

WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

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FEATURED TOPICS

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- Immigration advisals on pleas and dispositions
- Assistance communicating advisals to clients
- Language access support & interpreter referrals
- Help identifying a client's immigration status
- Written or oral advisals for courts or prosecutors
- CLEs on immigration consequences of crimes
- Participation in case conferences
- Referrals to deportation defense counsel

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PRESERVING THE BEST DEFENSE FOR A PERMANENT RESIDENT IN REMOVAL PROCEEDINGS

By Sophie Feal, Managing Attorney, WNYRIAC, Legal Aid Bureau of Buffalo

The WNYRIAC is funded by the NYS Office of Indigent Legal Services to support mandated criminal, appellate, and family defense providers in the 7th and 8th Judicial Districts. Following *Padilla v. Kentucky*, defense counsel must advise non-citizen clients on potential immigration consequences before a plea. We provide no-cost support to help attorneys meet these obligations.

Cancellation of Removal for Lawful Permanent Residents (“cancellation”) is the most generous waiver from deportation that is available to lawful permanent residents (“green card” holders or “LPRs”). An applicant for this relief must meet the following statutory requirements:

1. has been LPR for not less than 5 years,
2. has resided in the United States continuously for 7 years after having been lawfully admitted, and
3. has not been convicted of any aggravated felony.

“The cancellation waiver is only available once. If an LPR has received this form of relief in the past, they will not be eligible for it a second time...”

INA §240A(a).

The continuous residence requirement is not fulfilled by simply living in the United States for seven years. Continuous residence is stopped by either the commencement of removal proceedings or by the commission (a conviction is not necessary) of a criminal offense that renders the LPR inadmissible to the United States. INA §240A(d)(1); *Pereira v. Sessions*, 585 U.S. 198 (2018). The latter is a critical point for defense attorneys to understand because any contact with the criminal legal system can cut off the period of continuous residence and make a person ineligible for cancellation.

The two most common offenses that render an LPR inadmissible and stop time are crimes of moral turpitude (CMT) and controlled substance offenses. In *Barton v. Barr*, 590 U.S. 222 (2020),

the U.S. Supreme Court held that if an applicant for cancellation committed a disqualifying offense during the requisite seven-year period, they are ineligible for cancellation of removal. The court further held that an immigration court can review the removal offense and any prior offense(s) committed during the statutory period, even if the disqualifying offense is not charged as a ground of removal. For this reason, a review of a client's criminal history is important when assessing eligibility for cancellation of removal and determining the consequences of a conviction.

A person is also ineligible for cancellation of removal if they have been convicted of an "aggravated felony." The list of aggravated felony crimes includes murder, rape, sexual abuse of a minor, arson, and drug trafficking regardless of the sentence imposed. Aggravated felonies also include crimes of theft (including possession of stolen property even if not by theft) where a one year sentence of incarceration is imposed; a crime of violence (as defined in 18 USC §16) where a one year sentence of incarceration is imposed; as well as the offenses of commercial bribery, counterfeiting, forgery, perjury or obstruction of justice, if a one year sentence is imposed, regardless of actual time served. A crime of fraud where the loss to the victim is greater than \$10,000 is also an aggravated felony. An attempt or conspiracy to commit any of these crimes is treated the same as the underlying offense. INA §101 (a)(43).

If an LPR is statutorily eligible for cancellation of removal, they apply for relief before an

immigration court in removal proceedings. If relief is granted as a matter of discretion, it waives the criminal grounds of removal with which the LPR has been charged and allows them to remain in the U.S. with LPR status.

To prevail on an application for cancellation, LPRs must prove their equities outweigh criminal and other "bad" acts. The burden of proof is on the LPR applicant. Equities include:

- **Family ties within the U.S. (if lawfully present).**
- **Residency of long duration in the U.S. (especially beginning in childhood).**
- **Evidence of hardship for the LPR and family if deportation occurs.**
- **Service in Armed Forces (usually with an honorable discharge).**
- **History of employment and the payment of taxes.**
- **Existence of property or business ties.**
- **Community service.**
- **Proof of genuine rehabilitation if a criminal record exists.**
- **Evidence attesting to a respondent's good character in general.**

An LPR's equities are balanced against any negative factors, including the nature and underlying circumstances of grounds of removal. This means the judge will want to know what happened and why, and whether it will happen again. Other factors include significant

immigration violations, criminal records, and other evidence of bad character or undesirability.

An immigration judge may not look to an applicant's prior arrests or convictions to reassess guilt or innocence.

The cancellation waiver is only available once. If an LPR has received this form of relief in the past, they will not be eligible for it a second time, and will be deportable, absent any other form of relief for which they may qualify.

Two recent decisions from the Board of Immigration Appeals (BIA) reversed the immigration trial courts' grants of cancellation after finding the applicants did not merit relief as a matter of discretion despite residencies in the United States since childhood.

In the first case, Mr. Kim came to the United States in 1979 at age 10 from South Korea and became a lawful permanent resident that same year. The BIA found that Mr. Kim did not merit cancellation as a matter of discretion, because of his criminal history, which included fraud convictions and a 4-year prison sentence. In reversing the trial court, the BIA cited Mr. Kim's probation report which stated, "The defendant behaves as if the rules and laws of society do not apply to him."

The BIA found that Mr. Kim should be removed despite his residence in the United States since childhood, his lack of familiarity with South Korea, evidence of rehabilitation and the presence of his three adult United States citizen children, with whom he maintained close ties.

Matter of Chong Sik Kim, 29 I&N Dec. 339 (BIA 2025).

In the second case, Ms. Jimenez-Ayala a resident of the United States since infancy, was found not to merit cancellation based on criminal conduct that both resulted in a conviction and conduct that did not result in a conviction. Ms. Jimenez-Ayala admitted that she used methamphetamine in 2014, and became addicted to the drug in 2019, used throughout her pregnancy with her fourth child, and in front of her other children.

Although she was engaged in rehabilitation she relapsed and violated her probation. Ms. Jimenez-Ayala testified to her sincere remorse, her continued participation in rehabilitation programs, and her desire to be a better parent to her children. The evidence showed her mother, father, partner, children, and extended family members all resided in the United States as citizens or lawful permanent residents. Despite these equities, the BIA found that Ms. Jimenez-Ayala should be removed as a matter of discretion despite her family ties and long-term residence in the United States. *Matter of Maricruz Jimenez-Ayala*, 29 I&N Dec. 325 (BIA 2025).

It is a common misconception that a person's length of residence in the United States means that they will not be deported even if they are convicted of crimes. Both decisions highlight that removal is a consequence applied to even those who have resided here lawfully since childhood, with continued and significant family ties in the United States and little familiarity with their home countries.

OBTAINING A BOND IN REMOVAL PROCEEDINGS

A noncitizen held in ICE custody during removal proceedings must show they are not a flight risk and not a danger to the community to receive a bond. In a recent precedential decision, *Matter of Kamatov*, 30 I&N Dec.34 (BIA 2026), the BIA reasoned that the noncitizen, "in the relatively short period of time he has resided in the United States... has engaged in street racing and been charged with resisting arrest, both of which are inherently dangerous activities and evince a disregard for the safety of others and the laws of the United States." (note that the BIA does NOT say he was convicted). "That the [noncitizen] did not injure the officer or officers he is claimed to have resisted does not change the seriousness of the charge itself." Driving on a suspended license and possession of a cell phone "which constituted contraband while in police detention, although perhaps less serious, are further indications of his disregard for the laws of the United States. The State court's decision to release the respondent from custody on his own recognizance after his recent arrests, while relevant, is insufficient to alleviate our concerns about the respondent's dangerousness given his actual conduct."

DISCLOSING AN ARREST ON A PENDING APPLICATION

When a non-citizen client has a pending application for naturalization or other immigration benefit at the time of an arrest

it is important that they receive advice from immigration counsel about updating their application and reporting their contact with the legal system.

In general, failure to disclose an arrest or conviction may lead to a finding that an applicant misrepresented a material fact. Failure to disclose an arrest or conviction could also lead to the denial of the application and in certain cases future denaturalization. A person may also face prosecution under federal law for committing fraud pursuant to 18 U.S.C. 1546(a)(4). The Second Circuit recently held that a conviction for this violation of federal law is a crime involving moral turpitude. *Nemis v. Blanche*, No. 25-304-ag (2d Cir. Sept. 17, 2026).

RESTITUTION ORDER CAN SUPPORT AGGRAVATED FELONY FINDING IN REMOVAL PROCEEDINGS

When determining the loss amount connected to a fraud conviction, an immigration court may consider the facts and circumstances underlying a conviction, as well as restitution orders and presentence reports.

In *Matter of A-V-O*, 30 I & N Dec. 44 (BIA 2026), the BIA found a non-citizen had committed an aggravated felony, based on her conviction for a fraud offense with a loss exceeding \$10,000. 8 U.S.C. 1101(a)(43)(M)(i). The respondent argued that the factual proffer and record established that the total loss amount connected to her

conviction was only \$3,450, and therefore not an aggravated felony conviction. The BIA disagreed and relied on the restitution order and judgment of conviction that identified the total loss related to the conviction as \$345,100, even though the loss amount associated with her plea colloquy was under \$10,000. When negotiating a disposition in a fraud case, defense counsel should be aware of any potential restitution that may be ordered before entering a plea.

Matter of A-V-O also overruled long-standing BIA precedent and now holds that those convicted of aggravated felonies are also inadmissible as those permanently ineligible for citizenship.

Previously, that ground of inadmissibility only applied to evaders of the military draft.

CELLPHONE SEARCH AT BORDER DOES NOT VIOLATE THE 4TH AMENDMENT

The Second Circuit, in *United States v. Alisigwe*, No. 24-960 (2d Cir. Sept. 17, 2026), held that while at the border, no reasonable suspicion or warrant was required before the government searched a traveler's cellphone.

Mr. Alisigwe was stopped at JFK airport after returning from a trip abroad. Customs agents were notified that Mr. Alisigwe was the subject of a fraud investigation and pulled him aside for questioning. During questioning, agents took possession of Mr. Alisigwe's phone, scrolled through the phone and photographed evidence. This evidence was used against Mr. Alisigwe at trial. The court held that the search of the phone

was a routine search of property that did not violate the 1st or 4th Amendments, and thus no warrant or reasonable suspicion was required.

The court reasoned that as opposed to "routine" searches, "nonroutine" border searches, which are more invasive and involve the search of a person's body, such as strip searches, may require reasonable suspicion before a search.

Searches of property at the border have long been upheld as constitutional. According to the court, the government's interests at the border supersede an individual's right to privacy.

This decision now classifies cellphone searches as similar to the search of any other property and thus "routine" despite the volume of personal data contained on such devices. Judge Eunice Lee, concurred with the majority's judgment in the case, but took exception with the characterization of such searches as routine. Judge Lee stated, "A standard that permits a search of every international traveler's cellphone without suspicion means that any person who goes on vacation or a business trip anywhere outside the country can be subject, upon their return home, to review of their medical records, financial information, personal messages, internet search and viewing habits, location tracking, and any other private information that may be contained on their cellphone through stored data, apps, or cloud connection. Under the majority's view, law enforcement at an international airport, whether it is TSA, Customs and Border Protection, or ICE

has unlimited power to review the data on any traveler's cellphone. This unrestricted authority to search is not a carefully-crafted exception to the Fourth Amendment to address an immigration or contraband-related interest in controlling who or what comes into the country; it eliminates Fourth Amendment protections in this context." *Id.* at 19.

ADMISSION TO CRIME AT INTERVIEW CAN TRIGGER INADMISSIBILITY

In a troubling decision that overturns former precedent and makes it much easier to deny benefits to noncitizens, including admission to the U.S., the Board of Immigration Appeals held

that an applicant for a "green card" who admitted during his interview that he had used cocaine, had made a sufficient admission to committing a crime such that he was ineligible to become a permanent resident. *Matter of Mendez-Maldonado*, 30 I&N Dec. 62 (BIA 2026), changes existing law that required the government to give a noncitizen a definition of a crime and the essential elements of the offense prior to their admission. The Board reasoned that this procedure exceeded any statutory or regulatory requirements.

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