



Update on INA § 212(h) Defense Strategies:

Many Permanent Residents Are Not Subject to the § 212(h) Permanent Resident Bar; The Eleventh Circuit Reaffirms § 212(h) as a Direct Waiver of Deportability; Additional Minor Drug Offenses are Waivable under § 212(h); Using § 212(h) When LPR Cancellation is Not an Option

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Summary

Section 212(h)² provides a crucial discretionary waiver of some of the crimes-based inadmissibility grounds. This article will discuss the lawful permanent resident (LPR) bar to eligibility for § 212(h), the procedural contexts in which § 212(h) can be applied for, which minor drug offenses can be waived, and the use of § 212(h) as an option when LPR cancellation is not available. This section will summarize the article's main points.

Part A discusses the basic requirements for eligibility for § 212(h). An applicant for § 212(h) must be aware of its significant limits in terms of the inadmissibility grounds that it will waive, the types of noncitizens who may submit a waiver, and when an application will be granted as a matter of discretion, especially if the conviction is of a "dangerous or violent" offense.

Part B discusses recent case law relating to the statutory bar to § 212(h) that applies to some permanent residents. The last paragraph of § 212(h) provides that the waiver will not be granted to certain permanent residents based on either of two disqualifiers: conviction of an aggravated felony since being admitted to the U.S. as a permanent resident, or failure to accrue seven years of lawful continuous residence before issuance of a Notice to Appear. This bar, however, does not apply to all permanent residents in these situations. Recent cases have established that many permanent residents still may apply for a § 212(h) waiver even if they have been convicted of an aggravated felony or lack the seven years. In summary:

¹ Many thanks to Dan Kesselbrenner of the National Immigration Project, National Lawyers Guild and Su Yon Yi of the Immigrant Legal Resource Center for their thoughtful comments and suggestions. The errors belong to the author. Copyright Immigrant Legal Resource Center 2011.

² INA § 212(h), 8 USC § 1182(h).

- 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.
- Because an admission at the border under INA § 101(a)(13) is required for the § 212(h) bar to apply, a permanent resident's re-entry into the United States after a trip abroad should not come within the § 212(h) bar if the entry does not constitute a new "admission" under INA § 101(a)(13).³
- The § 212(h) bar should not apply to a person who adjusted status to permanent resident, became inadmissible under a crimes ground, traveled abroad, and upon return to the U.S. is found to be an arriving alien seeking admission pursuant to § 101(a)(13)(C). The § 212(h) bar applies only to a person who has "previously been admitted" as a permanent resident at the border, not one who is currently seeking the *first* such admission.
- Advocates should aggressively challenge the holding in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) that an adjustment of status to permanent residency following *entry without inspection* does trigger the § 212(h) bar. *Koljenovic* is incorrectly decided because it ignores the statutory language of the § 212(h) bar and misconstrues the holdings in *Martinez v. Mukasey*, *supra*, and *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999).

The Eleventh Circuit declined to follow *Koljenovic*. *Lanier* 631 F.3d at n. 3. The Fifth and Ninth Circuit decisions pre-dated *Koljenovic*, and other circuit courts of appeal have not ruled on the issue.

- The Ninth Circuit found that a person who was admitted at the U.S. border pursuant to a permanent resident visa is subject to the § 212(h) bar, despite the

³ INA § 101(a)(13)(A), 8 USC § 1101(a)(13)(A) defines admission as an entry after inspection into the United States at the border or its equivalent. Section 101(a)(13)(C) provides that a permanent resident is presumed *not* to be making a new "admission" when returning to the U.S. from a trip abroad, unless the person comes within one of five enumerated categories, such as being inadmissible under the crimes grounds or having left the U.S. for more than six months. In that case the permanent resident does make a new "admission" upon return to the United States.

fact that the person was inadmissible at the time of admission. *Sum v. Holder*, 602 F.3d at 1096-1097.

Part C discusses when an application under § 212(h) can be used to waive a ground of deportability rather than inadmissibility. The § 212(h) waiver can be filed as a defense in removal proceedings in conjunction with an application for adjustment of status, or to retroactively waive inadmissibility at the time of a prior admission. Recently the Eleventh Circuit reaffirmed that a § 212(h) waiver of inadmissibility can be used to waive a charge of being deportable under the moral turpitude ground even if the person has not left the United States, similarly to how the former § 212(c) waiver was applied. *Lanier v. U.S.A.G.*, 631 F.3d at n. 1 (citing *Yeung v. INS*, 76 F.3d 337, 340 (11th Cir. 1995)). The Fifth and Seventh Circuits have disagreed with this holding, and the Ninth Circuit is likely to. Most importantly, the U.S. Supreme Court has accepted certiorari on a case involving the former § 212(c) relief that is likely to resolve this issue in terms of § 212(h) as well. *Judulang v. Holder*, 179 L. Ed. 2d 889; 2011 U.S. LEXIS 3099 (April 18, 2011).

Part D discusses which controlled substance offenses beyond possession of less than 30 grams of marijuana can be waived under § 212(h).

Part E highlights one way that § 212(h) can save the day: as an option for permanent residents who are not eligible for LPR cancellation under INA § 240A(a).

- An aggravated felony conviction is a bar to cancellation, but in many cases an aggravated felony conviction will not bar a permanent resident from relief under § 212(h). To qualify for § 212(h), however, the aggravated felony must not be an offense related to a controlled substance (and hopefully not be a “violent or dangerous” offense), such as theft, fraud, counterfeiting, obstruction of justice, etc.
- Permanent residents who are barred from cancellation because they do not have the required seven years may qualify for § 212(h). Permanent residents who are subject to the LPR § 212(h) bar have a seven-year lawful residence requirement, but the time is calculated differently from cancellation and the seven year period terminates only upon filing of the Notice to Appear, not upon commission of an offense. Permanent residents who are not subject to the LPR bar have no seven-year requirement for § 212(h).
- An application for cancellation is statutorily barred by a prior grant of cancellation, the former § 212(c) relief, or the former suspension of deportation. Section 212(h) is not barred by such a prior grant, and a grant of § 212(h) does not statutorily preclude a subsequent application for cancellation.

Discussion

A. Basic Requirements for and Limitations of INA § 212(h)

By its terms, INA § 212(h) will only waive the *inadmissibility grounds* relating to:

- Crimes involving moral turpitude (no limit to the number of offenses);
- Engaging in prostitution;
- A single conviction for simple possession or being under the influence of 30 grams or less of marijuana, or an equivalent amount of hashish (see additional discussion at Part D, *infra*);
- Conviction of two or more offenses of any kind with an aggregate sentence imposed of at least five years; or
- Asserting immunity against prosecution of a serious crime.

In addition, the § 212(h) *applicant* must be:

- A spouse, parent, son or daughter of a U.S. citizen or permanent resident who will face extreme hardship if the applicant is removed;
- A VAWA self-petitioner;
- Inadmissible only under the prostitution ground; or
- Inadmissible based upon a conviction or event that took place more than 15 years before the current application. In these last two categories the applicant must prove that she is rehabilitated and her admission is not contrary to U.S. interests.

Section 212(h) is granted as a matter of discretion. If the conviction to be waived was of a “dangerous or violent” offense, the applicant must meet an extraordinarily high standard in order to win a discretionary grant.⁴

⁴ 8 CFR 212.7(d) provides that in the case of a violent or dangerous offense, positive discretion to grant a § 212(h) waiver will not be exercised “except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion” See also *Matter of Jean*, 23 I&N Dec. 373, 373 (AG 2002) (applying

B. Defense Strategies: Overcoming the Lawful Permanent Resident Bar to § 212(h)

1. Adjustment of Status versus Admission at the Border as an LPR: The Fifth Circuit’s Holding in *Martinez v. Mukasey*

Some lawful permanent residents (LPRs) are statutorily barred from applying for § 212(h), under two circumstances: the person was convicted of an aggravated felony after being admitted to the U.S. as a permanent resident, or the person failed to accrue at least seven years of lawful continuous residence before the start of removal proceedings. The issue addressed in recent cases is, *which* permanent residents are subject to this bar?

The last paragraph of INA § 212(h), 8 USC § 1182(h) provides:

No waiver shall be granted under this subsection in the case of an alien who has *previously been admitted to the United States as an alien lawfully admitted for permanent residence* if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

A key defense strategy is based upon the fact that the § 212(h) bar references two types of admissions, each of which has a different statutory definition.

“Previously been admitted to the United States” under INA § 101(a)(13). This phrase in the § 212(h) bar is defined at INA § 101(a)(13)(A), 8 USC § 1101(a)(13)(A) as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” It means a physical entry into the United States at a border or border equivalent (e.g., airport) pursuant to some status or visa, such as lawful permanent resident, tourist, border crossing card, or other category. This article will refer to this type of admission as “admission at the border” or “admission under § 101(a)(13)(A).”

“Alien lawfully admitted for permanent residence” under INA § 101(a)(20). This phrase in the § 212(h) bar is defined at INA § 101(a)(20), 8 USC § 1101(a)(20), as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” The definition encompasses permanent residence granted by any means, including (a) admission at the border based on a permanent resident visa obtained through consular processing, or (b) adjustment of status to that of a lawful permanent resident within the United States. This article will refer to this definition as “lawfully admitted for permanent residence” or “admission under § 101(a)(20).”

the same standard to applications for asylum and for waiver of certain crimes in adjustment based on asylee or refugee status under INA § 209(c), 8 USC § 1159(c)).

The Fifth, Ninth and Eleventh Circuits have held that according to the plain language of the statute, to come within the bar to eligibility to § 212(h) the applicant *must have been admitted at the border or border equivalent as a permanent resident*, under § 101(a)(13)(A).⁵ The BIA in *Matter of Koljenovic, supra*, found that there is an exception to this rule for persons who entered the U.S. without inspection and then adjusted status, but this appears to be error.

Martinez v. Mukasey. The Fifth Circuit first set out this analysis in *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008). It held that the bar to § 212(h) applies only to a noncitizen who previously has been “admitted to the United States” at the border as a permanent resident, under INA § 101(a)(13)(A). It does not apply to a person who only adjusted status to permanent residence within the United States, which is included under INA § 101(a)(20).

Mr. Martinez was admitted to the U.S. as a tourist when he was a child, overstayed the visa, and later adjusted status to lawful permanent residence. Years later he was convicted of bank fraud, which the immigration judge found to be an aggravated felony and a crime involving moral turpitude. He was charged with being deportable as an aggravated felon, and he asked to apply to re-adjust status through his U.S. citizen wife as a defense to removal. Because there is no “aggravated felony” ground of inadmissibility *per se*, his only obstacle to adjustment was that the conviction made him inadmissible under the moral turpitude ground. The immigration judge found that Mr. Martinez was not permitted to submit a waiver of the moral turpitude inadmissibility ground under INA § 212(h), because he came within the bar to § 212(h) for lawful permanent residents. The Fifth Circuit reversed the IJ, and remanded to permit Mr. Martinez to apply for the § 212(h) waiver and adjustment.

Why did the Fifth Circuit rule in Mr. Martinez’ favor? Judge Rhesa Hawkins Barksdale based the decision on the plain meaning of the statutory language at § 212(h), which bars an alien who “has previously been *admitted* to the United States as an alien lawfully *admitted* for permanent residence.” She noted that Congress provided a statutory definition of both types of admission in the phrase. Regarding “admitted to the United States,” INA § 101(a)(13)(A) provides in pertinent part:

The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful *entry of the alien into the United States* after inspection and authorization by an immigration officer. (emphasis added)

The Court held, “[u]nder this statutory definition, “admission” is the lawful *entry* of an alien after inspection, something quite different, obviously, from post-entry adjustment of status, as done by Martinez.” *Martinez*, 519 F.3d at 544 (emphasis in original).

⁵ *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).

Still, the government argued that the second “admitted” – “lawfully admitted for permanent residence” – ought to control the entire definition. This definition of admitted has been held to include adjustment. The Fifth Circuit distinguished the two statutory definitions.

That term, "lawfully admitted for permanent residence", is an entirely separate term of art defined at § 101(a)(20), which does in fact encompass both admission to the United States as a LPR and post-entry adjustment to LPR status. Section 212(h), however, expressly incorporates that term of art ("lawfully admitted for permanent residence"), as defined by § 101(a)(20), separate and apart from its use of "admitted", as defined by § 101(a)(13). To illustrate, § 212(h) only denies waivers of eligibility to those aliens who have "previously been *admitted* [§ 101(a)(13)] to the United States as an *alien lawfully admitted for permanent residence* [§ 101(a)(20)]."

Id. at 546 (emphasis in original).⁶

The Court concluded, “[a]ccordingly, we hold: for aliens who adjust post-entry to LPR status, § 212(h)'s plain language demonstrates unambiguously Congress' intent *not* to bar them from *seeking* a waiver of inadmissibility.” *Id.* (emphasis in original).

The bar based on lack of seven years lawful continuous residence. Under the language of the statute, the § 212(h) bar based on lack of the seven years continuous lawful residence, like the bar based on conviction of an aggravated felony, applies only to persons who have previously been admitted to the U.S. at the border as permanent residents.⁷ Therefore, while the federal decisions *Martinez*, *Sum* and *Lanier*, *supra* all

⁶ It is a canon of statutory construction that courts should avoid interpreting statutory language as being “mere surplusage” and without meaning. It is noteworthy that the government’s interpretation of the § 212(h) bar would be exactly the same – and finally would be correct -- if statutory language were deleted so that the bar read as follows:

No waiver shall be granted under this subsection in the case of ~~an alien who has previously been admitted to the United States~~ as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

⁷ To make this more clear, consider the language of the § 212(h) bar with the aggravated felony section struck out.

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if ~~either since the date of such admission the alien has been convicted of an aggravated felony~~ or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

The BIA acknowledged that the statutory language applies to the seven years in *Matter of Koljenovic*, 25 I&N Dec. at 220 (“The issue presented in this appeal is whether the respondent ‘has previously been admitted to the United States as an alien lawfully admitted for permanent residence’ and must therefore

concerned permanent residents who were convicted of an aggravated felony, the same beneficial ruling – that the bar will only be given effect if the person was previously admitted to the U.S. at the border as a permanent resident -- applies to the bar based on lack of seven years lawful continuous residence.

Subsequent departures and returns to the United States. None of the cases addressing the LPR bar has involved a noncitizen who gained lawful permanent residency by adjustment and subsequently traveled outside the United States. The language of the statute suggests several defense arguments, however.

First, under the terms of the statute, a permanent resident who does not make a new *admission* upon his return from a trip abroad should not be subject to the bar. Permanent residents who travel abroad are presumed not to be seeking admission upon their return, unless they fall into one of several categories set out in INA § 101(a)(13)(C), such as remaining outside for more than six months or traveling while inadmissible under the crimes grounds. Because a permanent resident who does not come within § 101(a)(13)(C) is not “admitted” to the U.S. upon his return, he should not be subject to the § 212(h) bar.

Example: Angel adjusted status in 2002. In 2005 he traveled abroad to briefly visit family; he was not seeking “admission” upon his return because he did not come within one of the categories of § 101(a)(13)(C). In 2007 he was convicted of an offense that made him inadmissible under the moral turpitude ground and also was an aggravated felony. Angel does not come within the § 212(h) bar because he never has been “admitted” at the border as a permanent resident.

Second, the bar applies to “an alien who has *previously* been admitted to the United States” as a permanent resident. INA § 212(h); emphasis added. Therefore the bar should not apply to an applicant who adjusted status to permanent residency, became inadmissible for a crime, traveled outside the U.S., and now is held to be seeking admission upon her return. The permanent resident should be able to request a § 212(h) waiver in this current, first application for admission at the border as a permanent resident.

Example: Bill adjusted status in 2005. In 2007 he was convicted of an offense that made him inadmissible under the moral turpitude ground. He took a short trip outside the country in 2010, and upon his return a Notice to Appear was filed charging him with being inadmissible as an arriving alien pursuant to § 101(a)(13)(C). The government asserts that he is barred from applying for § 212(h) because he is applying for admission at the border as a permanent resident, and he lacks the seven years required by the bar. Bill asserts that he is not subject

satisfy the 7-year lawful continuous residence requirement of section 212(h) of the Act to be eligible for a waiver.”)

to the bar and therefore does not have to have the seven years, because he has not “previously been admitted to the United States” as a permanent resident.

2. The Ninth Circuit’s Decision in *Sum v. Holder*: Wrongful Admission at the Border

In *Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010) the Ninth Circuit agreed with *Martinez* that the § 212(h) bar applies only to a noncitizen who has been admitted into the United States at the border as a lawful permanent resident. The Court rejected the petitioner’s argument that the § 212(h) bar should not apply to him because he was inadmissible at the time he was admitted at the border, however.

In *Sum* the petitioner had been admitted to the United States at the border as a permanent resident, without revealing that he actually was inadmissible based on a prior conviction. Years later he was convicted of another offense, which was both an aggravated felony and a crime involving moral turpitude. Like Mr. Martinez, Mr. Sum wished to apply to adjust status as a defense to removal, and needed to submit a § 212(h) waiver with the adjustment application. He argued that he was not subject to the LPR bar to § 212(h), because that applies only to “an alien *lawfully* admitted for permanent residence” under INA § 101(a)(20), and his fraud meant that he was never “lawfully” admitted.

First, citing *Martinez*, the Court noted that under the plain language of the statute, in order to come within the § 212(h) bar the applicant must have been admitted as a permanent resident at the U.S. border or its equivalent, under INA § 101(a)(13). *Sum*, 602 F.3d at 1096.

Next, the Ninth Circuit rejected the petitioner’s argument that the bar did not apply to him, because when he was admitted as a permanent resident at the border, he actually was inadmissible. The court found that the statutory language bars a noncitizen who was admitted at the border “as” an alien lawfully admitted for permanent residence, even if the person only was posing as one. The Court found that if a procedural admission as a permanent resident at the border occurred, i.e. there was an authorized entry after inspection as an LPR, it does not matter that substantively the admission was not lawful. *Id.* at 1096-1097.

3. The Eleventh Circuit’s Decision in *Lanier*: Adjustment Preceded by Entry Without Inspection

Recently the Eleventh Circuit followed *Martinez* and *Sum* to hold that adjustment of status to lawful permanent residency does not trigger the § 212(h) bar. *Lanier v. United States AG*, 631 F.3d 1361 (11th Cir. 2011). The Court held that this rule applies in the case of a person who entered without inspection prior to adjustment.

Ms. Lanier entered the United States without inspection, and later adjusted her status to that of a lawful permanent resident. She was convicted of offenses and was charged with being deportable for conviction of an aggravated felony and a crime involving moral turpitude. She conceded deportability but applied for a waiver of removability pursuant to § 212(h), based on hardship to an ill U.S. citizen child.

Note that it appears that Ms. Lanier applied for § 212(h) as a straight defense to being deportable, not in conjunction with a new adjustment application or to cure a prior admission while inadmissible. See further discussion of this issue at Part C, below. The focus of the decision, however, was whether the § 212(h) bar applied.

The government argued that the bar applied to Ms. Lanier because the Eleventh Circuit was required to defer to the BIA's decision in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010). There the BIA held that the § 212(h) bar applies to a person who adjusted status to permanent residency following an *entry without inspection*, because in that case the adjustment of status is the person's only "admission." The Eleventh Circuit declined to follow the BIA, stating, "Because we find no ambiguity in the statutory text, however, we accord no deference to the BIA's interpretation of § 212(h)." *Lanier*, 631 F.3d at n. 3.

Outside of cases arising in the Eleventh Circuit, the government will assert that immigration judges must follow *Matter of Koljenovic* where an adjustment follows an entry without inspection. The next section provides an argument that *Koljenovic* is wrongly decided.

4. Adjustment Preceded by Entry Without Inspection: Why the BIA Decision in *Matter of Koljenovic* is Wrong

Summary. In *Matter of Koljenovic* the BIA examined the case of a § 212(h) applicant who was similarly situated to the Fifth Circuit's Mr. Martinez, except that he had entered without inspection before adjusting status to permanent resident, instead of having been admitted on a tourist visa before adjustment. The BIA used this difference to create an exception to *Martinez*. It held that the LPR bar to § 212(h) *does* apply to a noncitizen who entered without inspection before adjusting, because adjustment of status to permanent residence must be considered to be an "admission" for this purpose, in the absence of any prior admission.

While the Eleventh Circuit declined to defer to the BIA on the grounds that the statutory text unambiguously required a different holding,⁸ in other circuits the government will assert that *Matter of Koljenovic* must be followed where an adjustment follows an entry without inspection. Counsel should assert that *Matter of Koljenovic* contains crucial errors.

⁸ See *Lanier*, 631 F.3d at n. 3, and discussion *supra*.

First, despite the fact that the case turns on statutory construction of the complex language in INA § 212(h), the Board does not analyze this language using accepted rules of statutory construction. In fact, after quoting the statute at the beginning of the decision, the Board does not discuss the language of the § 212(h) bar at all. Significantly, it does not acknowledge that the bar implicates two different definitions of admission: “admitted to the United States” as defined at INA § 101(a)(13), and “lawfully admitted for permanent residence” as defined at § 101(a)(20).

Second, *Koljenovic* held that interpretation of language in the § 212(h) bar is controlled by *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999) (en banc). This is not correct. *Matter of Rosas* interpreted the phrase “after admission” as applied to a ground of deportability, while the § 212(h) bar incorporates two separate definitions of admission, “previously been admitted to the United States as an alien lawfully admitted for permanent residence,” and applies this to eligibility for relief. Moreover, *Koljenovic*’s characterization of adjustment as an admission to the United States is in direct conflict with *Matter of Rosas*.

Third, *Koljenovic* asserted that that if the *Martinez* rule were applied to a permanent resident who entered without inspection before adjusting status, then the rule in *Matter of Rosas* would be negated and the person never would be subject to the grounds of deportability, with absurd and legally disastrous results. This is error. These decisions do not negate each others’ effect, because *Matter of Rosas* addresses when the grounds of deportability apply, while *Martinez* addresses eligibility for the discretionary § 212(h) waiver. The legal findings in *Martinez* and *Matter of Rosas* are entirely consistent: both decisions hold that adjustment of status is an admission under INA § 101(a)(20) and is not an admission under INA § 101(a)(13)(A). Both rules can be applied in the same case without conflict, as the Eleventh Circuit did in *Lanier, supra*.

Counsel should assert that federal courts are not required to give *Chevron* deference to *Matter of Koljenovic*.⁹ The Eleventh Circuit in *Lanier* specifically declined to grant *Chevron* deference to *Koljenovic*, on the grounds that the statutory language in the § 212(h) bar is not ambiguous.¹⁰ While *Martinez* and *Sum* did not address the effect of an entry without inspection preceding adjustment on the § 212(h) bar, in both opinions the courts found that the statutory language of the § 212(h) bar, including the definitions

⁹ In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) the Supreme Court held that federal courts should defer to an administrative agency’s permissible interpretation of a statute over which it has jurisdiction if the statutory language in question is ambiguous, but should not defer if the meaning of the statutory language is clear.

¹⁰ Discussing *Matter of Koljenovic*, the Eleventh Circuit stated, “Because we find no ambiguity in the statutory text, however, we accord no deference to the BIA’s interpretation of § 212(h).” *Lanier v. United States AG*, 631 F.3d 1361, at n. 3 (11th Cir. 2011).

of “admission,” is not ambiguous.¹¹ *Koljenovic* directly conflicts with the interpretation of the statute in *Martinez* and *Sum*.

Discussion. *Koljenovic* does not parse the language of the § 212(h) bar, nor discuss the Fifth Circuit’s careful interpretation in *Martinez* of this language and the two statutory definitions it contains.¹² Instead, *Koljenovic* refers to the § 212(h) bar as simply requiring “an admission.”¹³

Based on this misstatement, the Board finds that Mr. Koljenovic’s § 212(h) application is controlled by the definition of “after admission” in *Matter of Rosas, supra*. There are two problems with this. First, *Matter of Rosas* interpreted a wholly different phrase (“after admission”) and addressed a different legal issue (when a noncitizen becomes subject to deportation grounds) than *Koljenovic* does. The Board in *Matter of Rosas* carefully limited its holding to characterizing adjustment as an admission for purposes of deportability.¹⁴ Second, having stated that it will apply the reasoning in *Matter of Rosas*, the Board in *Koljenovic* appears to come to the opposite conclusion, in direct conflict with *Rosas*.

In *Matter of Rosas* a respondent who had entered without inspection and adjusted status to permanent residence asserted that she was not subject to the aggravated felony ground of deportation, because that ground provides that “[a]ny alien who is convicted of an aggravated felony at any time *after admission* is deportable.”¹⁵ Ms. Rosas argued that the statutory phrase “after admission” did not apply to her, based on the fact that she never had been admitted to the United States at the border under INA § 101(a)(13)(A). She asserted that since she had not been admitted, she was not subject to this or any

¹¹ See *Martinez v. Mukasey*, 519 F.3d 532, 546 (5th Cir. 2008), *Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir. 2010) (plain meaning of the statute is that § 212(h) bar applies only if there was a previous admission as a permanent resident at the border).

¹² *Martinez v. Mukasey* was the only federal decision available to the Board. *Matter of Koljenovic* and *Sum v. Holder* were published in the same week, and *Lanier v. U.S.A.G.* was published several months after *Koljenovic*.

¹³ See, for example, “An interpretation of section 212(h) of the Act that does not treat an alien’s adjustment of status as an admission that invokes the 7-year residence requirement would frustrate this legislative purpose.” *Koljenovic*, 25 I&N Dec. at 222. “We reemphasize that not construing an alien’s adjustment to lawful permanent residence to be an admission would have problematic consequences for other aliens.” *Id.* at 224. “Applying *Matter of Rosas* to the facts of this case, it is clear that the respondent’s only “admission” into the United States was pursuant to his 2001 adjustment of status. The respondent, like the alien in *Rosas*, entered without inspection, so this is not a case where alternative dates of admission are possible. If his 2001 adjustment of status is not considered an admission, he would be in the absurd position of being a lawful permanent resident without ever having been “admitted” in that status and thus could be subject to inadmissibility under section 212(a)(6)(A)(i) of the Act and ineligible for various forms of relief.... Therefore, we conclude that the respondent’s adjustment of status was an “admission” within the meaning of the Act.” *Id.* at 222.

¹⁴ See *Rosas*, 22 I. & N. Dec. at 623, n.5, cited in *Martinez*, 519 F.3d at 542 (“We do not here attempt to resolve the meaning of ‘admission’ in other contexts or under other provisions for adjustment of status”).

¹⁵ See *Rosas*, 22 I&N Dec. at 617 (citing INA § 237(a)(2)(A)(iii)) (emphasis in original).

deportation ground that applies only “after admission.” The immigration judge agreed, finding that because adjustment of status is not an “admission” under INA § 101(a)(13)(A), she was not deportable.

The BIA reversed and found that Ms. Rosas was subject to the deportation grounds. First, however, the BIA held that adjustment of status is *not* an “admission” under INA § 101(a)(13)(A), because that definition “refers to an entry after inspection and authorization.”¹⁶ The BIA held that nonetheless Ms. Rosas was “admitted” and therefore subject to the grounds of deportation, because she had been “lawfully admitted for permanent residence” under a separate definition at INA § 101(a)(20). This section includes permanent resident status conferred by admission at the border after consular processing or by adjustment of status. The BIA summarized:

In the instant case, the respondent was "admitted" to the United States when her status was adjusted to that of "an alien lawfully admitted for permanent residence" pursuant to section 245A(b) of the Act. Although ***this change in status does not meet the definition of an "admission" in section 101(a)(13)(A)***, because entry occurred prior to the determination of admissibility, that definition does not set forth the sole and exclusive means by which admission to the United States may occur under the Act. Admissions also occur after entry through the process of adjustment of status under sections 245 and 245A. ***Such admissions are explicitly recognized in the language of section 101(a)(20)***.

Matter of Rosas, 22 I&N Dec. at 623 (emphasis added).

The decision in *Koljenovic* directly contradicts *Rosas* on this central point. In *Rosas* the BIA held that an adjustment is not an admission under INA § 101(a)(13), but is an admission under § 101(a)(20); *Rosas* was decided based upon § 101(a)(20). In *Koljenovic* the BIA does not discuss or cite INA § 101(a)(20) in its analysis of *Matter of Rosas*,¹⁷ or anywhere else in the opinion. Instead it cites repeatedly to § 101(a)(13) and

¹⁶ *Ibid.*

¹⁷ See, e.g., *Koljenovic*, 25 I&N Dec. at 221

We have consistently construed an adjustment of status as an "admission." In *Matter of Rosas*, 22 I. & N. Dec. 616, we held that aliens who are lawfully admitted for permanent residence through the adjustment of status process are considered to have effectuated an "admission" to the United States. In that case, the respondent entered the United States without inspection and thereafter adjusted her status to that of a lawful permanent resident pursuant to section 245A of the Act. The Immigration Judge found that her adjustment of status was not an "admission" within the meaning of section 101(a)(13) of the Act and that she was therefore not deportable as an alien convicted of an aggravated felony at any time after admission. We disagreed, noting that if that were the case, aliens who entered without inspection and later adjusted their status would never have been "admitted" for permanent residence and would therefore be ineligible for relief from removal that includes an "admission" requirement. We concluded that such an interpretation of the statute would be inconsistent with the overall structure of the Act as it has been amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA").

suggests that § 101(a)(13) includes adjustment of status,¹⁸ in direct conflict with *Rosas*. Although *Koljenovic* does not discuss the significance of this strained construction, it appears that the Board rightly determined that in order to bar Mr. Koljenovic from § 212(h) relief, it somehow would have to find that Mr. Koljenovic's adjustment was an admission under § 101(a)(13) rather than just under § 101(a)(20), because only under § 101(a)(13) would he have "previously been admitted to the United States" as a permanent resident.

Koljenovic also errs when it finds that the meaning of "admission" as used in *Rosas* is the same as the meaning of "previously been admitted to the United States as an alien lawfully admitted for permanent residence."¹⁹ Based on this error, *Koljenovic* asserts that if a person who enters without inspection and then adjusts status is held not to have been "admitted to the United States" for purposes of the § 212(h) bar (the *Martinez* rule), then she must be held to have no admission for any purpose, and the government will be forced to treat her as having no admission date at all and not being subject to the deportation grounds. ("*Martinez* did not consider whether the same rule would apply in a case like the respondent's where the alien was not previously admitted. Indeed, if we were to literally apply the Fifth Circuit's holding to this case, the respondent would have no admission date at all." *Koljenovic*, 25 I&N Dec. at 223.) In a parade of horrors the Board describes the legal problems and absurdities that would be caused by having no admission date (*Id.* at 223-224), when in fact this would not happen.

The federal courts see no conflict in working with both statutory definitions. In *Martinez* the Fifth Circuit acknowledged the holding in *Matter of Rosas* with approval, but noted that it faced a different question: does adjustment of status *also* meet the

¹⁸ See, e.g., above quote, and *Koljenovic* at 221 (emphasis in original)

Sections 245(a) and (i) and section 245A(b)(1) of the Act, 8 U.S.C. § 1255a(b)(1) (2006), plainly authorize the Attorney General to adjust an alien's status "to that of an alien lawfully *admitted* for permanent residence" and thus provide that adjustment applicants are to be treated as if they are being "admitted." (Emphasis added.) For these reasons, it is not necessary that section 101(a)(13) of the Act specifically include adjustment of status in the definition of an "admission."

¹⁹ The Board's recent interpretation of "admission" in *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011) does not affect interpretation of the § 212(h) bar. In *Matter of Alyazji* the BIA interpreted the term "after the date of admission" in the context of a deportation ground. A noncitizen is deportable based on conviction of a single moral turpitude offense with a potential sentence of at least one year, if he or she committed the offense within five years "after the date of admission." INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i). Similarly to *Matter of Rosas*, the Board in *Matter of Alyazji* held that if a noncitizen entered without inspection and then adjusted status, the "admission" starting the five-year clock for the deportation ground is the adjustment of status. If instead a noncitizen is admitted at the border, e.g. as a tourist, and later adjusts status to lawful permanent residency, the "admission" starting the five-year clock is the admission at the border. In short, the BIA ruled that the "admission" is the event that causes the person to be subject to the grounds of deportability rather than inadmissibility. See *Matter of Alyazji*, 25 I&N Dec. at 408. See further discussion in Brady, "*Matter of Alyazji*: Adjustment of Status Following an Admission Does Not 'Re-Start' the Five-Year Clock for Purposes of the Moral Turpitude Deportation Ground" at www.ilrc.org/criminal.php. Note that *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005) cited for certain propositions in *Matter of Kolejnovic*, was overruled by *Matter of Alyazji*.

separate definition of admission under INA § 101(a)(13), and thus bar the discretionary waiver available under INA § 212(h)? See discussion at *Martinez*, 519 F.3d at 542. Consistent with *Matter of Rosas*, the Fifth Circuit held that while adjustment is included in the definition at § 101(a)(20), it does not meet the definition at § 101(a)(13)(A). The Eleventh Circuit addressed a fact situation exactly on point with *Koljenovic*, and found that a person who entered without inspection and then adjusted to permanent residence is subject to the grounds of deportability based on an admission under § 101(a)(20), but is not barred from § 212(h) for having “previously been admitted to the U.S.” as a permanent resident due to an admission under § 101(a)(13). *Lanier*, 631 at 1366-67.

Here is how the BIA’s decision on Mr. Koljenovic’s application should have read, regarding eligibility to apply for relief under INA § 212(h).

Mr. Koljenovic’s adjustment of status following entry without inspection qualifies as an “admission” under INA § 101(a)(20) for purposes of subjecting him to the grounds of deportability. *Matter of Rosas*. Mr. Koljenovic conceded that he is deportable under the aggravated felony ground.

Turning to relief, Mr. Koljenovic is not barred from applying for a waiver under § 212(h), because his adjustment of status is not a prior admission to the United States under INA § 101(a)(13)(A), as is required by the terms of § 212(h). *Martinez v. Mukasey*, *Sum v. Holder*, *Lanier v. U.S.A.G.* (an admission to the United States as a permanent resident under § 101(a)(13) is required in order for the § 212(h) bar to apply); *Matter of Rosas*, *Martinez v. Mukasey*, *Lanier v. U.S.A.G.* (adjustment of status is not an admission to the United States under § 101(a)(13)).

C. When Can One Apply for § 212(h)? Section 212(h) as a Defense to a Charge of Deportability

Summary. This section turns from discussing the LPR § 212(h) bar, to a discussion of the procedural contexts in which a § 212(h) waiver application may be filed by any immigrant. In sum, the § 212(h) waiver is most commonly applied for to waive inadmissibility in conjunction with an application to adjust status (affirmatively or in removal proceedings); to immigrate through consular processing; or as a waiver of inadmissibility when seeking admission at the border. It also can be used as a defense in removal proceedings to the charge that a noncitizen is deportable for having been inadmissible at last admission, or as a defense to a charge that a noncitizen is deportable based on a conviction, if in fact the person left the country and could have applied for a § 212(h) waiver upon return.

The focus of this section is the use of § 212(h) to waive a charge of deportability in removal proceedings when none of the above circumstances is present. In *Lanier v. United States AG*, 631 F.3d 1361 (11th Cir. 2011) the Eleventh Circuit reaffirmed its

prior holding that as a matter of equal protection, a permanent resident may apply under § 212(h) to waive a charge of being deportable under the moral turpitude ground, even without an application for adjustment, or an application to waive inadmissibility at a prior admission *nunc pro tunc*. The Fifth and Seventh Circuits have rejected this holding, and the Ninth Circuit is likely to do so.

Discussion. A § 212(h) waiver on inadmissibility can be granted in several procedural postures. It can be granted to waive an inadmissibility ground in conjunction with an application for adjustment of status, whether the adjustment is an affirmative filing or a defense in removal proceedings.²⁰ If the adjustment of status application is granted, the person will not be found deportable based on the conviction(s).²¹

Example: Vivian entered on a tourist visa and overstayed. She is inadmissible because she was convicted of possessing less than 30 grams of marijuana. She applies for adjustment of status based on an approved visa petition submitted by her U.S. citizen husband. She may submit a § 212(h) waiver in conjunction with the adjustment application.

Example: Ray is a permanent resident who is deportable for committing several thefts. He is charged with being deportable under the moral turpitude ground. As a defense to removal, he can apply to “re-adjust” his status to permanent residence, in conjunction with a § 212(h) waiver. If his applications are granted, he will no longer be deportable or inadmissible based on the waived convictions.

A § 212(h) waiver can be granted in conjunction with an application for admission at a U.S. border or border equivalent such as an airport.²²

Example: Maurice is immigrating on a family visa petition through a U.S. consulate abroad. If he is inadmissible under a waivable ground, he may submit a § 212(h) waiver.

²⁰ See, e.g., *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980) (noting that consideration of 212(h) and adjustment application in deportation proceedings for having been convicted of a CIMT within 5 years of entry under INA § 241(a)(4) is proper); see also *Matter of Abosi*, 24 I&N Dec. 204, 207 (BIA 2007).

²¹ See *Abosi*, 24 I&N Dec. at 207. Once an adjustment application is granted, the charged deportation ground is considered waived. See, e.g., discussion in *Matter of Rainford*, 20 I&N Dec. 598, 602 (BIA 1992) (where adjustment of status is granted, the applicant will no longer be found deportable based on his firearms conviction); *Matter of Gabryelsky*, 20 I&N Dec. 750, 755-56 (BIA 1993) (§ 212(c) waiver cures inadmissibility for controlled substance offense, and re-adjustment of status cures deportability for firearms conviction).

²² See, e.g., *Matter of Abosi*, 24 I&N Dec. at 205-206 (an inadmissible LPR who is seeking admission after a trip abroad can file a § 212(h) waiver to cure the inadmissibility, and does not need to also file an application for adjustment of status). Under INA § 101(a)(13), 8 USC § 1101(a)(13), a permanent resident returning from abroad is presumed not to be seeking a new admission unless she comes within certain categories enumerated in § 101(a)(13)(C), which includes being inadmissible under certain crimes-based grounds.

Example: Permanent resident Marta left the U.S. for a brief family visit -- after she had been convicted of offenses that made her inadmissible under the prostitution and moral turpitude grounds. Upon her return she was found to be inadmissible and seeking admission to the U.S., under INA § 101(a)(13)(C). She may submit a § 212(h) waiver with her application for admission.

A noncitizen is deportable if he or she was inadmissible at a prior admission.²³ As a defense to this charge, the noncitizen in removal proceedings may apply under § 212(h) to waive the inadmissibility ground *nunc pro tunc*, meaning retroactive to the time of the prior admission.²⁴ (There is no need for an adjustment of status application to be filed as well.) The § 212(h) waiver can be granted even if the charge on the NTA is for being deportable based on moral turpitude conviction\,s, for example under § 237(a)(2)(A)(i), and not for being deportable based on having been inadmissible at last admission, under § 237(a)(1)(A).²⁵

Example: Consider Marta in the above example, who left the U.S. after becoming inadmissible under the prostitution and moral turpitude conviction grounds. Assume that upon her return to the U.S., instead of being charged with being an inadmissible arriving alien she was (wrongly) admitted at the border as a returning lawful permanent resident. Later she is placed in removal proceedings and charged with being deportable for conviction of two moral turpitude offenses, as well as for having been inadmissible at last admission. As a defense to these charges she can submit an application for a § 212(h) waiver *nunc pro tunc*, meaning “as if at the time of” her prior admission. If the waiver is granted she will no longer be deportable or inadmissible.

The Eleventh Circuit *Yeung and Lanier* cases. Finally, what happens to a permanent resident who is charged with being deportable for one or more crimes involving moral turpitude, but lacks the above defense options, meaning that he cannot apply for adjustment of status, and did not take a trip outside the U.S. that would be a basis for a *nunc pro tunc* waiver. Can § 212(h) be used directly as a waiver of deportability, like the former § 212(c) relief, or the current LPR cancellation?

In 1995 the Eleventh Circuit in *Yeung v. INS*²⁶ held that it can be. Mr. Yeung became a lawful permanent resident and then was convicted of a crime involving moral turpitude that made him deportable and inadmissible. In deportation proceedings,²⁷ he

²³ INA § 237(a)(1)(A), 8 USC § 1227(a)(1)(A).

²⁴ See, e.g., *Matter of Millard*, 11 I&N Dec. 175, 177 (BIA 1965); *Matter of Sanchez*, 17 I&N Dec. 218, 218 (BIA 1980), *Matter of Parodi*, 17 I&N Dec. 608, 608 (BIA 1980). See *Matter of Lett*, 17 I&N Dec. 312, 313-14 (BIA 1980).

²⁵ See, e.g., *Matter of Sanchez*, 17 I&N Dec. at 222-223.

²⁶ *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995).

²⁷ Mr. Yeung was in deportation proceedings, a type of proceeding that was replaced by removal proceedings as of April 1, 1997. However, the difference between the former deportation and exclusion proceedings, and the current removal proceedings that may be based on a charge of deportability or

asked to waive the moral turpitude deportation charge under INA § 212(h), based on hardship to his lawful permanent resident wife and citizen child. The immigration judge noted that Mr. Yeung could have defended against deportability by applying for a § 212(h) waiver of inadmissibility *nunc pro tunc* to a prior admission – if he had happened to leave the United States after his conviction. But because he had not made such a trip, the immigration judge held that he could not apply for § 212(h) as a defense to deportability.

The Eleventh Circuit found that this was a violation of equal protection, because it provided disparate treatment to nearly identical classes of noncitizens.

In practical effect, the Board has applied § 212(h) so as to create two classifications of aliens identical in every respect but for the fact that members of one of the classifications departed and returned to this country at some point after they became deportable. According to the Board, those who have so departed and returned are worthy of consideration by the Attorney General for exclusion waivers. Those whose fate has not led them to sojourn are due no such consideration.

Yeung, 76 F.3d at 341

The Court held that the § 212(h) waiver should be treated similarly to the former § 212(c) waiver under *Francis v. INS*, 532 F.2d 268 (2nd Cir. 1976). In *Francis* the Second Circuit held that it was a violation of equal protection to permit a permanent resident who had traveled outside the U.S. to defend against deportation charges by applying for a § 212(c) waiver *nunc pro tunc* to the last admission, while not permitting a permanent resident who had *not* happened to travel abroad to make the same application. Therefore, *Francis* held that a lawful permanent resident should be able to use the former INA § 212(c) to waive a deportation ground, as long as the deportation ground was sufficiently analogous to an inadmissibility ground that it would have applied had the person traveled outside the U.S. The *Francis* rule was followed by the BIA nationally in *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976) and in all circuits deciding the issue.

The Eleventh Circuit held that the *Francis* rule should apply to § 212(h) in Mr. Yeung's case. Because the moral turpitude conviction would make Mr. Yeung inadmissible as well as deportable under the moral turpitude grounds, Mr. Yeung could ask the judge to waive the moral turpitude deportation charge.

On remand, the BIA declined to address the Eleventh Circuit's equal protection holding in *Yeung*, but denied the case on another ground (which was that Mr. Yeung

inadmissibility, do not change the § 212(h) analysis. See, e.g., *Lanier*, 631 F.3d at n. 1 (11th Cir. 2011); *Matter of Abosi*, 24 I&N Dec. at 205-206.

came within the recently enacted LPR bar to § 212(h)).²⁸ The Third and Seventh Circuits have declined to follow the Eleventh Circuit's rule in *Yeung*.²⁹

In *Lanier v. United States AG*, 631 F.3d 1361, n. 2 (11th Cir. 2011) the Eleventh Circuit cited *Yeung* and again permitted a permanent resident to apply for § 212(h) as a defense to deportability, to waive an inadmissible crime involving moral turpitude that also was an aggravated felony.³⁰ The permanent resident did not have an adjustment application, and had not left the United States since becoming inadmissible and deportable.

Section 212(h) as a defense to deportability under *Yeung/Lanier* presents some excellent opportunities, but there are at least two obstacles to qualifying for the relief. First is the fact that to date only the Eleventh Circuit has upheld this defense, while the Fifth and Seventh Circuits have rejected it.³¹ Advocates in the Ninth Circuit will face a difficult fight. In an unusual step, the Ninth Circuit *en banc* recently withdrew from its quarter-century of support for the *Francis* equal protection rationale even in § 212(c) cases.³² Therefore it is unlikely that the Ninth Circuit would order immigration authorities to adopt the *Yeung* rule in § 212(h) cases as a matter of equal protection. Now the U.S. Supreme Court has accepted certiorari on a Ninth Circuit case that presents the issue of whether the *Francis* Equal Protection rule was valid in the context of § 212(c) cases.³³ The decision may resolve the issue for § 212(h) cases as well.

The second obstacle to the *Yeung/Lanier* rule comes into play only if the moral turpitude offense also is an aggravated felony. Even if the permanent resident is not subject to the § 212(h) bar, it may be challenging to waive the aggravated felony deportation ground under § 212(h) under this Equal Protection theory because of the issues asserted in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). In *Blake*, the Board declined to permit the former § 212(c) to be used to waive a charge of deportability based on conviction of a "sexual abuse of a minor" aggravated felony, because it found that this would require an analogous "sexual abuse of a minor" inadmissibility ground, which

²⁸ *Matter of Yeung*, 21 I&N Dec. 610, 612 (BIA 1996).

²⁹ See *Klementanovsky v. Gonzales*, 501 F.3d 788, 793 (7th Cir. 2007); *Cabral v. Holder*, 632 F.3d 886, 893-894 (5th Cir. 2011). The Third Circuit rejected the argument in an unpublished opinion. *Montano v. Attorney Gen. of the United States*, 350 Fed.Appx. 643, 647 (3d Cir.2009).

³⁰ In *Lanier v. U.S.A.G.*, *supra* at note 2, the Court stated, "The § 212(h) discretionary waiver is typically referred to as the "waiver of inadmissibility," as INA § 212 sets forth grounds upon which an alien can be denied admission to the United States, as well as conditions under which certain of those grounds can be waived. However, the waiver is also available in removal proceedings. *Yeung v. I.N.S.*, 76 F.3d 337, 340 (11th Cir. 1995)."

³¹ See *Klementanovsky v. Gonzales* and *Cabral v. Holder*, *supra*, and the Third Circuit unpublished opinion *Montano v. Attorney Gen. of the United States*, *supra*.

³² *Abebe v. Mukasey*, 554 F.3d 1203, 1205-06 (9th Cir. 2009) (en banc). The Ninth Circuit did not find that the BIA and DHS may not extend the former § 212(c) relief to certain deportation grounds, and the BIA and DHS continue to so in cases arising in the Ninth Circuit.

³³ *Judulang v. Holder*, 179 L. Ed. 2d 889; 2011 U.S. LEXIS 3099 (April 18, 2011)

does not exist. The Board held that the moral turpitude inadmissibility ground was not sufficiently analogous. To date the Board has identified only the drug trafficking aggravated felony category as being sufficiently analogous to an inadmissibility ground. (Of course, § 212(h) does not waive drug trafficking at all.) The Second Circuit has rejected *Matter of Blake*.³⁴ In other circuits, counsel might investigate arguments based on the fact that the statutory language of § 212(h), including its limits on aggravated felony convictions, is different from the language in the former § 212(c).

The *Blake* issue comes up only when the applicant is filing § 212(h) in removal proceedings and has no absence from the U.S., as in *Yeung/Lanier*, and when the moral turpitude offense also is an aggravated felony. *Blake* does not apply to a § 212(h) waiver of inadmissibility, whether in conjunction with an application for adjustment, admission, or *nunc pro tunc* to waive inadmissibility at a prior admission.

D. More Than You Might Think: Controlled Substance Offenses that Are Waivable under § 212(h) (And Exempted from the Controlled Substance Deportation Ground)

Section 212(h) may waive inadmissibility for a controlled substance conviction “insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana.”³⁵ This language is nearly identical to that used in the automatic exception to the controlled substance deportation ground, for conviction of “a single offense involving possession for one's own use of 30 grams or less of marijuana.”³⁶

This common statutory language has been interpreted to include several offenses beyond simple possession of marijuana. To date these include possessing, being under the influence of, or possessing paraphernalia for the use of, a small amount of marijuana or hashish, and being under the influence of THC-carboxylic acid. Additional offenses may be found to qualify. Also, counsel may consider challenging the holding in *Matter of Moncada*, 24 I. & N. Dec. 62 (BIA 2007), that an offense for simple possession of marijuana near a school or in prison does not come within this language.

Note that the burden of proof that the offense involved a small amount of marijuana will change based upon whether the issue is qualifying for the exception to the deportation ground versus eligibility for § 212(h) relief, although in the Ninth Circuit the change is not significant in practice. See discussion below.

³⁴ *Blake v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007).

³⁵ The inadmissibility ground based upon a controlled substance conviction appears at INA § 212(a)(2)(A)(i)(II), 8 USC § 1182(a)(2)(A)(i)(II). The language relating to 30 grams of marijuana appears at INA § 212(h), 8 USC §§ 1182(h).

³⁶ INA 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(1).

Marijuana, Hashish, and the Definition of Cannabis; THC-Carboxylic Acid.

Although § 212(h) and the exception to the controlled substance deportation ground refer to “marijuana,” the General Counsel of the (former) INS stated that this also includes hashish, based on the fact that 21 USC § 802(16)³⁷ defines marijuana to include all parts of the Cannabis plant. The Counsel instructed that in general the § 212(h) waiver is limited to an amount of hashish equivalent to 30 grams or less marijuana, but that an offense involving more hashish than that may be waived in “unusual circumstances.”³⁸

While this Advisory will refer to the statutory term “marijuana,” counsel should be aware that the deportation ground and § 212(h) waiver refer to the full definition of Cannabis at 21 USC § 802(16). For example, a conviction for being under the influence of, or possessing paraphernalia in order to use, a small amount of hashish should come within both of these sections, just as the same offenses involving marijuana would.

The Ninth Circuit found that conviction for attempt to be under the influence of THC-carboxylic acid in violation of Nev. Rev. Stat. §§ 193.330 and 453.411 is not categorically a deportable controlled substance conviction. Instead, it comes within the marijuana exception to the deportation ground, or at the least is divisible for this purpose. *Medina v. Ashcroft*, 393 F.3d 1063, 1065 (9th Cir. 2005). This decision was based not on the federal definition of Cannabis, but on the fact, conceded by ICE, that THC-carboxylic acid is the metabolite in the human body by which drug tests detect marijuana, i.e. marijuana use causes a person to test positive for THC. In fact, the court noted that Mr. Medina had unsuccessfully attempted to subpoena a representative from the state prosecution office to testify that the office generally charges a person who was under the influence of marijuana with being under the influence of THC-carboxylic acid. *Ibid*, and notes 6, 7. The court found that ICE did not meet its burden of proving that Mr. Medina was deportable, because it failed to establish under the categorical approach that the conviction related to something other than being under the influence of marijuana. (See discussion of burdens of proof, below.)

³⁷ Section 802(16) provides: “The term “marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.”

³⁸ See INS General Counsel Legal Opinion 96-3 (April 23, 1996), “So long as the facts of a case satisfy the other requirements of section 212(h), you may properly interpret section 212(h) as giving you the authority to grant a waiver to an alien whose conviction was for the simple possession of 30 grams or less of any cannabis product that is within the definition found in 21 USC § 802(16). Absent some unusual circumstances, however, we recommend that you limit your discretion in section 212(h) cases so that a section 212(h) waiver will be denied in most cases in which the alien possessed an amount of marijuana, other than leaves, that is the equivalent of more than 30 grams of marijuana leaves under the Federal Sentencing Guidelines, 18 USC App. 4.”

Under the influence. The Ninth Circuit held that a single conviction for being under the influence of marijuana comes within the automatic exception to the deportation ground for simple possession of 30 grams or less of marijuana. *Flores-Arellano v. INS*, 5 F.3d 360, 362 (9th Cir. 1993); *Medina v. Ashcroft*, *supra*.

The Board affirmed that a conviction relating to being under the influence of marijuana is waivable under § 212(h). In *Matter of Martinez-Espinoza*, 25 I&N Dec. 118, 125 (BIA 2009), discussed *infra*, the Board held that § 212(h) is available to waive possession of drug paraphernalia, as long the respondent can establish that the paraphernalia was for the “sole purpose of introducing 30 grams or less of marijuana into his body.”

Offenses that “relate to” possessing marijuana; Paraphernalia. In *Matter of Martinez-Espinoza*, *supra*, the BIA held that a noncitizen who is inadmissible for a controlled substance conviction may “apply for a section 212(h) waiver if he demonstrates by a preponderance of the evidence that the conduct that made him inadmissible was either ‘a single offense of simple possession of 30 grams or less of marijuana’ or an act that ‘relate[d] to’ such an offense.”

This conduct-based test opens the door to waiving offenses other than simple possession. The Board cautioned, however, that the offense must relate only to simple possession and not a more serious crime, for example possession of marijuana near a school or in a prison. *Ibid*, citing *Matter of Moncada*, 24 I. & N. Dec. 62 (BIA 2007). Note, however, that advocates suggest that the rule in *Matter of Moncada* may be open to challenge.

In *Martinez-Espinoza* the Board warned that it would not “relitigate” a prosecution to look behind the conviction. “If the fact of conviction is sufficient to show that an alien committed actions in addition to (or more culpable than) a single offense of simple possession of a small amount of marijuana, then the inquiry is at an end, and section 212(h) relief is unavailable.” *Martinez-Espinoza*, 25 I&N Dec. at 125.

The Board held that § 212(h) potentially can be used to waive a conviction for possession of paraphernalia under Calif. H&S Code § 11364, if the noncitizen can prove that the offense related only to possession of a small amount of marijuana. “Thus, when a person possesses drug paraphernalia for the sole purpose of introducing 30 grams or less of marijuana into his body, his conduct ‘relates to’ the offense described in section 212(h).” *Ibid*. See also *Escobar-Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008).

The Board reasoned that the statutory language does not require that the inadmissible *conviction* be solely for simple possession of 30 grams or less of marijuana, but just that the offense “relates to” simple possession of 30 grams or less.

Section 212(h) does not require an applicant to show that he was convicted of a single marijuana possession offense, or even that he committed such an offense; instead, it requires the applicant to show that his inadmissibility "relates to" such an offense. As in section 212(a)(2)(A)(i)(II), the "relates to" phrase employed in section 212(h) expresses a legislative judgment that an alien's inadmissibility need only stand in some natural relation to the specific offense that is its object of reference.

Id. at 123.

The Seventh Circuit found that, depending on the type of paraphernalia involved, a court may be able to determine whether the offense related to simple possession of a small amount of marijuana and therefore qualifies under § 212(h). "Pipes, roach clips, and other paraphernalia designed for use with personal-possession quantities of marijuana come within § 1182(h) because the paraphernalia relates to the drug, and the implied quantity is under 30 grams. Scales, bagging gear, trays and lamps for growing whole plants, and other apparatus for use with larger quantities or distribution do not relate to 'simple possession' and so fall outside the waiver. Drawing the line will be difficult in some cases but is easy in Escobar's." *Escobar-Barraza v. Mukasey*, 519 F.3d at 392-393. Mr. Escobar was convicted of possessing a single "pot pipe," and the court found that his conviction could be waived under § 212(h).

Burden of proof of deportability. In marijuana possession cases, courts have held that ICE must meet its burden of proving deportability by proving that a conviction does *not* come within the marijuana exception to the controlled substance deportation ground.³⁹ See discussion of *Medina v. Ashcroft*, 393 F.3d 1063, 1065 (9th Cir. 2005), *supra*. In *Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001) the Seventh Circuit considered a case where, following the defendant's plea to possession of more than 30 grams of marijuana, an Illinois court modified the sentence to a probation that is available only where the conviction was for possessing less than 30 grams. The court held that the INS bore the burden of proving that the conviction had *not* been vacated and re-entered to conform with the sentence. The court noted, "In order to show that Sandoval's original conviction for possessing more than thirty grams of marijuana remained in effect, the INS could have shown 1) that the Illinois judge exceeded his authority under state law, thus rendering the modification ineffective, or 2) that the sentence modification was legal but not effective for purposes of federal immigration law. We find that the INS did not establish either of these factual situations by clear, unequivocal, and convincing evidence." *Id.* at 581.

³⁹ This question should not be confused with another issue of proof involving marijuana. The BIA and courts are in conflict over who bears the burden to demonstrate that a state conviction is not a drug trafficking aggravated felony, because it is for giving away a small amount of marijuana. See discussion of *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008) and cases such as *Wilson v. Ashcroft*, 350 F.3d 377, 382 (3d Cir. 2003) in Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit*, § 3.5 (www.ilrc.org) (2011).

Burden of proof of eligibility for the § 212(h) waiver; Ninth Circuit rule on burden of proof. In *Martinez-Espinoza*, the BIA found that to qualify for § 212(h) relief, the noncitizen bears the burden of proving that the offense involved possession of 30 grams or less of marijuana. The Board held that the noncitizen can meet this burden under the “circumstance specific” evidentiary approach set out in *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009), rather than under the stricter categorical approach otherwise used to characterize convictions in immigration proceedings.⁴⁰

We conclude that section 212(h) employs the term "offense" ... to refer to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime.... Read in its most natural sense, this narrow language invites what the *Nijhawan* Court referred to as a "circumstance-specific" inquiry, that is, an inquiry into the nature of the conduct that caused the applicant to become inadmissible. [*Nijhawan*, 129 S.Ct. at 2298.]

We do not deny that the elements of some State drug crimes may be defined with sufficient particularity as to encompass all the elements of the "offense" described in section 212(h) of the Act. But there are also many statutes--including 21 U.S.C. § 844 (2006), the Federal simple possession statute--that are far broader in scope, applying to all controlled substances and making no mention (in the marijuana context at least) of drug quantity. An alien convicted under such a broad statute could never establish categorical eligibility for a waiver because the quantity of the offending substance would not have been a statutory element that needed to be admitted or proven to a jury in order to convict. We think it unlikely that Congress intended to make an alien's eligibility for a waiver dependent on such an arbitrary factor as whether the convicting jurisdiction treated drug quantity as an element.

Martinez-Espinoza, 25 I&N Dec. at 123-124

The Board emphasizes that it is acting in the immigrants' interest by choosing the “circumstance specific” rather than the stricter categorical approach as a standard for the noncitizen's burden of proof. As the Board points out, requiring the immigrant to prove eligibility for relief under the categorical approach would appear to violate the intent of Congress. However, the Supreme Court in *Nijhawan* did not indicate that its test should be used to establish eligibility for relief, and *Nijhawan* imposes evidentiary restrictions in the “circumstance specific” test that, while less stringent than the categorical approach, still are more restrictive than simply proving the required fact by a preponderance of credible evidence.

⁴⁰ For further discussion of these evidentiary standards, see Brady, “Preliminary Analysis: *Nijhawan v. Holder*” in *Bender's Immigration Bulletin*, August 1, 2009 and at www.ilrc.org/criminal.php; see also Vargas and Kesselbrenner, “The Impact of *Nijhawan v. Holder*” at www.nationaimmigrationproject.org.

The Ninth Circuit approach avoids these issues. The court has held that based on the nature of the categorical approach, ***an inconclusive record of conviction is sufficient to meet the immigrant’s burden of proving that a conviction under a divisible statute is not a bar to relief.*** See, e.g., *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9th Cir. 2011); and see Brady, “Burden of Proof Victory in the Ninth Circuit” (2011) (www.ilrc.org/criminal.php). Under this rule, Mr. Martinez-Espinoza should be held to have met his burden of proving eligibility for § 212(h) as the record of conviction before the immigration judge is inconclusive, i.e. as long as the record fails to establish that the offense did *not* relate to possession of 30 grams or less of marijuana.

Withdrawal of plea may erase the conviction in the Ninth Circuit. In the Ninth Circuit only, an expungement or other means of withdrawing a plea after successful completion of probation will eliminate the immigration effect of a first conviction of simple possession, or a less serious offense with no federal analogue such as possession of paraphernalia. See *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) and subsequent cases.⁴¹ However, at this writing the Ninth Circuit en banc is deciding whether or not to reverse the *Lujan-Armendariz* rule. See *Nunez-Reyes v. Holder*, 631 F.3d 1295 (9th Cir. 2010), *vacating and rehearing en banc* 602 F.3d 1102 (9th Cir. 2010). For this reason, while *Lujan-Armendariz* is the law in immigration proceedings in the Ninth Circuit now, counsel should attempt to identify an alternative defense strategy in case the rule is reversed in the future.

E. Section 212(h) as an Option When LPR Cancellation Won’t Work

Section 212(h) can be a life-saving alternative for deportable permanent residents who don’t qualify for cancellation of removal for permanent residents under INA § 240A(a). When cancellation is ruled out because of an aggravated felony conviction, lack of the seven years, or a prior grant of cancellation or suspension, in some cases § 212(h) will be a viable option.

Seven-year requirement for LPR cancellation. An applicant for LPR cancellation must have acquired seven years of residence. The time begins at admission to the U.S. in any status, and ends upon the filing of a Notice to Appear *or* when the person commits certain offenses.⁴²

Under § 212(h), some permanent residents have no seven-year requirement because they are not subject to the LPR bar at all (see Part B, above). Permanent residents who are subject to the § 212(h) bar have a seven-year requirement, but it is calculated quite differently from the one for cancellation. They must have “lawfully

⁴¹ For further discussion of the case law and other developments relating to the *Lujan-Armendariz* benefits, see Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit*, § 3.7 (www.ilrc.org) (2011).

⁴² INA § 240A(d)(1), 8 USC § 1229b(d)(1).

resided continuously in the United States for a period of not less than 7 years before initiation” of removal proceedings. INA § 212(h). Lawful residence is not limited to lawful permanent residence; it might include a period of time granted pursuant to a visitor’s visa, but does not include time spent as an applicant for adjustment of status or asylum.⁴³ However, § 212(h) has a great advantage in that *committing an offense* does not stop accrual of the seven years. Therefore, LPRs who committed offenses soon after obtaining lawful status but then led productive lives may be barred from cancellation, but eligible for §212(h).

Example: Sonia was admitted to the United States as a lawful permanent resident in 1998. Her transition was difficult and by 2000 she had been convicted of credit card fraud on two different occasions. This made her inadmissible and deportable under the moral turpitude grounds. She lived a lawful life for the next ten years. In 2010 the government filed an NTA charging her with being deportable for the convictions.

Sonia is not eligible to apply for LPR cancellation, because for that purpose her seven years ceased to accrue in 2000, two years after she had first been admitted in any status. She is subject to the § 212(h) bar, because she became a permanent resident through consular processing rather than adjustment. Fortunately, she has the seven years that are required for § 212(h) under the bar. For § 212(h) purposes the time started when she gained lawful permanent resident status in 1998, and did not end until the NTA was issued twelve years later.

(Hopefully Sonia can apply for a § 212(h) waiver in conjunction with an application for adjustment, admission, or to waive inadmissibility at last admission *nunc pro tunc*. Otherwise, unless she is in removal proceedings arising within the Eleventh Circuit, she will have to fight to persuade authorities to let her submit the § 212(h) application under the reasoning in *Yeung* and *Lanier*, discussed in Part C, *supra*.)

Aggravated Felony Bar to LPR Cancellation. Conviction of an aggravated felony is an absolute bar to LPR cancellation, but many § 212(h) applicants may proceed despite such a conviction. A § 212(h) applicant may waive, e.g., a crime involving moral turpitude offense that also is an aggravated felony *unless* she (a) is a permanent resident who is subject to the § 212(h) bar and (b) was convicted of the aggravated felony after admission at the border as a permanent resident. See discussion in Part B.

Section 212(h) is limited in what aggravated felonies it can waive. Under the statute § 212(h) will not waive a drug aggravated felony (it will waive only a single

⁴³ *Matter of Rotimi*, 24 I&N Dec. 567, 569 (BIA 2008). The Board found that § 212(h) permits applicants who are subject to the LPR bar to apply if they “have lawfully resided continuously in this country for 7 years immediately preceding the institution of proceedings, irrespective of whether the period of lawful residence was as a permanent resident.” *Matter of Rotimi*, 24 I&N Dec. 567, 569 (BIA 2008)

possession of 30 grams or less of marijuana), and a discretionary grant is unlikely to be given if the conviction is of a “dangerous or violent” crime.⁴⁴ It is most likely to succeed in waiving moral turpitude crimes that also come within non-drug, non-violent, aggravated felony categories such as theft, fraud, counterfeiting, perjury, bribery, obstruction of justice, etc.

Prior Grants of Suspension, § 212(c) or Cancellation; Subsequent Applications.
Cancellation of removal is not available if the applicant has previously been granted cancellation, the former suspension of deportation, or the former § 212(c) relief.⁴⁵ Section 212(h) is not barred by a prior grant of this relief, and does not preclude any future application for relief.

⁴⁴ See 8 CFR 212.7(d) and discussion at Part A, *supra*.

⁴⁵ INA § 240A(c)(6), 8 USC § 1229b(c)(6).