

INADMISSIBILITY AND REMOVABILITY- AN OVERVIEW

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Immigration Law 101

Inadmissibility and Removability-An Overview

I. INTRODUCTION

The concept of Removal Proceedings began with the passage of sweeping immigration reform that was enacted on September 30, 1996: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA completely changed the structure for immigration court proceedings and amended the Immigration and Nationality Act in order to establish the concept of “Removal Proceedings”.¹ The term “admitted” becomes the key factor in removal proceedings. What would appear to be a very straight forward term turns out to be anything but straight forward. In just about every area of Immigration Law, understanding the grounds of inadmissibility and removability becomes the foundation for representing clients both in the United States and those in other countries trying to find a way to get here.

II. ADMISSION

INA² 101(a)(13)(A) defines “admission” :

A lawful entry into the United States after inspection and authorization by an immigration officer. If someone has been “admitted” into the United States, then they are subject to the grounds of removability under INA Section 237.

Those who have not been “admitted” are considered to be applicants for admission and are subject to grounds of inadmissibility under INA Section 212.

Who is subject to the grounds of inadmissibility?

- i. EWI entrants (entry without inspection)
- ii. Applicants for adjustment of status
- iii. Applicants for admission at the border (non-immigrant visa holders, visa waiver applicants, immigrant visa holders arriving for the first time)
- iv. Parolees (but see INA 101(a)(13)(B))
- v. Alien crewmen
- vi. Lawful Permanent Residents who fall within INA 101(a)(13)(C)
- vii. Refugees

Who is subject to grounds of removability?

¹ Removal Proceedings commenced on April 1, 1997. Any court cases that were already pending on that date remained in deportation proceedings and exclusion proceedings.

² Immigration and Nationality Act

- i. Nonimmigrant visa holders who are in the United States pursuant to a lawful admission
- ii. Visa Waiver entrants
- iii. Visa Wavier and visa holder overstays
- iv. Lawful Permanent Residents who do not fall within INA 101 (a)(13)(C)

What is the LPR exception under INA 101(a)(13)(C)?

- i. Has abandoned or relinquished permanent resident status
- ii. Has been absent from the United States for more than 180 day (continuous period)
- iii. Has engaged in illegal activity after departing the United States
- iv. Has left the United States while under removal or extradition proceedings
- v. Has committed an offense included in INA 212(a)(2)
- vi. Is attempting to enter without inspection

III. INA Section 212(a): Grounds of Inadmissibility

There are 10 sections which define grounds of inadmissibility under the INA. Sections 212(a)(1)- (10) set out all grounds based on general categories which range from health related grounds to miscellaneous grounds.

- 212 (a)(1)-Health Related Grounds
- 212 (a)(2)-Criminal and Related Grounds
- 212 (a)(3)-Security Related Grounds
- 212 (a)(4)-Public Charge Grounds
- 212 (a)(5)-Labor Certification and Qualifications
- 212 (a)(6)-Illegal Entrants and Immigration Violators
- 212 (a)(7)-Documentation Requirements
- 212 (a)(8)-Ineligible for Citizenship
- 212 (a)(9)-Previously Removed and Unlawful Presence
- 212 (a)(10)-Miscellaneous

IV. INA Section 237 (a): Grounds of Removability

There are also several sections which define the grounds of removability under the INA. Section 237 (a)(1)-(a)(6) set out grounds of removability in broad categories which encompass a wide range of conduct.

- 237 (a)(1)-Immigration Violations
- 237 (a)(2)-Criminal Offenses
- 237 (a)(3)-Failure to Register as an alien, falsification of documents
- 237 (a)(4)-Security and related grounds
- 237 (a)(5)-Public Charge
- 237 (a)(6)-Unlawful voting

V. What does it all mean when representing clients?

It is critical to understand the difference between inadmissibility and removability because the burden of proof is completely different depending on which section your client is being charged under. For example, if your client is being charged under Section 212 of the INA, once alienage has been established, the respondent has the burden to prove that she is “clearly and beyond a doubt entitled to be admitted and is not inadmissible under Section 212”³. On the other hand, if the respondent is charged under Section 237 of the INA, the burden is on the government to prove by “clear and convincing evidence that the non-citizen is deportable”.⁴ The Government has to prove that there has been conduct which triggers the ground of deportability. In the case of a criminal conviction, the government must first prove that the non-citizen has actually been convicted and also that the crime triggers one of the grounds that would make her removable under Section 237 of the INA.

It is very important to review all of the relevant documentation to make sure that the respondent has been properly charged. Many times, the charging document is created out in the field by non-lawyers who may not be familiar with the grounds of inadmissibility or removability. The analysis of the charging documents will most likely be the most important step in representing non-citizens before any immigration court.

There may be times when proceedings can be terminated as a result of legally defective documents based on charging under the wrong section of the INA. It is common for there to be many mistakes in the drafting of the Notice to Appear. Those mistakes may give legal advocates the ability to be able to help their clients maneuver the complicated legal system and in many cases have the proceedings terminated all together.

Unlawful presence under 212 (a)(9) is probably one of the most complicated and misunderstood concepts in the INA. Every case in which there is any time of unlawful presence needs to be examined carefully before proceeding with adjustment of status or sending someone out of the US in order to complete consular processing. No matter how simple it may appear at first, do not be fooled by this very dangerous ground of inadmissibility.

Practice Pointers: Don't assume the Government is always right. There are many areas in which the officers taking down the information from the respondent may simply type over an existing form and not have accurate information. Don't be afraid to ask the Government attorneys to do their job. In cases where the burden of proof is on the Government to prove a conviction, do not admit until they have submitted the

³ 8 CFR 1240.8 (c)

⁴ 8 CFR 1240.8 (a)

required documents. In cases where the conviction is very old, they may not be able to produce the records they need to make their burden of proof. If they cannot prove there has been a conviction, the Immigration Judge will have to terminate proceedings.

Don't be afraid to object and make a good record. You never know when there will be a need to appeal your client's case to a higher court. It is critical to maintain a good record of objections in order to preserve issues at the appellate level. There is nothing worse than taking a case up on appellate review only to have the appeals court say that the issue is valid but it was waived in the lower court setting.

Take the time to go over all allegations of fact and of law with your client. Make sure they understand the difference between legal entry and unlawful status. Make sure that you have review manner of entry before making any concessions in immigration court. Make sure to review the statute under which your client was convicted before accepting allegations involving conduct that may be construed as having moral turpitude.⁵ Many other issues are making their way through the Federal Circuit Courts and eventually to the Supreme Court of the United States. Immigration law and the interpretation of its application to State convictions offers advocate the opportunity to litigate many unresolved issues before the Immigration Courts of the US.

Waivers: There are waivers available for many of the grounds of inadmissibility and removability. Each waiver will have its individual requirements as to levels of extreme hardship, qualifying relatives and other discretionary factors needed to file. The attached chart covers the most common grounds of inadmissibility and describes which ones are subject to the waiver provisions. Please note that there are many grounds where there are no waiver provisions and will most likely never be able to be overcome.

VI. Conclusion

Immigration law is no doubt one of the most complicated areas of law that exists today. The good news is that great lawyers all over the country continue to litigate and help interpret what defines and how to apply grounds of inadmissibility and removability under the Immigration and Nationality Act. These rules are the foundation to any immigration case. All practitioners should have a basic understanding of when and how these rules may be applied in their cases. Moreover, it is an ever changing part of the statute and it these sections must be revisited each and every time a client is advised.

⁵ See, *Descamps v. U.S.*, 133 S.Ct.2276 (2013) – The US Supreme Court has made some very important decisions regarding immigration cases in the last few years.

Appendix 1

A. Common Grounds of Inadmissibility

ALIENS PREVIOUSLY REMOVED AND UNLAWFULLY PRESENT

| Class of Inadmissibility | IV Waivers |
|----------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Aliens Previously Removed (INA 212(a)(9)(A)); | No waiver, but DHS may grant permission to reapply for admission to the United States to an alien otherwise inadmissible under this section. (Form I-212, Permission to Reapply). However, such permission to reapply does not remove the grounds which led to the alien’s denial of admission to or removal from the United States. The reason for such denial of admission or removal may lead to another ground of inadmissibility. |
| Aliens Unlawfully Present (INA 212(a)(9)(B)); | DHS has sole discretion to grant a 212(a)(9)(B)(v) waiver in the case of an immigrant who is the spouse, son, or daughter of a U.S. citizen or Legal Permanent Resident , if refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawful resident spouse or parent of such alien. |
| Aliens Unlawfully Present After Previous Immigration Violations (INA 212(a)(9)(C)); | No waiver, but DHS may grant permission to reapply for admission to the United States to an alien otherwise inadmissible under this section provided at least ten years have passed following the alien’s last departure from the United States. (Form I-212, Application for Permission to Reapply) Permanent Bar |

ILLEGAL ENTRANTS, IMMIGRATION VIOLATORS, AND MISREPRESENTATION

| Class of Inadmissibility | IV Waivers | |
|-------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| Aliens Present Without Admission or Parole (INA 212(a)(6)(A)); | This ground does not apply to visa applicants. | |
| Failure to Attend a Removal Proceeding (INA 212(a)(6)(B)); | No waivers available. Inadmissible for 5 years following departure or removal subsequent to removal hearing. | |
| Fraud and Misrepresentation (INA 212(a)(6)(C)(i)); | INA 212(i) waivers are available if applicant can show extreme hardship to USC/LPR spouse, or parent or, if a VAWA self-petitioner, the alien demonstrates extreme hardship to the <i>alien</i> , or the alien’s U.S. Citizen or LPR relative. | |
| False Claim of Citizenship (INA 212(a)(6)(C)(ii)); | No waiver available. | |
| Stowaways (INA 212(a)(6)(D)); | This ground does not apply at time of visa application. | |
| Smugglers(Knowingly Assisted) (INA 212(a)(6)(E)); | INA 212(d)(11) waiver available. DHS may grant a waiver to an applicant for family-based immigration if the alien applicant had aided an individual who at the time of such action was the alien’s spouse, parent, son, or daughter entering or attempting to enter the United States in violation of the law. | |

CRIMINAL AND RELATED GROUNDS

| Class of Inadmissibility | IV Waivers |
|--------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Crimes Involving Moral Turpitude (INA 212(a)(2)(A)(i)(I); | I-212(h) waiver is available for an immigrant who is the spouse, parent, son, or daughter of a U.S. citizen or legal permanent resident (LPR) if, in the opinion of DHS, not granting the waiver would result in extreme hardship to the U.S. citizen or LPR qualifying relative. INA 212(h) waiver is also available in cases where the alien’s admission to the United States would not be contrary to the national welfare, safety and security of the United States and the applicant has been rehabilitated, and the activities |

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| | <p>for which the applicant is inadmissible occurred more than 15 years before the date of visa</p> <p>or</p> <p>The alien is a VAWA self-petitioner</p> <p>No waiver is available if the applicant has been convicted of (or has admitted committing acts that constitute) murder, criminal acts involving torture, or conspiracy to commit either murder or criminal acts involving torture.</p> <p>**This section continues to be litigated in most areas of the country and there are many, many different crimes that could fall within this section of inadmissibility.</p> |
| <p>Controlled Substance Violators</p> <p>(INA 212(a)(2)(A)(i)(II));</p> | <p>INA 212(h) waiver is available if the alien’s admission to the United States would not be contrary to the national welfare, safety, or security of the United States; and the alien has been rehabilitated and the inadmissible act occurred more than 15 years before the visa application;</p> <p>For the spouse, parent, son, or daughter to the U.S. citizen or LPR if, in the opinion of the Secretary of Homeland Security, refusing the waiver would result in extreme hardship to the U.S. citizen or LPR; or</p> <p>The alien is a VAWA self-petitioner.</p> <p>INA 212(h) is only available if the violation relates to a single offense of simple possession of 30 grams or less of marijuana.</p> |
| <p>Multiple Criminal Convictions</p> <p>(INA 212(a)(2)(B));</p> | <p>INA 212(h) waiver is available if: activities for which the alien is inadmissible occurred more than 15 years before the date of the alien’s application; the alien’s admission to the United States would not be contrary to the national welfare, safety, or security; and the applicant has been rehabilitated; or</p> <p>For the spouse, parent, son, or daughter to the U.S. citizen or LPR if, in the opinion of the Secretary of Homeland Security, refusing the waiver would result in extreme hardship to the U.S. citizen or LPR; or</p> <p>If the alien is a VAWA self-petitioner.</p> <p>No waiver is available if the applicant has committed murder, criminal acts involving torture, or conspiracy to commit either murder or criminal acts involving torture.</p> |
| <p>Controlled substance Traffickers and the Spouse, Son, or Daughter of Substance Traffickers Who Obtained Financial or other Benefit and Knew or have Known that the</p> | <p>No waiver is available.</p> |

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| <p>Financial Benefit was the Product of Illicit Activity within the Past Five Years</p> <p>(INA 212(a)(2)(C));</p> | |
| <p>Prostitution and Commercialized Vice Within the Past 10 Years of the Date of Application for a Visa, Admission, or Adjustment of Status</p> <p>(INA 212(a)(2)(D); and INA 212(a)(2)(A)(i)(I))</p> | <p>INA 212(h) waiver is available in cases of prostitution (D)(i) or procuring (D)(ii) if the alien's admission to the United States would not be contrary to the national welfare, safety, or security, and the alien has been rehabilitated. In cases of other commercialized vice (D)(iii), 212(h) is available if the two conditions above are met, and all relevant criminal acts took place more than 15 years before the date of application; or</p> <p>Available to IV applicants with a close family relationship (spouse, parent, son, or daughter) to a U.S. citizen or LPR, if, in the opinion of DHS, not granting the waiver would result in extreme hardship to the petitioning U.S. citizen or LPR and the alien has been rehabilitated; or</p> <p>The alien is a VAWA self-petitioner.</p> |
| <p>Certain Aliens Involved in Serious Criminal Activity Who Have Asserted Immunity from Prosecution</p> <p>(INA 212(a)(2)(E))</p> | <p>INA 212(h) waiver is available if the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application, the alien's admission to the United States would not be contrary to the national welfare, safety, or security, and the alien has been rehabilitated; or</p> <p>For applicants with a close family relationship (spouse, parent, son, or daughter) to a U.S. citizen or LPR, if, in the opinion of DHS, refusing the waiver would result in extreme hardship to the U.S. citizen or LPR; or</p> <p>The alien is a VAWA self-petitioner.</p> <p>Neither waiver is available if the alien has committed murder or criminal acts involving torture, or conspiracy to commit either murder or criminal acts involving torture.</p> |
| <p>Foreign Government Officials Who Have Committed Particularly Severe Violations of Religious Freedom</p> <p>(INA 212(a)(2)(G));</p> | <p>No waiver is available.</p> |

DOCUMENTATION REQUIREMENTS

| Class of Inadmissibility | IV Waivers |
|----------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| No Entry Documents – Immigrants | No waiver is available at time of visa application. However, under INA 212(k), DHS may waive this inadmissibility for an IV holder at the port of entry. |

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| (INA 212(a)(7)(A)); | |
| Nonimmigrants Not in Possession of Passport Valid for Six Months of Nonimmigrant Visa or Border Crossing Card (INA 212(a)(7)(B)); | Not applicable. |

HEALTH RELATED GROUNDS

| Class of Inadmissibility | IV Waivers |
|----------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Communicable Disease of Public Health Significance (INA 212(a)(1)(A)(i); | <p>INA 212(g) waiver is available for:</p> <p>The spouse, unmarried son or daughter, or minor unmarried lawfully adopted child of: a U.S. citizen, an alien who has been issued an immigrant visa, or an alien who has been lawfully admitted for permanent residence; or</p> <p>The parent of a son or daughter who is: a U.S. citizen, a lawfully admitted permanent resident alien, or an alien who has been issued an immigrant visa; or</p> <p>A Violence Against Women Act (VAWA) self-petitioner.</p> |
| Failure to Submit Proof of Vaccination INA 212(a)(1)(A)(ii) (INA 212(a)(1)(A)(iii); | <p>If alien receives vaccines that are initially missing, a waiver may be approved by the consular officer under a blanket delegation of authority by USCIS. (9 FAM 40.11 N12.5-1; INA 212(g)(2)(A))</p> <p>If the panel physician determines required vaccinations would be medically inappropriate, a waiver may be approved by the consular officer under a blanket delegation of authority by USCIS. (9 FAM 40.11 N12.5-2; INA 212(g)(2)(B))</p> <p>If there is a religious or moral objection to vaccination, a waiver may be approved by Department of Homeland Security (DHS). (9 FAM 40.11 N12.5-3 and INA 212(g)(2)(C))</p> |
| Physical or Mental Disorder and Behavior Associated with | INA 212(g)(3) waivers are granted at the discretion of DHS in consultation with HHS. Waivers may be subject to conditions proposed by the Department of |

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| <p>the Disorder Which May Pose, or Has Posed a Threat, to Property or Safety, of the Applicant or Others and Which is Likely to Recur</p> <p>(INA 212(a)(1)(A)(iii);</p> | <p>Health and Human Services, such as the giving of bond or requirement that a family member or medical escort accompany the applicant.</p> <p>***This ground can be dangerous for clients with alcohol related crimes at anytime</p> |
| <p>Drug Abuser or Addict, one who has engaged in "non-medical use of a controlled substance."</p> <p>(INA 212(a)(1)(A)(iv);</p> | <p>No waiver is available. However, a "CLASS A" inadmissibility finding by the panel physician may be overcome in the future according to CDC guidelines. (9 FAM 40.11 N13.2)</p> |

SECURITY AND RELATED GROUNDS

| Class of Inadmissibility | IV Waivers |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>General Prejudicial Activities: Espionage, Sabotage, or Prohibited Export of Sensitive Technology, or Sensitive Information</p> <p>(INA 212(a)(3)(A));</p> | <p>No waiver is available but inadmissibility applies only to current circumstances.</p> |
| <p>Terrorist Activities</p> <p>(INA 212(a)(3)(B));</p> | <p>No waiver is available.</p> |
| <p>Membership or Affiliation with Communist or Other Totalitarian Party, Domestic or Foreign (applies only to immigrants)</p> <p>(INA 212(a)(3)(D));</p> | <p>INA 212(a)(3)(D) waiver available. Also, there are exceptions contained in INA 212(a)(3)(D) relating to past membership and/or involuntary membership.</p> <p>*Rarely used but there are exceptions that exist</p> |
| <p>Participation in Nazi Persecutions or Genocide and Commission of Acts of Torture or Extrajudicial Killings</p> <p>(INA 212(a)(3)(E));</p> | <p>No waiver is available.</p> |

PUBLIC CHARGE

| Class of Inadmissibility | IV Waivers |
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|---------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Public Charge</p> <p>(INA 212(a)(4)(A));</p> | <p>No waiver is available. However, always a good idea to explore eligibility for the I-864W.</p> <p>Applicants may overcome the finding by presenting evidence to convince USCIS that the inadmissibility no longer applies. While there are provisions for overcoming the inadmissibility by posting a bond with DHS, the applicant is still subject to Affidavit of Support and income requirements. Consequently, there are few circumstances in which a bond would be offered as an alternative to the Affidavit of Support.</p> |
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