CHAPTER 4
GOOD MORAL CHARACTER

Overview of Good Moral Character

Several immigration benefits require that an applicant demonstrate that he or she has been a person of good moral character (GMC) for a specified period of time. For example:

- Naturalization requires that an applicant have been of GMC during the period of required continuous residence in the United States. Most naturalization applicants must be able to establish GMC for the five years immediately preceding the filing of their N-400 application and up until taking the oath of allegiance. However, spouses of U.S. citizens need to be able to establish GMC for only the three years immediately preceding the filing of their N-400 application and up until taking the oath of allegiance. Special rules apply to persons qualifying for naturalization based on military service.
- Applicants for suspension of deportation (before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA[1]) and persons who are not lawful permanent residents (LPRs) applying for cancellation of removal (after IIRAIRA) must show GMC during the relevant statutory periods (seven years and 10 years, respectively). For suspension and non-LPR cancellation applicants, these seven– and ten-year periods of GMC are calculated backward from the date the application is finally resolved by the immigration judge (IJ) or the Board of Immigration Appeals (BIA).[2]
- Salvadorans and Guatemalans applying for suspension or cancellation under the Nicaraguan Adjustment and Central American Relief Act (NACARA)[3] must demonstrate GMC during the last seven years of continuous physical presence. If the noncitizen is deportable on certain criminal or security grounds, GMC must be established during the last 10 years of continuous physical presence.[4]
- Self-petitioners under the Violence Against Women Act (VAWA)[5] must demonstrate GMC for the three years preceding their application and up until

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[1] Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

[2] *See Duron-Ortiz v Holder, 698 F.3d 523* (7th Cir. 2012); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1162 (9th Cir. 2009); *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005); *Matter of Castro*, 19 I&N Dec. 692 (BIA 1988).

[3] Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193–201 (1997), technical corrections made at Pub. L. No. 105-139, 111 Stat. 2644 (1997).

[4] *See* 8 CFR §§240.65(c)(2), 1240.65(c)(2) (suspension of deportation), 240.66(c)(3), 1240.66(c)(3) (cancellation of removal).

[5] Originally enacted as Pub. L. No. 103-322, §§40701–03, 108 Stat. 1796, 1953–55 (1994).

the time of adjustment of status or issuance of an immigrant visa.[6] Applicants for VAWA cancellation or VAWA suspension must demonstrate GMC during the three years immediately preceding the filing of their application and up until the time of adjudication of their application.[7] But note that pursuant to the BIA's decision in *Matter of Ortega-Cabrera*,[8] there is a good argument that this three-year period actually should be calculated backwards from the date when the application is finally resolved by the IJ or the BIA. There are some special exceptions to the GMC requirement for VAWA applicants, which are discussed *infra*.

- For cases pending before April 1, 1997, a noncitizen must be able to establish GMC for a specified period to be eligible for voluntary departure or registry. For cases pending after April 1, 1997, to be eligible for voluntary departure at the completion of removal proceedings, an applicant must be able to establish GMC during the five years immediately preceding the application for voluntary departure.[9] Applicants applying for voluntary departure prior to the conclusion of removal proceedings (*e.g.*, at a master calendar hearing) do not need to establish GMC.[10]

Two-Step Process for Establishing GMC

The INA incorporated a definition of GMC into the law for the first time in 1952. Prior to that, GMC was determined on a case-by-case basis, based on community standards. Per INA §101(f), GMC is defined through a listing of types of conduct that preclude a showing of GMC if the conduct took place during the period of time for which GMC is required to be established. Several of these automatic bars under INA §101(f) incorporate by reference certain criminal grounds of inadmissibility. In addition, §101(f) includes a "residual clause" that provides that a person may be found to lack GMC for reasons other than the specified grounds. Thus, even if an applicant is not barred from demonstrating GMC under INA §101(f) automatically, the adjudicator may look at other factors, and determine GMC based on the "totality of the circumstances," balancing the good against the bad. Consequently, the assessment of GMC is essentially a two-step process, involving the determination of whether a statutory bar applies, and then whether other adverse circumstances may prevent the applicant from establishing GMC.

Illustrating the significance of the "residual clause," a decision from the U.S. Court of Appeals for the Eleventh Circuit upheld the denaturalization of an individual based on a GMC assessment under the residual clause.[11] In this case, the defendant

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[6] INA §§204(a)(1)(A)(iii)(II)(bb), (B)(ii)(II)(bb), (iii); *see also* 8 CFR §204.2(c)(1)(vii).

[7] INA §240A(b)(2)(A)(iii).

[8] 23 I&N Dec. 793 (BIA 2005).

[9] INA §240B(b)(1)(B).

[10] INA §240B(a)(1).

[11] *Jean-Baptiste v. U.S.*, 395 F.3d 1190 (11th Cir. 2005).

had been arrested, indicted, and convicted for a drug trafficking offense after taking the oath of allegiance and becoming a citizen. However, the conviction related to criminal activity that occurred before taking the oath. Relying on the residual clause, as well as the regulations at 8 CFR §316.10(b)(3)(iii), the Eleventh Circuit found that this criminal activity had precluded the defendant from establishing the required GMC and that therefore he was ineligible for naturalization and should be denaturalized.

Automatic Bars to GMC

INA §101(f) and 8 CFR §316.10(b)[12] set forth the bars that preclude a person from establishing GMC. Under these provisions, the following persons are *permanently barred* from establishing GMC:

- Persons who have ever been convicted of murder
- Persons convicted of an aggravated felony on or after November 29, 1990

In addition, applicants are barred from establishing GMC if they committed the following offenses during the relevant statutory period:

- Prostitution and commercialized vice
- Alien smuggling
- Crimes of moral turpitude (unless petty offense or juvenile exceptions apply)
- Drug crimes, except single possession of 30 grams or less of marijuana
- Multiple crimes with a total sentence of five years or more
- Drug trafficking
- Two or more gambling offenses
- False testimony to obtain an immigration benefit
- Assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings
- Severe violations of religious freedom by foreign government official

Further, a person cannot establish GMC if during the relevant statutory period he or she is or was:

- Confined to a penal institution for 180 days or more
- A habitual drunkard
- A polygamist
- A person who derived his or her income principally from illegal gambling

[12] 8 CFR §316.10(b) applies in the naturalization context.

GMC Under Community Standards

Under the "residual clause" in INA §101(f), the fact that the person is not within one of the specified classes does not preclude a finding that, for other reasons, the person lacks good moral character.

In the naturalization context, the regulations for establishing GMC specifically delineate other factors that bear on the determination. Under 8 CFR §316.10(b)(3), unless the applicant establishes "extenuating circumstances," an applicant who (1) has willfully failed to support dependents; (2) had an extramarital affair that tended to destroy an existing marriage; or (3) committed other unlawful acts that adversely reflect on the applicant's moral character, may be found to lack GMC.

In the VAWA context, the regulations state that GMC will be evaluated on a case-by-case basis, taking into account the bars set out in §101(f) and the standards of the average citizen in the community.[13] These regulations, however, do identify a few factors in particular to be considered, although they do not require a finding of lack of good moral character: an applicant who has "willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts" may be found to lack GMC unless extenuating circumstances exist.

This chapter will focus principally on the criminal bars to establishing GMC. Several of these bars incorporate by reference the criminal grounds of inadmissibility found at INA §212(a)(2). Some of these grounds have parallel grounds of deportability. However, it is important to emphasize that while prior criminal convictions may not necessarily bar an applicant from establishing GMC for naturalization or other purposes, applying for naturalization or some other benefit requiring a showing of GMC may trigger the discovery that an applicant is also removable and result in an applicant being placed into removal proceedings. It is thus critical to keep in mind the relationship between GMC and the grounds of inadmissibility and deportability. This is especially true in the naturalization context, in which applicants who are able to establish GMC often end up in proceedings because they are also subject to removal under the grounds of deportability.

Life Bars to Establishing GMC

Persons convicted of murder *at any time* or of other aggravated felonies on or after November 29, 1990, are forever barred from establishing GMC. The date of conviction is the date on which a person is sentenced.[14] Also permanently barred are persons who assisted in Nazi persecution, participated in genocide, or committed of acts of torture or extrajudicial killings, and foreign government officials who have committed particularly severe violations of religious freedom.

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[13] 8 CFR §204.2(c)(1)(vii).

[14] *Singh v. Holder*, 568 F.3d 525, 531 (5th Cir. 2009).

Murder Convictions

A conviction for murder, being an aggravated felony, renders an applicant permanently ineligible to establish GMC.[15] Murder was included as a disqualifying crime before INA §101(f) was amended to make all aggravated felonies disqualifying. The date of conviction, which for other aggravated felonies is important, is not relevant with respect to murder.[16]

Aggravated Felony Convictions on or After November 29, 1990

Chapter 3 analyzed in depth the question of what crimes constitute aggravated felonies under immigration law. That chapter, relevant case law and statutes, as well as other secondary resources should be carefully reviewed when determining whether a conviction constitutes a conviction for an aggravated felony. As discussed in chapter 3, in light of the radical expansion of the definition of aggravated felony to include a variety of offenses that may not be aggravated and need not even be felonies, it is important to challenge determinations that the client has an aggravated felony conviction. This section will address the effect an aggravated felony conviction has on an applicant's ability to establish GMC.

Except for murder convictions,[17] only those aggravated felony convictions that occur on or after November 29, 1990 (the effective date of the Immigration Act of 1990[18], render the noncitizen permanently ineligible to establish GMC. The Act amended INA §101(f) to make all aggravated felonies, not just murder, disqualifying.[19] However, the act gave no disqualifying effect to convictions for aggravated felonies occurring before its effective date. Notwithstanding, a conviction for an aggravated felony occurring prior to November 29, 1990, may be taken into account in evaluating the applicant's moral character under community standards.[20]

Moreover, while a pre–November 29, 1990, aggravated felony offense does not preclude an applicant from establishing GMC, the conviction is likely to trigger removal proceedings for those aliens subject to removal on deportation grounds. This is because a conviction for an aggravated felony renders an LPR deportable, regardless of the date of conviction.[21] Thus, when an individual with a pre–November 29, 1990, aggravated felony conviction applies for naturalization, the application may trigger the discovery that the individual is also removable under the aggravated felony

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[15] INA §101(f)(8).

[16] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, §306(a)(7), Pub. L. No. 102-232, 105 Stat. 1733, 1751; *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1994); *see also*, in the naturalization context, 8 CFR §316.10(b).

[17] *See supra*.

[18] Pub. L. No. 101-649, 104 Stat. 4978.

[19] INA §101(f)(8).

[20] Immigration and Naturalization Service Legal Opinion, D. Martin, General Counsel, No. 96-16 (Dec. 3, 1996), *reprinted in* 74 *Interpreter Releases* 1515, 1530 (Oct. 6, 1997).

[21] *Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998).

ground of deportability under INA §237 and result in the applicant being placed in removal proceedings[22].

Bars for Conduct or Status During Relevant Statutory Period

As noted above, under INA §101(f), certain conduct or status during the relevant statutory period precludes a person from establishing GMC. There is no balancing test; if an applicant's conduct or status during the period of required GMC is described by the statute, he or she is precluded from showing GMC.

Grounds of Inadmissibility

INA §101(f) disqualifies persons if they are described in several of the grounds of inadmissibility, whether they in fact are inadmissible or not. These grounds include the following:

- Conviction or admission of a crime of moral turpitude—INA §212(a)(2)(A)(i)(I)
- Conviction or admission of a controlled substance violation—INA §212(a)(2)(A) (except as it relates to a single offense for simple possession of 30 grams or less of marijuana)
- Multiple crimes with a total sentence of five years or more—INA §212(a)(2)(B)
- Trafficking in a controlled substance—INA §212(a)(2)(C)
- Prostitution and commercialized vice—INA §212(a)(2)(D)
- Alien smuggling—INA §212(a)(6)(E)
- Polygamy—INA §212(a)(10)(A)

Several of these criminal grounds were analyzed in-depth in chapter 2. Keep in mind that most of these grounds have equivalent grounds of deportability. Therefore, a naturalization applicant who is inadmissible under one of these grounds also may be deportable and likely will be placed into removal proceedings. Once removal proceedings have begun, USCIS is barred from considering the applicant's naturalization application unless the immigration judge terminates proceedings to allow the applicant to pursue his or her naturalization application.[23] However, this form of relief has become much more difficult in light of the BIA's decision in *Matter of Acosta Hidalgo*,[24] which held that an IJ cannot terminate for naturalization unless there is an af-

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[22] *See* USCIS Memo, Nov. 7, 2011, *Revised Guidance for the Referral of Cases and Issuance of NTAs in Cases Involving Inadmissible and Deportable Aliens, pp 7-9*, and discussion in this chapter, *infra.*

[23] *See* 8 CFR §1239.2(f).

[24] 24 I&N Dec. 103 (BIA 2007). Several courts of appeals have agreed: *Shewchun v Holder*, 658 F. 3d 557 (6th Cir. 2011); Robertson-Dewar v Holder, 646 F.3d 226 (5th Cir. 2011); *Zegrean v. AG*, 602 F.3d 1273 (3d Cir. 2010); *Barnes v. Holder*, 625 F.3d 801 (4th Cir. 2010); *Ogunfuye v. Holder*, 610 F.3d 303 (5th Cir. 2010); *Perriello v Napolitano*, 579 F.3d 135 (2nd Cir. 2009); *Hernandez de Anderson v Gonzales*, 497 F3d 927 (9th Cir. 2007); *But see Gonzalez v Secretary of DHS*, 678 F.3d 254 (3rd Cir. 2012)

firmative communication from the Department of Homeland Security (DHS) of the respondent's prima facie eligibility to naturalize.

Crimes Involving Moral Turpitude, §212(a)(2)(A)(i)(I)

See chapter 2 for a detailed discussion of how to determine whether a crime constitutes one involving moral turpitude. A person who is inadmissible for having committed a crime involving moral turpitude (CMT) or having admitted to the essential elements of a CMT during the relevant statutory period is barred from proving GMC. Also, convictions of some CMTs also may constitute aggravated felonies, therefore barring the applicant forever from establishing GMC if the conviction occurred on or after November 29, 1990.

As discussed in chapter 2, no clear definition exists within the law for a CMT, although the term has been held to involve acts demonstrating baseness, vileness, and depravity on the part of the perpetrator. CMTs usually are intent crimes. Crimes that have fraud as an element usually are considered to involve moral turpitude, as are most theft crimes and other crimes against property. Most crimes of violence involving intent, such as murder, voluntary manslaughter, or rape, also have been held to be CMTs, although simple assault has been held not to be a CMT. Similarly, involuntary manslaughter has not been considered a CMT, nor is DUI, because of the absence of intent. However, multiple DUI convictions can lead to a finding that the applicant is a habitual drunkard and thus barred from establishing GMC on that basis.

In analyzing whether a particular offense is a CMT, the representative should obtain a copy of the client's criminal record and the exact state or federal criminal statute under which the client was convicted. When it is not clear whether the crime is a CMT, the representative should research case law from the BIA and circuit courts regarding similar offenses. The practitioner should compare the criminal provision under which the client was convicted to similar criminal provisions in other cases, and look for similarities or differences. In some cases, the criminal statute may be divisible.[25] If the statute is divisible or if it is otherwise unclear whether the convictions was for a CMT, in some jurisdictions the adjudicator may look to additional evidence to determine whether the offense involved moral turpitude.[26] For a detailed discussion of the Attorney General's decision in *Matter of Silva-Trevino*[27] and its impact on CMT findings, see chapter 1.

An applicant convicted of or who admits to a CMT may be eligible for the petty offense exception if the CMT has a maximum possible penalty of one year of imprisonment and the person was sentenced to a term of imprisonment of no more than six months.[28] The applicant may also be eligible for the juvenile exception if the crime was committed while the applicant was under 18 years of age and more than five

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[25] See chapter 1 for a discussion of divisible statutes.

[26] *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

[27] *Id.*

[28] For further discussion, see chapter 2.

years have passed since the conviction or completion of the sentence.[29] In these cases, the applicant will not be barred from demonstrating GMC. A conviction, however, may render the applicant deportable. A noncitizen is deportable under the CMT ground of deportation, as amended in 1996 by Antiterrorism and Effective Death Penalty Act of 1996,[30] if:

- he or she is convicted of a CMT committed within five years after the date of admission; and
- the crime carries a maximum possible sentence of one year or more.

Thus, some misdemeanors that carry maximum possible sentences of one year may make a person deportable, even if the person was sentenced to less than six months and is eligible for the petty offense exception to the grounds of inadmissibility. There is no petty offense or juvenile exception to deportability based on a CMT.

Multiple Criminal Convictions, §212(a)(2)(B)

To be inadmissible under INA §212(a)(2)(B), a noncitizen must have been:

- convicted of two or more crimes; and
- sentenced to a term of imprisonment of five years or more.

It does not matter whether the convictions occurred in the same trial, whether the crimes were CMTs, or whether the offenses arose from a single scheme of misconduct.

A noncitizen who is deportable for multiple criminal convictions but not inadmissible is not barred from establishing GMC. An applicant for naturalization, however, may find himself or herself in removal proceedings.

Example: Edgar entered the United States as a refugee in 1991. In 1993, he became an LPR. In 1994, Edgar fell on hard times and was twice convicted of shoplifting, first in late 1994 and then again in early 1995. The first time he was given probation, but on the second occasion he received an eight-month sentence, which he completed in December 1995. After that, Edgar turned his life around, and in 2001 decided to apply for naturalization. Can Edgar establish good moral character? What other problems is he likely to face in pursuing his application?

Edgar is not precluded from establishing good moral character, and otherwise appears to be eligible for citizenship. Although he has committed more than one CMT, the last conviction was more than five years before his application for naturalization, and thus, does not fall within the relevant statutory period. He is deportable, however, under INA §237(a)(2)(A)(ii), for having multiple convictions for CMTs that did not arise out of a single scheme of criminal misconduct. When he applies for naturalization, he faces being placed into removal proceedings[31].

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[29] For further discussion, see chapter 2.

[30] Pub. L. No. 104-132, 110 Stat. 1214.

[31] *See USCIS Memo, Nov. 7, 2011, Revised Guidance for the Referral of Cases and Issuance of NTAs in Cases Involving Inadmissible and Deportable Aliens, pp 7-9, and discussion in this chapter, infra.*

Controlled Substance Violations, §§212(a)(2)(A)(i)(II), 212(a)(2)(C)

Inadmissibility under INA §§212(a)(2)(A)(i)(II) and 212(a)(2)(C), the two criminal provisions relating to controlled substance violations, apply to persons:

- who have been convicted of or admit to drug-related crimes;
- whom the immigration or consular officer has reason to believe are drug traffickers; and
- who are the spouse, son, or daughter of an illicit trafficker, if that spouse, son, or daughter has, within the previous five years, obtained any financial or other benefit from the illicit activity and knew or reasonably should have known that the benefit was the product of the activity.

Persons who can be described under any of these provisions during the relevant statutory period are precluded from establishing GMC. The only exception is for persons convicted of a single offense of simple possession of 30 grams or less of marijuana. Convictions for multiple drug offenses *may* also constitute an aggravated felony, thus permanently barring the applicant from establishing GMC.[32]

These two grounds of inadmissibility were analyzed in chapter 2. For purposes of establishing GMC, it is important to remember that, while the first ground applies to anyone convicted of or who admits to the essential elements of a controlled substance violation, the second ground applies when the immigration or consular officer has reason to believe that the noncitizen is or has been an illicit trafficker. No conviction or admission is required. A detailed affidavit from a consular employee may be sufficient to provide a reason to believe. Furthermore, when a noncitizen has multiple arrests for drug-related offenses and charges were dropped, the immigration or consular officer still may find that the noncitizen was an illicit trafficker. The State Department explains in the *Foreign Affairs Manual* that:

> Reason to believe might be established by a conviction, an admission, or a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable corroborative reports. The essence of the standard is that the consular officer must have more than a mere suspicion.[33]

The government's "reason to believe" determination must be supported by "reasonable, substantial, and probative evidence."[34] In the context of security and related grounds of inadmissibility under INA §§212(a)(3)(A), (B), (C), and (E), the BIA has equated the "reason to believe" standard with "probable cause."[35]

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[32] *See Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007); *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007).

[33] 9 *Foreign Affairs Manual* (FAM) 40.23 N2.

[34] *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337 (11th Cir. 2010); *Lopez-Molina v Ashcroft*, 368 F.3d 1206 (9th Cir. 2004); *Alarcon-Serrano v. INS*, 220 F.3d 1116 (9th Cir. 2000); *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

[35] *See Matter of U–H–*, 23 I&N Dec. 355 (BIA 2002); *see also Yusupov v. Att'y Gen.*, 518 F.3d 185 (3d Cir. 2008); *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990).

In the context of establishing GMC, if an immigration officer or IJ has reason to believe the applicant is a drug trafficker, or has been a drug trafficker during the relevant statutory period, the applicant would be barred from establishing GMC. DHS and the IJ also can consider evidence of the applicant's past under the residual clause in INA §101(f), discussed in greater detail below.

Prostitution and Commercialized Vice, INA §212(a)(2)(D)

This ground of inadmissibility applies to the following persons:

- Persons coming to the United States to engage in prostitution or who have engaged in prostitution within 10 years of the date of application for a visa, adjustment of status, or entry into the United States
- Persons who are procurers of prostitutes, who attempt to procure, who receive the proceeds of prostitution, or who have done any of these activities within the preceding 10 years
- Persons coming to the United States to engage in unlawful commercialized vice, whether or not related to prostitution

For purposes of establishing GMC, an applicant must demonstrate that he or she has not engaged in any of these practices during the relevant statutory period. The term "engage in prostitution" requires the person to have engaged in this conduct over a period of time. Having been convicted of a single act of prostitution should not subject the person to this ground, or preclude the applicant from showing GMC.[36] The applicant may be subject to the bar for a CMT, however, unless he or she qualifies for the petty offense exception. Past conduct also may be considered under the residual clause.

A criminal conviction for trafficking in prostitution may be an aggravated felony, and as discussed above, may bar the applicant from establishing GMC.

Alien Smuggling, INA §212(a)(6)(E)

This ground of inadmissibility applies to

> [a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of law . . . .[37]

Having engaged in the conduct is sufficient; no conviction or admission is required as this is not a crime-related ground of inadmissibility. Further, a conviction for alien smuggling may not be a CMT but may still preclude a finding of GMC.[38]

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[36] *See Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008) (a single act of soliciting prostitution on one's own behalf does not fall within INA §212(a)(2)(D)(ii), and a conviction for disorderly conduct relating to prostitution does not render a noncitizen inadmissible under INA §212(a)(2)(D)(ii)).

[37] INA §212(a)(6)(E).

[38] *See Matter of Tiwari*, 19 I&N Dec. 875 (BIA 1989).

Alien smuggling is broadly defined, and encompasses aiding and abetting another noncitizen to enter in violation of law, even where the "smuggler" did not accompany the other noncitizens into the country. For example, people who help arrange for relatives or others to enter the United States illegally are subject to this inadmissibility ground, and thus may be found to lack good moral character.[39] Transporting noncitizens known to be illegally within the United States, however, should not subject the person to this ground automatically, unless it can be shown that the person was aiding or abetting entry.

There is a narrow exception in the inadmissibility context for persons who qualify for family unity under the Immigration Act of 1990[40] and who are applying for either family unity or for an immigrant visa as immediate relatives or second-preference immigrants.[41] The exception only applies if the applicant encouraged, induced, assisted, abetted, or aided the applicant's spouse, parent, son or daughter, *and no other individual*. This exception should insulate the applicant from the GMC bar. There is a separate waiver under INA §212(d)(11) for returning LPRs and applicants for admission or adjustment of status under immediate relative, and 1st, 2nd and 3rd preference family-based categories, where the person smuggled was the applicant's spouse, parent, son, or daughter. This waiver applies in the context of admission or adjustment of status, and may not exempt an applicant from the GMC bar.[42]

This is particularly troubling for many Guatemalan and Salvadoran applicants for NACARA suspension or cancellation, many of whom may have brought family members across the border during the civil wars that plagued those countries. In these cases, and if the family member was a spouse, parent, son, or daughter, it may be better to forego applying for relief until the disqualifying act no longer falls within the relevant statutory period. Family members in these situations should be strongly advised not to bring in relatives who still may be living outside the United States.

The smuggling provision has a parallel ground of deportability[43] and may lead to loss of permanent residence for the naturalization applicant. There is a special waiver of deportation available to LPRs who smuggled their spouse, parent, son, or daughter.[44]

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[39] *See Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011) (parents' pattern of financially facilitating their children's illegal entry into the United States satisfied both the assistance and knowledge requirements of the "alien smuggling" provision; thus the parents were ineligible to establish good moral character for NACARA); *Urzua Covarrubias v. Gonzales*, 487 F.3d 742 (9th Cir. 2007) (petitioner statutorily barred from establishing good moral character because he collected money and arranged payment for a smuggler to assist sibling across the border); *Soriano v. Gonzales*, 484 F.3d 318 (5th Cir. 2007) (the statute applies regardless of whether the assisting individual was present at the border crossing).

[40] Pub. L. No. 101-649, 104 Stat. 4978.

[41] *See* INA §212(a)(6)(E)(ii).

[42] *See Sanchez v. Holder*, 560 F.3d 1028, 1030 (9th Cir. 2009) (holding that an applicant for cancellation of removal cannot demonstrate good moral character after participation in family-only smuggling).

[43] INA §237(a)(1)(E).

[44] INA §237(a)(1)(E)(iii).

Moreover, a criminal conviction for alien smuggling may constitute an aggravated felony under INA §101(a)(43)(N), making the applicant ineligible to establish GMC if the conviction was on or after November 29, 1990, and subject to deportation if the person was admitted in any status. This aggravated felony ground covers convictions under section INA §274(a) (relating to alien smuggling), and has only a limited exception for those convicted of a first offense in which the offender only assisted, abetted, or aided his or her spouse, parent, or child. "Relating to alien smuggling" for purposes of INA §101(a)(43)(N) has been interpreted broadly.[45]

Practicing Polygamists, INA §212(a)(10)(A)

Persons described in INA §212(a)(10)(A)—practicing polygamists—are barred from establishing GMC if the polygamy existed during the statutory period. This GMC bar was re-added to INA §101(f) by the Violence Against Women Reauthorization Act of 2005 (VAWA 2005), signed into law on January 5, 2006.[46] It was removed due to a previous legislative drafting error that had mistakenly replaced it with a bar for those who had previously been removed under INA §212(a)(9)(A). VAWA 2005 clarified that a prior removal order under INA §212(a)(9)(A) does not constitute a bar to establishing GMC.

***Habitual Drunkards,* §101(f)(1)**

Under INA §101(f)(1), those who are habitual drunkards during the relevant statutory period are precluded from establishing GMC. This issue might arise, for example, if an applicant has a large number of convictions for driving under the influence (DUI), or if an adjustment applicant's medical examination indicates that he or she is an alcoholic. If the evidence indicates that the applicant was a habitual drunkard in the past, the applicant should present countervailing evidence of rehabilitation.

Gambling Offenses, INA §§101(f)(4), (5)

Deriving income principally from illegal gambling includes three types of activities:

- Noncitizen has financial interest in illegal gambling establishment
- Illegal gambling activities of noncitizen
- Being an employee in an illegal gambling establishment if the employment is proximately related to the gambling activities

The term "principally" encompasses situations in which illegal gambling may have been the principal source of income during any part of the relevant statutory

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[45] *See Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999) (a conviction for transporting an undocumented alien *within* the United States constituted an aggravated felony under INA §101(a)(43)(N)); *Patel v. Ashcroft*, 294 F.3d 465 (3d Cir. 2002) (conviction for harboring an undocumented alien after entry was an aggravated felony).

[46] Pub. L. No. 109-162, §§3(a), 801–34, 119 Stat. 2960, 2964–71, 3053–77 (2006), as amended by Pub. L. No. 109-271, 120 Stat. 750 (2006).

period.[47] A gaming establishment will be considered illegal, even when it is tolerated by the authorities, if the activity is forbidden under an applicable statute.

A person convicted of two or more gambling offenses during the relevant statutory period also will be barred from establishing GMC. In addition, conviction of some gambling offenses may constitute an aggravated felony, and create a lifetime bar to establishing GMC.

False Testimony to Obtain an Immigration Benefit, INA §101(f)(6)

For this bar to apply, the following requirements must be met:

- Testimony under oath
- Given to obtain an immigration benefit
- Testimony given during the statutory period

The false testimony need not be *material*. This means that a noncitizen may be barred from establishing GMC for a misrepresentation that is irrelevant to the outcome of his or her case. Such an applicant will be found to lack GMC, however, only if the false statement was made *for purposes of obtaining an immigration benefit.*[48] Thus, even if an applicant has given false testimony, the examiner must conduct a further inquiry to determine why the false testimony was given. When a false statement was made, for example, because the applicant forgot or was embarrassed about a previous arrest or because the applicant was improperly advised that an expunged arrest was not considered an arrest for immigration purposes, such a statement should not trigger this statutory bar to GMC.[49] Oral testimony under oath, even if given in a non-adversarial interview, such as in an interview with the asylum office or naturalization unit, may qualify to bar an applicant from establishing GMC if it was given to obtain an immigration benefit. Voluntary and timely retraction of the false testimony will make this bar inapplicable. The retraction, however, must be voluntary and without delay.[50]

Confined to a Penal Institution for 180 Days or More, §101(f)(7)

INA §101(f)(7) bars a person from establishing GMC if that person, during the relevant statutory period:

> has been confined, as a result of a conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the of-

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[47] *Matter of S K C*, 8 I&N Dec. 185 (BIA 1958).

[48] *See Kungys v. INS*, 485 U.S. 759 (1988); *see also* in naturalization context, 8 CFR §316.10(b)(2)(vi).

[49] *See, e.g., Rodriguez-Gutierrez v. INS*, 59 F.3d 504 (5th Cir. 1995) (false testimony means knowingly giving false testimony with intent to deceive).

[50] *Valadez-Munoz v. Holder*, 623 F.3d 1304 (9th Cir. 2010); *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973).

fense, or offenses, for which he has been confined were committed within or without such period.[51]

To be subject to this bar, an applicant must have been confined:

- For at least 180 days, whether consecutive or not, during the relevant statutory period
- As a result of a single or multiple convictions
- To a penal institution

Presentence confinement can count towards the 180 days only if the applicant was convicted and the judge counts time served. Probation does not constitute confinement to a penal institution. Furthermore, it is irrelevant if the criminal act leading to the conviction occurred outside the relevant statutory period.

Good Moral Character Under Community Standards

An applicant who is not automatically barred under INA §101(f) from demonstrating GMC still must show that he or she is a person of GMC based on community standards. This is known as GMC under the "residual clause," because the last paragraph of INA §101(f) states, "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person was not of good moral character."

GMC under community standards signifies that the conduct is consistent with the conduct of the average citizen in the applicant's community. It does not signify outstanding moral character. If an applicant is not precluded under the statute from demonstrating GMC, the immigration officer or IJ must look at the "totality of the circumstances" in evaluating moral character, balancing the good against the bad. In evaluating moral character, the examiner also can look at conduct outside of the relevant statutory period if it sheds light on whether the person has good GMC. The more serious the past misconduct, the longer the period of intervening good conduct must be to establish GMC.[52] Thus, while a person who engaged in prostitution outside of the relevant statutory period is not precluded from showing GMC, the examiner can still consider this previous conduct in evaluating GMC under the residual clause. However, the examiner also must consider the totality of the circumstances in determining whether the applicant is a person of GMC, taking into account all relevant factors.

False claim of U.S. Citizenship

A false claim to U.S. citizenship, that may trigger inadmissibility under INA § 212(a)(6)(C)(II) and deportability § 237 (a)(3)(D) does not bar an individual from establishing good moral character.[53] While a false claim to citizenship may fall with-

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[51] INA §101(f)(7).

[52] *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991).

[53] *Matter of Guadarrama,* 24 I&N Dec. 625 (BIA 2008)

in the residual clause as conduct establishing a lack of good moral character, such a finding is not mandated by every case involving a false claim.

Note that an exception to inadmissibility and deportability for certain persons was included in section 201(b)(2) of the Child Citizenship Act of 2000.[54] Under that exception, the inadmissibility ground does not apply if each natural or adoptive parent of the alien is or was a U.S. citizen, by birth or naturalization, the alien permanently resided in the United States prior to reaching age 16, and the alien reasonably believed at the time of making the representation that he or she was a citizen.[55] The exception applies to representations made on or after September 30, 1996.[56]

Regulatory factors in the naturalization context

The naturalization regulations at 8 CFR §316.10(b)(3) list certain situations in addition to those listed in INA §101(f) that will preclude a finding of GMC unless the applicant can demonstrate extenuating circumstances. These include that the applicant:

- Willfully failed or refused to support dependents
- Had an extramarital affair that tended to destroy an existing marriage
- Committed unlawful acts that are not a statutory bar but that reflect adversely on the applicant's moral character

Arguably, the USCIS cannot add to the statutory categories, and thus, these grounds should be automatic bars to establishing GMC. Rather, USCIS must weigh all relevant factors.

These regulations regarding GMC and the residual clause have been in the context of naturalization and, to a more limited extent, VAWA. Similar regulations have not been developed in the context of NACARA §203, cancellation of removal, or suspension of deportation. Nonetheless, these regulations and interpretations may be of persuasive authority to USCIS and IJs in determining GMC in other contexts.

Willful Failure to Support Dependents

The current Form N-400, Application for Naturalization, requests detailed information regarding the names, birthdates, and addresses of all sons and daughters, and asks whether the applicant has ever failed to support dependents or to pay alimony. Local naturalization units are likely to examine whether the applicant had a minor child during the relevant statutory period and whether the applicant provided support for that child. Failure to support dependents should not trigger this ground, however, unless the failure is willful. For example, if the custodial parent never sought child support and if the child is otherwise well-provided for, the ground should not apply. USCIS may request, however, that the applicant provide an affidavit from the custo-

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[54] Pub. L. No. 106-395, §201(b)(2), 114 Stat. 1631, 1634.

[55] INA §212(a)(6)(C)(ii)(II).

[56] Pub. L. No. 106-395, §201(b)(3), 114 Stat. 1631, 1634.

dial parent indicating that the applicant did not willfully fail or refuse to support dependents during the relevant statutory period. If it is not possible to provide this information from the custodial spouse, the applicant should be able to demonstrate why such a statement is unavailable.

Probation, parole, or suspended sentence 8 CFR §316.10(c)(1)

Having been on probation, parole, or suspended sentence during all or part of the relevant statutory period will not preclude a person from establishing GMC. Such probation, parole, or suspended sentence, however, may be considered in evaluating GMC. USCIS will not grant a naturalization application until after the probation, parole, or suspended sentence has been completed.

Selective Service

Legacy INS took the position in the naturalization context that if an applicant willfully fails to register with the Selective Service when required to do so within the statutory period for showing GMC, the applicant will be found to lack GMC. USCIS took the same position for many years, but now analyzes this issue with relationship to the requirement of attachment to the U.S. Constitution. [57]A willful failure to register during the statutory period is still significant however; it will lead to the denial of a naturalization application. An applicant for naturalization between the ages of 26 and 31 will also be denied for failure to register unless he can show that the failure to register was not knowing or willful. After age 31, naturalization applicants should not be affected by this issue because any failure to register would be outside the statutory period[58].

Failure to Pay Income Taxes

Income tax fraud or simply a failure to pay income taxes is an unlawful act that reflects negatively on moral character.[59] Some IJs look closely at income tax issues and regularly look at a failure to pay income taxes as an indication of a lack of GMC. Some USCIS naturalization offices seem to consider a failure to file income taxes as a bar to establishing GMC.

Implications of GMC Finding for Various Forms of Relief

Chapter 6 discusses the various forms of relief from removal for persons with criminal convictions. This section briefly summarizes the contexts in which the GMC standard arises.

Naturalization

As discussed above, naturalization applicants must establish that they were persons of GMC during the relevant statutory period. Persons barred from establishing GMC

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[57] USCIS Policy Manual, Volume 12, *Citizenship and Naturalization*, Part D, Chapter 7, Section B

[58] *Id*

[59] *See Matter of Locicero*, 11 I&N Dec. 805 (1966).

during the relevant statutory period should postpone applying for naturalization until the disqualifying act is outside of that period. A naturalization applicant who is found to lack GMC because he or she committed an act during the statutory period that bars an applicant from demonstrating GMC always has the option of reapplying. However, USCIS may consider the previous offense under the residual clause, even if the applicant is no longer automatically barred from showing GMC. The more serious the offense, the more time must have passed before applying for naturalization.

As stated repeatedly throughout this chapter, some LPRs are eligible to naturalize, but are still subject to the grounds of deportability. Applying for naturalization is likely to trigger the discovery of the deportability ground and could therefore result in the naturalization applicant being placed into removal proceedings. Thus, for example, even an applicant with an aggravated felony conviction before November 29, 1990, should be very wary of applying for naturalization. Although he or she is not barred from establishing GMC and is thus eligible for naturalization, he or she is also deportable under INA §237.

Revised USCIS guidance on prosecutorial discretion discusses the procedures to be followed in cases where a naturalization application is filed by an applicant who is not barred from showing good moral character but is also deportable[60]. This would include, for example, applicants convicted of aggravated felonies prior to November 29, 1990 and applicants convicted of deportable offenses outside the GMC period. In such situations, the immigration officer must make a written recommendation on the issuance of an NTA, based on review of the totality of the circumstances, including other criminal conduct, rehabilitation, immigration history, and contribution to the community. The recommendation is then forwarded to the NTA Review Panel for the particular Field Office where the application is pending, for a panel determination on NTA issuance. If an NTA is issued, the N-400 is placed on hold until proceedings are concluded. If the Review Panel declines to issue an NTA, the N-400 may be adjudicated.

This policy does not apply to N-400 applicants with criminal convictions deemed to be "egregious public safety" cases; per the guidance, such cases must be denied and referred to ICE to determine issuance of an NTA. Egregious public safety offenses include several aggravated felony offenses as defined at INA § 101(a)(43)(A), (C), (E), (F), (H), (I), (K)(iii) and (N) as well as human rights violators, known or suspected gang members, and persons re-entering the U.S. after a removal order subsequent to a felony conviction, where an I-212 application for re-entry has not been approved[61].

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[60] USCIS Policy Memorandum, November 7, 2011 *Revised Guidance for the Referral of Cases and Issuance of NTAs in Cases Involving Inadmissible and Removable Aliens*

[61] *Id* at p. 4

In view of the risk of removal proceedings, applicants who qualify for naturalization but who are also potentially deportable should not apply for naturalization unless they are willing to risk removal and they have a strong case for relief or termination in immigration court.

Termination of Proceedings

An LPR in proceedings who otherwise qualifies for naturalization cannot have his or her application considered unless the immigration judge terminates proceedings. Under 8 CFR §1239.2(f), the IJ has authority to terminate removal proceedings to allow an applicant to proceed to a final hearing on a naturalization application, where the respondent demonstrates prima facie eligibility for naturalization and exceptionally appealing or humanitarian factors. Obtaining termination of proceedings, however, has been made more difficult as a result of the BIA's decision in *Matter of Acosta Hidalgo*,[62] which held that an IJ cannot terminate for naturalization unless there is an affirmative communication from the Department of Homeland Security (DHS) of the respondent's prima facie eligibility to naturalize[63] .

Administrative and Judicial Review

If USCIS denies the applicant's naturalization application, the applicant may file a request for administrative review within 30 days of the USCIS denial on Form N-336. Administrative review is basically a second bite at the apple before a USCIS examiner of equal or higher rank than the original hearing officer. It also is a prerequisite to seeking review in federal court. If the administrative review also is denied, the applicant may seek de novo review of the USCIS denial in district court.[64] The petition for review must be filed in district court in the district in which the applicant resides within 120 days of the USCIS denial of administrative review. The review is de novo, meaning that the court must make its own findings of fact and conclusions of law, and must conduct a hearing on the application at the request of the petitioner.[65]

In short, establishing GMC continues to be one of the major hurdles faced by naturalization applicants. Naturalization applicants with criminal pasts also face the danger of being found deportable and placed into removal proceedings, even if they are not barred from demonstrating GMC. Many individuals currently are in removal proceedings because they failed to obtain proper legal advice before applying for

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[62] 24 I&N Dec. 103 (BIA 2007). Several courts of appeals have agreed: *Shewchun v Holder*, 658 F. 3d 557 (6th Cir. 2011); Robertson-Dewar v Holder, 646 F.3d 226 (5th Cir. 2011); *Zegrean v. AG*, 602 F.3d 1273 (3d Cir. 2010); *Barnes v. Holder*, 625 F.3d 801 (4th Cir. 2010); *Ogunfuye v. Holder*, 610 F.3d 303 (5th Cir. 2010); *Perriello v Napolitano*, 579 F.3d 135 (2nd Cir. 2009); *Hernandez de Anderson v Gonzales*, 497 F3d 927 (9th Cir. 2007); *But see Gonzalez v Secretary of DHS*, 678 F.3d 254 (3rd Cir. 2012)

[63] *See Chapter 6 for more detailed discussion of termination of proceedings for naturalization*

[64] *See* INA §310(c).

[65] *Id.*

naturalization. It is imperative that representatives carefully assess applicants' criminal histories before assisting them in filing the N-400.

VAWA Applicants

VAWA self-petitioners and applicants for VAWA suspension or cancellation must demonstrate that they are persons of GMC. Although INA §101(f) provides that certain persons are precluded from establishing GMC, statutory changes enacted in 2000 eased the requirements for self-petitioners who could show a connection between the abuse they had suffered and such acts or convictions. INA §204(a)(1)(C) now provides that, notwithstanding INA §101(f), if an offense would be waivable for purposes of determining the self-petitioner's admissibility under INA §212(a) or deportability under INA §237(a), USCIS may find the self-petitioner to be of GMC if the self-petitioner can demonstrate the requisite connection between the act or conviction and the battery or extreme cruelty.[66]

In a memorandum dated January 19, 2005, USCIS gave guidance for determining good moral character despite a bar.[67] In regard to the first requirement, the memorandum provides that the adjudicator does not need to determine whether a waiver would be granted, but only whether one would be available for filing at the time the adjustment of status application or visa application is filed. In regard to the second requirement, the evidence must establish that the battering or extreme cruelty the self-petitioner experienced compelled or coerced the self-petitioner to commit the act or crime. In other words, the evidence should establish that the self-petitioner would not have committed the act or crime in the absence of the battering or extreme cruelty. In making this determination of connection, the adjudicator officer should consider "the full history of the domestic violence in the case, including the need to escape an abusive relationship."[68] Finally, even if both requirements are met, the adjudicator must determine whether to exercise discretion favorably.

The memorandum makes special reference to criminal acts or convictions. For acts or convictions that involve a violent or dangerous crime, the memo instructs USCIS officers to consult 8 CFR §212.7(d). That provision states that discretion generally should not be exercised favorably in cases involving violent or dangerous crimes, except in extraordinary circumstances. Examples of such extraordinary circumstances include ones involving national security or foreign policy considerations, or where denial of the waiver would result in exceptional and extremely unusual hardship. In regard to aggravated felonies, if the adjudicator determines that the act or conviction is an aggravated felony as defined in INA §101(a)(43), the adjudicator should refer the case for issuance of a notice to appear for removal proceedings.

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[66] *See* USCIS Memorandum, W. Yates, "Determinations of Good Moral Character in VAWA-Based Self-Petitions" (Jan. 19, 2005), *published on* AILA InfoNet at Doc. No. 05012561 (*posted* Jan. 25, 2005).

[67] USCIS Memorandum, W. Yates, "Determinations of Good Moral Character in VAWA-Based Self-Petitions" (Jan. 19, 2005), *published on* AILA InfoNet at Doc. No. 05012561 (*posted* Jan. 25, 2005).

[68] *Id.*

In addition to demonstrating the absence of a statutory bar to GMC, the self-petitioner must provide sufficient information to allow USCIS to conclude that she is a person of GMC. USCIS has established a three-year good moral character test for self-petitioners. That is, the self-petitioner must submit police clearance letters for any place where the applicant has lived for six months or more during the three years preceding the application[69]. Similarly, applicants for VAWA cancellation or suspension must demonstrate GMC during the three years preceding their application and GMC at the time suspension or cancellation is granted. But note that, pursuant to the BIA's decision in *Matter of Ortega-Cabrera*,[70] there is a good argument that this three-year period actually should be calculated backwards from the date when the cancellation or suspension application is finally resolved by the IJ or the BIA. If the applicant has a criminal charge or conviction, she must submit certain court documents, including the indictment or information and the disposition of the case. A USCIS examiner or IJ can find that an applicant is statutorily eligible, but still make a discretionary determination that the applicant has not demonstrated GMC.

In addition to the police clearance letters, the applicant's personal statement is key to establishing GMC. If a self-petitioner has committed or been charged with one of the offenses described above, it is critical that she explain the circumstances in her personal statement, demonstrating the connection between the offense in question and the abuse. When there is no statutory bar, the examiner must consider all countervailing factors, including positive equities and the applicant's situation as a victim of domestic violence. In straightforward cases, the police clearance letter and the applicant's own statement should be enough. In more complicated cases in which there are previous convictions, criminal charges, or other negative indicators, the self-petitioner should include affidavits or letters from friends, neighbors, churches, and community organizations that attest to her GMC.

In the context of VAWA suspension or VAWA cancellation, previous arrests or convictions may make it more difficult to establish GMC, because the same waivers available to adjustment applicants are not available to VAWA suspension or cancellation applicants. VAWA 2000, however, did create a limited waiver under INA §237(a)(7) for certain domestic violence victims deportable for having a conviction of domestic violence, stalking, or violation of a protective order who could show that they were not the primary perpetrators of violence, and that there was some relationship between their conviction and their having been abused. Thus, VAWA applicants in proceedings who have a conviction for a CMT may be eligible to establish GMC if they are eligible for a waiver under INA §237(a)(7). VAWA 2005[71] clarified that this waiver is available to abused spouses and children in cancellation of removal and adjustment of status cases.

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[69] *Self-petitioners may also submit state security checks or the results of an FBI fingerprint check to meet this requirement*

[70] *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005).

[71] Pub. L. No. 109-162, 119 Stat. 2960 (2006).

Suspension of Deportation and Cancellation of Removal

The other principal area in which the GMC standard continues to apply is suspension of deportation and cancellation of removal. Persons placed into proceedings prior to April 1, 1997, who were continuously physically present in the United States for at least seven years and can demonstrate extreme hardship may be eligible for suspension of deportation.[72] Persons placed into proceedings after that date who were continuously physically present for at least 10 years may be eligible for cancellation of removal if they can demonstrate exceptional and extremely unusual hardship to a qualifying relative.[73] Both sets of applicants must demonstrate that they were persons of GMC during the relevant statutory period, and that they are of GMC at the time residency is granted. For both suspension and non-LPR cancellation applicants, these seven– and ten-year periods of GMC are calculated backward from the date the application is finally resolved by the IJ or the BIA.[74]

Similarly, Salvadorans, Guatemalans, and certain Eastern Europeans may be eligible for seven-year suspension of deportation or cancellation of removal under §203 of NACARA. The applicable form of relief depends on whether they were placed into proceedings prior to or after April 1, 1997. They also must demonstrate GMC during the relevant statutory period. Certain NACARA applicants who have committed certain offenses that would make them inadmissible under INA §212(a)(2) or deportable under INA §237(a)(2) may be eligible for relief under NACARA, but they must demonstrate 10 years of continuous physical presence and that they have been persons of GMC during this entire 10-year period. In light of the fact that the GMC grounds incorporate several of the grounds of inadmissibility, if the disqualifying offense was committed within the 10-year period, it will preclude the applicant from demonstrating GMC also. Thus, eligibility for NACARA §203 for persons with prior convictions that fall within the grounds of inadmissibility will benefit only those individuals whose offenses occurred outside the 10-year statutory period.

Voluntary Departure

A grant of voluntary departure from an IJ gives a noncitizen who has been found removable a period of time within which to leave the country before a removal order against him or her goes into effect. With shorter maximum departure times and no work authorization, voluntary departure in removal proceedings has fewer benefits than this form of relief had in deportation proceedings. However, at least in the case of noncitizens applying for voluntary departure before a hearing—either prior to proceedings or, if in proceedings, at the master calendar hearing—eligibility for this relief has been ex-

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[72] Former INA §244(a).

[73] INA §240A(b).

[74] *See Duron-Ortiz v Holder,698 F.3d 523(7th Cir. 2012);Matter of Castro*, 19 I&N Dec. 692 (BIA 1988); *Matter of Ortega-Cabrera*, 23 I&N Dec. 93 (BIA 2005).

panded by eliminating any requirement of a showing of GMC.[75] Note, however, that voluntary departure is a discretionary form of relief, and the adjudicator may properly consider evidence of the respondent's "bad character" in deciding whether to grant voluntary departure at this stage in the proceedings[76]

The voluntary departure grant at this juncture is limited to a period of 120 days, and a bond may be required to ensure departure but is not statutorily required.[77] An individual given voluntary departure by the IJ prior to the completion of removal proceedings must present ICE with a passport for inspection within 60 days of the grant of voluntary departure, or the voluntary departure order will be vacated automatically and a removal order will be entered.[78]

At the conclusion of removal proceedings, further restrictions apply. To obtain this relief, an applicant must establish that he or she:

- Has been physically present in the United States for a period of at least one year prior to the initiation of removal proceedings
- Is and has been a person of GMC for at least five years immediately preceding the application for voluntary departure
- Is not deportable under the aggravated felony or terrorism grounds
- Has established by clear and convincing evidence that he or she has the means to depart the United States and intends to do so.[79]

Voluntary departure at the conclusion of removal proceedings may be granted for a period not to exceed 60 days. The statute requires that the noncitizen post a bond to ensure that he or she complies with the grant of voluntary departure. [80]

Registry

Registry is a method by which noncitizens who have resided continuously in the United States since January 1, 1972, can avoid deportation and gain lawful permanent residence through the creation of a record of admission.[81] The noncitizen may apply directly with the USCIS district director or before the IJ in removal proceedings. Approved registry applications confer lawful permanent resident status on the applicant as of the date the application is granted. To qualify for registry, the noncitizen must satisfy the following requirements:

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[75] *See Matter of Arguelles-Campos*, 22 I&N Dec. 811 (BIA 1999).

[76] *Rojas v Holder*, 704 F.3d 792(9th Cir. 2012) (Immigration Judge may consider respondent's admission of sexual conduct with a minor, although there was no conviction)

[77] INA §240B(a)(2)(A), (a)(3).

[78] 8 CFR §1240.26(b)(3).

[79] INA §240B(b)(1).

[80] INA §§240B(b)(2), (3).

[81] INA §249.

- Entered the United States prior to January 1, 1972
- Have had residence in the United States since such entry
- Be a person of GMC
- Not be ineligible for citizenship and not be deportable for terrorist activities

There is no fixed period for which the applicant must demonstrate GMC, but generally he or she should be of GMC at the time of the application and for a reasonable period of time preceding the application.[82] The burden of proof is on the registry applicant to establish GMC. While occasional lapses may not bar a finding of GMC, the more serious any prior misconduct is, the longer the intervening period of good behavior must be before the applicant can meet his or her burden of establishing GMC.

[82] *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991).