WAIVERS:
Tips for a Successful I-601 Application

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In an ever increasing culture of "no," Government officials continue to apply grounds of inadmissibility or deportability more stringently to the detriment of foreign nationals thus requiring the filing of a waiver of inadmissibility or deportability. They also seem to have lowered their standards on what conduct or facts trigger these bars. In such an environment, it is crucial for the practitioner to first understand the grounds of inadmissibility and deportability and when they are triggered so as to provide a solid structural and strategic foundation in order to build a successful waiver application. Practitioners must next creatively dissect each waiver case and present it in a manner that distinguishes it from other cases and thus captures the adjudicator's attention. This article will first provide a brief overview regarding the importance of identifying whether your client needs a waiver, what type of waiver is needed, and when grounds of inadmissibility and deportability should be contested. Next this article will highlight strategic tips for filing a successful waiver application before the Immigration Judge or USCIS.

Does your client even need a waiver?
Don't automatically concede inadmissibility or deportability.

There are numerous grounds of inadmissibility and deportability, however in the authors' experience three or four of those comprise a substantial majority of cases. These common grounds are unlawful presence, fraud, crimes, and to a lesser extent, health related grounds. It is beyond the scope of this article to address the grounds of inadmissibility in details[1]. This is only a reminder to practitioners to never concede a ground of inadmissibility without first conducting a thorough analysis. A review of AAO unpublished decisions shows that many waiver appeals are remanded back to the district office with a finding that the ground of inadmissibility was not triggered in the first place. Since the common grounds of inadmissibility mostly require extreme hardship as the basic standard, this article will focus mainly on that standard and procedural and practice related issues.

A Waiver is Necessary – How to Package a Successful Waiver Application

Government officials have provided practitioners with various practice pointers through various conferences and unofficial pronouncements. Although these pointers are not to be considered authority and cannot be cited in legal briefs, they are worth mentioning as they assist in preparation of professional and successful waiver applications.

Technical Matters

[1] For a more thorough analysis of the common grounds of inadmissibility see for example Lee O'Connor, Determining Unlawful Presence for the Purposes of the Three-Year, Ten-Year, and Permanent Bars, Inside Immigration, October 2010; found at http://www.ailapubs.org/unlawfulpres.html

Government officials have suggested that many attorneys are not complying with the basic procedural requirements of waiver filing. Such recommendations included[2]:

- *Be sure the G-28 is signed by both attorney and applicant.*
- *Provide English translations of any documents not in English.*
- *Confirm that the hardship statement is from the Qualifying Relative, not the Applicant.*

Statements from both the applicant and the qualifying relative may be submitted, but practitioners must ensure to include one from the qualifying relative. For more on the technical requirements, see the I-601 manual published by USCIS, dated April 2009 and found on the USCIS website[3].

Common Errors

The USCIS adjudicators were polled and asked to describe what they felt were the most common errors made by attorneys in preparing I-601s.

- *Failure to provide a statement to explain the evidence or failure to provide evidence to support a statement.* These are two sides of the same coin. A successful waiver packet has both evidence and a statement, brief, or letter describing the hardships and how the evidence proves the hardship. Including either the evidence or the statement is generally insufficient. Even the most detailed evidence will not have the intended effect unless explained in a succinct and cohesive manner tying all evidence and factors to the overall hardship the qualifying relative will suffer. Practitioners need to be aware of the time adjudicators have to review a waiver packet. A well written brief tying all the evidence together will have much more effect than just submitting a lot of unexplained evidence. The intent is to lay down the case in the brief so that the officer does not have to spend too much time deciphering the evidence submitted.
- *Failure to link the hardship to the qualifying relative and to the waiver.* A leading expert in the field of waivers has noted in the past that this is one of the chief complaints of the AAO[4] in its decisions. It is not enough to simply state that there is a problem. The brief, statement, or letter must explain how the problem affects the qualifying relative and how the problem is made worse by the alien's absence from the United States or the qualifying relative's presence in the alien's country. This becomes even more important when the hardship affects a non-qualifying relative more. If hardship to non-qualifying relatives is documented, it must be shown how that affects the qualifying relative.
- *Failure to argue both why the qualifying relative can't move abroad AND why the qualifying relative can't remain in the US without the alien.* This is another common error noted by the AAO[5]. Proving either why the qualifying relative can't move abroad OR why the qualifying relative can't remain in the US without the alien is only half the case; both sides must be proven. Why does hardship result when the qualifying relative

[2] Statements in italics are taken verbatim from government sources.
[3] http://www.uscis.gov/files/article/i601_immigrant_waivers_8jun09.pdf
[4] Laurel Scott with contributions from John Ovink, "How to Make the AAO Happy: Avoiding Mistakes When Appealing an I-601 Denial," Immigration and Nationality Law Handbook (AILA 2010-11 Ed.).
[5] Id

and the applicant are in separate countries? Why is it equally hard on the qualifying relative when he or she moves abroad to be with the alien?

- *Failure to make any hardship claims.* The adjudicators mentioned that they see many applications that only prove the validity of the relationship and completely fail to make any hardship claims. In the humble opinion of the authors, failure to make hardship arguments is grounds for a bar complaint and a malpractice suit. The validity of the relationship has already been established in most cases and the clear issue is hardship.

Suggestions for Faster Adjudication

- *Include a table of contents and put page numbers throughout the packet.* Adjudicators warned that sometimes packets get reorganized by the consulate or mail processing clerks, so pagination helps them navigate the packet and ensure that nothing has been misplaced in transit. Pagination can be difficult as the final packet has a tendency to change at the last minute, upsetting pagination. One idea may be to try tiered pagination, giving each exhibit a letter and then numbering the pages within the lettered exhibit, e.g. A-1, A-2, B-1, etc. It might also be a wise investment to purchase a Bates stamp and paginate the packet when it is finalized or use pagination through Adobe Acrobat Pro.
- *Organize the packet from most relevant evidence to least.* In past years, adjudicators have stated off the record that they are at liberty to approve the packet as soon as they find a reason to approve. The faster they can find that reason, the faster they can move on to the next packet and speed adjudication for everyone. Providing the best evidence with the most weight first enables faster adjudications for everyone. The order of the evidence should be reflected in the order and flow of the attorney's brief or statement.
- *If there is a lot of documentation, highlight the most relevant parts.* While the adjudicators used the term "highlight," the authors of this article recommend underlining because highlighting does not always photocopy or scan well in black and white. Already CIS is providing electronic copies of files in response to FOIA requests, and in the future, the use of electronic scanning is likely to increase in general for immigration cases.
- *Be judicious about including a lot of irrelevant documentation*. In the authors' opinion adjudicators feel that large packets with copious amounts of irrelevant or unimportant documentation slow down the progress of their work, but the adjudicators don't want to say anything that might discourage applicants from including a document that might be important. Attorneys should use their judgment regarding the relevance of the documentation they include. Adjudicators are not impressed by large packets of fluff. They want material, relevant evidence. Remember that an I-601 appeal to the AAO is a de novo review[6], so new evidence may be submitted on appeal even if it could have been provided previously. There is no need to provide extra evidence on the initial filing in order to preserve an argument for appeal.
- *Provide a summary of the applicant's immigration history.* As the applicant's entire immigration history is relevant to the discretionary portion of the waiver, the adjudicator needs to know what that history is. The adjudicators do have access to the information and can go retrieve it, but for the attorneys to simply provide that information will speed up processing times for everyone.

[6] From "How to Make the AAO Happy", supra.

- *Include all possible arguments for the totality of the circumstances analysis*. The authors of this article find this to be an interesting suggestion from the adjudicators as one of the prior suggestions is to decrease the size of the waiver packet and to not include copious amounts of irrelevant or unimportant documentation. Including a lot of weaker arguments takes attention away from the stronger arguments and may even damage the applicant's credibility if he appears to be complaining about something minor. One possible balance between the adjudicator's suggestion and the concerns previously described is to summarize weaker arguments in a section of your waiver entitled, for example, "Other Concerns". This section could artfully explain that the arguments in that section are believed by the applicant to be lesser arguments, but that they are included for purposes of completeness. Such concerns must still be supported with evidence, but you might want to minimize the effort spent collecting these documents so you and the client can focus on building the case for your stronger arguments.

Remarks about Certain Types of Evidence

- *Country condition information should be specific.* The more specific the report or article can be regarding the particular argument made, the better. For example, an argument showing that the client can't get proper medical treatment in a particular country, provide information on the treatment of that particular condition in that country, not just general information on medical care. Furthermore, and specifically, arguments about safety in Mexico do not carry much weight unless they are relevant to the client's situation, i.e. a client who has already received threats or who has had a family member kidnapped or killed by criminal elements.
- *Medical conditions, symptoms and prognosis should be explained in layman's terms.* Adjudicators stated that they prefer a detailed, comprehensive, easy to understand letter from a doctor over hundreds of pages of medical reports and lab results in medical terminology. The authors believe that ideally you should have a letter from the doctor, an article explaining the condition in layman's terms (e.g. from "MedlinePlus" of the NIH), a selection of medical records, and letters from lay people describing in their own words how the situation is made worse by the alien's absence.
- *Financial arguments must describe income/assets as well as debts/liabilities and must include a detailed written argument or summary, rather than just bills.* The heart of this complaint from adjudicators is that it proves nothing to send them copies of a lot of bills and vaguely state that there is financial hardship.
- *Psychological evaluations should describe in detail ongoing relationships with a mental health professional and/or significant prior treatment.* The adjudicators echoed what the AAO has repeatedly said: evaluations will be given limited weight if they are based on a single visit or brief handful of visits to a mental health professional. The adjudicators went a step further than the AAO to say that evaluations will be given limited weight if it appears that the patient visited the mental health professional for the **sole** purpose of getting an evaluation for the I-601. To be clear, they did not say the reports would be ignored, only that they would be given limited weight. One very useful comment was that if there is some reason why the patient has not had an ongoing relationship with a mental health professional, this reason should be described and possibly supported with evidence. It may also be helpful to request that the mental health professional conduct a home study so that he or she can be more educated about the client's situation. In one

author's opinion this carries more weight than just an office visit, especially if the professional/expert has not had a long standing relationship with the qualifying relative.

Many of the comments from the adjudicators were expected as they reflect statements made by the AAO in their decisions. Some other comments finally substantiate theories presented by attorneys in other articles on waivers. Still other comments were unexpected. By reviewing and digesting the information provided by the adjudicators, we can prepare better waiver packets that are not only more likely to be successful, but that are also easier and faster to adjudicate, allowing the government to speed up their processing times for all applicants.

Practitioners should bear in mind that, especially for foreign filed waivers, the adjudicator reviews I-601 application packets all day long. Therefore some arguments that come up frequently such as financial and emotional hardship become mundane and do not seem that extreme any longer. Because of this, it becomes important to find a unique angle or hook which will make the waiver application stand out from the rest. In other words, treat a waiver application as if you were writing a novel. Develop a main theme to your waiver story, find a unique hook to capture the adjudicator's attention and develop all the factors so that they support that main, unique theme. This is not to say that one cannot meet the hardship standard with only financial or emotional issues, but every element has different degrees. It is the job of the practitioner to find a unique angle or portrayal of these factors to make the application stand out. For example, emotional stress or depression is to be expected by most if not all qualifying relatives, therefore, in and of itself, may not be sufficient to meet the burden. However, documenting the fact that the qualifying relative suffered physical and sexual abuse as a child because of a lack of emotional support from parents will paint the current emotional hardship in a new light that could, in and of itself, meet the extreme hardship standard. In another example, someone who has a history of clinical depression the emotional issues suffered from the separation or a move to a foreign country are not the only ones that will affect that depression. Lack of money, lack of education, career opportunities, availability of psychological health care, etc. are all different factors of extreme hardship that can be painted in such a way so as to make the chronic depression the central theme of the waiver packet. This could be said for many of the other common factors. This is where waivers take an art form. I-601 waivers are fertile ground for good lawyering. Even a seemingly weak I-601 case can be turned into a sure winner with proper investigation of all factors and some work to paint things in the right light.

The most important job of the practitioner in this respect is to investigate and explore all issues of the qualifying relative's life regardless of how unimportant they may seem at first. Step number one is to have a long discussion with the client and explore every area of their life even if it seems irrelevant. Get a full financial picture of the client's and qualifying relative's life, what the income is, what the obligations are, property owned in the US, liabilities etc. Loss of income, loss of business, loss of property, etc, even though not exceptional and unusual in and of themselves will certainly contribute to overall analysis of hardship. A totality of the circumstances is considered.

A history of the client's and qualifying relative's life is also helpful. Many times we are faced with clients who have a violent past or have suffered severe trauma from the loss of a loved one, parental abandonment or downright physical and sexual abuse. That kind of history

makes for a compelling case of hardship. Although sad to admit, there is a lot of hurt in this world and virtually no one has had a perfect, pain free life.

It is the authors' opinion that this investigation or brainstorming with the client must be done by the attorney and not a paralegal. The strategy for each waiver must be developed from scratch by the attorney in consultation with the client. The quality of a waiver will decrease if treated in a pro forma manner where paralegals gather certain common documents and prepare a brief from a generic template. Furthermore, it is the opinion of the authors that a good brief should always be developed from scratch (aside from generic statements not pertaining to the client's situation) as that will have the fullest effect, not only in being relevant to the case, but also to help the attorney's creative juices flow better.

Although the same principles and strategies apply to waivers presented before the Immigration Courts, the presentation of the case is much different than for those waivers filed with USCIS. The major difference is that USCIS waivers are adjudicated solely on paper, where the nature of immigration court decreases the importance of a paper presentation and makes testimony the first priority. Immigration judges are unlikely to have reviewed the entire documentation submitted in support of a waiver. This is especially true if there is voluminous evidence submitted. Unlike the standard of review at the AAO, the BIA only reviews the record created below. No new evidence can be submitted unless it can be shown that it was previously unavailable. Therefore, it becomes important to submit all evidence on all points of hardship to the immigration judge. This is not to say that practitioners should flood the court with irrelevant fluff as that could have an adverse effect in the judge ignoring the good evidence simply because of the sheer volume of the not-so-good evidence. Good judgment should always be exercised in choosing what evidence to include and what not to include, the "kitchen sink" approach is never a good practice.

While evidence is important, the major undertaking in a waiver presented before a judge is testimony. Practitioners should spend a substantial amount of time prepping witnesses for testimony, especially qualifying relatives. USCIS adjudicators do not give much attention to psychological reports created for purposes of the waiver. However, the testimony of a good social worker or therapist can be very persuasive in court, especially if the therapist or social worker has spent considerable time with the client and possibly done a home study or extensive interaction with the qualifying relatives and their surroundings.

There is extreme hardship, and then there is exceptional and extremely unusual hardship. The standard for most common waivers of inadmissibility is extreme hardship. However a client whose only relief is cancellation of removal under INA 240A(b)(1) has to show not just extreme hardship, but a much higher standard than that. The strategy on how to build a good cancellation case is the same as what has been covered previously in this article. The difference is a matter of degree.

There is no definition of "exceptional and extremely unusual hardship." It can take many forms. The common example would be a qualifying relative with a severe medical illness that requires the foreign national's presence in the US and that cannot be treated in a foreign country. However do not limit your outlook only to these rare cases. Sometimes the BIA surprises us

with certain decisions reversing immigration judges on this standard. [7] At the very least, practitioners should evaluate all aspects of the case and not judge the viability of a case simply by the existence or lack of a severely ill relative.

One last word when it comes to waivers in general: they are discretionary decisions. This is lost on a lot of practitioners who focus all their attention on extreme hardship and don't think about the overall equities of the case. Extreme hardship is perhaps the most important element (when required by statute), but not the only one taken into the consideration. Although rare, it is possible that a waiver is denied on discretion even though the extreme hardship standard is met. The weight given to discretionary factors depends on the adjudicator. It is usually unknown who will adjudicate the waiver when it is submitted overseas. However, when dealing with a local officer or immigration judge the idiosyncrasies of the particular adjudicator become important. If unfamiliar with a particular officer or immigration judge, it is imperative to poll local experienced practitioners as to what the particular adjudicator likes to see in a waiver and how much weight is placed on overall discretion.

"Provisional Waivers" and "State-side Processing" Now In Effect

On March 4, 2013, the USCIS begin processing "provisional waivers," allowing immigrants to file a new waiver on Form I-601A, before they leave the United States so they can await the waiver approval while still in the U.S. with their families. Once the waiver is approved, the immigrant must leave the U.S. to attend a visa interview, and obtain the immigrant visa for which his waiver has been preapproved. By reducing the time spent abroad, applicants will now be able to remain in the United States longer and keep families intact.

It is important to note that Form I-601A will apply only for applicants found inadmissible for unlawful presence. See § 212(a)(9)(B)(v). Despite a change in the procedural process, the substantive requirements will remain in force – i.e., extreme hardship showing – and an applicant must still travel to an American consulate abroad to complete the visa process and obtain an immigrant visa. It remains to be seen whether USCIS widens the reach of the "provisional waiver," to include the relatives of legal permanent residents and additional inadmissibility grounds.

First introduced on June 4, 2012, the "stateside processing" of I-601 and I-212 waiver application is now in effect at all U.S. Consulates. Immigrants who are consular processing must file any required I-601 and I-212 waivers at the Phoenix, Arizona lockbox facility for initial

[7] By way of example, the BIA has found in unpublished decisions the hardship standard to be met in some surprising cases. In one case, the hardship standard was met where the U.S. citizen spouse had been emotionally ill for many years of her life due to heave drug use that even forced her to be a prostitute until she me the foreign national who helped her change her life around. In another case, the BIA granted cancellation for a 17 year old respondent who had been brought to the United States as a young child and whose mother had other US citizen children and could not relocate to Mexico. In yet another case, the BIA found the hardship element met where the two qualifying relatives were children of 9 and 15 years of age who had lost their mother (respondent's wife) due to cancer 5 years earlier. In the latter case the BIA, in a one paragraph decision, found the element to be met because a move to Mexico would be too traumatic for these children.

processing. After processing, the applications are then forwarded to the Nebraska Service Center where they are adjudicated by a core of 26 adjudicators.

At the lockbox facility, applications will be checked to ensure all requisite signatures, information and fees are provided. While the waiver can be filed as soon as the consular interview has occurred, the waiver cannot be filed prior to the consular interview at this time. Clients receive a written notice at their consular interviews directing them to file their waivers at the Phoenix Lockbox. A copy of this notice should be included in the waiver filing.

When the waiver is received at the NSC, the USCIS officer references a computer system, linked to a DOS database, to determine the ground of inadmissibility applied by the consular officer. Once a decision is made, the USCIS will forward their decision to the US Consulate. If approved, your client will be asked to provide their passport for immigrant visa stamping.

As a result of these measures, the lockbox requirements bring consistency to decision making by centralizing the adjudication process. USCIS aims to adjudicate all waivers within 3 months.

I-212 Waivers

In order to lawfully return to the United States after deportation a client must file a Form I-212 *Application for Permission to Reapply for Admission into the United States after Deportation or Removal*. Under 8 C.F.R. §212.2 the I-212 form must be filed only if the client is still within the five year bar period after having been expeditiously removed, or within the 10 year bar period after having been ordered removed, or within the 20 year bar period for clients convicted of aggravated felonies and for second or subsequent removal orders.

Adjudicators will examine whether to grant or deny permission for readmission based upon a "totality of the circumstances" analysis. See *Matter of Tin* 14 I&N Dec. 371 (RC 1973) and *Matter of Lee,* 17 I&N Dec. 275 (Comm. 1978). The I-212 waiver is essentially a simple weighing of the positive and negative equities. There is no requirement to show extreme hardship. *Matter of Tin* lists 10 factors to consider when deciding whether a favorable exercise of discretion is warranted.

> (1) The basis for deportation; (2) recency of deportation; (3) length of residence in the United States; (4) applicant's moral character; (5) his respect for law and order; (6) evidence of reformation and rehabilitation; (7) family responsibilities; (8) any inadmissibility under other sections of law; (9) hardship involved to himself and others; and (10) the need for his services in the United States

The directions to the form I-212 list unfavorable factors including past criminal convictions, repeated immigration law violations, absence of close family ties, and unauthorized employment amongst others. Applicants for permission to reenter should aim to follow the above guidelines for the I-601 waivers being sure to include evidence ranging across family ties, rehabilitation, medical issues, employment, and country conditions.

Generally, if the Form I-601 is approved, the Form I-212 will also be approved, since approval of the Form I-212 involves the exercise of discretion and, by deciding to approve the Form I-601, the adjudicator has determined that the alien merits a favorable exercise of discretion.

Establishing extreme hardship would be considered to be a very strong positive equity weighing in favor of granting the I-212. However, when applying for a standalone I-212 it is important to correctly state the legal standard including the fact that no extreme hardship is required to be shown to obtain a favorable decision.

Conclusion

In sum, when considering inadmissibility and deportability for purposes of filing a waiver, it is first necessary to determine whether a waiver is required. In other words, it is not prudent to always concede inadmissibility or deportability because all too often – especially in cases of alleged fraud or certain crimes – the bar to admission does not apply. When a waiver is required, however, simply submitting documents will unlikely yield a favorable result. Practitioners should not forget to be lawyers when filing waiver applications and should document all evidence in an organized brief or legal statement.