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# Relief Available With An Aggravated Felony Conviction

What relief is available to a person in removal proceedings who has been convicted of an aggravated felony.

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# INA 212(h) Waiver -- No AF Bar for Refugees

## Aggravated Felony Bar

Normally an Aggravated Felony will disqualify someone from eligibility for an INA 212(h) waiver.

AF is NOT a bar to INA 212(h) for a Refugee Who Adjusted to an LPR. See *Matter of N-V-G-*, 28 I&N Dec. 380 (BIA 2021).

→ The Fifth, Ninth and Eleventh Circuit Courts of Appeal have held that the LPR bar to § 212(h) based on an aggravated felony conviction will only apply to a noncitizen who was admitted to the United States as a lawful permanent resident at the border or its equivalent (e.g., an airport). Merely adjusting status to permanent residency does not trigger the bar. *Martinez v. Mukasey*, 519 F.3d 532, 544-45 (5th Cir. 2008); *Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir. 2010); *Lanier v. United States AG*, 631 F.3d 1361, 1366-67 (11th Cir. 2011). The same rule should apply to the LPR bar based on lack of seven years lawful continuous residence.

## 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 offenses<sup>1</sup>--but no other drug offense.

**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;
4. Applicant for adjustment of status affirmatively;

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).

#### **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.<sup>7</sup> 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)

# Protections Under the Convention Against Torture

## **WITHHOLDING OF REMOVAL**

A person might not be barred from applying for withholding of removal under INA § 243(b)(3), 8 USC § 1231(b)(3).

### **An aggravated felony conviction will only act as a bar to withholding if:**

(a) it is classed as a “particularly serious crime” (which includes nearly any drug trafficking offense, among other crimes)

**or**

(b) one or more convictions of an aggravated felony resulted in a total sentence of at least five years. 8 CFR 208.16(d)(3).