

court where you have a criminal conviction.

Can I do anything to change my criminal conviction?

Yes. You can ask the criminal court (not the Immigration Court) to vacate or erase your criminal conviction for certain reasons. One reason is if you pled guilty but the judge did not warn you that pleading guilty could lead to deportation from the U.S. There may be other ways to vacate a conviction if you pled guilty and did not understand your rights. If the criminal court vacates your conviction, the prosecution can still bring the charges against you again, but sometimes the prosecution does not do so. Perhaps the lawyer who represented you in your criminal case can help you, or you can contact the Committee for Public Counsel Services, Immigration Impact Unit, 21 McGrath Highway, Somerville, MA, 02143 (telephone: 617-923-0591).

You may also be able to lower your sentence by filing a motion to revise and revoke your sentence. Some crimes are aggravated felonies, such as theft or assault, only if you received a sentence of one year or more. If you lower the sentence to less than one year, the crime may not be an aggravated felony. An Immigration Judge, however, will usually not stop a deportation case just because you have asked the criminal court to vacate or dismiss the conviction or lower the sentence. So, it is important to get the conviction vacated or dismissed, or lower the sentence as soon as possible.

If I am deported for a criminal conviction, when can I come back?

After deportation, a person must wait either 5 or 10 years (depending on the case) before returning to the U.S. legally. 8 U.S.C. §1182(a)(9)(A). After a second deportation the wait is 20 years. 8 U.S.C. §1182(a)(9)(A). You can ask Immigration for permission to re-enter sooner but Immigration may not allow it. If you are deported for an aggravated felony, you can probably never return to the U.S. 8 U.S.C. §1182(a)(6)(B).

PREVENTING IMMIGRATION FROM DEPORTING YOU FROM THE U.S.

There are only a few defenses against deportation from the U.S:

(1) Citizenship

Immigration cannot remove a U.S. citizen. You may be a citizen if:

- you were born in the U.S., including Puerto Rico (8 U.S.C. §1401); or
- you were born in another country but one parent was a U.S. citizen and lived in the U.S. for certain periods of time prior to your birth (8 U.S.C. §1401(g)); or
- you were born in another country but one or both of your parents naturalized and became citizens when you were under 18 and living in the U.S. as a lawful permanent resident (8

U.S.C. §1432(a)); or

- you were found in the U.S. while under the age of 5 and your parents are unknown (8 U.S.C. §1401(f)).

The law is complicated and has several other requirements. If your parent or grandparent was a U.S. citizen, you may be a U.S. citizen. It is important to know when you were born, when your citizen parent or grandparent lived in the U.S., when your citizen parent or grandparent was born, whether and when your parents were married and divorced, who had custody of you if your parents were separated, and whether your parents naturalized and became citizens before you turned 18. **If one or both of your parents or grandparents are U.S. citizens, tell the Immigration Judge.** Also, contact PAIR because you may already be a U.S. citizen.

You may be able to apply for your own naturalization even if you have a criminal conviction. You need to show that you have had good moral character for the past five years. 8 U.S.C. §1101(f). Some activities prevent you from showing good moral character:

- * An aggravated felony conviction after November 29, 1990
- * A drug conviction (other than simple possession of 30 grams or less of marijuana)
- * A crime of moral turpitude (unless it had a possible sentence of one year or less and you actually were sentenced to 6 months or less)
- * two convictions where you received a sentence of 5 years or more
- * giving false testimony to receive an immigration benefit
- * serving 180 days or more in jail for any crime
- * habitual drunkards, convicted gamblers, prostitutes, and smugglers.

A person with an Immigration Court case can file an application for naturalization and ask the Immigration Judge to stop the deportation case if he can show “exceptionally appealing or humanitarian factors.” 8 C.F.R. §1239.2(f). This might apply where you have an old conviction (even an aggravated felony conviction before Nov. 29, 1990). You must have exceptionally good behavior and meet other requirements for naturalization, such as having your green card for at least 5 years (or 3 years if you married a U.S. citizen). You will, however, need the government Trial Attorney or US Citizenship & Immigration Services (USCIS) to agree that you are eligible for naturalization, which may be difficult with a criminal conviction. If you served honorably in the U.S. military in active duty during armed conflict, you need have only one year of good moral character. 8 U.S.C. §1440; 8 C.F.R. §329.2

(2) Cancellation of Removal and 212(c) Waiver

Cancellation of Removal

Cancellation of removal is a defense to deportation if you have a criminal conviction that is **not** an aggravated felony. You must:

- (1) have been a lawful permanent resident (had a green card) for at least 5 years;

(2) have resided in the U.S. continuously for 7 years after having been admitted to the U.S. in any status; and

(3) have not been convicted of an aggravated felony (see page 12).

8 U.S.C. §1229b(a). This law applies to cases started on or after April 1, 1997. So, you cannot apply for cancellation of removal if you have an aggravated felony (see page 12). Cancellation also waives gun possession or crimes of moral turpitude.

212(c) Waiver

If you have an old conviction, you might be able to use the old immigration law section 212(c), which allowed lawful permanent residents to waive or excuse criminal convictions under different rules. This law still applies to some cases where people were convicted before April 24, 1996 if:

(1) you are a lawful permanent resident (have a green card);

(2) you have lived in the U.S. lawfully for at least 7 years, including time as a lawful permanent resident or lawful temporary resident. If you were a minor when your parents had their green cards but you did not have yours yet, you may be able to add the time your parents had green cards to the time you had yours to equal 7 years. Call PAIR to discuss this issue.

(3) you have not served 5 years or more in prison for an aggravated felony.

If your conviction was after April 24, 1996, up until April 1, 1997, you might be still be able to apply for a 212(c) waiver, but it would not waive aggravated felonies after April 24, 1996.

Applying for Cancellation of Removal or 212(c) Waiver. In seeking cancellation of removal or a 212(c) waiver, you have to convince the Immigration Judge that even though you have a criminal conviction, you have very good parts to your life. These include the length of time you have lived in the U.S., your family ties in the U. S., your job history, your payment of income taxes, your child support payments, rehabilitation, and hardship to you and your family if you were to be removed. You want to convince the Immigration Judge that you are sorry, that you will not commit any other crimes in the future and that you have changed your life. See page 23 for information about this process.

(3) Asylum, Withholding of Removal and the Torture Convention

Asylum

Asylum is for someone who has suffered harm or fears harm in his or her country because of race, religion, nationality, actual or suspected political opinion, or membership in a

particular group. 8 U.S.C. §1101(a)(42) & §1158. Groups can be a student or teacher group, the military or the guerrillas, a political party, a human rights group, a religious group, a union, your clan, your family, women opposed to certain practices, homosexuals, or some other persecuted group. If you oppose coercive family planning policies in your country, such as forced abortions or involuntary sterilization, and have been harmed or fear harm for that reason, you have an asylum case.

You must apply for asylum within one year of arrival in the U.S. unless you show changed circumstances or extraordinary circumstances. Changed circumstances can be changes in your home country or in your own circumstances outside your country. Extraordinary circumstances can be serious illness, or depression resulting from past harm, or changes in your immigration status. If you miss the one-year filing deadline and do not meet one of the exceptions, you can still apply for withholding of removal and relief under the Torture Convention if you would be harmed if you returned to your country.

Asylum is for people who fear harm or persecution, but it is not usually available if you fear prosecution for a crime. However, if the prosecution is to punish you for political activities, religion, nationality, race or group membership, then you do have an asylum case.

Crimes that Bar Asylum: Some crimes prevent you from winning asylum. For example, you cannot win asylum if you were convicted of an aggravated felony (see page 12), or if you were convicted of a particularly serious crime and constitute a danger to the community. 8 U.S.C. §1158(b)(2). These crimes usually include burglary of a dwelling, robbery, shooting with intent to kill and other violent crimes. You also cannot win asylum if you assisted in the persecution of others, or engaged in terrorist activities, or committed a serious nonpolitical crime in your country. 8 U.S.C. §1158(b)(2).

Withholding of Removal

If you have an aggravated felony conviction, you can still apply for withholding of removal unless you were sentenced to five years' imprisonment. 8 U.S.C. §1231(b)(3). You must show that your life or freedom would be threatened due to your race, religion, nationality, political opinion or membership in a particular group. 8 U.S.C. §1231(b)(3).

Torture Convention

If you fear you would be tortured by government agents or with the government's acquiescence, ask the Immigration Judge for relief under the Torture Convention. Criminal convictions are not a bar. If you already have a deportation order, try to reopen your case with the Immigration Court and explain why you would be tortured.

<p><u>Preparing an Application.</u> You apply for asylum, withholding of removal and the Torture Convention by filling out Form I-589 that the Immigration Judge will give you. . You need to explain why you left your country and what you think will happen to you if you return. You need to show why you would be in danger and who will harm you. Explain all the details. If you have letters or newspaper articles or other papers, add them to your application or bring them to court at your hearing.</p>

(4) Adjustment of Status

Adjustment of status means becoming a lawful permanent resident and getting your green card. The main way to adjust status in Immigration Court is if you are:

- married to a U.S. citizen, or
- have a U.S. citizen child 21 years of age or older, or
- have a U.S. citizen parent.

Your U.S. citizen relative must file a family petition for you (Form I-130) with Immigration. Then you file Form I-485 with the Immigration Judge and show that you are admissible to the U.S. Some of the crimes that cause problems are a crime of moral turpitude (unless it had a possible sentence of one year or less and you actually were sentenced to 6 months or less), drug convictions, or two crimes where you received a sentence of 5 years or more.

Abused spouses, children and parents who have been abused by a U.S. citizen or lawful permanent resident spouse, parent or child can file a self-petition seeking legal status without asking the abuser to file the papers.

(5) 212(h) Waiver

Only certain people described below can apply for a 212(h) waiver, which waives some crimes of moral turpitude. This waiver is difficult to win, and does not excuse murder or torture (or attempted murder or torture), or drug crimes (except simple possession of 30 grams or less of marijuana). 8 U.S.C. §1182(h). If you think you can apply for a 212(h) waiver, tell the Immigration Judge.

Usually, a person applying for a 212(h) waiver must also be seeking adjustment of status to become a lawful permanent resident (adjustment of status is described above). The person must also be married to a U.S. citizen or lawful permanent resident, or have a son, daughter or parent who is a U.S. citizen or lawful permanent resident. You must also show that removing you from the U.S. would cause extreme hardship to your spouse, parent, son or daughter who is a U.S. citizen or lawful permanent resident. If you have been convicted of a violent or dangerous crime, you have to show that your removal would cause exceptional and extremely unusual hardship to one of those relatives listed above. 8 C.F.R. § 212.7(d).

If you are returning from a trip abroad and are already a lawful permanent resident, you can apply for a 212(h) waiver to excuse these crimes without applying for adjustment of status all over again.

Lawful permanent residents applying for a 212(h) waiver have stricter rules than those who are not lawful permanent residents. Lawful permanent residents cannot receive a 212(h) waiver if convicted of an aggravated felony since admission to the U.S., or if not lawfully residing continuously in the U.S. for at least 7 years before removal proceedings.

For extreme hardship, the Immigration Judge will consider your age now, your age when you entered the U.S., family ties in the U.S. and in other countries, the amount of time you have lived in the U.S., your health and the health of your citizen or lawful permanent resident children, the political and economic conditions in your home country, the economic problems in leaving the U.S., the possibility of other ways of gaining legal status in the U.S., your involvement in the community, and your immigration history. You and your relatives who are U.S. citizens and lawful permanent residents should write declarations about these points. You can also ask teachers, employers, church officials, probation officers, neighbors, and others to write declarations about your good qualities. You should also file any past income taxes. The application form for a 212(h) waiver is Form I-601.

(6) Cancellation of Removal and Suspension of Deportation

Cancellation of Removal

There is another type of cancellation of removal, which allows people to remain legally in the U.S. even if they never had a green card or legal status before. You must meet certain requirements:

- (1) you must have been physically present in the U.S. for 10 years;
- (2) you must have good moral character during that time
- (3) you must show "exceptional and extremely unusual" hardship to your U.S. citizen or lawful permanent resident spouse, parent or child if you were to be deported. Hardship to yourself does not count.

8 U.S.C. §1229b(b). Most criminal convictions bar you from this type of cancellation of removal since you cannot show good moral character. 8 U.S.C. §1101(f). These convictions include: any conviction resulting in imprisonment for 180 days or more; any drug conviction; any aggravated felony; and others.

Cancellation for Battered Immigrant Women and Children

There are special rules if a person has suffered battering or extreme cruelty from a U.S. citizen or lawful permanent resident spouse or parent. For example, a battered spouse can apply for cancellation of removal after being in the U.S. for only 3 years. 8 U.S.C. §1229b(b)(2). In addition, people suffering abuse from a U.S. citizen or lawful permanent resident spouse or parent can also file a self-petition seeking legal status without having to rely on her abuser.

(7) Voluntary Departure

Voluntary departure allows you to leave the U.S. but not be deported. This makes it easier to return legally to the U.S. Most criminal convictions make it difficult to receive voluntary departure, however. You may request voluntary departure in Immigration Court **at the beginning of your case** if you are not removable for terrorist activities or for an aggravated

felony (see page 12). 8 U.S.C. §1229c(a)(1). If you request it at the beginning, you do not need to show good moral character. This means that even if you have a criminal conviction, you may still be able to get voluntary departure.

At the **end** of your case (after you have presented any other defenses to deportation), you may receive voluntary departure if you: (1) show physical presence in the U.S. for at least one year before the Notice to Appear; (2) have good moral character for at least the previous 5 years; (3) are not removable for an aggravated felony or terrorism; (4) can pay your way back to your country; (5) post a voluntary departure bond; and (6) have not received voluntary departure before after being in the U.S. without admission or parole. 8 U.S.C. §1229c(b).

(8) Refugee Waiver

Refugees who have a criminal conviction and never applied for adjustment of status to get a green card may apply for a refugee waiver. You apply for the waiver on Form I-602 and for adjustment of status on Form I-485. You must show humanitarian reasons why you should not be deported. 8 U.S.C. §1159(c). You should include a declaration about why you fled your country and the harm you face if deported, human rights reports that support your declaration, and declarations from family and others who know the situation. This waiver does not apply if the government has a reason to believe you are or have been a drug trafficker, or a security or terrorist threat. Arrests on suspicion of drug distribution can be a problem even if charges were dismissed. If you think you can apply for a refugee waiver, be sure to tell the Immigration Judge.

IMMIGRATION ADDRESSES

To file applications and other papers, send or deliver them to the Immigration Court at the following address unless the Judge tells you to file them at another address:

Immigration Judge
Executive Office for Immigration Review
John F. Kennedy Federal Building, Third Floor
15 New Sudbury Street – Room 320
Boston, MA 02203
Telephone: 617-565-3080



When you send anything to the Immigration Court, **you must send a copy to the government.** You must also send a Certificate of Service to the Immigration Court showing that you sent a copy to the government's lawyers. See sample Certificate of Service below. You mail the copies to:

District Counsel – Trial Attorney Unit
Department of Homeland Security
John F. Kennedy Federal Building, Room 425
15 New Sudbury Street
Boston, MA 02203
Telephone: 617-565-3140