

## Waivers In Removal Proceedings\*

- Scott Bratton, Cleveland, OH (DL)
- Farhad Sethna, Cuyahoga Falls, OH
- Sarah Owings, Atlanta, GA

\*Originally presented at AILA-Ohio annual conference, Oct 6, 2017; modified for class use by Farhad Sethna, Esq.

---

---

---

---

---

---

---

---

## Grounds of Inadmissibility/Removability

- INA Section 212 - **Inadmissibility** may be determined at a port of entry, or once an alien is inside of the U.S. and seeking to adjust their status.
- INA Section 237 - **Removability** is when an alien has already been admitted to the U.S. in some status, but has become ineligible to maintain that status.

---

---

---

---

---

---

---

---

## What's a Waiver?

- Certain Grounds of Inadmissibility/Removability may be forgiven
- Applications for waivers are available in removal proceedings, before USCIS, or before the Department of State.

---

---

---

---

---

---

---

---

## Slide 2

---

- S1** So Sarah, what can you and scott tell us about how waivers can be applied?  
SoccerDad, 10/3/2017

**Crimes**

- The DHS may establish inadmissibility under 212(a)(2) in one of two ways – determining that the alien is the subject of a 'conviction' as defined in INA 101(a)(48)(A) OR if the alien 'admits to having committed acts constituting the essential elements of the crime.'
- Section 212(h) waives **Inadmissibility** for:
  - a crime involving moral turpitude, INA 212(a)(2)(A)(i)(I),
  - multiple criminal convictions, . INA 212(a)(2)(B),
  - prostitution or commercialized vice, INA 212(a)(2)(D),
  - a single conviction for simple possession of 30 grams or less of marijuana 212(a)(2)(A)(i)(I).
  - serious criminal activity committed by an individual who asserts immunity from prosecution INA INA 212 (a)(2)(E).

---

---

---

---

---

---

---

---

---

---

**Section 212(h) waiver**

- Can also be used to waive aggravated felonies
- Matter of J-H-J-, 26 I&N 563 (BIA, 2015):  
 "An alien who *adjusted status* in the United States, and who *has not entered as a lawful permanent resident*, is not barred from establishing eligibility for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) (2012), *as a result of an aggravated felony conviction*. *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), and *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), withdrawn.

---

---

---

---

---

---

---

---

---

---

**Crime Waiver 212(h)(1)(B)**

- Must show extreme hardship to a qualifying relative
- Qualifying relatives under section 212(h)(1)(B) are parents, spouses, and children who are United States citizens or LPRs.
- Also must show that the favorable factors (rehabilitation, stability, positive contributions to society etc.) outweigh the negative factors.
- The standard that is used is found in *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), however, if the conviction at issue is one of violence, then a heightened standard of Exceptional and Extremely Unusual Hardship is applied. See *Matter of Jean* 23 I&N Dec. 373 (A.G. 2002).
- Filed using Form I-601

---

---

---

---

---

---

---

---

---

---

#### Slide 4

---

- S2** what are some of the waivers available - for instance, lets start with waivers for a person's criminal inadmissibility.  
SoccerDad, 10/3/2017

#### Slide 6

---

- S3** What are some of the requirements to qualify for a waiver under 212(h)?  
SoccerDad, 10/3/2017

## Crime Waiver 212(h)(1(A) – Remember the “Ors”!!!!

- If alien is inadmissible only under (D)(i) or (D)(ii) [Prostitution] **OR**
- if the offense occurred more than 15 years prior to the date of admission,
- **AND** you have proof that the alien is rehabilitated and their admission would not be contrary to the national welfare, safety, or security of the United States.
- No Qualifying Relative Necessary!

---

---

---

---

---

---

---

---

## Special Circumstances

- ▶ Remember that being granted VAWA status can give a respondent special waivers and exemptions from all but the most egregious violations of the law and illegal / undocumented status
- ▶ File form I-360 with USCIS, VSC for VAWA application

---

---

---

---

---

---

---

---

## Fraud and Misrepresentation

- INA § 212 (a)(6)(C)(i) makes inadmissible anyone “who, by fraud or willfully misrepresenting a material fact, seeks to procure . . . a visa, other documentation, or admission into the United States or other benefit provided under [the INA].”
- This is generally interpreted broadly by the government.

---

---

---

---

---

---

---

---

## Slide 7

---

- S4** Does one always need a "qualifying relative?"  
SoccerDad, 10/3/2017
- S5** Sarah - what form is this waiver filed on, and where is it filed?  
SoccerDad, 10/3/2017

**Fraud Waiver**

- INA § 212(j) waives Fraud and Misrepresentation if the foreign national is the spouse, son, or daughter of a United States citizen or lawful permanent resident and can show extreme hardship to the qualifying relative.
- Children are not qualifying relatives!
- Same standard as INA § 212(h)
- Form I-601

---

---

---

---

---

---

---

---

**Unauthorized Employment**

- Aliens other than immediate relatives as defined in INA 201(b) or a special immigrant under 101(a)(27)(H)-(K) – are not allowed to accept unauthorized employment or is out of status, or failed to maintain lawful status are ineligible to AOS under 245(a)
- An alien who is eligible to receive an immigrant visa under paragraphs (1), (2), or (3) of section 203(b) (priority workers, advanced degrees, or skilled workers)
- There is no form for this waiver – explain in cover letter

---

---

---

---

---

---

---

---

**245(k) Waiver for Unauthorized Employment**

- Limited to certain employment based categories of adjustment
- Must be present in the US pursuant to a lawful admission when AOS filed
- Subsequent to lawful admission must not have:
  - Failed to maintain lawful status, OR
  - Engaged in unauthorized employment, OR
  - Or otherwise violated the terms of the alien's admission for more than 180 days
- A way for those with inadvertent immigration violations to adjust status

---

---

---

---

---

---

---

---

## Slide 10

---

**S6** What is the standard for extreme hardship?

SoccerDad, 10/3/2017

**S7** Where is this waiver filed?

SoccerDad, 10/3/2017

## Slide 12

---

**S8** Sarah - with the new focus on employment-based AOS, if an applicant does have this problem, do you suggest he or she have this waiver ready to file at the AOS interview or possibly even with the I-485?

SoccerDad, 10/3/2017

## Alien Smuggling

- Noncitizens who smuggle aliens into the United States are inadmissible under INA § 212(a)(6)(E)(i).
- This section states that an individual is inadmissible if he or she brings aliens into the country or encourages, induces, assists or aids the entry of individuals into the United States.
- The government is not even required to prove that the smuggling was for financial gain. However, to be found inadmissible, the individual must be aware of facts that would have caused a reasonable person in like circumstances to deduce that participation may result in the illegal entry of an alien into the United States.
- Sharing water at the border – example at recent seminar

---

---

---

---

---

---

---

---

## Alien Smuggling Waiver

- Section 212(d)(11) provides a LIMITED discretionary waiver of this ground of inadmissibility.
- Lawful permanent residents and other family-based immigrants who smuggle a spouse, parent, son, or daughter into the United States are eligible for the waiver.
- The waiver does not require hardship. Instead, the applicant must appeal to the government's discretion and argue that the applicant is deserving of the waiver "for humanitarian purposes, to assure family unity or when it is otherwise in the public interest." INA § 212(d)(11).
- To be eligible, the required family relationship must have existed at the time of the smuggling, not the time of application.

---

---

---

---

---

---

---

---

## INA § 237(a)(1)(H) Waiver

- ▶ Waiver for certain misrepresentations where the applicant was inadmissible at the time of admission under INA § 212(a)(6)(C)(i).
- ▶ Available where the inadmissibility at the time of admission was due to fraud or a material misrepresentation, whether willful or innocent. *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006).
- ▶ Must have a USC or LPR parent, spouse, or child.
- ▶ Must have been in possession of an immigrant visa or equivalent document and otherwise admissible to the U.S. at the time of such admission except for the grounds of inadmissibility set forth in INA § 212(a)(5)(A) and (7)(A).
- ▶ Can be used by VAWA self-petitioners or LPR's
- ▶ What are the benefits of this waiver? It restores LPR status

---

---

---

---

---

---

---

---

## Slide 15

---

- S9** What are some of the common misrepresentations that you have encountered which can be addressed using this waiver?  
SoccerDad, 10/3/2017
- S14** What is a 237(a)(1)(H) waiver and what are the statutory requirements?  
SoccerDad, 10/5/2017
- S15** What are the benefits of the waiver?  
SoccerDad, 10/5/2017

316  
316

## INA § 237(a)(1)(H) Waiver

- ▶ Adjustment of status constitutes an "admission" for purposes of § 237(a)(1)(H) eligibility. *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015).
- ▶ Removability under INA § 237(a)(1)(D) (termination of conditional residence) – *Vasquez v. Holder*, 602 F.3d 1003 (9<sup>th</sup> Cir. 2010)
- ▶ The waiver cannot be used to waive removability under § 212(a)(2)(A)(i) (conviction of a CIMT) even if the conviction is based on the fraud. *Matter of Iima*, 26 I&N Dec. 839 (BIA 2016).
- ▶ No showing of hardship is required.
- ▶ Factors to consider are set forth in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998).
- ▶ No Form – just set forth to the Immigration Court a notice of intent to file the waiver
- ▶ Purely discretionary waiver – depends on the Immigration Judge

---

---

---

---

---

---

---

---

---

---

317  
317

## INA § 212(c)

- ▶ "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . ."
- ▶ Repealed and replaced with cancellation of removal for LPRs (INA § 240A(a)).
- ▶ The effective date does not bar eligibility for those with certain pre-IIIRIRA pleas or convictions. *INS v. St. Cyr*, 533 U.S. 289 (2001).

---

---

---

---

---

---

---

---

---

---

318  
318

## INA § 212(c)

- ▶ Applicable to those in deportation proceedings commenced prior to April 24, 1996.
- ▶ INA § 212(c) may also apply to those in removal proceedings.
  - ▶ *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014): Sets forth § 212(c) eligibility requirements for pleas or convictions entered before 4/24/96 and those entered between 4/24/96 and 4/1/97.
- ▶ Statutory counterpart rule - *Judulang v. Holder*, 132 S.Ct 476 (2011)
- ▶ Discretionary Standard – *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978)
- ▶ Form I-191

---

---

---

---

---

---

---

---

---

---

## Slide 16

---

**S10** If there's no form, how does one apply for this waiver? Obviously if there is no form, there is also no fee, correct?

SoccerDad, 10/3/2017

**S16** What are the factors to consider for these waivers?

SoccerDad, 10/5/2017

## Slide 17

---

**S11** Are you still seeing cases which use this old, time tested waiver?

SoccerDad, 10/3/2017

**S17** What is a 212(c) waiver and does it still exist?

SoccerDad, 10/5/2017

## Slide 18

---

**S18** What factors should an IJ consider in granting the waiver?

SoccerDad, 10/5/2017

**S19** What factors should an IJ consider in granting the waiver?

SoccerDad, 10/5/2017

**I-601A/INA § 212(a)(9)(B)**

- ▶ Apply with USCIS to waive unlawful presence (INA § 212(a)(9)(B))
- ▶ Extreme hardship standard
- ▶ For those in removal proceedings, the applicant must have his or her case administratively closed to apply.
- ▶ Unilateral motion to administratively close – *Matter of Avelisyan*, 25 I&N Dec. 688 (BIA 2012)
- ▶ Termination of proceedings vs. voluntary departure upon approval

---

---

---

---

---

---

---

---

**INA § 212(k)**

"Attorney General's discretion to admit otherwise inadmissible aliens who possess immigrant visas – Any alien, inadmissible from the United States under paragraph (5)(A) or (8)(A)(i) of subsection (a), who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission."

---

---

---

---

---

---

---

---

**INA § 212(k)**

- ▶ What are the benefits of a waiver under INA § 212(k)?

1. Does not require a qualifying relative; and
2. Can be used in both removal and USCIS proceedings

---

---

---

---

---

---

---

---

## Slide 19

---

**S12** when we were preparing for this panel, Scott, you mentioned how some TA's were balking at consenting to Admin Close cases; what has been your experience with IJ's being receptive to such unilateral motions to admin close?

SoccerDad, 10/3/2017

**S20** What have you seen with respect to re-calendaring cases that were administratively closed for 601As?

SoccerDad, 10/5/2017

## Slide 20

---

**S13** What exactly is a 212(k) waiver applied? What is the process, and what form is used?

SoccerDad, 10/3/2017

**INA § 209(c)**

- ▶ Applies to asylee and refugee adjustments
- ▶ Waives most grounds of inadmissibility, including fraud and criminal grounds.
- ▶ The applicant must show that the waiver should be granted for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.
- ▶ Once a foreign national has adjusted status as a refugee or asylee under § 209, he/she cannot readjust under that section with a § 209(c) waiver. *Matter of C-H-J-*, 26 I&N Dec. 284 (BIA 2014); *Matter of N-A-I-*, 27 I&N Dec. 72 (BIA 2017).
- ▶ Form I-602
- ▶ CANNOT use if asylee / refugee has already adjusted status

---

---

---

---

---

---

---

---

**Wrapping up: Other waivers / Defenses to Removal**

- ▶ Cancellation of Removal – for LPR's and non-LPR's
- ▶ Adjustment of Status
- ▶ Consular processing using I-601 or I-601A processes
- ▶ Immigrant visa petition – either employment or family based

NOTE: The foregoing was NOT an exhaustive list; it is simply intended as a guide to the issues facing individuals in removal proceedings or USCIS processes as to possible strategies in case of a disabling criminal or other ground of either removal or inadmissibility.

---

---

---

---

---

---

---

---

**S21** When is a 209(c) waiver used and how does it work?

SoccerDad, 10/5/2017