

## CHART: ELIGIBILITY FOR A § 212(C) WAIVER AFTER *JUDULANG* AND *ST. CYR*<sup>1</sup>

### Basic Eligibility Requirements for a §212(c) waiver:

1. LPR with a lawful domicile for at least 7 years;  
-- 7 years of lawful domicile continued to accrue during exclusion and deportation proceedings until a final order was entered by an IJ or the BIA
2. Not excludable under former INA sections addressing national security and international child abduction.
3. For convictions entered between 11/30/1990 and 9/30/1996, LPR has not served more than 5 years imprisonment for one or more aggravated felony offenses

### IIRAIRA, *St. Cyr*, *Judulang*, and Possible Future Developments

INA §212(c) was repealed on September 30, 1996 by IIRAIRA, effective April 1, 1997. In *INS v. St. Cyr*, the U.S. Supreme Court held that a §212(c) waiver remains available in removal proceedings to a LPR who was eligible for the waiver at the time of his guilty plea entered before its repeal. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001).

In *Judulang v. Holder*, the U.S. Supreme Court rejected the DOJ's regulation implementing the "statutory counterpart rule," also known as the "comparable grounds rule," and the Board of Immigration Appeals' interpretation of the regulation and affirmation of this rule in deportation-based removal proceedings as violative of the Administrative Procedures Act because it was "arbitrary and capricious." *Judulang v. Holder*, 132 S.Ct. 476 (2011). The U.S. Supreme Court reaffirmed its holding in *INS v. St. Cyr*, *supra*, and remanded the case to the BIA to determine which LPRs remain eligible for a §212(c) waiver.

Practitioners should be aware that the availability of a §212(c) waiver following a conviction at trial varies among circuits. As of 4/8/2012, the current circuit split follows:

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<sup>1</sup> This chart was prepared by Maria Baldini-Potermin of Maria Baldini-Potermin & Associates, P.C., in Chicago, IL, on behalf of the National Immigration Project, with thanks to Ahilan Arulanantham and Dan Kesselbrenner for their help. Author may be reached at [maria@baldini-potermin.com](mailto:maria@baldini-potermin.com).

- A. No demonstration of reliance required for §212(c) waiver: *Atkinson v. Attorney Gen.*, 479 F.3d 222, 229 (3d Cir. 2007); *Lovan v. Holder*, 574 F.3d 990, 993 (8th Cir. 2009).
- B. Demonstration of objective likelihood of reliance on availability of §212(c) relief required:
  - 1. *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006) (with respect to foregone right to appeal).
  - 2. *Khodja v. Holder*, 666 F.3d 415 (7th Cir. 2011) (actual reliance where forewent right to appeal denial of a JRAD motion yet appealed verdict in criminal prosecution before 11/30/1990).
  - 3. *Peng v. Holder*, No. 06-75841, --- F.3d ---, 2012 WL 954649 (9th Cir. Mar. 22, 2012) (narrow exception for reasonable reliance permitted where charged with one CIMT and convicted at trial before IIRAIRA); *but see Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002) (suggesting that actual reliance rather than mere objective reliance required).
- C. No eligibility for §212(c) relief following trial unless demonstrate actual reliance on availability of §212(c): *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Rankine v. Reno*, 319 F.3d 93 (2d Cir.2003); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200 (5<sup>th</sup> Cir. 2007); *Kellermann v. Holder* 592 F.3d 700 (6th Cir. 2010); *Ferguson v. Attorney Gen.*, 563 F.3d 1254 (11th Cir. 2009); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004);.

However, the requirement of reliance may be subject to further litigation based on the U.S. Supreme Court's decision in *Vartelas v. Holder*, --- S.Ct. ----, 2012 WL 1019971, case no. 10-1211 (3/28/2012). For more information about the impact of *Vartelas* on reliance, see American Immigration Council, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, "*Vartelas v. Holder*: Implications for LPRS who take brief trips abroad and other potential favorable impacts," available at [http://nationalimmigrationproject.org/legalresources/practice\\_advisories/cd\\_pa\\_Vartelas.pdf](http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Vartelas.pdf).

Disclaimer

The following chart is based on the history of §212(c), *St. Cyr*, and *Judulang*. It does not constitute legal advice and does not take the place of legal research and review by a qualified attorney. The law has continued to develop for the last 17 years, and it continues to develop based on challenges brought by practitioners. Practitioners must do their own research for individual cases.

Conviction Info	Exclusion Proceedings	Deportation Proceedings	Removal Proceedings
<p>One Crime involving Moral Turpitude (CIMT)</p>	<p>1917-1952: Yes.</p> <p>1952 to 4/1/1997: Yes, if determined not to fall under <i>Fleuti</i> following a brief trip abroad.</p>	<p>1917-1940: No.</p> <p>1940-1976: LPRs who traveled abroad. Yes, if LPR traveled abroad and then returned to US to later be arrested and placed in deportation proceedings. <i>Matter of L-</i>, 1 I&amp;N Dec. 1 (AG 1940).</p> <p>1940-1976: No for LPRs who did not leave the U.S.</p> <p>1976-4/24/1996: LPR who was convicted but never traveled abroad could obtain §212(c) if LPR would have been eligible in exclusion proceedings. <i>Francis v. INS</i>, 532 F. 2d 268 (2d Cir. 1976); <i>Matter of Silva</i>, 16 I. &amp; N. Dec. 26 (BIA 1976).</p> <p>4/24/1996 – 9/29/1996: Only if not committed within 5 years of entry and not sentenced to a term of imprisonment for one year or longer AND offense was not an aggravated felony under the law then in effect at the time of the plea or</p>	<p>Yes: <u>Guilty plea</u>: all circuits if eligible for §212(c) at the time of the plea.</p> <p><u>Trial Verdict</u>: Depends on circuit law. Check your circuit.</p>

Conviction Info	Exclusion Proceedings	Deportation Proceedings	Removal Proceedings
		<p>verdict.</p> <p>9/30/1996: IIRAIRA enacted. New aggravated felony definition was effective on date of enactment to actions taken on or after 9/30/96. IIRAIRA §321(c).</p> <p>9/30/96-3/31/1997: Yes where deportation proceedings were commenced before 4/1/1997, even when the convictions occurred after the effective date of IIRAIRA, 4/1/1997. See <i>Romero Pascua v. Holder</i>, 641 F.3d 316 (9th Cir. 2011).</p>	
Multiple CIMTs	Yes: 1917 – 4/1/1997. AEDPA did not change availability for exclusion proceedings, only deportation proceedings.	Yes: 1917 – 4/24/1996. AEDPA amendment eliminated §212(c) if deportable for two CIMTs under former INA §241(a)(2). Need to check whether met ground of deportability for 1. a single CIMT committed within 5 years and sentenced to 1 year term of imprisonment; OR 2. multiple CIMTs not arising out of a single scheme.	<p>Yes. All circuits, if eligible for §212(c) at the time of the plea.</p> <p><u>Trial Verdict:</u> Depends on circuit law. Check your circuit.</p>
Drugs: Possession	Yes: 1952 to 3/31/1997, if determined not to fall under <i>Fleuti</i> following a brief trip abroad.	<p>1940-1976: No for LPRs who did not leave the U.S.</p> <p>1976-4/24/1996: LPR who was convicted but never traveled abroad could obtain §212(c) if LPR would have been eligible in</p>	<p>Yes:</p> <p><u>Guilty plea:</u> all circuits if eligible for §212(c) at the time of the plea.</p> <p><u>Trial Verdict:</u> Depends on circuit law. Check your circuit.</p>

Conviction Info	Exclusion Proceedings	Deportation Proceedings	Removal Proceedings
		<p>exclusion proceedings. <i>Francis v. INS</i>, 532 F. 2d 268 (2d Cir. 1976); <i>Matter of Silva</i>, 16 I. &amp; N. Dec. 26 (BIA 1976).</p> <p>Not deportable for possession of 30 grams or less of marijuana for one possession.</p>	
Drugs: Possession with Intent, Distribution, Manufacture	Yes: 1952 to 4/1/1997, if determined not to fall under <i>Fleuti</i> following a brief trip abroad.	<p>1940-1976: No for LPRs who did not leave the U.S.</p> <p>1976-4/24/1996: LPR who was convicted but never traveled abroad could obtain §212(c) if LPR would have been eligible in exclusion proceedings. <i>Francis v. INS</i>, 532 F. 2d 268 (2d Cir. 1976); <i>Matter of Silva</i>, 16 I. &amp; N. Dec. 26 (BIA 1976).</p>	<p>Yes: <u>Guilty plea</u>: all circuits if eligible for §212(c) at the time of the plea.</p> <p><u>Trial Verdict</u>: Depends on circuit law. Check your circuit.</p>
Drugs: Paraphernalia	Yes: 1952 to 4/1/1997, if determined not to fall under <i>Fleuti</i> following a brief trip abroad.	<p>1940-1976: No for LPRs who did not leave the U.S.</p> <p>1976-4/24/1996: LPR who was convicted but never traveled abroad could obtain §212(c) if LPR would have been eligible in exclusion proceedings. <i>Francis v. INS</i>, 532 F. 2d 268 (2d Cir. 1976); <i>Matter of Silva</i>, 16 I. &amp; N. Dec. 26 (BIA 1976).</p>	<p>Yes: <u>Guilty plea</u>: all circuits if eligible for §212(c) at the time of the plea.</p> <p><u>Trial Verdict</u>: Depends on circuit law. Check your circuit.</p>
Drugs: Under the Influence	Yes: 1952 to 4/1/1997, if determined not to fall under <i>Fleuti</i> following a brief trip abroad.	<p>1940-1976: No for LPRs who did not leave the U.S.</p> <p>1976-4/24/1996: LPR who was convicted</p>	<p>Yes: <u>Guilty plea</u>: all circuits if eligible for §212(c) at the time of the plea.</p>

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		but never traveled abroad could obtain §212(c) if LPR would have been eligible in exclusion proceedings. <i>Francis v. INS</i> , 532 F. 2d 268 (2d Cir. 1976); <i>Matter of Silva</i> , 16 I. & N. Dec. 26 (BIA 1976).	<u>Trial Verdict</u> : Depends on circuit law. Check your circuit.
Firearms: Possession	No. Not a grounds of excludability.	<p>1917- 1976. No.</p> <p>1976 - 1/10/1990. No, unless offense had turpitudinous element and LPR was charged with being deportable for a CIMT.</p> <p>1/11/1990 – 3/17/1991. Yes. <i>Matter of Hernandez-Casillas</i>, 20 I. &amp; N. Dec. 262, 282, n. 4 (BIA 1990).</p> <p>3/18/1991-3/31/1997: No, unless: 1. ground of deportability charged was ground other than firearms grounds; or 2. offense involved moral turpitude and LPR could do new adjustment of status based on a new immigrant visa petition (family or employment-based). <i>Matter of Hernandez-Casillas</i>, 20 I. &amp; N. Dec. 262 (A.G. 3/18/91) (overruling BIA decision in <i>Matter of Hernandez-Casillas</i>).</p> <p>If no turpitudinous element, then no §212(c) waiver required because LPR could not be charged as deportable for CIMT. LPR could apply for adjustment of status based on a new immigrant visa</p>	Yes: 1. if there was a turpitudinous element of the offense and charged with ground of deportability for a CIMT; or 2. could apply for adjustment of status based on a new immigrant visa petition (family or employment-based) with a §212(c) waiver. <i>Matter of Azurin</i> , 23 I. & N. Dec. 695 (BIA 2005) (reaffirming <i>Matter of Gabryelsky</i> , 20 I. & N. Dec. 750 (BIA 1993) and <i>Matter of Rainford</i> , 20 I. & N. Dec. 598 (BIA 1992))

Conviction Info	Exclusion Proceedings	Deportation Proceedings	Removal Proceedings
		petition (family or employment-based). <i>Matter of Rainford</i> , 20 I. & N. Dec. 598 (BIA 1992).	
Firearms: Sale	1990-3/31/1997: Yes, if exclusion proceedings began before 4/1/1997 and there was a turpitudinous element of the firearms offense. <i>Matter of Hernandez-Casillas</i> , 20 I. & N. Dec. 262, 282, n. 4 (BIA 1990)	<p>1917- 1976. No.</p> <p>1976 - 1/10/1990. No, unless offense had turpitudinous element and LPR was charged with being deportable for a CIMT.</p> <p>1/11/1990 – 3/17/1991. Yes. <i>Matter of Hernandez-Casillas</i>, 20 I. &amp; N. Dec. 262, 282, n. 4 (BIA 1990).</p> <p>3/18/1991-3/31/1997: No, unless: 1. ground of deportability charged was ground other than firearms grounds; or 2. offense involved moral turpitude and LPR could do new adjustment of status based on a new immigrant visa petition (family or employment-based). <i>Matter of Hernandez-Casillas</i>, 20 I. &amp; N. Dec. 262 (A.G. 3/18/91) (overruling BIA decision in <i>Matter of Hernandez-Casillas</i>).</p> <p>If no turpitudinous element, then no §212(c) waiver required because LPR could not be charged as deportable for CIMT. LPR could apply for adjustment of status based on a new immigrant visa petition (family or employment-based). <i>Matter of Rainford</i>, 20 I. &amp; N. Dec. 598 (BIA 1992).</p>	Arguably yes, with new AOS application

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Other Grounds of Deportability beyond drugs and CIMTs	Only if comparable ground of excludability.	<p>1/11/1990 – 3/17/1991: Yes for all grounds of deportability except former INA 241(a)(6), (a)(7), (a)(17), and (a)(19) relating to national security, subversives and war criminals. <i>Matter of Hernandez-Casillas</i>, 20 I. &amp; N. Dec. 262, 282, n. 4 (BIA 1990).</p> <p>3/18/1991-3/31/1997: No, unless: 1. ground of deportability charged by INS had comparable ground of inadmissibility; or 2. offense involved moral turpitude and LPR could apply for adjustment of status based on a new immigrant visa petition (family or employment-based) with a §212(c) to waive ground of inadmissibility. <i>Matter of Hernandez-Casillas</i>, 20 I. &amp; N. Dec. 262 (A.G. 3/18/91) (overruling BIA decision in <i>Matter of Hernandez-Casillas</i>).</p>	