

**NONIMMIGRANT VISA
WAIVERS AT CONSULAR
POSTS FOR THE**

**AILA TEXAS CHAPTER CONFERENCE
APRIL 2016**

Jan Pederson, jan@Maggio-kattar.com
David Ware, dware@david-ware.com

4/14/16 1

INTRODUCTION

- **NONIMMIGRANT WAIVERS**
 - Legal References
 - 212(d)(3)(A) and 212(d)(3)(B) of the INA
 - 9 FAM Notes 305.4 (processing waivers) and 9 FAM 302 (grounds of inadmissibility)
 - AILA, "The Waivers Book—Advanced Issues in Immigration Law Practice".

4/14/16 2

NONIMMIGRANT WAIVERS

- **Who is Eligible?**
 - Everyone eligible unless ground cannot be waived
 - No need for qualifying relative
 - No need for passage of time since inadmissibility ground arose.

4/14/16 3

NONIMMIGRANT WAIVERS

- Who is Eligible?
 - Everyone eligible unless ground cannot be waived
 - No need for qualifying relative
 - No need for passage of time since inadmissibility ground arose.
 - No need for extreme hardship.

4/14/16

4

WHAT GROUNDS CANNOT BE WAIVED

- Espionage, sabotage or export law violations—212(a)(3)(A)(i)
- Unlawful Activity Related to Security—
 - 212(d)(3)(A)(ii)
- Attempts to overthrow USG-- 212(d)(3)(A)(iii)
- Contrary to Foreign Policy Interests—
 - 212(a)(3)(C)

4/14/16

5

WHAT GROUNDS CANNOT BE WAIVED

- Nazi Party Membership and Genocide
 - 212(a)(3)(E)(i) and (ii)
- Individual whose presence is contrary to USG interests—212(f)
- Applicants who are or have been determined to be Class A for drug abuse or addiction for those substances listed in Schedule I through V of Section 202 of the Controlled Substance Act are not eligible for a waiver and must complete the time period for sustained, full remission before reapplying for a visa—general one year of full remission

4/14/16

6

WHAT GROUNDS CAN BE WAIVED

- Persons involved in money laundering or drug trafficking.
- Terrorists (sparingly used). E.g., Nelson Mandela.
- And everything else except grounds under 212(a)(3) previously mentioned.

4/14/16

7

“REASON TO BELIEVE” INADMISSIBILITY

- Most challenging grounds to overcome.
- 212(a) is riddled with the phrase “reason to believe”.
- 9 FAM 302.4-3(B)(3) defines reason to believe as “The essence of the standard is that the consular officer must have more than a mere suspicion, there must exist a probability, supported by evidence that the alien is or has been engaged in trafficking.

4/14/16

8

“REASON TO BELIEVE” INADMISSIBILITY

- You are required to assess independently evidence relating to a finding of inadmissibility.
- Common “reason to believe” grounds of 212(a) inadmissibility included:
 - Controlled substance trafficking.
 - Money laundering. 212(a)(2)(I).
 - Export law violations. (212(a)(3)(I)(II).

4/14/16

9

“REASON TO BELIEVE” INADMISSIBILITY

- Espionage.
- Sabotage.
- Any other unlawful activity.
- Terrorist activity.
 - Alien who rents office space to a company owned by someone much later designated as a terrorist is common example.
 - Extremely broad and killers of the dream to come to America.

4/14/16 10

NIV WAIVER PROCESS

- No Application Required
- No fee required
- Documentation in Support of Waiver Submitted to Consular Officer
- Consular Officer must make favorable recommendation to the Admissibility Review Officer of ARO
 - Thus, consular officer is the front line officer to whom case must be made

4/14/16 11

FACTORS CONSIDERED BY CONSULAR OFFICERS

- Recency and seriousness of activity or condition causing applicant’s inadmissibility
- Reasons, length of proposed travel to U.S.
 - Any legitimate purpose such as family visits,
 - medical treatment (whether or not available abroad, business conferences, tourist, etc.
 - Crimes—5 year rule. Prism of violence
 - Misrepresentation

4/14/16 12

FACTORS CONSIDERED BY CONSULAR OFFICERS

- Unlawful Presence
 - Reason for and culpability in unlawful presence
 - Length of time outside the United States since unlawful presence
 - Incompetent legal representation
- Substance abuse
 - DUIs
 - DOS/CDC policy
 - One alcohol related arrest or conviction within law five years or two more alcohol related arrests or convictions with last ten years or other evidence to suggest an alcohol problem invokes mandatory referral to panel physician and often psychologist to consider abuse and associated harmful behavior—past, present or future.
 - Beware of new DOS policy to revoke visas with only an arrest for DUI; happens within days.
 - Visa revocation generally does not affect NIV status in US.

DUI or Drug Arrest—Prepping

- First piece of advice to client:
 - Don't travel until you are an LPR, or maybe have AP.
- Second piece of advice to client:
 - If you must travel, put as much time as possible between you and the offense, and bring certified copies of record with you.
- Third piece of advice to client:
 - If you inhaled, don't brag about it.
- Fourth piece of advice to client:
 - Expect at best, inordinate delay and hassle; at worst sitting out a year or more until a visa will issue.
- Panel physicians are basically out of control, finding addict or abuser in many flimsy cases; they report to CDC, not DOS. Overturning a PP decision virtually impossible.

FACTORS CONSIDERED BY CONSULAR OFFICERS

- Drug Use
- Helpful Evidence to Submit to Prove Rehabilitation/Remission.
- Google Test. Google your client and know the government will also. If issuance of a visa may cause political or national security ramifications, consular officers will often consult with the Visa Office before submitted to ARO.

If the Consul Says Yes

- Waiver is attached to a visa, or for Canadians, an entry or entries.
- When the visa expires, so does the waiver.
- When the Canadian has used the entry or entries, has to get a new waiver.
- NIV waivers are a different animal than IV waivers; USCIS might consider the grant of an NIV waiver in its process, but not decisive or dispositive of IV waiver. IV waiver is permanent, NIV is not.

4/14/16

16

WAIVER PERIOD

- Consular officer may recommend a multiple entry, five year visa to ARO.
 - On initial waiver, ARO usually grants only one year multiple entry visas.
 - Waiver may not exceed the number of entries and duration of visa under reciprocity schedule.
 - For subsequent waivers, maximum validity permitted may be requested of ARO.

4/14/16

17

WAIVER PERIOD

- NIV D3 waiver lasts for the validity of the waiver as indicated on the annotated visa. Visa cannot be issued for longer. 9 FAM305.4-3(G).
- Validity of waiver is considered extended if applying for extension or change of status at USCIS and extension or change of status granted.

4/14/16

18

WHEN THE CONSULAR OFFICER SAYS NO

- Attorney has right to appeal refusal of consular officer to recommend waiver to the Advisory Opinion Division of the Visa Officer and request *de novo* review
- Rarely successful unless previous waiver granted and no changed circumstance to justify refusal of subsequent waiver
- If VO agrees waiver should have been recommended they can recommend a waiver to ARO
 - Note: Consular officer has opportunity to submit arguments to VO opposing the waiver

4/14/16

19

LOGISTICS IN PROCESSING NIV WAIVERS

- Consular Post Process
 - Electronic Process
 - How to Ensure Attorney Material Submitted to ARO
 - Processing Times at Posts Today
- ARO Process (Canadian citizens)
 - Attorney Communication with ARO
 - Processing Times by Category
 - Processing Steps

4/14/16

20

ATTORNEYS CAN MAKE A DIFFERENCE!

- Develop case strategy based on ground of inadmissibility.
 - With an 85% approval rate for unlawful presence and an estimated approval rate of 35% for misrepresentation and criminal convictions, common sense dictates far more intensive case work be done on the latter.
 - Attorneys report that it is advisable to wait about five years from conviction or discharge from punishment before requesting criminal conviction waivers

4/14/16

21

ATTORNEYS CAN MAKE A DIFFERENCE!

- In unlawful presence cases, provide memo to consular officer if you do not believe the 3/10 year bars triggered
- Provide memo and supporting documents in all cases
- Avoid submitting boiler plates. Waiver cases are very fact specific

4/14/16 22

THANKS FOR ATTENDING!

- **BREAK OUT SESSION TO BE**
- **HELD AFTER THE SESSION!**

4/14/16 23
