA § 101(a)(13)(C).

¹⁰ See *Matter of Abosi*, 24 I&N Dec. 204, 205-206 (BIA 2007) (an LPR applying for admission at the border does not require an adjustment of status application to apply for a § 212(h) waiver).

¹¹ Based on unique language at INA § 209(a)(1), 8 USC § 1159(a)(1), the Eighth Circuit held that admission and subsequent adjustment as a refugee subjects the person to the LPR bars. At least one BIA opinion did not agree. Compare *Spacek v. Holder*, 688 F.3d 536, 539 (8th Cir. 2012) with *Matter of Peduri*, A071 302 021 (BIA May 19, 2017) (unpublished).

¹² *Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010).

¹³ Lawfully residing requires a “grant of a specific privilege to stay in this country, not the mere fact that he or she is an applicant for such a privilege.” It does not require an admission to start, per the language of § 212(h)(2). It ends when the NTA is filed, or when there is a break in lawful status. It is not necessarily interrupted by trips outside the country, as long as the applicant maintains intent to reside here. See INA § 101(a)(33). It does not include time spent as applicant for adjustment or asylum, but does include time spent (without break) as a non-immigrant, LPR, refugee, or asylee. *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008). It ought to include TPS and, as the Ninth Circuit held in *Yepez-Razo v. Gonzales*, 445 F.3d 1216 (9th Cir. 2006), Family Unity. The BIA did not rule on the Family Unity issue, but it noted *Yepez-Razo* and stated:

Ordinarily, we would expect the privilege of residing in this country to be reflected in a recognized status such as that of nonimmigrant, refugee, or asylee, each of which is set out in the statute. The unique nature of the Family Unity Program may qualify as well, given its statutory foundation in section 301 of the Immigration Act of 1990, and its expectation of long-term presence and ultimate regularization of status. Notably, benefits under the Family Unity Program require the filing of an application and a favorable decision on that application. See 8 C.F.R. § 236.14 (2008).

Matter of Rotimi, 24 I&N Dec. at 576-77.

Under that reasoning, arguably time spent after a grant of an SIJS I-360 application meets these criteria and also qualifies. See, e.g., discussion in *Garcia v. Holder*, 659 F.3d 1261, 1270-1271 (9th Cir. 2011), regarding the similarities between the benefits of SIJS and those of Family Unity. (Note, however, that *Garcia* was not addressing § 212(h); instead, it held that a grant of SIJS is an “admission” for purposes of LPR cancellation, INA § 240A(a). The “admission” holding in *Garcia* is in some doubt after the Ninth Circuit deferred to the BIA to find that a Family Unity grant is not an admission for § 240A(a) purposes, in *Medina-Nunez v. Lynch*, 788 F.3d 1103, 1104 (9th Cir. 2015). But that is a different question from the 212(h) seven years, which do not require an admission.) Advocates can argue that deferred action under DACA counts; it is not unlawful presence for purposes of the 3/10 year bars under INA § 212(a)(9)(B) and arguably the underlying policy is that DACA recipient ultimately will stay in the United States. See USCIS, , *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act*, (May 6, 2009) at

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

¹⁴ See, e.g., the recorded webinar *Understanding Extreme Hardship in Waivers* (Jan. 2018) at <https://www.ilrc.org/understanding-extreme-hardship-waivers-what-extreme-hardship-and-how-prove-it>.

¹⁵ See ILRC, *Practice Advisory: Understanding Extreme Hardship in Waivers* (Jan. 2018) at https://www.ilrc.org/sites/default/files/resources/understanding_extreme_hardship_waivers-ab-20180131.pdf.

¹⁶ For information on ILRC, *Hardship in Immigration Law: How to Prepare Winning Applications for Hardship Waivers and Cancellation of Removal* (May 30, 2017), go to <https://www.ilrc.org/hardship-in-immigration-law>, or see <https://www.ilrc.org/publications>.

¹⁷ See *Matter of Mendez*, 21 I&N Dec. 296, 300 (BIA 1996) (stating that § 212(h) relief should employ the same factors for discretionary rulings as § 212(c) relief which are set out in *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)).

¹⁸ *Mejia v. Gonzales*, 499 F.3d 991 (9th Cir. 2007).

¹⁹ *Matter of Gordon*, 20 I&N Dec. 52, 56 (BIA 1989); *Matter of Balderas*, 20 I&N Dec. 389, 393 (BIA 1991).

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

²¹ *Matter of Taveras*, 25 I&N Dec. 834 (BIA 2012), upheld in *Taveras v. AG of the United States*, 731 F.3d 281 (3rd Cir. 2013), and see *De Hoyos v. Mukasey*, 551 F.3d 339 (5th Cir. 2008).

Many thanks to ILRC attorney Alison Kamhi for her valuable comments and edits to this advisory.



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About the Immigrant Legal Resource Center

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