Slide 1

Grounds of Inadmissibility, INA 212(a)

- Applicant for immigration based on family visa petition must be admissible, or if inadmissible must be eligible for and granted a waiver.
- Grounds apply to family immigration in:
  - Consular processing
  - Affirmative adjustment
  - Adjustment as a defense to removal

Slide 2

Adjustment in Removal; Re-Adjustment of LPR

Deportable LPR can apply to "re-adjust"

- If she is admissible
  - *Rainford*, 20 I&N Dec. 598 (BIA 1992)
- Or if she is inadmissible but a waiver of inadmissibility is available
  - *Parodi*, 17 I&N 608 (BIA 1980) (212(h) waiver); *Azurin*, 23 I&N Dec. 695 (BIA 2005) (212(c) waiver, *Blake* does not apply).

Slide 3

Aggravated Felonies and Admissibility

- There is no 'per se' AF ground of inadmissibility, but most AF's come within moral turpitude or drug inadmiss grounds.
- In some cases an AF (not relating to drugs) is not a bar to adjustment.
- AF bars consular processing, because AF conviction plus removal is a permanent bar.
  - INA 212(a)(9)(A)(ii), (iii)

Slide 4

Crimes Grounds of Inadmissibility

- Crime involving moral turpitude
  - one conviction or admission, but see petty offense exception
- Controlled substances
  - One conviction or admission, but waiver for simple poss 30 gm marijuana
  - Current addict or abuser
  - "Reason to believe" was or helped a trafficker

Slide 5

Crimes Grounds, cont'd

- Engage in prostitution
- Five year sentence imposed for any three convictions
- Mental or physical disorder posing threat to self or others
  - Alcoholic, sexual predator, psychopath, suicidal

Slide 6

Divisible statutes; "Categorical Analysis"

- Some "divisible" criminal statutes include, e.g., both CMT and non-CMT offenses
- To prove *deportability*, gov't must produce a record of conviction establishing that D was convicted under the CMT section of a divisible statute
- Circuits split as to what the gov't must produce when the question is *inadmissibility*.

Slide 7

Catgorical Analysis, cont'd

This seminar won't address the cat analysis in detail. See:

- Books (see Resources slide at end);
- ILRC webinar: Categorical Analysis in 9th Cir, 9/19/08; see www.ilrc.org;
- *Shepard v. U.S.*, 125 S.Ct. 1254 (2005);
- www.nationalimmigrationproject.org Burden of proof in applying for admission or relief, Practice Advisory, 3/22/07.

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Crimes Involving Moral Turpitude

INA 212(a)(2)(A)(i)(I), (ii)

Slide 9

Determine whether offense is CMT

- Use immigration CMT cases, not state law cases on CMT for impeachment etc. Sources:
  - Tooby, *Crimes Involving Moral Turpitude* and chart at www.criminalandimmigrationlaw.com
  - See www.defendingimmigrants.com for state-specific charts (but they are written for Public Defenders and therefore overly conservative)
  - Books such as *Immigration Law and Crimes* or, in Ninth Circuit, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org)

Slide 10

Determine whether offense a CMT, cont'd

- Examine elements as defined in statute and case law
- Intent: fraud; theft with intent to permanently deprive; intent to cause great bodily injury; often lewd or sexual intent; sometimes recklessness, malice
- Categorical analysis applies

Slide 11

CMT Inadmissibility Ground

One CMT conviction creates inadmissibility unless:

- Petty Offense Exception
  - INA 212(a)(2)(A)(ii)(II)
- Youthful Offender Exception
  - INA 212(a)(2)(A)(ii)(I)

Slide 12

Petty Offense Exception

- Defeats inadmissibility if:
- (1) D only *committed* one CMT
- (2) not sentenced to more than 6 mos (even if sent. suspended)
- (3) max possibe sentence 1 yr or less
  - California wobbler reduced to misd = max sentence of one yr, *La Farga v. INS*, 170 F.3d 1213 (9th Cir. 1999)

Slide 13

Definition of sentence

For purposes of petty offense exception, 6 mo. sentence imposed is:

- Sentence that actually was imposed; or
- Where imposition of sentence was withheld or suspended, and jail time imposed as a condition of probation, the jail time imposed = sentence imposed; or
- Where sentence imposed but execution suspended, whole sentence counts

Slide 14

Youthful Offender Exception

- Defeats inadmissibility if:
- (1) D only *committed* one CMT ever
- (2) committed while under 18
- (3) offense and release over 5 yrs ago

Slide 15

CMT Solutions

- Argue not a CMT conviction
  - Divisible statute
- Expungement does not eliminate, vacation for cause does outside of 5th Circuit
- Post-conviction relief to reduce imposed or potential sentence
- Waiver under INA 212(h)
- Cancellation of removal for LPR's

Slide 16

Section 212(h) Waiver

INA 212(h)

Slide 17

212(h) Relief: Waivable Grounds

- Excuses inadmissibility based on the grounds related to
  - moral turpitude,
  - 2 convictions w/ aggregate 5 yrs imposed
  - prostitution, and
  - 1st offense simple poss or under influence of 30 grams or less of mj/hashish

Slide 18

212(h) and simple possession 30 gm marijuana or less

- Conviction can be waived under 212(h), and is not a basis for deportability
- Waiver/exception extends to hashish
  - INS General Counsel Legal Opinion 96-3 (April 23, 1996); but 212(h) generally denied if amt of hash is more than what 30 gms mj would be.
  - See also *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005) (THC within 30 gm deport grnd exception).
- Shd extend to under influence as well as poss:
  - *Flores-Arellano v. INS*, 5 F.3d 360 (9th Cir. 1993).

Slide 19

30 grams Marijuana, cont'd

- Does not include possession in prison.
  - *Moncada-Servellon*, 24 I. & N. Dec. 62 (BIA 2007)
- *212(h) waives no drug conviction other than this 30 gm marijuana category!*

Slide 20

212(h) Relief: Eligible Immigrants

- Must be spouse, parent, or child of USC or LPR who would suffer extreme hardship; or
- events occurred more than 15 years ago, or
- inadmissible for prostitution, or
- VAWA-eligible

Slide 21

212(h) for Non-LPRs

- 212(h) is easier for non-LPR
- Agg. felony conviction no bar
  - E.g. CMTs which are also agg. felonies (e.g., violence with 1-yr sentence, sex abuse minor) do not bar this relief
    - *Matter of Michel*, Int. Dec. 3335 (BIA 1998); *Matter of Kanga*, Int. Dec. 3424 (BIA 2000)
- No Seven-Year Requirement

Slide 22

Review: What can Non-LPR waive under 212(h)?

- Waives inadmissibility under the CMT and controlled substance grounds:
  - First simple poss 5 gms hashish
  - First possession cocaine
  - Sale of hashish (an agg felony)
  - Theft with six month sentence (not agg felony)
  - Theft with two-year sentence (agg felony)

Slide 23

LPR 212(h) Limits

Barred if:

- Convicted of an agg. felony since becoming LPR, *or*
- Stop-Time: Must have resided lawfully continuously in US for 7 years before the initiation of removal proceedings
  - Family Unity = lawful status, *Yepez-Razo v Gonzales*, 445 F.3d 1216 (9th Cir. 2006).
  - Try also asylee, H-1, TPS, etc.

Slide 24

Review: What can LPR waive under 212(h)?

Q: Can LPR waive under 212(h), and why/why not.

- First simple poss 5 gms hashish
- Second simple possession
- Sale of hashish (an agg felony)
- Theft with six-month sentence (not AF)
- Theft with two-year sentence (AF)

Slide 25

212(h) Limits to LPR – Don't Apply in Adjustment?

- Fifth Circuit held as a matter of statutory construction that the 212(h) LPR restrictions apply in consular processing but *not* in adjustment applications.
  - *Martinez v. Mukasey*, 519 F.3d 592 (5th Cir. 2008)

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Note 212(h) v Cancellation: Stop-Time Rule

212(h) commission of act does *not* stop the 7 yr clock

- 240A(a) cancellation requires 7 yrs since admission in any status; clock stops on *commission* or NTA
- 212(h) requires 7 yrs continuous lawful residence, clock stops only on NTA issuance

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212(h) Regulation on Discretion

- AG in general will deny 212(h) for conviction of **violent or dangerous crime** absent
  - Extraordinary circumstances such as nat'l security or
  - Clear demonstration that denial results in exceptional and extremely unusual hardship.
  - 8 CFR 212.7(d) upheld in *Mejia v. Gonzales*, 499 F.3d 991 (9th Cir. 2007); *Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008) .

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Matter of Jean: Applying the Violent/Dangerous standard

- Case applied the same violent/dangerous standard in 212(h) cases to grant of asylum or adjustment waiver under 209(c).
  - Same extraordinary circumstances/extremely unusual hardship standard as 212(h). And even this showing may not be sufficient.
  - *Matter of Jean*, 23 I&N 373 (AG 2002), disapproving *Matter of H-N-* (BIA 1999)

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Discretionary Denials under Jean, II

- Humanitarian equities etc must be balanced against seriousness of the offense.
- AG states balance "will nearly always require the denial of a request for discretionary relief from removal *where an alien's criminal conduct is as serious as that of the respondent*"

Slide 30

Jean III: Dangerous or Violent?

What is a "violent or dangerous crime?" Fact-based issue, not categorical analysis.

- *Jean* was 2nd degree manslaughter for hitting, violently shaking baby and failing to call 911 when baby stopped breathing
- *H-N-*, disapproved in *Jean*, involved 2nd degree robbery where co-conspirator shot woman to death in front of children

Slide 31

Dangerous or Violent, cont'd

- AF forgery conviction held not violent or dangerous, so did not have to meet *Jean* standard.
  - See also *Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th 2006)(stat rape = rape but not necessarily violent/dangerous)
- But even nonviolent AF require "rare situations" with "truly compelling countervailing equities" (asylee has child with cerebral palsy; forgery AF waived)
  - *Matter of K-A-*, 23 I. & N. Dec. 661, 666 (BIA 2004)

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212(h) Discretion for other offenses

- 212(h) st'd close to old 212(c) standard: beyond proving extreme hardship to family members, 212(h) applicant must show + equities outweigh neg.
  - *In re Mendez*, Int. Dec. 3272 (BIA 1996) (denying relief but saying failure to admit guilt not automatic bar to showing rehab).

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Controlled Substances

Conviction, Addict/Abuser,
"Reason to Believe" Trafficking,
Admission

Slide 34

Drug Convictions – Immigration Penalties

- Any conviction, even a minor one, relating to a federally defined controlled substance triggers deportability & inadmissibility.
- *Exception:* 1st offense simple poss of under 30 gms, or being under influence of mj or hash, can be waived under INA 212(h), and is not a basis for deportability.

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Drug Solutions I: Accessory, Misprision

Not a deportable offense ("relating to controlled substance") if statute not primarily directed at drugs:

- Accessory after the fact. *Batista Hernandez*, 21 I&N 955 (BIA 1997).
- Misprision of felony. *Matter of Espinoza*, 22 I&N 889 (BIA99).
- Similar state statutes

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Drug Solutions II – Unidentified substance

- Many state drug schedules include substances not on the federal schedule. In that case, a conviction is not a *deportable* drug offense unless the record of conviction identifies the controlled substance as one on the federal list.
  - *Matter of Paulus*, 11 I&N 274 (BIA 1965).
  - *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007).

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Drug Solutions II – Un-ID'd substance, cont'd

To show *admissibility*, will immigrant have burden of proving drug was *not* on federal list?

- See relevant discussion in categorical analysis materials, above.
- Safest if crim defender can plead to a specific state substance that is not on the federal list.

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Solutions III: In 9th Circuit, *Lujan-Armendariz*

- In immigration cases arising in the Ninth Circuit only, state rehabilitative relief such as expungement or deferred adjudication will eliminate a first, minor drug conviction.
  - *Lujan-Armendariz v. INS*, 222 F3d 728 (9th Cir. 2000)
- Check in other circuits to see if ruling in accord with *Lujan* may be possible.

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Solutions III: In 9th Circuit, *Lujan-Armendariz*

- ***First offense***, simple possession.
  - *Lujan-Armendariz*, 222 F3d 728 (9-00)
- Same for smaller offenses without federal analogue, e.g., poss. of para., under influence
  - *Cardenas-Uriarte*,227 F.3d 1132 (9-00)
- Same for giving away small amount marijuana
  - but see *Matter of Aruna*, 21 I&N Dec. 452 (BIA 2008)
- Same for foreign expungements
  - *Dillingham*, 267 F.3d 996 (9th 2001)

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Convictions that can be treated under *Lujan*, cont'd

- Prior pre-plea diversion eliminates *Lujan* eligibility for subsequent conviction.
  - *Melendez v. Gonzales* (9th Cir. September 19, 2007)

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Benefits of *Lujan*

- Conviction eliminated "for all purposes under the law."
- Not deportable or inadmissible for drug conviction, not AF.
- With *Lujan* treatment, guilty plea does not count as a formal "admission" of a drug offense (see below discussion of admissions)

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Lujan warnings!

- Conviction exists until rehabilitative relief obtained
  - *Chavez-Perez v Ashcroft*, 386 F.3d 1284 (9th Cir. 2004)
  - !! However, *Chavez* noted it did not rule on a deferred adjudication statute or one where expungement already pending; *Id.* at p. 1293.
- Cannot deny arrest occurred (unless under 21 when committed offense)
  - *Paredes-Urresterazu v. INS*, 36 F.3d 801 (9th Cir. 1994)

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Drug Conduct: Abuse/Addiction

- Deportable for abuse, addiction since admission
- Inadmissible if "current"
  - Current drug abuse defined as more than "mere one-time experimentation" within last three years
  - Watch for drug tests, interview when immigrating.

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Drug Conduct: Reason to Believe Trafficking

- Inadmissible but not deportable if gov't has "reason to believe" person ever was or helped a drug trafficker;
  - or benefitted from a spouse or parent's trafficking w/in 5 years
- Probative, substantial evidence.
- Only relief is LPR cancellation, U or T visa, withholding/CAT

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Reason to believe, cont'd

- Conviction not required for trafficking, they can consider any evidence. Categorical analysis does not apply.
- IJ should permit testimony of witnesses supporting credibility of immigrant who denies trafficking
  - *See, e.g., Lopez-Umanzor v Gonzales*, 405 F.3d 1049 (9th Cir. 2005)

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Formal Admission of Drug Offense or CMT

- Formal admission of all of the elements of a CMT or drug offense makes the person inadmissible, even absent a conviction.
  - INA 212(a)(2)(A)(i)
- Not true where charges were heard by criminal court and dispo was less than a conviction, e.g. charges dismissed.
  - *Matter of Seda*, 17 I&N 550 (BIA 1980); *Matter of E.V*, 5 I&N 194 (BIA 1953)

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Formal admission, cont'd

- Admission must be complete, knowing statement of elements.
  - See, e.g., *Matter of Espinosa*, 10 I&N Dec. 98 (BIA, 1962); *Matter of K-*, 9 I&N Dec. 715 (BIA 1962).
- But statement re drugs to visa medical doctor held to be admission!
  - *Pazcoguin v Radcliffe*, 292 F.3d 1209 (9th Cir. 2002).