NATIONAL IMMIGRANT JUSTICE CENTER

SCOTT D. POLLOCK & ASSOCIATES PC

NATIONAL IMMIGRATION PROJECT
Lawyers for the Movement

Practice Advisory on Returning Lawful Permanent Residents and Crimes[1]

January 16, 2025

I. Introduction

Being a lawful permanent resident (LPR) of the United States carries important benefits, including the right to live and work in the United States and the ability to apply for U.S. citizenship after certain requirements are met. However, in some situations an LPR's travel outside of the United States, even for a brief trip, can jeopardize their status and its attendant benefits. One of these situations is where the LPR has committed certain criminal offenses, even though the offense may be minor and even when the offense would not render the LPR deportable if they never departed the United States. Now more than ever, it is important for legal practitioners to fully understand and properly advise LPR clients about the potential consequences of travel. This practice advisory describes the circumstances when LPRs returning from a trip abroad who have committed certain offenses can be treated as seeking admission and outlines the negative consequences for an LPR treated as seeking admission. It then provides practice tips to try to prevent an LPR from being treated as seeking admission due to certain criminal offenses, as well as strategies for defending an LPR in immigration court who has been charged as seeking admission due to criminal offenses.

II. Are LPRs returning from a trip abroad generally treated as seeking an admission like any other noncitizen?

No. The Immigration and Nationality Act (INA) defines "admission" as "the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer."[2] Generally, a noncitizen who comes to a port of entry seeking admission is subjected to an inspection by an immigration officer to determine if they are entitled to be admitted.[3] However, LPRs are usually exempt from needing to establish that they are entitled to be admitted when they return from a trip abroad and thus they can depart and return to the United States without being screened for inadmissibility.[4] That said, if one of six circumstances apply, immigration officials

[1] Publication of the National Immigrant Justice Center (NIJC), National Immigration Project (NIPNLG), and Scott D. Pollock & Associates PC, 2025. This practice advisory is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The authors of this resource are Elizabeth Gibson, NIJC Managing Attorney for Capacity Building; Anne Relias, Partner at Scott D. Pollock & Associates PC; and Rebecca Scholtz, NIPNLG Senior Staff Attorney. The authors would like to thank the following individuals for their thoughtful contributions to this resource: Russell Abrutyn, Abrutyn Law, PLLC; Khaled Alrabe, NIPNLG Senior Staff Attorney; Michelle N. Méndez, NIPNLG Director of Legal Resources and Training; and Kathryn R. Weber, Partner, Scott D. Pollock & Associates. This resource is not a substitute for independent legal advice provided by legal counsel familiar with a client's case.

[2] INA § 101(a)(13)(A).

[3] INA § 235(a)(3), (b)(2)(A).

[4] INA § 101(a)(13)(C).

can treat the LPR as seeking an admission.[5] As explained further below, being treated as an applicant for admission carries a number of negative consequences for an LPR.

A. What are the circumstances in which a returning LPR can be treated as an applicant for admission?

There are six circumstances in which a returning LPR can be treated as an applicant for admission, as follows:

1. The LPR has abandoned or relinquished their LPR status;
2. The LPR has been outside of the United States continuously for more than 180 days;
3. The LPR has "engaged in illegal activity" after they left the United States;
4. The LPR left the United States while they were in removal or extradition proceedings;
5. The LPR has "committed an offense identified in [INA § 212(a)(2)], unless since such offense the [noncitizen] has been granted relief under [INA § 212(h) or INA § 240A(a)]"; and
6. The LPR "is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer."[6]

This practice advisory focuses on the fifth scenario—LPRs who allegedly have committed an offense triggering crime-based inadmissibility. Section III below will describe in more detail who might fall into this category.

B. What are the consequences of being treated as a returning LPR applicant for admission?

Returning LPRs whom the Department of Homeland Security (DHS) treats as an applicant for admission face a number of negative consequences. First, returning LPRs may be subject to secondary inspection and additional scrutiny at the airport with limited access to legal counsel.[7] Attorneys may be able to call the Customs and Border Protection (CBP) supervisor to obtain information or provide additional facts about a client's case, but will be unable to advocate for a particular outcome. Often, clients are unable to call attorneys or family members/friends. If the issue is not resolved during secondary inspection, CBP can defer the returning LPR's inspection and require them to attend a subsequent deferred inspection appointment to determine whether to treat them as an applicant for admission.[8]

---

[5] *Id.*
[6] *Id.*
[7] Secondary inspection is a more detailed screening that takes place in a designated interview area at a port-of-entry. CBP may subject a noncitizen to secondary inspection when CBP cannot immediately verify the noncitizen's information or needs further documentation. *See* DHS, Study in the States, What is Secondary Inspection?, https://studyinthestates.dhs.gov/students/travel/what-is-secondary-inspection (last visited Jan. 7, 2025); *see also* 8 CFR § 292.5(b) (stating that individuals in primary and secondary inspection generally do not have the right to representation).
[8] *See* 8 CFR § 235.2; CBP, What Is a Deferred Inspection Site? (Mar. 14, 2024), https://www.help.cbp.gov/s/article/Article1856?language=en_US.

Second, when DHS decides to treat an LPR as an applicant for admission, DHS places them into removal proceedings and charges them in the Notice to Appear (NTA) with ground(s) of *inadmissibility* under INA § 212. This is different from the normal rules that govern the removal of LPRs, whereby they can only be placed into removal proceedings if they have allegedly triggered a ground of *deportability* under INA § 237. The grounds of deportability are generally narrower than the grounds of inadmissibility, and it is thus typically preferable to be subject to removal based on deportability rather than based on inadmissibility. For example, a single marijuana possession conviction, regardless of how small the amount, triggers inadmissibility, but a single conviction for possessing 30 grams or less of marijuana does not trigger deportability.[9]

Third, if DHS chooses to detain an LPR charged as an applicant for admission during their removal proceedings, they are ineligible for an immigration judge (IJ) bond hearing.[10] This is true regardless of which of the six circumstances DHS is alleging applies to the returning LPR. Even though returning LPRs charged as applicants for admission are not eligible for an IJ bond hearing, DHS retains discretion to release them pursuant to its parole authority under INA § 212(d)(5)(A).

Fourth, until recently, if the returning LPR was able to get removal proceedings dismissed other than by defeating the NTA charges—such as through DHS exercising prosecutorial discretion—and later applied for naturalization, USCIS could find them ineligible for naturalization alleging that they were not lawfully admitted as a permanent resident under 8 CFR § 316.2(b). That regulation states that a naturalization applicant bears the burden to prove that they were lawfully admitted as an LPR "in accordance with the immigration laws in effect at the time of the applicant's initial entry or *any subsequent reentry*."[11] Until recently, USCIS sometimes interpreted the italicized language to permit it to deny naturalization to a person who had been charged as a returning LPR applicant for admission but then had those proceedings dismissed based on DHS's exercise of prosecutorial discretion. After the Fourth Circuit struck down this interpretation in *Azumah v. USCIS*, 107 F.4th 272 (4th Cir. 2024), USCIS on November 14, 2024 changed its naturalization policy nationwide in a way that is favorable to returning LPRs. Under the new policy, when USCIS considers whether a naturalization applicant has been lawfully admitted for permanent residence under INA § 318, USCIS considers only the LPR's initial admission or adjustment and does not review the LPR's subsequent reentries.[12] As long as this favorable policy is in effect, prosecutorial discretion-based (or NTA defect-based) dismissal of removal proceedings should not prevent naturalization for LPRs charged as applicants for admission. In an

[9] *Compare* INA § 212(a)(2)(A)(i)(II), *with* INA § 237(a)(2)(B)(i). Further, the controlled substance offense *inadmissibility* ground can also be triggered by an "admission" that meets certain requirements, whereas the controlled substance *deportability* ground requires a conviction.

[10] Being charged as an "applicant for admission" is not the only situation that can trigger detention with no eligibility for an IJ bond hearing for an LPR. LPRs charged with deportability under INA § 237 are subject to detention and not eligible for an IJ bond hearing if they have triggered certain criminal grounds of deportability, *see* INA § 236(c). But an LPR placed into removal proceedings based on deportability (rather than as a returning LPR applicant for admission) would not be subject to detention without access to an IJ bond hearing based on the broader crime-based *inadmissibility* grounds.

[11] 8 CFR § 316.2(b) (emphasis added).

[12] USCIS Policy Alert, PA-2024-28, Lawful Admission for Permanent Residence Requirement for Naturalization (Nov. 14, 2024), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20241114-LPRAdmissionForNaturalization.pdf; USCIS Policy Manual, Vol. 12, Pt. D, Ch. 2.A, https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-2.

abundance of caution, practitioners can ask that the IJ order that dismisses proceedings include language that the LPR is "admitted as a returning lawful permanent resident."

C. What is the burden of proof scheme in removal proceedings initiated against returning LPRs?

If DHS places an LPR into removal proceedings charging them as an applicant for admission, the BIA has held that DHS has the burden to prove by clear and convincing evidence that the LPR is properly charged as seeking admission—in other words, that one of the six exceptions applies.[13] This is a more favorable burden of proof scheme than what applies to other noncitizens charged with grounds of inadmissibility in removal proceedings.[14] In fact, a number of circuit courts have concluded that DHS must satisfy an even higher burden than that recognized by the BIA to establish that a returning LPR is properly subject to one of the six exceptions—of "clear, unequivocal, and convincing evidence."[15]

In contrast, the BIA has not decided who has the burden of proof regarding an LPR's inadmissibility once DHS has met its burden that the LPR is properly charged as an applicant for admission, calling it an "open question."[16] Some circuit courts have concluded that DHS has the burden of proof to establish a returning LPR's inadmissibility, by "clear and convincing" or "clear, unequivocal, and convincing" evidence.[17] The Eighth Circuit, in contrast, concluded that the returning LPR has the burden to prove they are admissible.[18]

III. When is an LPR treated as seeking admission based on an INA § 212(a)(2) offense?

With regards to removability, LPRs usually only need to worry about a criminal record if it forms the basis for a ground of *deportability* under INA § 237 in contrast with the broader grounds of *inadmissibility* under INA § 212.[19] However, when an LPR travels abroad, the calculation changes, and a conviction that did not subject them to deportability may now raise serious problems at the port of entry.

---

[13] *Matter of Rivens*, 25 I&N Dec. 623, 625–26 (BIA 2011).
[14] INA § 240(c)(2)(A), (c)(2)(B); 8 CFR § 1240.8(c).
[15] *See, e.g.*, *Mahmoud v. Barr*, 981 F.3d 122, 125–26 (1st Cir. 2020); *Atseyinku v. Sessions*, 731 F. App'x 198, 201–202 (4th Cir. 2018) (unpublished); *Ward v. Holder*, 733 F.3d 601, 603–06 (6th Cir. 2013); *Matadin v. Mukasey*, 546 F.3d 85, 89–93 (2d Cir. 2008); *Hana v. Gonzales*, 400 F.3d 472, 477 (6th Cir. 2005); *Moin v. Ashcroft,* 335 F.3d 415, 419–21 (5th Cir. 2003); *Khodagholian v. Ashcroft*, 335 F.3d 1003, 1006 (9th Cir. 2003); *cf. Addington v. Texas*, 441 U.S. 418, 432 (1979) (discussing "clear, unequivocal, and convincing" standard used in denaturalization and stating that the term "unequivocal" means "proof that admits of no doubt, a burden approximating, if not exceeding, that used in criminal cases"). While the BIA in *Rivens* justified its conclusion that "clear and convincing" is the proper standard based on "longstanding case law," the precedent the BIA cited instead establishes a "clear, unequivocal, and convincing" standard. 25 I&N Dec. at 625. The BIA only briefly recognized the distinction between the two standards in a footnote. *Id.* at 626 n.3.
[16] *Rivens*, 25 I&N Dec. at 626–27.
[17] *See, e.g.*, *Centurion v. Holder*, 755 F.3d 115, 119 (2d Cir. 2014) ("clear, unequivocal, and convincing"); *Ward*, 733 F.3d at 603–06 ("clear, unequivocal, and convincing"); *Singh v. Mukasey*, 553 F.3d 207, 212 (2d Cir. 2009) ("clear and convincing"); *Barradas v. Holder*, 582 F.3d 754, 762 (7th Cir. 2009) ("clear and convincing").
[18] *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892, 894 (8th Cir. 2005).
[19] A criminal record that does not trigger removability may be relevant in other specific circumstances, even without travel, such as in determining eligibility for cancellation of removal. *See Barton v. Barr*, 590 U.S. 222 (2020).

As discussed above, there are six scenarios where a returning LPR can be treated as seeking admission; this section will focus on the fifth exception: commission of certain crimes under INA § 101(a)(13)(C)(v). Under this subsection a returning LPR is treated as seeking admission if:

1) They have committed an offense "identified in" INA § 212(a)(2), and
2) They have NOT already been granted relief under INA § 212(h) (waiver for criminal grounds of inadmissibility) or INA § 240A(a) (LPR cancellation of removal).

A. What offenses does INA § 212(a)(2) cover?

The offenses that trigger problems for returning LPRs are under INA § 212(a)(2). The chart below lists those offenses and compares them to the grounds of deportability that usually apply to LPRs.

INA § 212(a)(2) Offenses *Apply to Returning LPRs Charged as Seeking Admission*	**INA § 237(a)(2) Offenses** *Apply to All LPRs*
Any single crime involving moral turpitude (CIMT), unless the petty offense or youthful offender exception applies **(C/A)**	**Two CIMTs,** or **one CIMT within five years of admission with a one-year sentence possible (C)**
Controlled substance offenses **(C/A)**	Controlled substance offenses **(except 30 grams of marijuana) (C)**
Controlled substance trafficker or has been a knowing aider, abettor, assister, conspirator, or colluder **(RTB)**	Controlled substance trafficker[20] **(C)**
Two or more convictions where aggregate sentence is five or more years **(C)**	
	Aggravated felony **(C)**, a lengthy list of offenses defined at INA § 101(a)(43)
Prostitution and commercialized vice **(CTE)**	
Human trafficking **(RTB)**	Human trafficking **(RTB)**
Money laundering **(RTB)**	
	Firearms offenses **(C)**
	Crimes of domestic violence **(C)**
	Child abuse, neglect, abandonment **(C)**
	Other miscellaneous specified crimes.

Basis for charge: C – Conviction; C/A – Conviction or Admission; RTB – Reason to Believe; CTE – Coming to Engage in.

[20] This is a type of aggravated felony defined at INA § 101(a)(43)(B).

While at first glance, the list of crimes under INA § 237 might look longer, that is only because INA § 212 contains broader crimes and INA § 237 includes a subset of more specific scenarios. Two significant differences for returning LPRs are that even (1) a single CIMT at least five years after admission or (2) a single offense involving a small amount of marijuana can jeopardize their status if they travel.[21] In contrast, neither of these offenses would make an LPR deportable if they did not leave and attempt to reenter the United States.[22] The inadmissibility provision barring a single CIMT in particular is a broad catch-all. A CIMT is "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[23] Although what exactly constitutes a CIMT is a murky, actively litigated area of law, this vagueness means returning LPRs with convictions may have to defend themselves against allegations that an offense is a CIMT even when there are good arguments their offense is not a CIMT.

B. What does an offense "identified in" INA § 212(a)(2) mean?

When considering whether a criminal record carries immigration consequences, it is important to look at just what kind of record counts: an arrest, a conviction, reason to believe, a verbal admission? When it comes to returning LPRs, it depends on the type of offense.

For CIMTs and controlled substance offenses, the statute specifically refers to convictions and admissions.[24] Even so, for returning LPRs, advocates should generally be most concerned about convictions. This is because in the immigration context, an "admission" of criminal conduct cannot be inferred from a basic statement of facts and requires the government to follow strict rules for eliciting the elements of a crime.[25] The U.S. Supreme Court has clarified that "the immigration officer at the border would check the [noncitizen]'s records for a conviction. He would not call into session a piepowder court to entertain a plea or conduct a trial."[26]

That said, other sections of INA § 212(a)(2) do not require a conviction and instead require a lower threshold such as "reason to believe" or "coming to the United States to engage in" certain conduct (See chart on page 5). A "reason to believe" standard applies to the subsections addressing controlled substance trafficking, human trafficking, and money laundering.[27] For offenses where the standard is "reason to believe," it is the IJ who must make a determination whether there is reason to believe that the returning LPR had engaged in illegal activity, rather than determining whether the officer at the port of entry had reason to believe at the time of re-entry.[28] However, if DHS instead charges the returning LPR with the deportability ground for being inadmissible at the

---

[21] This relates to returning LPRs considered applicants to admission under INA § 101(a)(13)(C)(v) based on INA § 212(a)(2)(A)(i)(I) (CIMTs) or INA § 212(a)(2)(A)(i)(II) (controlled substances).
[22] *See* INA § 237(a)(2)(A)(i), (ii) (CIMTs); INA § 237(a)(2)(B)(i) (controlled substances).
[23] *See Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994).
[24] INA § 212(a)(2)(A)(i)(I) (CIMTs), 212(a)(2)(A)(i)(II) (controlled substances).
[25] *See Matter of K*, 7 I&N Dec. 594, 597 (BIA 1957) (finding no admission where an immigration official failed to give the noncitizen a definition of the crime and its essential elements). For further discussion of "admission"-based inadmissibility based on the CIMT or controlled substance ground, see Kathy Brady, Immigrant Legal Resource Center (ILRC), *All Those Rules About Crimes Involving Moral Turpitude*, at 13–15 (June 2021), https://www.ilrc.org/sites/default/files/resources/all_those_rules_cimt_june_2021_final.pdf.
[26] *Vartelas v. Holder*, 566 U.S. 257, 275 (2012).
[27] INA § 212(a)(2)(C), (H), (I).
[28] *E.g. Gomez-Granillo v. Holder*, 654 F.3d 826, 828–31 (9th Cir. 2011).

time of entry pursuant to INA § 237(a)(1), the analysis arguably shifts to whether there was reason to believe at the time of the re-entry.[29] Separately, officials may consider if someone is "coming to the United States to engage in" prostitution or commercialized vice without a conviction.[30]

C. Does "brief" travel outside the United States count?

Unfortunately, any length of travel outside the United States places an LPR at risk of being deemed a returning LPR following a qualifying offense under INA § 212(a)(2).

However, there is a limited exception for older convictions. In *Vartelas v. Holder*, 566 U.S. 257 (2012), the U.S. Supreme Court held that INA § 101(a)(13)(C) does not apply retroactively to LPRs who committed an offense before April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. Under the pre-IIRIRA regime, called the *Fleuti* doctrine, LPRs who traveled abroad did not, upon their return, face inadmissibility—then called excludability—if their trip was "innocent, casual and brief."[31] Under *Fleuti*, the Court looked at three factors in determining that the LPR in that case did not "enter" the United States after his trip to Mexico: (1) the length of the trip; (2) the purpose of the trip; and (3) the necessity of travel documents.[32] The Court held that these factors were instructive, although not exhaustive, when considering whether an LPR displayed an intention to depart the United States.[33] For convictions before April 1, 1997, representatives should look to the case law developed by the BIA and courts of appeals addressing the *Fleuti* factors.[34]

Separately, do not forget that LPRs are treated as seeking admission when they have been outside the United States for 180 days, even without a conviction.[35]

---

[29] *See Matter of Casillas-Topete*, 25 I&N Dec. 317, 318 (BIA 2010).
[30] INA § 212(a)(2)(D).
[31] *See Vartelas*, 566 U.S. at 261–63 (discussing *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (known as the *Fleuti* doctrine)).
[32] *Fleuti*, 374 U.S. at 462.
[33] *Id.*
[34] *See, e.g.*, *Matter of Guimaraes*, 10 I&N Dec. 529, 531 (BIA 1964) (holding that intention not to disrupt LPR status alone is not determinative in the *Fleuti* analysis, but is one factor to consider); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1362–63 (9th Cir. 1995) (considering whether absence was temporary by design and limited in duration, whether the purpose of the absence was to accomplish an object not contrary to immigration laws, and whether the absence was occasional or if absences occurred with regularity); *Molina v. Sewell*, 983 F.2d 676, 679–80 (5th Cir. 1993) (finding that LPR had not made an "entry" as a matter of law due to the existence of pending deportation proceedings at the time of departure; rejecting BIA's contrary decision in *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (BIA 1967)); *Lozano-Giron v. INS*, 506 F.2d 1073, 1077–78 (7th Cir. 1974) (considering length of permanent residency, whether family lives with LPR, whether LPR owns a business or a home in the United States, and "the nature of the environment to which he would be deported, and his relation to that environment").
[35] INA § 101(a)(13)(C)(ii). Upon returning to the United States, LPRs should not automatically surrender their green cards if asked, and there are no negative ramifications for refusing to sign Form I-407, Record of Abandonment of Lawful Permanent Resident Status. An LPR who refuses to sign Form I-407 will be issued an NTA so an IJ can determine whether they have abandoned their LPR status. DHS must prove abandonment by clear, unequivocal, and convincing evidence. *See Matter of Huang,* 19 I&N Dec. 749 (BIA 1988); *see also* Catholic Legal Immigration Network, *Absences That Are Too Long and How to Cure Them*, https://www.cliniclegal.org/resources/absences-are-too-long-and-how-cure-them (last visited Jan. 13, 2025).

D. Troubleshooting other timing issues

1. What if a conviction happened before the person became an LPR?

There is a specific exception to INA § 101(a)(13)(C)(v) for LPRs who have been granted a waiver for criminal grounds of inadmissibility pursuant to INA § 212(h) or LPR cancellation of removal under INA § 240A(a). But what about other scenarios where a conviction was disclosed and waived at the time of adjustment or consular processing?

Official guidance and case law has not addressed whether INA § 101(a)(13)(C)(v) applies to convictions that predate the acquisition of LPR status. That said, practitioners report anecdotally that LPRs whose sole convictions were disclosed and waived at the time of adjustment have not been treated as applicants for admission following subsequent travel. For example, people with convictions that were waived as part of their application for U nonimmigrant status have traveled after adjusting status without problems. The argument here is that the matter was already reviewed and waived at the time of adjustment, and as such, there is no need for a subsequent waiver like cancellation of removal or a waiver pursuant to INA § 212(h). The textual basis for this argument is that the six grounds found at INA § 101(a)(13)(C) apply to conduct committed by "[noncitizens] lawfully admitted for permanent residence in the United States," rather than conduct an individual may have engaged in before becoming an LPR. Practitioners should also review the length and purpose for which a specific waiver is valid.[36] For example, with narrow exceptions, a waiver granted in connection with a grant of LPR status is considered valid indefinitely under 8 CFR § 212.7(a)(4)(ii).

That said, if a conviction was not disclosed at the time of adjustment, remember that the LPR could also be placed into removal proceedings and charged with deportability as a person who was inadmissible at the time of entry or adjustment of status under INA § 237(a)(1)(A).

2. What if an LPR commits an offense before departing, is paroled in for prosecution, and is convicted after returning?

In some cases, an LPR may have pending charges related to a qualifying crime at the time they are returning to the United States. The BIA has held that in these cases, the relevant inquiry is whether there is a conviction at the time DHS initiates removal proceedings charging the returning LPR pursuant to INA § 212 and not whether there was a conviction at the time the returning LPR physically reentered the United States, if that entry occurred after the offense.[37] Therefore, the relevant inquiry in these factual scenarios revolves around the status of the charge at the time that DHS initiates removal proceedings.

3. What if an LPR reenters after a qualifying crime, but no one notices?

Even if immigration officials admit a returning LPR rather than treat them as an applicant for admission, that does not mean the LPR is free of any consequences. If they fell within one of the six exceptions discussed above but were nevertheless admitted into the United States, they may

[36] *See also* USCIS Policy Manual, Vol. 9, Pt. A, Ch. 6(B)(4), https://www.uscis.gov/policy-manual/volume-9-part-a-chapter-6.
[37] *Matter of Valenzuela-Felix*, 26 I&N Dec. 53 (BIA 2012).

face problems during future travel or immigration applications and could even be placed into removal proceedings for being inadmissible at the time of entry.

Representatives may encounter LPR clients who think they have nothing to worry about if they travel abroad because officers let them through the last time that they traveled. There is always a risk that a more vigilant officer or progress in criminal records tracking technology will catch a criminal issue that previously slipped through the cracks. In addition, even without further travel, DHS might notice the conviction later and initiate removal proceedings charging the LPR as inadmissible at the time of entry pursuant to INA § 237(a)(1)(A).

IV. Practice Tips

A. Pre-travel practice tips

Once a client becomes an LPR, it is important to advise them, orally and in writing, regarding travel as an LPR, potential abandonment due to long absences, and the effects of arrests and convictions on their LPR status and admission at the port of entry upon return. Practitioners should advise clients to contact them or another legal representative if they are arrested to discuss the potential effects of any arrest or conviction, to advise any criminal defense counsel on the immigration consequences of a conviction, and to potentially help fashion a plea that would be a safe haven for the LPR. If an LPR client's criminal case has been dismissed, practitioners should encourage the LPR client to travel with the certified court disposition, as often this can resolve a potential issue at the port of entry and the client can avoid having their inspection deferred.

B. Advising LPR clients who decide to travel

If an LPR client decides to travel abroad and the practitioner is concerned about their re-entry given criminal or other issues, the practitioner should consider taking certain mitigating steps before the client leaves the United States. First, the practitioner could moot the client, with a colleague playing the CBP officer, on what CBP questioning might look like. A moot might be particularly helpful in cases of clients who do not believe that travel presents risks to them, to help them take the implications of travel seriously. Practitioners should advise returning LPR clients that they are not entitled to legal representation at ports of entry and prepare them to advocate for themselves and answer questions on inadmissibility issues that may arise. The practitioner should advise the client to keep their responses short and factual, for example by stating what they were charged with and what they pled guilty to. Clients should be warned not to admit to crimes for which they have not been arrested so as to create admission-based inadmissibility.

Second, for LPR clients who decide to travel with a criminal history that should not make them inadmissible, practitioners can provide the client with a simple, short letter explaining why they are not inadmissible. Practitioners can instruct the client to present this letter if and only if CBP brings up the client's criminal history. Similarly, for clients whose criminal history does not trigger inadmissibility, practitioners can instruct them to travel with the court disposition of the arrest (including records showing a charge was amended to a lesser charge, if applicable) to establish they should be admitted as a LPR at the port of entry.

Third, the practitioner should advise the LPR to consult with their criminal defense attorney to determine whether there are any state-court-imposed restrictions on their travel out of state or out of country. Fourth, the practitioner should consider contacting the CBP Watch Commander at the port of entry prior to the client's entry to alert CBP to a particular issue and advise why the client is not an LPR applicant for admission. Practitioners should know the communication protocols at the port of entry where the LPR is arriving; these protocols can be obtained via local and national AILA-CBP liaison committee minutes and on the CBP website: https://www.cbp.gov/about/contact/ports. Protocols can include the Chain of Command, email addresses, direct phone numbers, details regarding contacting CBP if a client is detained, and where to address allegations of unprofessional conduct by CBP. Whether to contact the Watch Commander should be decided on a case-by-case basis and should not be done in every case where a practitioner has concerns about admission. This is because contacting the Watch Commander could create a problem for the LPR or flag an issue that may not come up during the admission process. Finally, it is wise for a returning LPR to have their legal representative's contact information at the time of their arrival in the event they are permitted to call their representative from secondary inspection.

C. Post-travel practice tips

If an LPR travels abroad and their inspection is deferred when they attempt to re-enter, strategies can vary depending on whether the LPR has criminal convictions that make them inadmissible, is subject to mandatory detention, and/or is eligible for relief from removal.

If a returning LPR has a conviction and CBP defers their inspection to provide the applicable records, practitioners should obtain the certified court disposition and accompany the client to the CBP deferred inspection appointment with the disposition and any legal argument that the conviction is not a CIMT or controlled substance offense, or any other applicable legal argument. CBP will often order the returning LPR to return to deferred inspection with a wide variety of criminal records and arrest records. It is advisable to only provide CBP with the certified court disposition, unless another court document such as the charging document, judgment, or sentencing record supports a legal argument benefiting the LPR. CBP may request police records, but these should generally not be provided unless the records contain facts helpful to the returning LPR.[38] If the practitioner needs more time to obtain the records, they should contact the CBP deferred inspection office and request a later appointment date. Contact information for the applicable CBP deferred inspection office is usually available via local CBP and AILA liaison minutes.

If it is clear that a returning LPR client is inadmissible due to a criminal conviction and any legal arguments to the contrary have been made, the returning LPR can request that CBP exercise prosecutorial discretion in the form of (1) cancellation of the NTA under 8 CFR § 239.2(a), or (2) declining to take the returning LPR into custody after the issuance of the NTA. Prosecutorial discretion is the longstanding authority of an agency charged with enforcing the law to decide

[38] Some consideration should be given to whether not fully cooperating with the spirit of CBP's request could increase the risk of a punitive detention decision, as well as whether CBP can obtain the requested records on their own or whether the records have been expunged, sealed, or destroyed. In the latter situation, the practitioner should provide a letter from the applicable authority stating that no records can be obtained.

where to focus its resources and whether or how to enforce the law against an individual.[39] Whether prosecutorial discretion will be considered depends on the administration in power. If DHS has a prosecutorial discretion memorandum in effect, practitioners should file a written request based on the existing DHS guidance, attaching supporting evidence, requesting cancellation of the NTA, or, in the alternative, that DHS not take the LPR into custody and allow them to complete their removal proceedings in a non-detained setting. Supporting evidence will vary depending on applicable DHS guidance, but often includes evidence of employment, family ties, family caretaking, medical issues, rehabilitation, community involvement, financial responsibility, filing tax returns, education, and student loans.

V. Tips for Removal Proceedings

Strategies for LPRs placed into removal proceedings as applicants for admission may vary depending on the client's goals, but representatives generally should seek to terminate proceedings and pursue any available relief.

A. Challenging removability

When DHS charges an LPR as an applicant for admission, the best outcome is the IJ concluding that the LPR is not an applicant for admission and terminating removal proceedings. In this scenario, the client retains their LPR status and can potentially naturalize in the future. While advocates might be tempted to jump straight to available relief, it is incredibly important to hold DHS to its burden to prove the LPR has an offense that allows them to be treated as an applicant for admission. Even if the individual is granted relief, a removability finding could mean loss of LPR status, loss of the rights afforded an LPR in removal proceedings, loss of the ability to travel, and loss of eligibility to naturalize.

To challenge the classification as an applicant for admission, practitioners should not concede the relevant factual allegation(s) and charge(s) of removability and respectfully state that they are holding DHS to its burden to establish that the LPR is an applicant for admission.[40] Representatives should file a motion to terminate arguing that DHS has failed to meet its burden. Typically, this will involve an argument that the client's conviction is not a categorical match for an offense under INA § 212(a)(2). That said, in some cases it may be strategically advantageous to instead request a briefing schedule on the issue of removability, arguing that DHS bears the burden and should be forced to brief the matter first. This may be useful when it is unclear what conviction DHS is alleging constitutes the qualifying offense or why they believe it is a match.

Either way, counsel will want to argue that DHS has not met its burden, such as by employing the categorical approach to argue an element of the client's conviction does not match the federal definition of a CIMT, a controlled substance offense, or any other subsection of INA § 212(a)(2).[41]

---

[39] *See, e.g.*, *United States v. Texas*, 599 U.S. 670, 679 (2023) (recognizing that the "principle of enforcement discretion over arrests and prosecutions extends to the immigration context").
[40] *See Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); *Matter of Huang*, 19 I&N Dec. 749, 754 (BIA 1988).
[41] For an explanation of the categorical approach, see Kathy Brady, ILRC, *How to Use the Categorical Approach Now* (Oct. 2021), https://www.ilrc.org/sites/default/files/resources/note_2021_categorical_approach.pdf; Maureen Sweeney, *Categorical Analysis of Immigration Consequences 7 28 14*, YouTube (July 28, 2014), https://www.youtube.com/watch?v=eDA-wVIedT0.

For example, practitioners should look for ways that the state controlled substance schedule is broader than the federal definition or that the state statute lacks sufficient intent or turpitude to be a CIMT.

In addition, a client is not removable based on CIMT inadmissibility if they have a single CIMT and the petty offense or youthful offender exception applies. The petty offense exception applies where (1) the client has only one CIMT ever, (2) the client received a sentence of less than six months of imprisonment, and (3) the statute of conviction carries a maximum possible sentence of one year.[42] The youthful offender exception applies where (1) the client has only one CIMT ever, (2) the client committed the CIMT while under the age of 18, and (3) the conviction and any imprisonment concluded more than five years ago.[43] Note that this is only necessary if the client was charged as an adult since juvenile delinquency adjudications are generally not considered convictions for immigration purposes.[44]

Be aware that even if DHS fails to meet its burden to establish that a returning LPR is an applicant for admission based on a qualifying conviction, an LPR might still be removable on other grounds, in which case DHS may recharge them with a ground of deportability under INA § 237. However, in order to protect the rights that come along with LPR status, it is still important to fight an INA § 212 charge even if counsel believes the LPR client will be recharged under INA § 237.

Counsel may also seek to terminate proceedings due to defects in the NTA or other issues. However, be aware that unless the IJ concluded that the conviction is not a qualifying crime, DHS may file a new NTA and the LPR's status remains vulnerable during future travel or immigration applications.

B. Seeking relief in removal proceedings

If the judge determines that the LPR is an applicant for admission and sustains a charge of removability under INA § 212, the next question is whether the client is eligible for relief from removal. As with any removal defense case, an LPR in removal proceedings should be thoroughly screened for all forms of relief. The criminal conviction could present a bar to certain forms of relief, but some common options that include exceptions or waivers for convictions include:[45]

- **INA § 212(h) waiver**: This waiver can forgive certain offenses for LPRs who have seven years of continuous residence in the United States and do not have an aggravated felony conviction.[46] They must also either (1) be only inadmissible under INA § 212(a)(2)(D)(i) or (D)(ii) regarding prostitution;[47] (2) be inadmissible only for an offense that occurred

[42] INA § 212(a)(2)(A)(ii)(II).
[43] INA § 212(a)(2)(A)(ii)(I).
[44] *See Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).
[45] As stated, the bullet list here focuses on relief available despite an INA § 212(a)(2) offense. For LPRs charged as applicants for admission based on different grounds, another form of relief that may be available is re-adjustment of status, if the LPR was paroled into the United States and has a basis to re-adjust. In the context of an LPR charged as an applicant for admission, USCIS would have exclusive jurisdiction over the adjustment application despite the removal proceedings, under 8 CFR § 1245.2(a)(1) and 8 CFR § 245.2(a)(1).
[46] INA § 212(h).
[47] INA § 212(h)(1)(A)(i).

more than 15 years ago;[48] OR (3) have a U.S. citizen or LPR spouse, parent, or child who would suffer extreme hardship if the applicant was removed.[49] An LPR charged as seeking admission may apply for a standalone INA § 212(h) waiver.[50]

- **INA § 212(c) waiver**: LPRs who pled guilty to a conviction before April 1, 1997, may be eligible for a waiver under former INA § 212(c) if they meet additional criteria.[51] That said, they might also not be subject to INA § 101(a)(13)(C)(v) under the *Fleuti* doctrine, as discussed in section III.C above.

- **Cancellation of removal**: LPRs may seek cancellation of removal if they have been an LPR five years, have continuously resided in the United States for seven years after having been admitted in any status, have not been convicted of an aggravated felony, and meet other eligibility requirements.[52] Be aware that commission of an offense under INA § 212(a)(2) triggers the stop-time rule, meaning time occurring after the qualifying offense does not count toward the seven years of continuous residence.[53]

- **Asylum, withholding, and protection under the Convention Against Torture**: Applicants may seek protection from persecution and torture, but be aware that DHS may argue that the qualifying offense is also a particularly serious crime that bars asylum.[54]

- **U nonimmigrant status**: Noncitizens who suffered substantial mental or physical harm as a victim of a qualifying crime may be able to pursue U nonimmigrant status with a waiver for crime-based inadmissibility.[55] However, DHS may argue that LPRs are not eligible to apply and must first either relinquish LPR status or receive a removal order before applying. Advocates should argue that an application for U nonimmigrant status is not inconsistent with LPR status.

C. Asking for prosecutorial discretion

If a better option is not available, a representative may request that DHS join a motion to dismiss proceedings as a matter of prosecutorial discretion.[56] Prosecutorial discretion is often not ideal since it does not decisively resolve the LPR's status, potentially causing problems during future travel and immigration applications, particularly given the possibility of policy changes between different administrations.

---

[48] *Id.*
[49] INA § 212(h)(1)(B).
[50] *Matter of Abosi*, 24 I&N Dec. 204, 205–206 (BIA 2007).
[51] *See INS v. St. Cyr*, 533 U.S. 289 (2001); *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014).
[52] INA § 240A(a). LPRs may also apply for cancellation of removal for non-permanent residents pursuant to INA § 240A(b)(1) if that is strategically advantageous.
[53] *See* INA § 240A(d)(1)(B); *Pereira v. Sessions*, 138 S. Ct. 2105, 2109 (2018).
[54] *See* INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii); 8 CFR § 208.13(c).
[55] INA § 101(a)(15)(U).
[56] *See* Memorandum from Kerry A. Doyle, ICE Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (Apr. 3, 2022) (authorizing DHS attorneys to dismiss cases as a matter of discretion on a case-by-case basis), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

VI. Conclusion

The laws about when a returning LPR with certain criminal history can be treated as an applicant for admission are complicated, as can be their application to a client's factual circumstances. It is critical that practitioners who work with LPR clients understand these rules and communicate them to LPR clients, so that LPR clients with certain criminal history can make informed decisions about travel and take steps to mitigate potential risks.