

# **42A -- LPR CANCELLATION OF REMOVAL**

**Form 42A  
Cancellation of Removal  
for Certain Legal Permanent  
Residents**

## **Basic Eligibility**

**You can apply for LPR Cancellation of Removal  
under INA § 240(A)(a) if...**

## **A. You obtained LPR status lawfully and do not fall within certain categories.**

You must not have become an LPR through fraud or mistake. You must not come within certain categories, including persecutors and terrorists.

## **B. You have not been convicted of an aggravated felony.**

The immigration statute designates certain types of crimes as “aggravated felonies.” If the person was convicted of an aggravated felony at any time, it is a bar to LPR cancellation of removal.<sup>5</sup> If the aggravated felony does not involve drugs, check to see if the person might be eligible for relief under INA § 212(h).<sup>6</sup> If the aggravated felony conviction occurred in the 1990’s or earlier, check for eligibility for a waiver under INA § 212(c), discussed below. For other options, see the ILRC Relief Toolkit at [www.ilrc.org/chart](http://www.ilrc.org/chart).

## **C. You have been an LPR for at least five years. The applicant must have “been an alien lawfully admitted for permanent residence for not less than 5 years.”**

INA § 240A(a)(1). The five years of LPR status includes time spent as a conditional permanent resident. Children cannot use their parent’s time, for either the five-year LPR or seven-year continuous residence requirement.

The accrual of five years of LPR status is not subject to the “stop-time” rule set out at INA § 240A(d)(1), discussed below. The five years as an LPR continue to accrue through the removal proceedings until there is an administrative denial (meaning throughout the BIA appeal, if there is one).

## **D. You have accrued seven years of continuous residence in the United States since admission in any status.**

The applicant must have “resided in the United States continuously for 7 years after having been admitted in any status.” INA § 240A(a)(2). As discussed below, a complex “stop-time” provision governs when the seven years cease to accrue based on commission of certain offenses, under INA § 240A(d)(1)(B).

## **Five Years As LPR**

**Five-Year as LPR Example:** Maritza was admitted on a border crossing card in 2009, fell out of status, and then adjusted to lawful permanent resident status in 2014. She was convicted of an alleged deportable offense and served with a Notice to Appear in 2017. She was not eligible for LPR cancellation because she lacked the five years as an LPR (although she did have the seven years since admission in any status, discussed below). In removal proceedings, she contested deportability, lost, and appealed her case to the BIA. In 2019, while the appeal was still pending, she reached the five years of LPR status. The BIA agreed to her request to remand the case to the immigration judge to enable her to apply for LPR cancellation.

# 7 Years of Physical Presence

## 1. What starts the accrual of the seven years?

The seven-year “clock” starts with any admission, e.g., as an LPR, visitor, border crossing card-holder, student, etc., including if the person fell out of status for some period before they adjusted. If the person never was admitted, adjustment of status to LPR will count as the admission that starts the seven years. The Fifth and Ninth Circuits held that admission includes a person who was “waved through” at a port of entry, but the BIA will apply this rule only in cases arising within the Fifth and Ninth Circuit.<sup>11</sup> Advocates can assert that in some cases a grant of status within the United States constitutes an admission for purposes of the seven years. A grant of a T, U, or V visa should be so held.<sup>12</sup>

Advocates can consider arguments that an admission for this purpose includes a grant of Temporary Protected Status (TPS) (in the Fifth, Eighth, and Ninth Circuits) or of Special Immigrant Juvenile Status (in the Ninth Circuit). As always with untried arguments, at the same time they should explore other defense strategies, including post-conviction relief to vacate the removable conviction/s.

A grant of Family Unity, or merely applying for asylum or adjustment, or being granted asylum, is not an admission.<sup>15</sup>

## 2. What ends the accrual of seven years:

Served with a Qualifying Notice to Appear (NTA) Under the “stop-time” provision in INA § 240A(d)(1), the seven years since admission cease to accrue: “

(A) .... when the alien (sic) is served a notice to appear under section 239(a), or

**(B) when the alien (sic) has committed an offense referred to in section 212(a)(2) that renders the alien (sic) inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.” The Supreme Court ruled that for service of the notice to appear (NTA) to stop the accrual of time under § 240A(d)(1)(A), the NTA must contain the place, date, and time of the proceedings. See *Pereira v. Sessions*, 138 S.Ct. 2105 (2018). While *Pereira* and other cases concern non-LPR cancellation under INA § 240A(b)(1), the definition at INA § 240A(d)(1)(A) applies to both LPR and non-LPR cancellation. In many LPR cancellation cases the *Pereira* issue is not important, because the person committed an offense that stopped the clock before the NTA was served.**

**The issue can be determinative in LPR cancellation if (a) the seven-year clock was not already stopped before issuance of the NTA, and (b) the NTA that purports to stop the clock did not contain the place, date and time of the proceedings. If that is the case, advocates must dive into the multiple BIA and federal court cases that have varying interpretations of *Pereira*.**

## **DOUBLE CHECK ON THE OUTCOME OF THIS CASE:**

**The Supreme Court will decide a key issue, in *Niz-Chavez v. Barr*, 789 Fed. Appx. 523 (6th Cir. 2019), cert. granted, (June 8, 2020). If the government prevails, SCOTUS likely would uphold the BIA’s position that the stop-time rule is triggered when the subsequent service of a Notice of Hearing perfects a deficient NTA. If *Niz-Chavez* prevails, the stop-time rule would never be triggered by government service of additional documents where the NTA itself failed to list the time**

and place of proceedings, because an NTA must be a single document and cannot be “perfected” by the subsequent service of other document(s).

### **3. What ends the accrual of seven years?**

Rendered inadmissible under INA § 212 (a)(2), under *Barton v. Barr* The seven-year period also ends when the applicant “has committed an offense referred to in section 212(a)(2) that renders the alien (sic) inadmissible to the United States under section 212(a)(2) or removable [deportable] from the United States under section 237(a)(2) or 237(a)(4).” See INA § 240A(d)(1)(B). The Supreme Court addressed § 240A(d)(1)(B) in *Barton v. Barr*, --U.S.--, 140 S.Ct. 1442 (2020). The Ninth Circuit had interpreted the provision to mean that to stop the accrual of seven years, an offense always must be referred to in INA § 212(a)(2), but whether it must “render” the person inadmissible versus deportable is determined by the posture of the case.

If the LPR has been admitted (and thus is being charged with being deportable under INA § 237(a)), the LPR is not subject to the grounds of inadmissibility and therefore legally cannot be “rendered” inadmissible. In those removal proceedings, an offense stops the seven-year clock only if it is referred to in § 212(a)(2) and renders the person deportable under § 237(a)(2) or (4). *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018). Mr. Nguyen had admitted that he committed a drug offense (but was not convicted of it) before reaching his seven years. A qualifying admission of a drug offense is referred to in INA § 212(a)(2), but it does not make one deportable; that requires a conviction. The Ninth Circuit found that Mr. Nguyen’s admission did not meet the requirements of § 240A(d)(1)(B) and did not stop the time

accruing toward his seven years. In *Barton*, the Supreme Court rejected the Ninth Circuit's analysis, and interpreted § 240A(d)(1)(B) to mean that the seven years cease to accrue when the person has committed an offense referred to in § 212(a)(2) that renders them inadmissible under § 212(a)(2). In an opinion by Justice Kavanaugh, the Court held that a noncitizen could be "rendered" inadmissible under § 240A(d) even if they were not subject to the inadmissibility grounds. Writing for the dissent, Justice Sotomayor criticized the majority's interpretation for failing to give effect to the "two-track" system of inadmissibility and deportability in immigration law, and for rendering sections of the statute superfluous. *Barton* is discussed more below, but the bottom line is that:

- If any LPR cancellation applicant is described in the criminal inadmissibility grounds at INA § 212(a)(2), the clock stops as of the date that the person committed the relevant offense.
- If the LPR is not described in § 212(a)(2), then the offense does not stop the clock, even if it made them deportable. For a more comprehensive discussion of the effect of *Barton v. Barr* on the seven years, see IDP, ILRC, NIPNLG, Practice Advisory: Avoiding the Stop-Time Rule After *Barton v. Barr* (July 2020).

Advocates should keep abreast of advisories about *Barton* and possible new defenses, and always should investigate post-conviction relief to erase a harmful conviction. Here are the key points to remember.

a. The clock stops as of the date the offense was committed, but the person also must be "rendered" inadmissible via a conviction, admission, or other requirement under § 212(a)(2). In Mr. Barton's case, the Court held that the clock stopped because he was rendered inadmissible under the crimes involving moral turpitude (CIMT) ground, which requires that the person

either was convicted of, or admitted committing, a CIMT that does not fall within certain exceptions. Mr. Barton's clock stopped as of the date he committed the offense (this is a long-established rule).

The Court explained: "First, cancellation of removal is precluded if a noncitizen committed a § 1182(a)(2) offense during the initial seven years of residence, even if (as in Barton's case) the conviction occurred after the seven years elapsed.... "Second, the text of the law requires that the noncitizen be rendered "inadmissible" as a result of the offense. For crimes involving moral turpitude, which is the relevant category of § 1182(a)(2) offenses here, § 1182(a)(2) provides that a noncitizen is rendered "inadmissible" when he is convicted of or admits the offense. § 1182(a)(2)(A)(i). As the Eleventh Circuit explained, "while only commission is required at step one, conviction (or admission) is required at step two." *Barton v. Barr*, 140 S.Ct. at 1450 (emphasis in original, internal citations deleted).

**PRACTICE TIP:** An LPR is not "rendered inadmissible" under the controlled substance and CIMT grounds unless they were convicted of, or made a qualifying admission that they committed, the offense. The government's suspicion, allegation, or evidence that the person committed the offense is not enough to render them inadmissible and stop their clock, without a conviction or admission of conduct.

- If a conviction is vacated based on legal error so that it is eliminated for immigration purposes, then commission of the offense did not stop the clock because the person never was legitimately "rendered inadmissible." (Of course, where it is possible a more direct option is

**to vacate the deportable conviction/s that are the bases for removal, and terminate the proceedings.)**

- If there was no conviction and an LPR refuses to admit the conduct to DHS, they are not rendered inadmissible and the clock does not stop. See discussion of admitting conduct on the stand at subpart f, below.**

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