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## PRACTICE ADVISORY<sup>1</sup>: Avoiding the Stop-Time Rule after *Barton v. Barr*

June 25, 2020

This practice advisory discusses the implications of *Barton v. Barr*, 140 S. Ct. 1442 (2020), with strategic considerations for advocates representing lawful permanent residents (“LPRs”) in their immigration or criminal proceedings. In *Barton*, the Supreme Court held that committing an offense “listed in” the inadmissibility grounds at INA § 212(a)(2) triggers the “stop-time rule” for purposes of cancellation eligibility, even for an admitted LPR who cannot be placed into removal proceedings based on a ground of inadmissibility. The Court’s ruling primarily affects admitted LPRs who, within seven years of their admission, have committed an offense listed in INA § 212(a)(2). After *Barton*, it is critical for advocates to screen clients for cancellation eligibility by reviewing for *any* acts that may have rendered them inadmissible during their accrual of continuous residence, *even if convictions did not result*.

The advisory begins with a preliminary overview of the distinction between inadmissibility and deportability, Section I.A., the eligibility requirements for LPR cancellation, Section I.B., and a brief summary of *Barton*, Section II. Section III presents specific guidance on correctly calculating the period of continuous residence and important exceptions to the application of the stop-time rule. Section IV delves deeper into strategies regarding admissions to conduct that did not result in a conviction, as DHS may try to elicit admissions during a cancellation hearing or in other contexts.<sup>2</sup>

Section V provides considerations for defense lawyers representing LPRs in criminal proceedings. Defense counsel should avoid convictions for inadmissible offenses committed within the first seven years of the client’s admission to the United States. *Barton* also reinforces the importance of avoiding any conviction that subjects an individual to removal proceedings and the need to consult with immigration law experts to ensure that clients are not making any admissions during the criminal proceedings that may later trigger the stop-time rule.

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<sup>1</sup> Practice advisories identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice advisories do not replace independent legal advice provided by an attorney or representative familiar with a client’s case

<sup>2</sup> One issue **not** discussed in this advisory is the application of issue preclusion, also known as collateral estoppel. Where an individual has already been granted cancellation of removal, DHS may be barred from relitigating cancellation eligibility under the doctrine of issue preclusion absent changed factual circumstances. *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (holding that res judicata applies in adjudicatory administrative proceedings); *Matter of Fedorenko*, 19 I. & N. Dec. 57 (BIA 1984) (applying issue preclusion to removal proceedings). Individuals encountering this issue may reach out to [khaled@nlpnl.org](mailto:khaled@nlpnl.org) for more information.

## Contents

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I. Legal Background.....	3
A. Inadmissibility vs. deportability.....	3
B. Cancellation of removal for LPRs and the stop-time rule .....	3
II. Summary of <i>Barton v. Barr</i> .....	4
III. Strategies for Protecting Cancellation Eligibility in Removal Proceedings .....	5
A. Residence after admission “in any status,” including nonimmigrant admission before obtaining LPR status, counts toward the seven-year continuous residence requirement .....	5
B. An offense that is deportable under section 237 but not referred to in section 212(a)(2) does not trigger the stop-time rule .....	7
C. Offenses that fall within the petty offense and youthful offender exceptions to CIMT inadmissibility are not referred to in section 212(a)(2) and do not trigger the stop-time rule .....	7
D. Stop-time rule should not apply to pre-IIRIRA offenses.....	8
E. Clients may qualify for other forms of relief that provide a pathway to LPR status.....	9
IV. Strategies and Considerations Regarding Admissions to Inadmissible Conduct that Did Not Result in a Conviction.....	10
A. Admissions to conduct can trigger the stop-time rule .....	10
B. Consider the potential consequences of invoking the Fifth Amendment privilege against self-incrimination.....	11
C. Argue that your client’s statement did not amount to an admission of a crime.....	13
D. <i>Barton</i> may impact clients who are not currently in removal proceedings .....	16
V. Considerations and Tips for Defense Lawyers Providing Advisals Pursuant to <i>Padilla v. Kentucky</i> .....	17
A. For admitted LPRs, defense counsel must avoid convictions for inadmissible offenses committed within the first seven years of admission .....	17
B. For LPRs, <i>Barton</i> reemphasizes the importance of avoiding convictions that are deportable or inadmissible, due to risks that DHS will try to use other admissions (not convictions) to trigger the stop-time rule.....	18
C. Defense counsel must consult with immigration law experts to make sure their clients are not making admissions during criminal court proceedings that would trigger the stop-time rule.....	19

## I. Legal Background

### A. Inadmissibility vs. deportability

In removal proceedings under INA § 240, noncitizens may be charged as being either *inadmissible* under INA § 212 or *deportable* under INA § 237. Whether an individual has been “admitted” determines the applicable set of grounds: Someone arriving for the first time at a port of entry, who has entered without inspection, or who has been paroled in is deemed to be seeking admission and can be charged with inadmissibility. INA § 240(e)(2)(A). Once admitted as a nonimmigrant or LPR, the individual may only be charged with a ground of deportability, and the burden of proof shifts to the government. *Id.* § 240(e)(2)(B).

Both inadmissibility and deportability grounds include specified criminal offenses and convictions. In general, the set of “inadmissible offenses” is broader than the set of “deportable offenses.” For example, INA § 212(a)(2)(A)(i)(II) deems inadmissible any noncitizen who has been “convicted of, or who admits” to the commission of any offense “relating to a controlled substance.” By contrast, the deportability ground for a controlled substance offense requires a conviction and contains an exception for a single conviction of marijuana possession of under 30 grams. *Id.* § 237(a)(2)(B)(i).

As noted above, LPRs placed in removal proceedings are generally subject to the grounds of deportability. However, in certain circumstances, an LPR returning from abroad is considered an applicant for admission, and therefore subject to the grounds of inadmissibility. *See* INA § 101(a)(13)(C). As relevant here, a returning LPR who “has committed an offense identified in [INA § 212(a)(2)]” and has not been granted relief is deemed an applicant for admission. *Id.* § 101(a)(13)(C)(v).<sup>3</sup> As a result, when an LPR is convicted of an inadmissible offense, they are subject to removal proceedings under that ground of inadmissibility only if they depart and seek re-admission to the United States.

### B. Cancellation of removal for LPRs and the stop-time rule

If an immigration judge (“IJ”) finds that an LPR is deportable or inadmissible, INA § 240(c)(1), the individual may apply for various forms of relief under the INA, including cancellation of removal under INA § 240A(a) (“LPR cancellation”).<sup>4</sup> To qualify for LPR cancellation of removal, the applicant must have (1) “been . . . lawfully admitted for permanent residence for not

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<sup>3</sup> This provision does not apply if the conviction predates April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *Vartelas v. Holder*, 566 U.S. 257, 261 (2012). For these LPRs, a “innocent, casual, and brief” trip abroad does not necessitate a new admission. *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963).

<sup>4</sup> LPRs who have been battered or subjected to extreme cruelty by a U.S. citizen or LPR spouse or parent may also apply for Violence Against Women Act (“VAWA”) cancellation, provided they satisfy the other eligibility criteria. *See* INA § 240A(b)(2). The continuous physical presence requirement is three years for VAWA cancellation, in contrast to the seven years required for LPR cancellation. However, as VAWA cancellation can only be granted to applicants who are not inadmissible—with an exception for survivors who can demonstrate nexus between victimization and the inadmissible offense—it would not be available to LPRs who are barred from LPR cancellation by the rule announced by *Barton*.

less than 5 years,” (2) “resided in the United States continuously for 7 years after having been admitted in any status,” and (3) “not been convicted of any aggravated felony.” INA § 240A(a).

The accrual of continuous residence is deemed to stop if certain conditions are triggered. *Id.* § 240A(d)(1). This is known as the “stop-time rule.” *Pereira v. Sessions*, 138 S. Ct. 2105, 2109 (2018). Under subsection (d)(1)(B), the continuous residence clock stops “when the [noncitizen] has committed an offense referred to in section” 212(a)(2) “that renders the [noncitizen] inadmissible . . . under section” 212(a)(2) “or removable . . . under section” 237(a)(2) or 237(a)(4). If the clock stops before an LPR accrues seven years of continuous residence, the LPR is ineligible for cancellation of removal.<sup>5</sup>

## II. Summary of *Barton v. Barr*

In *Barton v. Barr*, 140 S. Ct. 1442 (2020), the Supreme Court addressed whether an admitted LPR who is not seeking re-admission because they are inside the United States or do not otherwise fall within INA § 101(a)(13)(C) can be “render[ed] . . . inadmissible” for the purposes of the stop-time rule. INA § 240A(d)(1).

Andre Martello Barton was an admitted LPR placed into removal proceedings under deportability grounds in INA § 237(a)(2), on the basis of two convictions after the first seven years following his admission. Mr. Barton conceded his removability, then sought to apply for LPR cancellation under INA § 240A(a). The IJ and Board of Immigration Appeals (“BIA”) found that he was ineligible for LPR cancellation because he had been convicted of a crime involving moral turpitude (“CIMT”) within the first seven years of his admission to the United States. That single CIMT conviction could not render Mr. Barton deportable,<sup>6</sup> but the agency found that it triggered the stop-time rule because it was “referred to in” INA § 212(a)(2) and thus “render[ed]” him “inadmissible.” INA § 240(d)(1)(B). The Eleventh Circuit affirmed. *Barton v. U.S. Att’y Gen.*, 904 F.3d 1294 (11th Cir. 2018).

In an opinion authored by Justice Kavanaugh, the Supreme Court held that “[a]s a matter of statutory text and structure,” the stop-time rule rendered Mr. Barton ineligible for cancellation of removal because he had been convicted of an offense “referred to” in INA § 212(a)(2) and “thereby rendered ‘inadmissible.’” *Barton*, 140 S. Ct. at 1450. The Court reasoned that the “statutory text . . . employs the term ‘inadmissibility’ as a status” that does not depend on being “found inadmissible in a subsequent immigration removal proceeding.” *Id.* at 1451-52. Accordingly, the Court concluded that admitted LPRs like Mr. Barton could be rendered inadmissible for purposes of the stop-time rule.

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<sup>5</sup> The stop-time rule also applies to stop the accrual of continuous “physical presence” for non-LPRs, who can apply for cancellation of removal under INA § 240A(b)(1) and INA § 240A(b)(2). These forms of cancellation, which require 10 and 3 years of continuous presence, respectively, were not at issue in *Barton*.

<sup>6</sup> A single CIMT conviction constitutes a deportable offense *only* if it occurs within five years of admission and carries a potential sentence of a year or more. *Id.* § 237(a)(2)(A)(i). However, a single CIMT renders a noncitizen inadmissible unless it is considered a “petty offense.” *Id.* § 212(a)(2)(A)(i)(I).

Under the Supreme Court’s decision, the stop-time rule’s cross-reference to INA § 237(a)(2) becomes “redundant surplusage.” *Id.* at 1453. As described above, *see supra* Section I.B., INA § 240A(d)(1) stops the continuous residence clock “when the [noncitizen] has committed an offense referred to in section [212(a)(2)]” and is “render[ed] . . . inadmissible . . . under section [212(a)(2)] . . . **or removable . . . under section [237(a)(2)]**” (emphasis added). But the Court brushed aside this key question of statutory interpretation, noting that “[s]ometimes the better overall reading of the statute contains some redundancy.” *Barton*, 140 S. Ct. at 1453 (quoting *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019)).

For a more detailed summary of the opinion and dissent, *see* [Practice Alert: The Impact of \*Barton v. Barr\* on Eligibility for Cancellation of Removal \(May 5, 2020\)](#).

### **III. Strategies for Protecting Cancellation Eligibility in Removal Proceedings**

Immigration practitioners must always consider their clients’ vulnerability to the stop-time rule if they have had *any* contact with the criminal legal system within the first seven years of their continuous residence after having been admitted in any status. Under *Barton*, the stop-time rule may be applied to noncitizens who are “hypothetically . . . inadmissible” during that time, 140 S. Ct. at 1458 (Sotomayor, J., dissenting), and are later charged with being removable under either INA § 212(a)(2) (inadmissibility grounds) or INA § 237(a)(2) or (3) (deportability grounds). DHS may seek to extend *Barton* by applying the stop-time rule to an array of offenses that are not referred to in INA § 212(a)(2), such as those falling within the youthful offender or petty offense exceptions and pre-IIRIRA convictions. This section presents some of the legal arguments for responding to DHS overreach.

#### **A. Residence after admission “in any status,” including nonimmigrant admission before obtaining LPR status, counts toward the seven-year continuous residence requirement**

Practitioners should recall that to qualify for LPR cancellation, the noncitizen must have continuously resided in the U.S. for at least seven years after being admitted to the U.S. “in any status,” before the commission of an offense that triggers the stop-time rule, and before the issuance of a valid notice to appear (“NTA”). A noncitizen’s period of prior residence in the U.S. after admission on a nonimmigrant visa counts toward these seven years.<sup>7</sup> In the Fifth and Ninth Circuits, a lawful entry includes a “wave-through” at the port of entry, even if the noncitizen was not admitted in any formal status.<sup>8</sup> Following a lawful entry, a respondent may fall (or remain)

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<sup>7</sup> *Matter of Blancas-Lara*, 23 I. & N. Dec. 458, 459 (BIA 2002) (finding that admission of the respondent as a nonimmigrant using a border crossing card met the requirement of having been admitted in any status for the purpose of calculating his continuous residence).

<sup>8</sup> *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017) (holding that a procedurally regular entry was lawful and therefore sufficient to start accruing presence towards the continuous residency requirement); *Tularubio v. Lynch*, 787 F.3d 288 (5th Cir. 2015) (same). *But see Matter of Castillo Angulo*, 27 I. & N. Dec. 194 (BIA 2018) (holding that outside of the Fifth and Ninth Circuits, a lawful entry is only one in which the respondent had lawful immigration status at the time of admission).

out of status and continue accruing continuous residence to qualify for LPR cancellation.<sup>9</sup> Persons granted adjustment of status to lawful permanent residence are deemed admitted, even if they originally entered the U.S. without inspection.<sup>10</sup> So too are recipients of U, T, and S nonimmigrant visas,<sup>11</sup> and in the Sixth and Ninth Circuits, respondents may assert that they were admitted as of the date they received Temporary Protected Status (“TPS”).<sup>12</sup> In contrast, parole is not considered an admission,<sup>13</sup> nor is a grant of asylum.<sup>14</sup>

Additionally, for purposes of LPR cancellation, the event triggering the stop-time rule must have occurred during the seven-year period **after** an admission. *See* INA § 240A(a)(2) (defining the continuous residence requirement by referring to time period “after” admission). That requirement is consistent with the rule that a ground of removability that is disclosed and waived at the time of admission cannot later render a noncitizen removable.<sup>15</sup> For example, if recipients of U and T nonimmigrant visas have been granted waivers for certain inadmissibility grounds before becoming “admitted,”<sup>16</sup> those grounds cannot later trigger the stop-time rule.<sup>17</sup> Practitioners, however, should be prepared for questions about grounds of inadmissibility that may have arisen during the time that the respondent resided in the U.S. with a U or T visa.<sup>18</sup> Practitioners may argue that conduct or convictions that were previously waived do not trigger

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<sup>9</sup> *Blancas-Lara*, 23 I. & N. Dec. at 461 (“Congress could easily have written section 240A(a)(2) to include maintenance of status as a prerequisite for relief, but it chose only to require 7 years of continuous residence after admission to the United States.”).

<sup>10</sup> *Matter of Rosas-Ramirez*, 22 I. & N. Dec. 616, 623 (BIA 1999).

<sup>11</sup> *Matter of Garnica Silva*, 2017 WL 4118896, at \*5 (BIA 2017) (deeming the stateside grant of U, S, or T nonimmigrant status a lawful “admission,” even if the recipient did not make a physical entry to the U.S. at the time of admission).

<sup>12</sup> *Ramirez v. Holder*, 852 F.3d 954, 958 (9th Cir. 2017) (TPS is an “admission” for the purpose of adjustment of status under INA § 245(a)); *Flores v. USCIS*, 718 F.3d 548, 553 (6th Cir. 2013) (same). *But see Serrano v. U.S. Att’y Gen.*, 655 F.3d 1260, 1265 (11th Cir. 2011) (TPS is not an admission); *Matter of H-G-G-*, 27 I. & N. Dec. 617, 637 (BIA 2019) (disagreeing with *Flores* and *Ramirez*, and holding that “even though a TPS recipient is considered to be in lawful status, the nature of that person’s unlawful entry remains unchanged”).

<sup>13</sup> *Alanniz v. Barr*, 924 F.3d 1061, 1065-66 (9th Cir. 2019) (holding that parole is not an admission for the purpose of the continuous residency requirement, and noting that the BIA has repudiated the court’s prior holdings in *Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006) (acceptance into the Family Unity Program constituted an admission) and *Garcia v. Holder*, 659 F.3d 1261 (9th Cir. 2011) (parole on SIJS is an admission), and adopting the narrower interpretation set forth in *Matter of Reza-Murillo*, 25 I. & N. Dec. 296 (BIA 2010)).

<sup>14</sup> *Matter of V-X-*, 26 I. & N. Dec. 147, 152 (BIA 2013) (asylees are subject to grounds of inadmissibility).

<sup>15</sup> *Matter of Rainford*, 20 I. & N. Dec. 598, 602 (BIA).

<sup>16</sup> 8 CFR §§ 212.17 (U visa); 212.16 (T visa).

<sup>17</sup> Although such waivers are broad, they only waive grounds of inadmissibility contained in the waiver application. Moreover, they are subject to revocation at any time by DHS. *See* 8 C.F.R. §§ 212.17(c) (“Under no circumstances will the [noncitizen] . . . have a right to appeal from a decision to revoke a waiver.”); 212.16(d) (same).

<sup>18</sup> Practitioners should also be aware of the contents of the waiver applications previously filed alongside the prior U and T visa applications, and prepare for questions about any grounds of inadmissibility not previously waived. *See infra* Section IV regarding what admissions may trigger the stop-time rule, and preparing for questioning of respondents during cancellation hearings.

the stop-time rule, as U and T visa recipients were not deemed admitted prior to their applications being granted, and their period of continuous residence did not begin until then.<sup>19</sup>

**B. An offense that is deportable under section 237 but not referred to in section 212(a)(2) does not trigger the stop-time rule**

Certain grounds of criminal deportability are not also referred to in INA § 212(a)(2). *See, e.g.*, INA § 237(a)(2)(C) (conviction for firearms offense)<sup>20</sup>; INA § 237(a)(2)(E)(i) (conviction for crime of domestic violence, stalking, or child abuse, neglect, or abandonment); INA § 237(a)(2)(E)(ii) (judicial finding of order of protection violation). To apply the stop-time rule to a noncitizen charged as deportable under one of these provisions, the IJ must find that the conviction is also referred to in INA § 212(a)(2). For example, if the conviction could also constitute an inadmissible CIMT, it would be referred to in INA § 212(a)(2). In assessing cancellation eligibility for noncitizens charged as deportable on the basis of a conviction under INA § 237, practitioners should first determine if the offense is also referred to in INA § 212(a)(2). If so, it triggers the stop-time rule as of the date of its commission. If the conviction is not also referred to in INA § 212(a)(2), it does not trigger the stop-time rule.

*Barton* does nothing to change this analysis. Thus, practitioners should be prepared to respond to erroneous DHS arguments seeking to apply the stop-time rule to convictions that are not referred to in the inadmissibility grounds at INA § 212(a)(2).

**C. Offenses that fall within the petty offense and youthful offender exceptions to CIMT inadmissibility are not referred to in section 212(a)(2) and do not trigger the stop-time rule**

The inadmissibility grounds at INA § 212(a)(2) provide that a noncitizen is inadmissible for a single conviction of CIMT (as was the petitioner in *Barton*), unless the person qualifies for the petty offense exception or youthful offender exception.<sup>21</sup> These statutory exceptions exclude certain CIMTs from the inadmissibility grounds, meaning if an offense comes within the exception, it is not “referred to” in 212(a)(2). Both exceptions remain applicable after *Barton*.

The youthful offender exception applies when a noncitizen has committed a CIMT while under the age of 18, regardless of the sentence, and any imprisonment for the offense ended more than five years before the current application.<sup>22</sup> The petty offense exception applies when a noncitizen

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<sup>19</sup> U and T visa recipients who entered on nonimmigrant visas or in another way recognized as an “admission” may be able to assert a longer period of continuous residence.

<sup>20</sup> *Matter of Campos-Torres*, 22 I. & N. Dec. 1289, 1295 (BIA 2000).

<sup>21</sup> INA § 212(a)(2)(A)(ii).

<sup>22</sup> INA § 212(a)(2)(A)(ii)(I). The youthful offender exception applies to convictions made final in adult court, to be distinguished from juvenile court dispositions, which are not “convictions” under INA § 101(a)(48)(A). *See Matter of Devison-Charles*, 22 I. & N. Dec. 1362, 1365 (BIA 2001) (en banc). The same benefits of the petty offense exception should accrue to the youthful offender exception. For a complete discussion of the immigration consequences of crimes involving moral turpitude, *see* Kathy Brady, ILRC, *Practice Advisory: All Those Rules About Crimes Involving Moral Turpitude* (June 2020), [https://www.ilrc.org/sites/default/files/resources/all\\_those\\_rules\\_cimt\\_june\\_2020.pdf](https://www.ilrc.org/sites/default/files/resources/all_those_rules_cimt_june_2020.pdf).

has committed a single offense that involves moral turpitude, the maximum possible punishment is one year or less, and the noncitizen received a sentence of six months or less.<sup>23</sup> A conviction that falls within the petty offense or youthful offender exception does not trigger the stop-time rule, even if it also makes the noncitizen deportable, because it is not “referred to” in INA § 212(a)(2).<sup>24</sup> A subsequent CIMT conviction stops the clock as of the date of the commission of the second offense, not the first offense.<sup>25</sup> *Barton* does not alter these statutory exceptions to inadmissibility, and they remain effective to avoid triggering the stop-time rule.

#### **D. Stop-time rule should not apply to pre-IIRIRA offenses**

Practitioners may argue that the “commission of offense” part of the stop-time rule should not apply to pre-IIRIRA offenses. Although increasingly remote in time, pre-IIRIRA offenses continue to affect removal proceedings for long term LPRs. Where the offense pre-dated April 1, 1997, the general effective date of IIRIRA, the stop-time rule should not terminate a noncitizen’s accrual of continuous presence. Although the statute expressly identified the circumstances under which the clock should stop prior to the effective date of IIRIRA, it is silent as to persons seeking LPR cancellation of removal.<sup>26</sup>

The Supreme Court has adopted a two-step analysis to determine the retroactivity of new statutory provisions.<sup>27</sup> Under step one, courts look to whether Congress gave a clear indication as to whether the statute is to be applied retroactively. The statutory language on this question must be “so clear that it could sustain only one interpretation.”<sup>28</sup> If the statutory language does not include an “express command” on retroactivity, then step two asks whether the statutory language would have an impermissible retroactive effect, that is, if “it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”<sup>29</sup> If so, then the presumption against retroactivity applies.<sup>30</sup> To the extent that there is any ambiguity, the general rule against retroactive

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<sup>23</sup> INA § 212(a)(2)(A)(ii)(II).

<sup>24</sup> See *Matter of Garcia*, 25 I. & N. Dec. 332, 336 (BIA 2010) (holding that a conviction for a single CIMT that qualifies as a “petty offense” is not for an “offense referred to in section 212(a)(2)” for purposes of triggering the stop-time rule in section 240A(d)(1), even it renders the noncitizen removable under section 237(a)(2)(A)(i)); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161-62 (9th Cir. 2009) (holding that a “petty offense” conviction does not trigger the stop-time rule because such an offense does not make one inadmissible).

<sup>25</sup> *Matter of Deanda-Romo*, 23 I. & N. Dec. 597, 600 (BIA 2003) (holding that the stop-time rule does not apply until the second conviction, where the first conviction was a “petty offense”).

<sup>26</sup> In IIRIRA § 309(c)(5), entitled “Transitional Rule With Regard to Suspension of Deportation,” Congress specified that the rule would apply retrospectively to persons seeking suspension of deportation under the old law. See *Tablie v. Gonzales*, 471 F.3d 60, 64 (2d Cir. 2006) (holding that transitional stop-time rule of INA § 240A(d)(1)(B) applies retroactively to stop accrual of the seven years of continuous residence required for suspension of deportation); *accord Peralta v. Gonzales*, 441 F.3d 23, 25 (1st Cir. 2006). No such retrospective provision was included with respect to persons seeking cancellation of removal.

<sup>27</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

<sup>28</sup> *I.N.S. v. St. Cyr*, 533 U.S. 289, 317 (2001) (citation omitted).

<sup>29</sup> *Landgraf*, 511 U.S. at 280.

<sup>30</sup> *Id.*

application of new legislative rules should apply to noncitizens who have committed removable offenses prior to IIRIRA's effective date.<sup>31</sup> Under this two-step analysis, the "commission of offense" clock-stopping rule should not be applied retroactively to an individual whose criminal offense predated the general effective date of IIRIRA.

Where respondents would suffer "serious adverse consequences," courts have found the stop-time rule to be impermissibly retroactive.<sup>32</sup> Courts have also agreed that actual reliance "is not an essential element of retroactive effect."<sup>33</sup> Practitioners may thus argue that regardless of the degree of reliance by the noncitizen affected, the application of the stop-time rule to pre-IIRIRA offenses is arbitrary and capricious. For this reason, practitioners may wish to argue that *Barton* should not extend to pre-IIRIRA offenses.

### **E. Clients may qualify for other forms of relief that provide a pathway to LPR status**

Finally, where *Barton* bars eligibility for LPR cancellation, remember that LPRs may apply for other forms of relief. For example, a removable noncitizen barred from LPR cancellation under *Barton* may be eligible for readjustment of status, with or without a § 212(h) waiver, provided

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<sup>31</sup> See *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1202-03 (9th Cir. 2006) (holding that permanent stop-time rule of INA 240A(d)(1)(B) does not apply retroactively under *Landgraf* step two to stop accrual of the seven years of continuous residence required under INA 240A(a)(2)); see also concurring opinion of Judge Straub in *Martinez v. I.N.S.*, 523 F.3d 365, 382-86 (2d Cir. 2008) (suggesting that requiring a showing of reliance on prior law in order to demonstrate impermissible retroactive effect under *Landgraf* step two should be reviewed); see generally Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. Rev. 97, 151-54 (1998) (reviewing legislative history supporting the argument that Congress did not intend for this part of the clock-stopping rule to be applied retroactively). But see *Matter of Robles-Urrea*, 24 I.& N. Dec. 22, 27-28 (BIA 2006) (applying stop-time rule retroactively to a pre-IIRIRA offense); *Matter of Perez*, 22 I.& N. Dec. 689, 690-91 (BIA 1999) (en banc) (holding that Congress intended retroactive application without any discussion of negative implication or legislative history); *Martinez v. I.N.S.*, 523 F.3d 365, 375-77 (2d Cir. 2008) (holding that retroactive application of permanent stop-time rule is not impermissible under *Landgraf* step two, as the rule "did not change the consequence of the petitioner's criminal act" but "immediately placed him in a category of [noncitizens] eligible for deportation upon conviction," and therefore settled expectations were not disrupted); *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1328-29 (9th Cir. 2006) (applying stop-time rule retroactively where petitioner was not eligible for discretionary relief pre-IIRIRA); *Heaven v. Gonzales*, 473 F.3d 167, 175 (5th Cir. 2006) (presuming that retroactive application of stop-time rule to deportation cases involving suspension relief requires application to cancellation of removal).

<sup>32</sup> *Sinotes-Cruz*, 468 F.3d at 1202 (holding that stop-time rule should not apply to petitioner because imposition would have "serious adverse consequences" for him, where he had accrued 7 years of continuous presence at the time IIRIRA became law, and pled guilty prior to IIRIRA's effective date); cf. *Valencia-Alvarez*, 469 F.3d at 1329 n.12 (distinguishing *Sinotes-Cruz* where petitioner committed the offense prior to IIRIRA but pled guilty after it became effective, and had not accrued 7 years of continuous presence).

<sup>33</sup> *Jaghoori v. Holder*, 772 F.3d 764, 772 (4th Cir. 2014) (holding that stop-time rule does not apply to pre-IIRIRA offense, despite petitioner's failure to take advantage of relief); accord *Jeudy v. Holder*, 768 F.3d 595, 605 (7th Cir. 2014) (holding that retroactive imposition of the stop-time rule would attach new and serious consequences to petitioner's criminal conduct, even if petitioner did not demonstrate reliance).

they have the necessary petitioning relative and qualifying relative for a waiver.<sup>34</sup> As another example, a removable LPR who has been the victim of a violent crime in the United States may be eligible to seek a U visa with a waiver of inadmissibility, subject to certain restrictions.<sup>35</sup> For additional resources on relief for LPRs ineligible for cancellation of removal, *see* Immigrant Legal Resource Center (ILRC), [Immigration Relief Toolkit for Criminal Defenders: How to Quickly Spot Possible Immigration Relief for Noncitizen Defendants \(2018\)](#).

#### **IV. Strategies and Considerations Regarding Admissions to Inadmissible Conduct that Did Not Result in a Conviction**

Under the rule announced in *Barton*, an LPR may be subject to the stop-time rule based on **conduct** that occurred within the first seven years of admission, even if the conduct did not result in criminal charges or a conviction. This is because certain criminal grounds “referred to in” INA § 212(a)(2) do not require a conviction to render a noncitizen inadmissible—the noncitizen need only commit or “admit [to] having committed” the “essential elements” of the offense for the inadmissibility ground to apply. INA § 212(a)(2)(A). However, agency and federal court case law establish specific parameters for when an admission to an offense triggers a § 212(a)(2) inadmissibility ground.

In light of *Barton* DHS attorneys or IJs may try to elicit admissions about past conduct to pretermitt cancellation. This section provides an overview of applicable cases governing what constitutes an admission in this context, discusses strategies and risks associated with objecting to DHS and IJ questioning, and outlines potential arguments that a noncitizen’s statement does not qualify as a formal admission.

##### **A. Admissions to conduct can trigger the stop-time rule**

Two common grounds of inadmissibility do not require a conviction to apply: CIMTs and controlled substance offenses (CSOs). Section 212(a)(2)(A) provides that a noncitizen who is “convicted of, or who **admits having committed**, or who **admits committing acts which constitute the essential elements** of” a CIMT<sup>36</sup> or CSO “is inadmissible” (emphases added).<sup>37</sup>

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<sup>34</sup>See Kathy Brady, ILRC, *Practice Advisory: All Those Rules About Crimes Involving Moral Turpitude* (June 2020), <https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude>.

<sup>35</sup> See Rachel Prandini & Sally Kinoshita, ILRC, *Practice Advisory: U Nonimmigrant Status as a Defense from Removal for Lawful Permanent Residents* (Mar. 2018), [https://www.ilrc.org/sites/default/files/resources/u\\_status\\_lpr\\_defense-sk-20180302.pdf](https://www.ilrc.org/sites/default/files/resources/u_status_lpr_defense-sk-20180302.pdf).

<sup>36</sup> Inadmissibility based on commission of a CIMT is limited by the petty offense exception, discussed *supra* Section III.C. When an individual has *admitted* to committing the elements of a CIMT, advocates need only establish that the offense carries a *maximum* sentence of one year (i.e., most state misdemeanors) for the petty offense exception to apply.

<sup>37</sup> Several grounds of inadmissibility under INA § 212(a)(2) require only that a “consular officer or the Attorney General know[] or ha[ve] reason to believe” the noncitizen committed certain types of offenses. *See* INA §§ 212(a)(2)(C) (controlled substance trafficking); 212(a)(2)(H) (trafficking in persons); 212(a)(2)(I) (money laundering). Under the plain language of the statute, such “reason to believe” inadmissibility grounds cannot trigger the stop-time rule because they do not establish that “the [noncitizen] *has committed* an offense referred to in [INA § 212(a)(2)].” INA § 240A(d)(1) (emphasis

In order to see how admitting to an offense which was never prosecuted can jeopardize an LPR's eligibility for cancellation, consider the facts in *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018), *abrogated by Barton v. Barr*. Vu Minh Nguyen, an LPR, was placed in removal proceedings based on three misdemeanor convictions. Crucially, none of these convictions occurred within seven years of Nguyen's admission to the United States in 2000. *Nguyen*, 901 F.3d at 1095. However, "[d]uring his merits hearing, Nguyen admitted on cross-examination that he used cocaine in 2005." *Id.* The government argued that this admission to unconvicted conduct was sufficient to render Nguyen inadmissible, thereby triggering the stop-time rule and "stopping his accrual of continuous residence at five years." *Id.* The Ninth Circuit held that because Nguyen was not "seeking admission" as an already-admitted LPR, he could not be "rendered inadmissible"—reasoning that the Supreme Court expressly overturned in *Barton*. *Id.* at 1100. However, note that the Court in *Barton* did **not** consider or address whether an admission like Nguyen's would be sufficient to trigger a conduct-based ground of inadmissibility.

Another example of DHS's questioning can be found in Appendix A, a Record of Sworn Statement form that at least one field office (including a field office in the Ninth Circuit) has used to elicit and record marijuana-related admissions from noncitizens. As demonstrated, this series of questions first seeks to explain the elements of a federal controlled substance offense then proceeds to require information about the noncitizen's prior use and possession of marijuana, suggesting that at least some DHS officers believe that a formal reading of elements is required in order to trigger an admissions-based inadmissibility ground. *See* Appendix A, Questions 9-21.

After *Barton*'s holding that commission of an offense listed in § 212(a)(2) triggers the stop-time rule for LPRs, the government may try more aggressively to elicit admissions to CIMTs or CSOs during removal proceedings and USCIS interviews. Advocates should be particularly cautious when applying for discretionary benefits or relief. Cancellation hearings, for example, typically entail wide-ranging questions about the applicant's past conduct and character.

### **B. Consider the potential consequences of invoking the Fifth Amendment privilege against self-incrimination**

During a cancellation hearing, practitioners should object to questions by DHS that may elicit admissions to inadmissible offenses.<sup>38</sup> For example, where the record contains no evidence or other indicia of inadmissible conduct by the noncitizen, practitioners may object to questions on

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added). Moreover, in interpreting INA § 212(a)(2)(C), the BIA held that the ground applies only "where an appropriate immigration official knows or has reason to believe that the [noncitizen] is a trafficker in controlled substances *at the time of admission* to the United States." *Matter of Casillas-Topete*, 25 I. & N. Dec. 317, 321 (BIA 2010) (emphasis added).

<sup>38</sup> It is well-established that while "the Federal Rules of Evidence are not binding in immigration proceedings . . . they may provide helpful guidance." *Matter of YLSC-*, 26 I. & N. Dec. 688, 690 (BIA 2015). For a detailed overview, *see* Catholic Legal Immigration Network, Inc. (CLINIC), [Practice Advisory: Rules of Evidence in Immigration Court Proceedings \(Mar. 13, 2020\)](#).

the basis that they are irrelevant, beyond the scope of direct examination, lack a foundation in the record, and/or violate fundamental fairness.<sup>39</sup>

If such objections are denied, or if IJs themselves engage in an inquiry that may elicit admissions to inadmissible offenses, practitioners should consider whether to advise a noncitizen to invoke their Fifth Amendment privilege against self-incrimination. In removal proceedings, as in criminal procedure, noncitizens may not be compelled to answer questions that could result in criminal liability.<sup>40</sup> Advocates should be aware that they cannot invoke the right to remain silent on their clients' behalf,<sup>41</sup> and that the IJ may draw an adverse inference from a client's silence in some instances, which may undermine the client's prospects for discretionary relief.<sup>42</sup> A noncitizen's counsel could potentially prevent these consequences by taking direct examination or redirect testimony about these issues, to provide the IJ with sufficient information to balance the relevant equities for a discretionary determination but without triggering a mandatory ineligibility bar. For example, a noncitizen testifying about past marijuana use may do so without admitting to possessing a substance known to fall within the federal marijuana definition.<sup>43</sup>

In a cancellation hearing, the burden is on the noncitizen to establish relief eligibility.<sup>44</sup> EOIR regulations provide that “[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the [noncitizen] shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”<sup>45</sup> Thus, if DHS proffers no evidence that a noncitizen has committed acts that satisfy the essential elements of an inadmissible offense, no adverse inference may be drawn from the noncitizen's privileged silence when asked about past conduct.<sup>46</sup> However, once there is evidence in the record that a

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<sup>39</sup> See *supra* note 39, CLINIC Practice Advisory, at 7 n.41.

<sup>40</sup> See *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (holding that the privilege may be “asserted in any proceeding, civil or criminal, administrative or judicial . . . and it protects against disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used”).

<sup>41</sup> *Matter of R-----*, 4 I. & N. Dec. 720, 721 (BIA 1952) (“The privilege against self-incrimination must be claimed by the individual involved and can only be claimed on his own behalf.”).

<sup>42</sup> *Matter of Guevara*, 20 I. & N. Dec. 238, 241-42 (BIA 1990) (collecting cases); see also *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) (“In a deportation hearing there is no prohibition against drawing an adverse inference when a petitioner invokes his Fifth Amendment right against self-incrimination.”).

<sup>43</sup> See *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (applying a strict categorical approach to controlled substance removability); *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965) (same); *Matter of Silva-Trevino III*, 26 I. & N. Dec. 826 (BIA 2016) (applying a strict categorical approach to CIMT removability).

<sup>44</sup> INA § 240(c)(4).

<sup>45</sup> 8 C.F.R. § 1240.8(d); see also *Matter of M-B-C-*, 27 I. & N. Dec. 31, 36-37 (BIA 2017) (holding that the use of “‘indicates’ and ‘may apply’ . . . means a showing less than the preponderance of the evidence standard”).

<sup>46</sup> See *Matter of Guevara*, 20 I. & N. Dec. at 242 (when the initial onus is on DHS, “the respondent’s silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case . . . sufficient to shift the burden of proof to the respondent.”); see also *Garcia-Andrade v. Holder*, 395 F. App’x 417, 419 (9th Cir. 2010) (doubting that respondent’s silence could support the inference that he had admitted to conduct that would bar cancellation).

client’s past unconvicted conduct may constitute a CIMT or CSO, the burden shifts to the client to prove that the stop-time rule is inapplicable. If that evidence includes a previous formal admission, practitioners should argue the admission does not trigger inadmissibility.

By contrast, if the government produces evidence of past conduct that does *not* include an admission to a CIMT or CSO, the client can avoid the stop-time rule by invoking the Fifth Amendment. Even if the IJ draws an adverse inference from the client’s silence—i.e., that the client in fact committed the inadmissible offense—the inference alone is not sufficient to trigger the stop-time rule. This is because of the two-part structure of the rule: as the Eleventh Circuit noted in *Barton*, “while commission of a crime alone satisfies [INA § 240A(d)(1)]’s prefatory clause, the operative ‘render[ing]’ clause requires more—*either a conviction of or a formal admission* to the underlying offense.” *Barton v. U.S. Att’y Gen.*, 904 F.3d 1294, 1302 n.4 (11th Cir. 2018), *aff’d*, 140 S. Ct. 1442 (2020) (emphasis added). So long as the client remains silent, there is no formal admission, and the past conduct in question may not serve as an inadmissibility ground.<sup>47</sup>

However, practitioners should exercise caution when invoking a client’s Fifth Amendment privilege in a cancellation hearing, as noncitizens applying for relief must also carry the burden of establishing that a favorable exercise of discretion is warranted.<sup>48</sup> An IJ may draw an adverse inference from the client’s silence about past conduct, increasing the likelihood that the client’s negative equities (such as a perceived lack of rehabilitation or credibility) will outweigh the positive.<sup>49</sup> Therefore, practitioners should carefully evaluate whether a client would be better served by answering questions about past conduct, and later arguing that the answers do not constitute admissions under § 212(a)(2)(A). These arguments are discussed next.

### **C. Argue that your client’s statement did not amount to an admission of a crime**

If DHS claims that a client’s statement, either in the removal hearing or elsewhere, constitute an admission to an offense that triggers the stop-time rule, practitioners have several potential arguments at their disposal. The INA and agency decisions limit when an admission of conduct can render a noncitizen inadmissible, and advocates should be prepared to push back and argue that the standard has not been met in their client’s case.

The BIA has established three requirements for an admission to qualify as a ground of inadmissibility. *First*, the conduct admitted to must actually have been a crime under the laws of the jurisdiction where it occurred.<sup>50</sup> In addition, the individual must admit to facts which include each “essential element” of the offense.<sup>51</sup> *Second*, for the admission to be valid, the individual

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<sup>47</sup> See *Garcia-Andrade*, 395 F. App’x at 419.

<sup>48</sup> INA § 240(c)(4)(A)(ii); see also *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998).

<sup>49</sup> See *Matter of Edwards*, 20 I. & N. Dec. 191, 195-96 (BIA 1990) (describing positive and negative discretionary factors).

<sup>50</sup> See *Matter of De S-*, 1 I. & N. Dec. 553 (BIA 1943) (admission to attempted smuggling not a federal crime); *Matter of M-*, 1 I. & N. Dec. 229 (BIA 1942) (conduct admitted to did not constitute bigamy under Texas law).

<sup>51</sup> *Matter of E-N-*, 7 I. & N. Dec. 153 (BIA 1956); *Matter of G-M-*, 7 I. & N. Dec. 40 (A.G. 1956); *Matter of B-M-*, 6 I. & N. Dec. 806 (BIA 1955).

must first be provided with an understandable definition and the essential elements of the offense.<sup>52</sup> *Third*, the admission must be voluntary.<sup>53</sup>

The second requirement may not always apply, however, depending on the context in which the admission was made. In one unpublished opinion, for example, the Ninth Circuit allowed for conduct admitted in removal proceedings when the individual was testifying “under oath in court while represented by counsel” to trigger a relief ineligibility provision,<sup>54</sup> though the panel specifically noted that the BIA in that case had not held him ineligible for “admitt[ing] to committing acts constituting the essential elements of a crime involving moral turpitude.” *Id.* at 749. The Ninth Circuit has also upheld the use of an admission to a doctor at a consular medical appointment, despite the fact that the doctor did not provide a definition of the crime, because the “examination was not conducted for the purpose of obtaining any such admission.”<sup>55</sup> By contrast, the respondent in *Matter of K-* admitted the essential elements of statutory rape in a police statement, but because he was not “given any definition of the crime of rape” or “advised concerning the essential elements,” these admissions were deemed invalid.<sup>56</sup>

**Example:** Ana entered the U.S. as an LPR in 2006. In 2012, she applied to naturalize. During the interview, the USCIS officer read her the federal marijuana statute and explained each element of the offense. In response, Ana stated that she had bought marijuana the previous June but had not been arrested. Her application was denied, but no further action was taken. In 2020, she was issued an NTA based on her violation of a protective order. If she applies for cancellation of removal, her admission to marijuana possession at the naturalization interview is deemed a ground of inadmissibility. Because she admitted to committing inadmissible conduct within 7 years of 2006, the stop-time rule is triggered and renders Ana ineligible for cancellation.

Certain admissions to past conduct will **not** trigger a § 212(a)(2)(A) ground of inadmissibility, even if otherwise valid:

- If the conduct would *necessarily* have resulted in a juvenile delinquency adjudication, the person should not be considered inadmissible.<sup>57</sup>

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<sup>52</sup> *Matter of K-*, 7 I. & N. Dec. 594, 597 (BIA 1957) (noting that this rule ensures “fair play” and “preclude[s] any possible later claim that [the noncitizen] had been unwittingly entrapped”); *Matter of G-M-*, 7 I. & N. Dec. at 43.

<sup>53</sup> *Matter of L-*, 2 I. & N. Dec. 486, 488 (BIA 1946) (requiring “voluntary, unequivocal, and unqualified admission”); *Matter of G-*, 1 I. & N. Dec. 225 (BIA 1942).

<sup>54</sup> *Rodriguez v. Sessions*, 741 F. App’x. 381, 384 (9th Cir. 2018) (IJ denied adjustment based on admissions made during a removal hearing) (citing *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 749 (9th Cir. 2007)).

<sup>55</sup> *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1217 (9th Cir. 2002).

<sup>56</sup> *Matter of K-*, 7 I. & N. Dec. at 598.

<sup>57</sup> *Matter of F-*, 4 I. & N. Dec. 726, 728 (BIA 1952) (declining to exclude a noncitizen who admitted that

- If an offense was ever charged in criminal court, an in-court admission may not serve as an inadmissibility ground if the charges were dismissed on non-technical grounds.<sup>58</sup>
- An in-court admission may not be used if the disposition is not a “conviction” for immigration purposes (e.g., some pretrial diversion programs).<sup>59</sup>
- If the person was convicted of a CIMT or CSO but received effective post-conviction relief, admissions during the criminal proceeding should not constitute inadmissibility grounds.<sup>60</sup> The same is true even if the person later admits to the offense before an immigration officer or judge.
- Likewise, if an individual is convicted of an offense that does not trigger inadmissibility, a later admission based on the same set of facts is not valid even if those facts establish a CIMT or CSO.<sup>61</sup>

In sum, if a client’s testimony (during a removal hearing or in any other past proceeding) could potentially constitute an admission to an inadmissible offense that pretermits their cancellation application, practitioners should consult a transcript of the testimony in order to determine whether one of the above defenses applies.

**Example:** Hector was admitted to the U.S. as an LPR in 2010. In 2014, he was arrested in New York and pled guilty to petit larceny under N.Y.P.L. § 155.25. Under *Obeya v. Sessions*, a New York petit larceny conviction before November 16, 2016 does not constitute a CIMT, so Hector’s conviction is not an inadmissibility or deportability ground.<sup>62</sup> In 2019,

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he had committed perjury as a minor); *see also Matter of Devison-Charles*, 22 I. & N. Dec. 1362, 1365 (BIA 2000) (“[A]cts of juvenile delinquency are not crimes . . . for immigration purposes.”).

<sup>58</sup> *Matter of C-Y-C-*, 3 I. & N. Dec. 623, 629 (BIA 1949) (“[W]here there has been an adjudication of the cause resulting in dismissal of the proceedings, we should not hold the [noncitizen] bound by an independent admission of the commission of the crime unless the court’s action is based on purely technical grounds, such as the running of the statute of limitations, or an acquittal obtained on the basis of perjured testimony.”).

<sup>59</sup> *See Matter of Seda*, 17 I. & N. Dec. 550, 554 (BIA 1980), *overruled in part on other grounds by Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988) (a guilty plea that did not result in a conviction under a first-offender statute was not an “admission” of inadmissibility); *Matter of Winter*, 12 I. & N. Dec. 638, 644 (BIA 1968) (finding “no case in which a guilty plea, followed by something less than a conviction . . . has been found a sufficient admission, without more, to sustain a finding of deportability”). Although these cases predate the expansion of the definition of “conviction,” *see* INA § 101(a)(48)(A), their underlying logic is still applicable to dispositions that do not meet the current definition.

<sup>60</sup> *See Matter of E-V-*, 5 I. & N. Dec. 194, 196 (BIA 1953) (pardon of state offense foreclosed using subsequent admissions of that offense as inadmissibility ground).

<sup>61</sup> *Matter of I-*, 4 I. & N. Dec. 159, 166 (BIA 1950) (“This Board held that where the [noncitizen] had been convicted of a certain offense his admission of the commission of a greater offense should not be accepted . . .”). *Cf. Esquivel-Garcia v. Holder*, 593 F.3d 1025, 1030 (9th Cir. 2010) (inconclusive record of conviction may be combined with an admission to the IJ to establish inadmissibility).

<sup>62</sup> *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018). Multiple other circuits, including the Third, Fifth, Ninth, and Tenth Circuits, have similarly held that the BIA’s expanded definition of a generic theft CIMT may not be applied retroactively to convictions before Nov. 16, 2016. *See Francisco-Lopez v. Att’y Gen.*,

Hector is convicted of a firearms offense and placed in removal proceedings. If he applies for cancellation of removal and is questioned about the larceny conviction, his statements before the IJ will not constitute an admission to a CIMT that triggers the stop-time rule. This is the case even though, post-*Obeya*, a conviction or admission to New York petit larceny may be a CIMT.

#### **D. *Barton* may impact clients who are not currently in removal proceedings**

The above considerations may apply to clients who are not currently in removal proceedings. Practitioners should keep in mind that the implications of *Barton* may later affect clients who are now seeking naturalization or other forms of relief that require them to make statements about past conduct.<sup>63</sup>

**Naturalization:** When screening for naturalization eligibility, practitioners generally assess the risk that an individual will be placed in removal proceedings as a result of submitting an application. In conducting this risk assessment, practitioners should not only identify any conviction that renders the individual deportable, but also screen for any offense that might bar them from seeking cancellation of removal *if* they were placed in proceedings. This is particularly important for an individual who has been convicted of a deportable offense but may nonetheless choose to apply for naturalization, relying on the fact that they will be eligible to seek cancellation of removal even if placed in proceedings. In both the N-400 form and a naturalization interview, an applicant is required to answer numerous questions involving past conduct, including the commission of any crime that did not result in an arrest and all past arrests, regardless of outcome.<sup>64</sup> Accordingly, practitioners should make sure to identify and ask about all arrests that occurred within the first seven years of admission, whether or not they resulted in a conviction.

**Travel:** As noted in Section I.A., LPRs returning from abroad are generally not deemed to be seeking admission to the United States unless they have “*committed* an offense identified in [INA § 212(a)].” INA § 101(a)(13)(v) (emphasis added). Practitioners should take care not only to identify any arrests or convictions that may subject an LPR to the grounds of inadmissibility, but also to analyze whether the client would be eligible for cancellation of removal if placed in proceedings. Practitioners should also advise LPRs that any admissions made to CBP officials in the course of their re-entry to the United States may both trigger removal proceedings and later be used to bar them from seeking relief.

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959 F.3d 108, 114 n.7 (3d Cir. 2020) (collecting cases).

<sup>63</sup> See, e.g., Appendix A.

<sup>64</sup> Dep’t of Homeland Security, U.S. Citizenship and Immigration Services, Form N-400, Application for Naturalization 14 (Sept. 17, 2019), <https://www.uscis.gov/sites/default/files/files/form/n-400.pdf>.

## V. Considerations and Tips for Defense Lawyers Providing Advisals Pursuant to *Padilla v. Kentucky*

*Barton* heightens the vulnerability of noncitizens who have contact with the criminal system. Primarily, the decision will limit the availability for LPR cancellation, an important form of relief from removal for (but not limited to) LPRs who are deportable or inadmissible due to past criminal offenses. The below paragraphs address key implications for defense lawyers representing noncitizen defendants.

### A. For admitted LPRs, defense counsel must avoid convictions for inadmissible offenses committed within the first seven years of admission

For noncitizen defendants who are LPRs, criminal defense counsel must ascertain their date of admission to the United States, and determine whether commission of the charged offense(s) is within seven years of that date. If so, in advising their client on the immigration consequences of a conviction, counsel must determine whether the conviction would render their client hypothetically inadmissible—i.e., whether the offense is listed in the inadmissibility grounds at INA § 212(a)(2). If the offense is referred to in INA § 212(a)(2), the client must be advised that this conviction will trigger the stop-time rule, and that should they subsequently become deportable under INA § 237, they will be ineligible for LPR cancellation. Defense counsel also has a duty to negotiate to mitigate this consequence where possible.

**Example:** Barbara was admitted to the U.S. for the first time as an LPR on April 15, 2015. On May 15, 2020, she was arrested and charged with violating Cal. P.C. § 487, grand theft, an offense that is categorically a CIMT that does not fall within the petty offense exception because the offense is punishable by more than a year in jail or prison. The complaint alleges she committed the offense on May 15, 2020. If she pleads guilty to this offense, she will not be deportable. The only deportability ground potentially triggered in her case is INA § 237(a)(2)(A)(i), one CIMT conviction within five years of admission,<sup>65</sup> but in Barbara’s case she committed the offense five years and one month after admission. However, this single CIMT offense would render Barbara hypothetically inadmissible—i.e., if Barbara were to travel, she could be charged as inadmissible under INA § 212(a)(2)(A)(i)(I) when she tries to reenter the United States. If Barbara pleads guilty to this offense, her clock is stopped. If she subsequently becomes deportable, she will be ineligible for LPR cancellation. For example, if in June 2025 she commits and pleads guilty to a second CIMT, she will be deportable for multiple CIMTs under INA § 237(a)(2)(A)(ii), and she will have her clock stopped as of the date of commission of the first CIMT that rendered her hypothetically inadmissible.

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<sup>65</sup> For a complete analysis of the immigration consequences of conviction under Cal. P.C. § 487, see ILRC, *Quick Reference Chart for Determining Key Immigration Consequences of Selected California Offenses* (Jan. 2020), <https://www.ilrc.org/chart>.

**B. For LPRs, *Barton* reemphasizes the importance of avoiding convictions that are deportable or inadmissible, due to risks that DHS will try to use other admissions (not convictions) to trigger the stop-time rule**

If an LPR becomes inadmissible or deportable and is placed in removal proceedings, under *Barton* they may be barred from cancellation if they are hypothetically inadmissible for commission of an inadmissible offense during their first seven years after admission. As explained above, *see supra* Section IV.A., certain criminal inadmissibility provisions are triggered by admissions to conduct and do not require conviction. DHS in removal proceedings may employ strategies to elicit admissions to inadmissible conduct committed within those first seven years in order to bar cancellation. This is especially pernicious because at the time of pleading guilty to a removable offense, the defendant will have to consider the possibility that in removal proceedings they will be questioned about acts committed perhaps years before their pending criminal matter. The criminal inadmissibility provisions that are based on conduct rather than conviction are:

- Admitting having committed or admitting committing acts which constitute the essential elements of a CIMT or controlled substance offense (INA § 212(a)(2)(A)(i)(I)-(II));
- Reason to believe a noncitizen is or has been an illicit trafficker in a controlled substance (INA § 212(a)(2)(C));
- Reason to believe a noncitizen has engaged in money laundering (INA § 212(a)(2)(I));
- Committing certain prostitution offenses (INA § 212(a)(2)(D));
- Committing certain human trafficking offenses (INA § 212(a)(2)(H)).

While defense counsel should always seek to avoid criminal case dispositions that create deportation vulnerability, the outcome in *Barton* reemphasizes this duty, given that it creates an additional path for DHS to bar cancellation. Additionally, where defense counsel is advising a client to plead guilty to an offense that will render them deportable or inadmissible, defense counsel must advise them that if placed in removal proceedings, admissions to certain inadmissible conduct committed during the first seven years following admission to the United States can bar cancellation.

**Example:** Fernando has been an LPR since 1999 and has lived in the U.S. continuously ever since. His first arrest occurred on May 15, 2020, when he was arrested in New York and charged with sale of a controlled substance under N.Y.P.L. § 220.39, sale of a narcotic, which has been found to be categorically a drug trafficking aggravated felony and controlled substance offense. The prosecution has offered him a plea to N.Y.P.L. § 220.16(12), criminal possession of a narcotic, a conviction that is categorically a deportable controlled substance offense but not an aggravated felony. If he pleads guilty, he will be deportable and inadmissible, but still eligible for cancellation. The conviction will not stop-time for cancellation because he committed the offense more than seven years after his admission into the United States. However, if he pleads guilty and is placed in removal

proceedings he may be questioned about acts he committed in the years prior to his arrest, including in his first seven years of residence. Removal defense counsel should raise strong arguments objecting to this line of questioning and to findings of inadmissibility, but if the IJ finds he is inadmissible under any of the conduct-based grounds, he will be barred from cancellation. An example for defense counsel to look to is the noncitizen in the *Nguyen* case, who the BIA found barred from cancellation because he admitted to a controlled substance offense committed within seven years of his admission into the United States. Defense counsel must advise Fernando of this future risk in the course of giving him individualized advice about the impact of this resolution on his immigration status.

**C. Defense counsel must consult with immigration law experts to make sure their clients are not making admissions during criminal court proceedings that would trigger the stop-time rule**

This is a remote possibility, but nonetheless something for defense lawyers to remember and consider in representing noncitizen defendants. As explained above, an admission to inadmissible conduct under the INA requires very specific procedural requirements be satisfied, which are unlikely to be followed in a state court proceeding (except where a judge is accepting a plea). Defense lawyers should be mindful of court appearances where the judge or other actor might be in a position to ask their client questions about committing certain acts. For example, certain forms of diversion might involve questions about inadmissible conduct, so defense counsel should be prepared to advocate with the prosecution and the presiding judge to ensure that their client's statements do not rise to the level of an "admission" under the immigration laws.<sup>66</sup> Again, this risk is somewhat remote, but is nonetheless a factor for defense counsel to attend to in representing noncitizens.

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<sup>66</sup> For more information about different forms of diversion in the criminal system, and the immigration impacts of diversion, see ILRC, *Diversion and Immigration Law* (May 29, 2019), <https://www.ilrc.org/diversion-and-immigration-law>.

# APPENDIX A

Department of Homeland Security  
U.S. Citizenship and Immigration Services

## Record of Sworn Statement (Fingerprints)

APPLICANT NAME: \_\_\_\_\_ FILE NO \_\_\_\_\_ A \_\_\_\_\_ DATE 00/00/2019

EXECUTED AT \_\_\_\_\_ NAME FIELD OFFICE, LOCATION \_\_\_\_\_

Before the following officer of the U.S. Citizenship & Immigration Services: \_\_\_\_\_  
(NAME AND TITLE)

in the English language. Interpreter N/A used.

I, \_\_\_\_\_, acknowledge that the above named officer has identified himself/herself to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He/she has informed me that he/she desires to take my sworn statement regarding:

He/she has told me that my statement must be made freely and voluntarily. I am willing to make such a statement. I swear that I will tell the truth the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement:

1. Are you willing to answer the following questions voluntarily and freely?
2. Please state your full and complete name.
3. Have you ever used any other names?
4. What is your date of birth?
5. Have you ever used any other date of birth?
6. Of what country are you a citizen?
7. Are you a citizen of any other country?
8. Do you make any claims to being a citizen or lawful permanent resident of the United States?
9. Some States legalize limited use of marijuana. However, the Federal law still renders marijuana offenses illegal. I am now going to give you a copy of a federal statute: Title 21 of the United States Code, Section 844. I will now read the pertinent section of the statute regarding the penalty for simple possession of a drug or controlled substance. [officer reads the statute as follows:]

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice.

Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon

conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense.

10. I have handed you a copy of the federal statute, 21 U.S.C. section 844. Do you see that the title of section 844 is Penalty for Simple Possession?
11. I will now discuss this section of the statute element by element, and ask you questions. Do you understand?
12. This statute begins "It shall be unlawful for any person "knowingly or intentionally." Do you know what the words "knowingly and intentionally" mean?
13. The word "knowingly" means that the person acts with knowledge or consciously. Do you understand?
14. The word "intentionally" means that the person acts purposefully, and not accidentally or involuntarily. Do you understand?
15. The statute also has the word "possess" in it. The word possess has a specific definition under the law. It means the actual control, care and management of a particular item. You possess an item when it is immediately accessible to you and you exercise control over that item. Do you understand what "possess" means?
16. The statute also has the words "a controlled substance" in it. [Officer shows 21 C.F.R Part 1308 with various schedules]. A controlled substance means a drug or other substance that the government controls or regulates because they are potentially dangerous to the public. These substances are named under one of the lists called Schedules - I,II,III,IV, or V - in the law that I have shown you. Do you now understand what a controlled substance is?
17. Federal law treats [insert the substance, marijuana, etc.] as a controlled substance. [If marijuana, add this explanation: although some States may allow recreational use. Marijuana (cannabis) is listed as #31 on Schedule I, it is still prohibited by federal law as I've explained to you.] Do you understand that [this drug] is listed as schedule [Insert the appropriate schedule here, I, II, etc.] controlled substance under federal law?
18. 21 U.S.C. § 812(b)(1) states that for a drug to be placed in Schedule I,
  - (A) The drug or other substance has a high potential for abuse.
  - (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
  - (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.Although there is a medical use exception for certain prohibited controlled substances, this exception does not apply to marijuana. Drugs under Schedule I still have no accepted medical use in treatment under federal law. Do you understand?
19. Do you understand that this means that marijuana is regulated by the federal government and its use prohibited by the federal government?
20. The statute has the words "unless such substance was obtained directly or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice. Do you understand what these words mean?

To recap: The officer has explained to me that federal controlled substance laws prohibit any person from knowingly or intentionally possessing a controlled substance unless such substance was obtained directly, or pursuant to a valid

prescription or order, from a practitioner, while acting in the course of his or her practice. He has further explained to me that the elements of the federal crime of possession of a controlled substance are:

- (1) that the person possessed a controlled substance;
- (2) that the possession was knowing or intentional; and
- (3) that the possession was not pursuant to a valid prescription or order from a practitioner, while acting in the course of his or her professional practice.

He has also explained to me that the federal law classifies marijuana as a controlled substance as a schedule I drug, which has no currently accepted medical use in treatment in the United States and that the federal law does not recognize medicinal use of marijuana as a defense to the crime of possession of marijuana.

21. Do you understand the elements (requirements) of this controlled substance violation?
22. Any questions before we proceed?
23. Have you ever used marijuana?
24. If yes,
  - a. How many times? (If a number is given as an answer and if it is a manageable number for the purpose of this Q&A, I'd recommend addressing each incident- when, where, how obtained it, how much and/or more than 30 grams, had prescription for it, etc.)
  - b. Beginning when?
  - c. How often?
  - d. In what form?
  - e. How much marijuana?
  - f. When was the last time you used marijuana?
25. Do you admit that when you previously used marijuana, that you possessed marijuana at the time of using this drug?
26. Have you ever knowingly or intentionally possessed more than 30 grams of marijuana at one time?
27. If yes -
  - a. When?
  - b. In what form?
  - c. How much?
28. How did you obtain the marijuana you possessed?
29. Who purchased it?

a. If someone else, do you know how he/she obtained it?

b. If you purchased, where was it purchased?

30. Did you ever obtain marijuana directly or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice?

31. Have you ever been charged or convicted for possession of any controlled substance, anywhere in the world, at any time in your life?

32. Do you have anything else to add your statement today?

Signature of Applicant \_\_\_\_\_

\_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. Sworn and subscribed before me:

\_\_\_\_\_  
Signature USCIS Officer

\_\_\_\_\_  
Signature of Witness