AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY[1]

§ 212(h) Eligibility: Case Law and Potential Arguments

By AILF's Legal Action Center[2]

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This practice advisory addresses the basic statutory requirements for eligibility for INA § 212(h) waivers, 8 U.S.C. § 1182(h). It also addresses the availability of § 212(h) waivers in removal proceedings depending on whether the person is a lawful permanent resident (LPR) and/or whether the person is charged with a ground of inadmissibility or deportability.

The practice advisory also addresses when it is or arguably might be possible for an individual to file a "stand-alone" § 212(h) waiver, that is, a § 212(h) waiver that need not be filed in conjunction with an application to adjust status. A stand-alone § 212(h) waiver generally can be used as an independent form of relief from removal by LPRs who are charged with inadmissibility. It also arguably may be used by LPRs who are charged with deportability but have departed the country and returned since committing a deportable offense. This practice advisory discusses arguments supporting the availability of stand-alone § 212(h) waivers to arriving aliens and to non-LPRs charged with inadmissibility. It also discusses arguments for stand-alone waivers for LPRs charged with deportability who have not departed since committing the deportable offense.

Finally, the advisory discusses the regulation imposing a heightened hardship standard in cases involving violent or dangerous crimes. However, this advisory does not address the procedures for applying for a § 212(h) waiver nor does it address the standards for evaluating the hardship requirement.

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The information in this advisory is accurate as of the date of the advisory. Readers are cautioned to check for new cases and legal developments. This practice advisory is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

I. STATUTORY OVERVIEW OF § 212(h).

Q1: What grounds of inadmissibility does § 212(h) waive?

A § 212(h) waiver, if granted, waives the following criminal grounds of inadmissibility:

- crimes involving moral turpitude. INA § 212(a)(2)(A)(i)(I).
- a single offense of simple possession of 30 grams or less of marijuana. INA §§ 212(a)(1)(A)(i)(II) & 212(h).
- multiple criminal convictions where aggregate sentence was 5 years or more. INA § 212(a)(2)(B).
- prostitution and commercial vice activities. INA § 212(a)(2)(D).
- serious criminal offenses involving a grant of immunity. INA § 212(a)(2)(E).

Q2. Who can receive a § 212(h) waiver?

A § 212(h) waiver is available to certain "immigrants" (including specifically VAWA self petitioners) who meet the statutory eligibility requirements and for whom the agency decides to exercise favorable discretion.[3]

Q3: What are the statutory requirements for a § 212(h) waiver?

First, the person must fit into *one* of the following categories (*see* INA § 212(h)(1)):

A. An immigrant charged with prostitution under subparagraphs (i) or (ii) of INA § 212(a)(2)(D), where:
   a. subparagraph (i) or (ii) is the sole basis of inadmissibility;
   b. admission would not be contrary to national welfare, safety, or security; and
   c. the person has been rehabilitated.

B. An immigrant charged with any other criminal ground of inadmissibility that is subject to the waiver, where:

[3] This practice advisory uses the term "immigrant" consistent with its use in § 212(h) and throughout the INA. *See* 8 U.S.C. § 1101(a)(15) (defining the term "immigrant" generally as referring to aliens other than those who fall within specified classes of "nonimmigrant aliens"). Thus, "immigrant" includes both those seeking to immigrate and those who already are LPRs. When the reference is to the LPR category only, the practice advisory will so designate.

a. the criminal activities (necessitating the waiver) occurred more than 15 years before the date of the application for a visa, admission or adjustment of status; and
b. admission would not be contrary to national welfare, safety, or security; and
c. the person has been rehabilitated.

C. An immigrant who:
a. is the spouse, parent, or son or daughter of a U.S. citizen or LPR; and
b. establishes that extreme hardship would befall the qualifying relative if admission were denied.

D. VAWA self-petitioners under INA §§ 204(a)(1)(A)(iii) or (iv) or 204(a)(1)(B)(ii) or (iii) (no additional statutory requirements).

Second, the person cannot have been convicted of having committed, attempted or conspired to commit, or have admitted acts that constitute murder or criminal acts involving torture. *See* INA § 212(h).

Third, "the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status." *See* INA § 212(h)(2).

Finally, in the case of a person previously granted LPR status, additional restrictions apply. In addition to the three requirements above, a § 212(h) waiver can only be granted to a person previously admitted to the U.S. as an LPR where the LPR:
a. has lawfully resided[4] in the United States for not less than 7 years before removal proceedings were initiated;[5] and
b. has not been convicted of an aggravated felony since becoming an LPR.[6]

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[4] In an unpublished decision, the BIA has held that the statute does not require 7 years of continuous residence as an LPR but instead only requires 7 years of continuous residence in any lawful status. *In re Afek*, No. A45-662-418, 2006 WL 3088766 (BIA Aug. 4, 2006). The BIA went on to hold that a person resides "lawfully" for purposes of § 212(h) if he or she was not subject to being removed as a matter of law during the prescribed period. *Id.*

[5] Notably, unlike cancellation of removal under INA § 240A, the commission of a criminal offense does not cut off the 7 years required for a § 212(h) waiver. Thus, an LPR who is not eligible for cancellation on this basis, or not eligible for § 212(c) relief (if offense is post-1996), still could be eligible to apply for a § 212(h) waiver.

[6] Several courts have considered whether the aggravated felony bar and/or seven year residency requirement violates equal protection insofar as these requirements do not apply to non-LPRs applying for § 212(h). *Compare* category C, above, *with*

Q4: In what circumstances can a person apply for a § 212(h) waiver?

Persons in the U.S. seeking § 212(h) waivers generally either will apply for the waiver in conjunction with an application to adjust status or as a stand-alone application in removal proceedings. 8 C.F.R. §§ 1212.7(a)(1)(ii)-(iv), 1240(a)(a)(ii). However, a person filing a stand-alone application in removal will also need a basis to avoid removal. Thus, stand-alone § 212(h) waivers are often filed by LPRs returning from a trip abroad, in which case pre-existing LPR status is maintained. Alternatively, stand-alone § 212(h) waivers may be filed by immigrant visa holders, in which case, the waiver must be granted *nunc pro tunc* which would concurrently render the visa valid.[7]

An LPR returning from a trip abroad arguably also could apply affirmatively for a § 212(h) waiver to U.S. Customs and Border Patrol. Such an affirmative application would be particularly useful if the person has not yet accrued 7 years of lawful residence in the United States, because otherwise the issuance of the Notice To Appear would cut off the continued accrual of physical presence.

Persons outside the U.S. can apply for a § 212(h) waiver in conjunction with an application for an immigrant visa at a U.S. consulate. 8 C.F.R. § 212.7(a)(1)(i).

II. SITUATIONS INVOLVING INADMISSIBLITY CHARGES

Q5: My client committed a waivable § 212(h) offense after becoming a lawful permanent resident. She then departed from the U.S., and was charged as an

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requirements for people previously granted LPR status. To date, courts have rejected these claims. *See Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 507-08 (5th Cir. 2007); *Taniguchi v. Schultz,* 303 F.3d 950, 957-58 (9th Cir. 2002); *Latu v. Ashcroft,* 375 F.3d 1012, 1020-21 (10th Cir. 2004); *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 638-40 (3d Cir. 2002); *Jankowski-Burczyk v. INS,* 291 F.3d 172, 178-81 (2d Cir. 2002); *Lukowski v. INS*, 279 F.3d 644, 647-48 (8th Cir. 2002); *Moore v. Ashcroft*, 251 F.3d 919, 925-26 (11th Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934, 947-48 (7th Cir. 2001); *Umanzor-Lazo v. INS*, 1999 U.S. App. LEXIS 8514 (4th Cir. 1999) (unpublished decision upholding statute in summary fashion). *See also In re Michel*, 21 I&N Dec. 1101, 1104 (BIA 1998) (affirming distinction on statutory basis).

[7] A § 212(h) waiver can be granted *nunc pro tunc* to cure a ground of inadmissibility existing at the time the person applied for the visa or admission. *See Matter of P--*, 7 I&N Dec. 713, 714 (BIA 1958) (§ 212(h)'s predecessor waiver may be granted *nunc pro tunc* to returning LPR charged with inadmissibility); *Matter of Millard*, 11 I&N Dec. 175, 178 (BIA 1965) (§ 212(h) waiver granted *nunc pro tunc* to immigrant visa holder charged with inadmissibility); *Matter of Sanchez*, 17 I&N Dec. 218, 222 (BIA 1980) (§ 212(h) waiver may be granted *nunc pro tunc* to returning LPR in deportation proceedings); *Matter of Parodi*, 17 I&N Dec. 608, 611 (BIA 1980) (§ 212(h) waiver available to LPR in deportation proceedings in conjunction with adjustment of status application).

arriving alien upon return from abroad. Is she eligible for a stand-alone § 212(h) waiver?

Yes. The Board of Immigration Appeals has held that a returning LPR seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in connection with a § 212(h) waiver. *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).

Section 101(a)(13) of the INA was enacted by IIRIRA and defines the terms "admission" and "admitted." Generally, under this definition, an LPR will not be regarded as "seeking admission" upon a return to the U.S., and thus will be allowed entry as an LPR. *See* INA § 101(a)(13). However, there are important exceptions to this in the statutory definition. Under subsection (C)(v) of INA § 101(a)(13), a lawful permanent resident returning from abroad may be regarded as seeking admission (and, thus, be classified as an arriving alien[8]) if, among other things, he or she has committed an offense identified in INA § 212(a)(2). *See* Q7 for exceptions to INA § 101(a)(13)(C)(v). LPRs regarded as seeking admission upon return to the U.S. will be placed in removal proceedings.

If the lawful permanent resident is seeking to overcome a ground of inadmissibility covered by a § 212(h) waiver (see Q1) and meets (or arguably meets) the statutory eligibility criteria for such a waiver (see Q3), he or she can apply for a § 212(h) waiver. Even if she is eligible for adjustment, an LPR in this situation will not have to apply for adjustment, but instead can apply solely for a stand-alone § 212(h) waiver.

In *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007), the BIA held that a returning lawful permanent resident who is placed in removal proceedings and charged as an arriving alien need not apply for adjustment of status in conjunction with the § 212(h) waiver. Rather, the grant of a § 212(h) waiver, the BIA reasoned, eliminates the basis of inadmissibility and leaves LPR status intact. The BIA further noted that the regulation requiring persons "in the United States" to file § 212(h) waiver applications concurrently with adjustment applications did not apply to the respondent, a returning LPR charged as an arriving alien. *Matter of Abosi*, 24 I&N Dec. at 205-06 discussing 8 C.F.R. § 1245.1(f).

Matter of Abosi involved an LPR who was cited for a possession of a small amount of marijuana, who then departed the United States and was placed in removal proceedings and charged as an arriving alien upon his return due to the drug offense. Important to the BIA's conclusion was that LPR status is not lost until entry of a final administrative removal order.

Q6: My client is an immigrant visa holder (but not an LPR) who has been placed in proceedings as an arriving alien; is he eligible for a stand-alone § 212(h) waiver?

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[8] An "arriving alien" generally is defined by regulation as an applicant for admission coming or seeking to come into the United States at a port-of-entry. 8 C.F.R. §§ 1.1(q) and 1001.1(q).

At least one group of non-LPR immigrants may be able to file stand-alone § 212(h) waivers in this situation. In *Matter of Millard,* 11 I&N Dec. 175 (BIA 1965), the respondent failed to disclose that she had engaged in prostitution outside the United States on her applications for a nonimmigrant border crossing card and on her subsequent immigrant visa application. Upon entry, she was placed in exclusion proceedings and charged with inadmissibility for misrepresentation, a crime involving moral turpitude (perjury) and prostitution. The BIA held that the granting of a stand-alone § 212(h) waiver application effectively eliminated her inadmissibility at the time of entry and concurrently rendered the immigrant visa valid. Consequently, she both defeated removal proceedings and was eligible for admission.

Thus, under *Matter of Millard*, an immigrant visa holder who is placed in removal proceedings and charged with inadmissibility as an arriving alien solely for a criminal offense that is waivable under § 212(h) should be permitted to file a stand-alone § 212(h) waiver. The criminal offense could have been committed outside the United States (as in *Matter of Millard*). Arguably, the criminal offense also could have been committed inside the United States (if the person was previously present) provided it was committed prior to the issuance of the immigrant visa by the U.S. Embassy or consulate abroad. The person would need to request *nunc pro tunc* adjudication (thereby restoring the validity of the immigrant visa). Once the validity of the visa was restored, the grounds for removal would be eliminated and the individual would be eligible for admission without additional relief, such as adjustment of status.[9]

Q7: My client is a lawful permanent resident who committed and pled guilty to an offense identified in INA § 212(a)(2) before April 1, 1997, who departed the U.S. and who does not want to be charged as an arriving alien. What argument is available?

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[9] This argument in support of stand-alone § 212(h) waivers for immigrant visa holders charged as arriving aliens and placed in removal proceedings is bolstered by the 2006 interim regulations on jurisdiction over adjustment applications of paroled arriving aliens in removal proceedings. *See* 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1). Under these interim regulations, which are currently effective, *only* USCIS has jurisdiction to adjudicate an adjustment application of an "arriving alien" in removal proceedings. Thus, if the § 212(h) application was filed in conjunction with the adjustment application before an IJ, the IJ would not have jurisdiction to hear the adjustment application and would pretermit it on this basis. It might be possible for the IJ to adjudicate the I-212(h) waiver first, and then pretermit the adjustment application for USCIS to adjudicate the adjustment application, but this would be very cumbersome and there is no guarantee IJs would be willing to cooperate. On the other hand, if the two applications were filed together with USCIS, USCIS would be in the position of deciding whether to waive inadmissibility – the very issue that was initially before the IJ in the removal proceedings. Thus, a stand-alone § 212(h) waiver is not only consistent with *Matter of Millard,* but also resolves the procedural dilemma created by the interim "arriving alien" adjustment regulations.

There is an argument, accepted by two circuit courts, that the definition of "admission" adopted by IIRIRA cannot be applied retroactively to LPRs who pled guilty prior to April 1, 1997.

IIRIRA enacted a new definition of "admission" and "admitted." INA § 101(a)(13). Under this definition, a returning LPR will be considered an applicant for admission in six specific situations. *See* § 101(a)(13)(C)(i)-(vi). Relevant here, the LPR will be considered an applicant for admission if he or she committed an offense identified in INA § 212(a)(2), unless since such offense, he or she has been granted relief under § 212(h) or cancellation. INA § 101(a)(13)(v). If the returning LPR is considered an applicant for admission under this definition, he or she will be charged as an arriving alien with a ground of inadmissibility.[10]

In some cases, it may be more beneficial for a returning LPR to be charged with a deportability ground under INA § 237(a)(2) rather than as an "arriving alien" with an inadmissibility ground under INA § 212(a). For example:

- Arriving aliens charged under INA § 212 bear the burden of proving admissibility. The government, however, bears the burden of proving deportability by clear and convincing evidence if the person is charged with deportability under § 237.

- A single crime of moral turpitude committed at any time may trigger inadmissibility whereas it must have been committed within 5 years of lawful admission for it to trigger deportability. *Compare* INA § 212(a)(2)(A)(i)(I) *with* INA § 237(a)(2)(A)(i)(I).

The Fourth and Ninth Circuits have held that LPRs who pled guilty prior to April 1, 1997 and who subsequently depart and return to the United States are not subject to current INA § 101(a)(13) and, thus, cannot be charged as arriving aliens. *See Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004); *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007). The courts reasoned that the retroactive application of INA § 101(a)(13)'s definition of admission (as enacted by IIRIRA) would have an impermissible retroactive effect because it effectively prohibits an LPR from traveling abroad.

III. SITUATIONS INVOLVING DEPORTABILITY CHARGES

Q8: My client is charged with deportability, is eligible to adjust status (or re-adjust status if client is an LPR) but needs a § 212(h) waiver. Could she apply for a § 212(h) waiver in this situation?

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[10] In unpublished decisions, the BIA has held that the government has the burden of proving that the returning LPR falls within one of the exceptions in § 101(a)(13(C) and should be categorized as an applicant for admission. *See, e.g., In re Picon Alvarado,* A90-316-913, 2004 WL 1405870 (BIA Mar. 12, 2004).

Yes, the BIA has held that persons charged with deportability may apply for a § 212(h) waiver in conjunction with an application for adjustment of status. *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968); *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980); *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The BIA reasoned in these decisions that, in order to qualify for adjustment of status, an applicant must be admissible under INA § 245(a). Moreover, it noted that an adjustment applicant has been held to be assimilated to the same position as a non-citizen presenting at the border and seeking entry as an LPR. Based upon this reasoning, the BIA concluded that an individual charged with deportability could apply for a § 212(h) waiver of inadmissibility in conjunction with an adjustment application.

Q9: Can a person charged with deportability apply for a stand-alone § 212(h) waiver?

Possibly. A person charged with a ground of deportability arguably is eligible for a stand-alone § 212(h) waiver where the deportable offense is also an inadmissible offense to which the § 212(h) waiver applies; *and* where the person has departed and reentered the U.S. after committing the deportable offense.

A person charged with a ground of deportability may be eligible for a § 212(h) waiver but not eligible for adjustment of status or another form of relief. For example, the person may have a U.S. citizen child (and thus a qualifying relative for the § 212(h) waiver) but the child is not old enough to file an immigrant visa petition. Arguably, if a stand-alone § 212(h) waiver were available in this situation, the waiver could be granted *nunc pro tunc* to restore the person's previous status. *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980) (§ 212(h) waiver may be granted *nunc pro tunc* to returning LPR in deportation proceedings). This would provide relief from removal for a person whose prior status was lawful. However, if the person's previous status was not lawful or had expired, then even a *nunc pro tunc* grant of a stand-alone § 212(h) waiver would not prevent a removal order.[11]

The BIA's decision in *Matter of Sanchez, supra,* establishes that stand-alone § 212(h) waivers are available to cure deportability grounds where the person: (1) committed a deportable offense which is also an inadmissible offense to which the § 212(h) waiver applies; *and* (2) departed and reentered the United States after committing the deportable offense. In *Matter of Sanchez*, the respondent was found deportable for having committed a crime involving moral turpitude within five years of entry. Relying on prior

[11] Generally, where the law is settled with respect to eligibility for a stand-alone § 212(h) waiver, it is not necessary for an individual to be *ineligible* for adjustment to consider filing a stand-alone waiver. Where the law is settled, filing a stand-alone § 212(h) waiver application is much simpler than filing a § 212(h) waiver application with an accompanying adjustment application. However, if the law is not settled, practitioners may want to file (and argue eligibility for) a stand-alone § 212(h) waiver application only in situations in which the person is ineligible for adjustment.

BIA precedent in the § 212(c) context, the BIA held that the § 212(h) waiver may be granted *nunc pro tunc* to cure a ground of deportability "when, at the time of the alien's last entry, he was inadmissible because of the same facts which form the basis of his deportability." *Matter of Sanchez*, 17 I&N Dec. at 221 (quoting *Matter of Tanori*, 15 I&N Dec. 566 (BIA 1976)).

The BIA has stated that where the person has not departed the United States since commission of the deportable offense (which is also an inadmissible offense), the person cannot obtain *nunc pro tunc* relief. In this situation, the BIA has considered § 212(h) waiver applications in conjunction with adjustment applications only. *Matter of Parodi*, 17 I&N Dec. 608, 611 (BIA 1980). This position has lead to equal protection challenges to the availability of stand-alone § 212(h) waivers based solely on departure from the U.S. See Q10, *infra.*

Notably, with two exceptions,[12] the regulation at 8 C.F.R. § 1245.1(f) provides that a concurrently filed adjustment of status application is the "sole method" of requesting the Attorney General's exercise of discretion for a § 212(h) waiver if the person is "in the United States." However, this regulatory language existed at the time of the BIA's decision in *Matter of Sanchez* and did not alter the outcome of the decision. Thus, immigration judges should continue to follow *Matter of Sanchez*.

Q10: Does the BIA's interpretation permitting stand-alone § 212(h) waivers for returning LPRs charged with inadmissibility but denying them to LPRs who have not left the country and, thus, are charged with deportability, violate equal protection?

Arguably, yes, however, circuit courts have reached opposite conclusions on this issue. The Eleventh Circuit has held that the BIA's distinction between LPRs based on whether they have departed and returned to the United States after becoming deportable is "arbitrary" and thus, its application to the petitioner violated equal protection. *Yeung v. INS*, 76 F.3d 337, 340-41 (11th Cir. 1995). The court concluded that the BIA's decisions (*Matter of Sanchez* and the decision below in *Yeung*) created two classifications of non-citizens "identical in every respect" but for their departure and held that deportable aliens are equally deserving of consideration for § 212(h) waivers. *Id.* [Notably, the BIA had not yet issued its decision in *Matter of Abosi* permitting returning LPRs to apply for a stand-alone § 212(h) waiver at the time of the Eleventh Circuit's decision in *Yeung.* Thus, the court relied on *Matter of Sanchez* for the proposition that a returning LPR is eligible for a stand-alone § 212(h) waiver].[13]

More recently, however, the Fifth and Seventh Circuits upheld the distinction between LPRs who departed the country and, thus, are charged with inadmissibility and those who

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[12] According to the regulation, the two exceptions are provided in 8 C.F.R. §§ 1235 and 1249.

[13] As it is the law of the circuit, DHS and immigration judges within the Eleventh Circuit are bound by the *Yeung* decision. Please let AILF know if the decision is not being followed by emailing us at clearinghouse@ailf.org.

had not departed and, thus, are charged with deportability. *Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2007); *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007). The Seventh Circuit in *Klementanovsky* posited reasons why Congress may have contemplated a statutory distinction between these two groups and criticized the *Yeung* decision for not having considered such reasons (notably, that the *Yeung* Court focused exclusively on the BIA-created distinction, and not any congressionally-created distinction). *Klementanovsky*, 501 F.3d at 793-94. The Fifth Circuit in *Malagon de Fuentes*, in a summary fashion, also concluded that the distinction survived rational basis review. *Malagon de Fuentes*, 462 F.3d at 504.

Both courts also purport to have distinguished their holdings from the § 212(c) context, in which the Second Circuit in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) found that permitting LPRs in exclusion proceedings to apply for § 212(c) relief while denying LPRs in deportation proceedings from similarly applying violated equal protection. *Malagon de Fuentes*, 462 F.3d at 504-05; *Klementanovsky*, 501 F.3d at 793-94.

IV. CHART

The following charts summarized the availability of § 212(h) waivers by charges lodged and immigration status (assuming statutory eligibility).

Persons Charged with Inadmissibility

	Stand-alone § 212(h) Waiver Available?	**Waiver Necessary In Conjunction with AOS?**
LPRs	Yes, per *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).	Not necessary if stand-alone § 212(h) waiver is granted. If person cannot avoid arriving alien classification and if paroled, person still has right to adjust status before USCIS.[14]

[14] *See generally*, 8 C.F.R. § 1245.2(a)(1)(ii). For more detailed information regarding arriving aliens and adjustment of status, see the following AILF practice advisories: "Arriving Aliens" and Adjustment of Status: What is the Impact of the Government's Interim Rule of May 12, 2006? (Updated October 3, 2006); Adjustment of Status of "Arriving Aliens" Under the Interim Regulations: Challenging the BIA's Denial of a Motion to Reopen, Remand, or Continue a Case (April 16, 2007); USCIS Adjustment of Status of "Arriving Aliens" with an Unexecuted Final Order of Removal (Amended March 14, 2007). *See also* AILF's issue page on this topic, located at http://www.ailf.org/lac/clearinghouse_102306.shtml.

Arriving aliens and non-LPRs	Yes, per *Matter of Millard*, 11 I&N Dec. 175 (BIA 1965), but need *nunc pro tunc* grant and, as a practical matter, other means to immigrate to avoid removal (*e.g.* immigrant visa holder).	Not necessary if stand-alone § 212(h) waiver is granted. If person cannot avoid arriving alien classification and if paroled, person still has right to adjust status before USCIS.[15]

Persons Charged with Deportability

	Stand-alone § 212(h) Waiver Available?	**Waiver Available in Conjunction with AOS?**
LPRs who have departed and returned since committing deportable offense	Yes, if meet conditions set forth in *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980).	Yes**,** per *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968) and *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980).
LPRs who have not departed the U.S. since committing deportable offense	Yes, if in the Eleventh Circuit per *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995). No, if in the Fifth or Seventh Circuits per *Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2007); *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007). Potential equal protection argument available to persons in the First, Second, Third, Fourth, Sixth, Eighth, Ninth and Tenth Circuits.	Yes, per *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968) and *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980).
Non-LPRs	No, must be adjustment eligible.	Yes, per *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992); *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998).

V. VIOLENT OR DANGEROUS CRIMES

[15] *See* footnote 14 above.

Q11: My client has been charged with what is arguably a violent or dangerous crime. Must they show "extreme hardship" or "exceptional and unusual hardship" to a qualifying relative to warrant a favorable exercise of discretion?

Short answer: Whether a crime is violent or dangerous is beyond the scope of this advisory. However, practitioners should first consider whether there is a basis for challenging this classification. Unless the courts rule otherwise, a person charged with a violent or dangerous crime must show either exceptional circumstances or exceptional and unusual hardship to a qualifying relative.

Explanation**:** In enacting § 212(h), Congress authorized the Attorney General to exercise broad discretion in deciding whether to grant a waiver:

> (2) the Attorney General, in his discretion, and *pursuant to such terms, conditions and procedures as he may by regulations prescribe*, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

INA § 212(h)(2). In turn, legacy INS promulgated the following regulation:

> (d) Criminal grounds of inadmissibility involving violent or dangerous crimes. The Attorney General, *in general*, will *not favorably exercise discretion under section 212(h)(2) of the Act* (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act *in cases involving violent or dangerous crimes, 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 under section 212(h)(2) of the Act.

8 C.F.R. § 212.7(d) (emphasis added). In *Mejia v. Gonzales*, 499 F.3d 991, 995-97 (9th Cir. 2007), the Ninth Circuit upheld the heightened "exceptional and unusual hardship" standard as a permissible construction of the Attorney General's statutorily-authorized authority to promulgate regulations governing the exercise of its discretion. The court also held that the regulation could be applied retroactively to a person who was convicted before the regulation was enacted. *Id.* at 997-98.