

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

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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.**

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.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)**
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