

Pardoned in the French Quarter: Exploring the I- 601A, I-601, and I-212

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What is inadmissibility?

- ▶ obstacle to being admitted to the US or adjusting status to permanent residence
- ▶ There are many grounds of inadmissibility:
 - ▶ Criminal and Related Grounds
 - ▶ Foreign Residence – for certain J-1 holders/ 212(e) of the Act
 - ▶ Health Related Grounds
 - ▶ Misrepresentation Grounds
 - ▶ Public Charge Grounds
 - ▶ Security and Foreign Policy Grounds
 - ▶ Stowaways and Smugglers
 - ▶ Unlawful Presence
 - ▶ Prior Removals
 - ▶ Miscellaneous Grounds - Including practicing polygamists, immigrants permanently ineligible for citizenship, international child abductors, unlawful voters and former USCs who renounced their citizenship for tax purposes or to evade military service.
- ▶ Some grounds are waivable and some are not. Some are waivable in some context but not in others – i.e. 209 of the Act, Adjustment under certain provisions of law
- ▶ We are focusing on waiving unlawful presence and will also discuss waiving grounds related to prior removals

Becoming a permanent resident

- ▶ The status of permanent residence is achieved through processing abroad (consular processing) or processing within the US (adjusting status under different provisions of the Act or some other operation of law).
- ▶ For the purposes of this session, we will be looking at consular processing and adjustment of status under section 245 of the Act.
- ▶ Section 245 of the Act sets forth basic requirements for adjustment includes:
 - ▶ inspected and admitted or paroled
 - ▶ in status and no work without authorization
 - ▶ Exception for IR
 - ▶ 180 day exception for employment based AOS
 - ▶ 245(i) exceptions as well
 - ▶ Some visa classes are not eligible to adjust under 245
- ▶ So, if you can't AOS, then must look at consular processing

Be very sure that your client is not eligible to AOS

- ▶ Was the EWI really a Quilantan entry?
- ▶ Do you have a way to get your client paroled?
 - ▶ TPS and advance parole
 - ▶ DACA and advance parole
 - ▶ Military parole in place
 - ▶ Humanitarian parole in place
- ▶ 245(i) – check way back
- ▶ 245(k)
- ▶ Immediate relative? Or if wait long enough can change classification to Immediate relative?

Before you send a client out to consular process...

- ▶ Be very sure you can get them back to the US
- ▶ In other words, make sure that the departure from the US is not triggering a ground of inadmissibility for which there is no waiver

Prior Removal

- ▶ INA §212(a)(9)(A) – inadmissible if
 - ▶ expeditiously removed at the border within the past five years
 - ▶ or ordered removed within the past 10 years.
- ▶ Exception is AG consent to readmission
- ▶ INA §212(a)(9)(A)(iii) can apply for such consent immediately after departure or possibly prior to departure, unless he or she has additional grounds of inadmissibility.
 - ▶ While the application can be made prior to the foreign national's departure and may actually be approved before he or she departs, the permission to reapply does not become effective until the foreign national actually departs.
 - ▶ Note that this means that someone with an outstanding or pending order for removal cannot resolve the problem by filing Form I-212 with an adjustment of status application.
- ▶ Removal and return without inspection – 212(a)(9)(C)(i)(II) – must wait ten years to apply

Unlawful Presence

- ▶ Out of Status v. Unlawful Presence
- ▶ INA 212(a)(9)(B)(ii) – Defines unlawful presence for the purposes of (B)(i) and (C)(i)(I):
 - ▶ Present after the expiration of the period of stay authorized by the Secretary of Homeland Security; or
 - ▶ Present without being admitted and paroled
 - ▶ Some safe havens
 - ▶ Students – Duration of Status
 - ▶ Canadians admitted without I-94
 - ▶ Filing of a non-frivolous application for change of extension of status tolls ULP for 120 days

Unlawful Presence

- ▶ INA §212(a)(9)(B)(i) – aliens unlawfully present
 - ▶ 180 days plus departure from the US = 3 year bar
 - ▶ 365 days plus departure from the US = 10 year bar
- ▶ Unlawful presence for purposes of the 3/10 year bars is not counted in the aggregate -- INA §212(a)(9)(B)(i) only applies to any single stay in the U.S.
 - ▶ Length of unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays.
- ▶ History Lesson:
 - ▶ No period of unlawful presence accrued prior to April 1, 1997 (effective date of IIRAIRA) counts for any of the ULP bars.

Unlawful Presence

- ▶ INA §212(a)(9)(B)(iii) provides exceptions to unlawful presence
 - ▶ Minors
 - ▶ Asylees
 - ▶ Bona fide application
 - ▶ Not employed without permission
 - ▶ Family Unity
 - ▶ Battered women and children
 - ▶ Victims of a severe form of trafficking in persons

Unlawful Presence – Permanent Bar

- ▶ INA §212(a)(9)(C) – 10 years before waiver available
- ▶ Unlawful presence for (a)(9)(C) is counted in the aggregate
- ▶ Any alien who has been unlawfully present in the US for an aggregate period of more than one year, or who has been ordered removed under INA §235(b)(1) (arriving aliens), or under INA §240, and who attempts to enter the U.S. without being admitted to the U.S. is inadmissible permanently, but may apply for a waiver after they leave the U.S.
- ▶ n.b. – depending on your jurisdiction ULP for 3/10 is not always the same as ULP for permanent bar

A Waiver of Unlawful Presence

- ▶ INA §212(a)(9)(B)(9)(v)
- ▶ The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

The statutory elements

- ▶ Immigrant context
- ▶ Must have requisite “qualifying relatives”
 - ▶ For this waiver – must have a parent or spouse who is a USC or LPR
- ▶ Extreme Hardship to the “qualifying relative”
 - ▶ Nuances of Extreme Hardship are beyond the scope of this presentation

I-601

- ▶ N.b. – the form is used for lots of different waivers, so the instructions can be confusing. Make sure you are looking at the right grounds of inadmissibility and right standard.
- ▶ Can be submitted concurrently with an adjustment application.
- ▶ Can be submitted while an adjustment is pending or in response to an interview or RFE or NOID etc.
- ▶ Can be submitted in removal proceedings
- ▶ Can be submitted following determination of inadmissibility by consular officer

Provisional Unlawful Presence Waivers

I-601A

- ▶ Also referred to as “stateside waiver”
- ▶ Allows the individual to apply for a provisional unlawful presence waiver before they leave the United States for their consular interview.
- ▶ The provisional unlawful presence waiver process does not change the immigrant visa process. Even if the provisional unlawful presence waiver is approved, the foreign national is still required to depart the United States for the immigrant visa interview with a U.S. consular officer abroad.

I-601A basics

- ▶ Be an immediate relative of a U.S. citizen (not a preference category immigrant who has a visa available). An immediate relative is an individual who is the spouse, child (unmarried and under 21), or parent of a U.S. citizen.
- ▶ Have an approved Form I-130, Petition for Alien Relative, or Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.
- ▶ Have a pending immigrant visa case with DOS for the approved immediate relative petition and have paid the DOS immigrant visa processing fee (IV Fee).
- ▶ Be able to demonstrate that refusal of your admission to the United States will cause extreme hardship to your U.S. citizen spouse or parent.
- ▶ Be physically present in the United States to file your application for a provisional unlawful presence waiver and provide biometrics.
- ▶ Only ground of inadmissibility is ULP

Questions and thoughts about I-601 and I601A

- ▶ How do you figure out what form to use for a waiver?
- ▶ How do you figure out the procedures for filing a waiver?
- ▶ How do you avoid rejections at the mailroom and frustrating Request For Evidence-s (RFEs)?
- ▶ How do you know you are doing it right?

I-601 and I-212 at the embassy

Historical Overview

- ▶ USCIS offices abroad used to adjudicate I-601 waivers
 - ▶ Inconsistency in application of standard
 - ▶ Inconsistency in processing time
- ▶ Waivers go through USCIS lockbox in Phoenix and then distributed to USCIS offices across the U.S.
 - ▶ Still have inconsistency, but not country specific
- ▶ Exception: exceptional and compelling Humanitarian Need to file at embassy or in Cuba

Begin with Finding of Inadmissibility

- ▶ Cannot file without sheet of paper issued by embassy which indicates ground(s) of inadmissibility and waiver(s) available
- ▶ Attorney is not notified. At consular interview or through delivery service applicant is provided the notice of any grounds of inadmissibility.
- ▶ Department of State v. USCIS in determining Ground(s) of Inadmissibility
 - ▶ Department of State (DOS) has their own legal interpretations which are often far more narrow than USCIS, but DOS has sole authority in determining admissibility abroad

Know...

- ▶ Know specific rules for your Applicant, Qualifying Relative and/or the exceptions for each ground before you send your client abroad.
- ▶ For example, waiver under section 212(d)(11) only available if Immigrant Visa is family based excluding Brothers and Sisters of USC's. When adjudicating AOS applications within U.S., USCIS often doesn't even apply this ground if the applicant brought their own child. However, this has been a common finding in Ciudad Juarez.
- ▶ "the Attorney General may in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted or aided only and individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

Know...

- ▶ Policy and Trends
- ▶ CDC provides guidelines to clinics outside of the United States as to who is a drug abuser. Right now any drug use ever will trigger this ground, especially in Mexico. Drug Abusers are then required to wait 1 year outside of the U.S. to show rehabilitation. This is not in INA, but policy based on CDC guidelines. In the United States, doctors use discretion, and USCIS uses discretion to determine rehabilitation.
- ▶ DOS legal has found that for bar under INA § 212(a)(9)(C)(I), unlawful presence acquired as a minor counts so that illegal re-entry after will lead to inadmissibility. This is NOT how most USCIS offices interpret.

Common issues

- ▶ An overview for inadmissibility factors that are common issues at consulates, for which no waivers are available:
 - ▶ False Claim to U.S. Citizenship 212(a)(6)(C)(ii)
 - ▶ Gang membership (coming to U.S. to engage in criminal activity) no waiver available EVER and little discretion exercised. INA § 212(a)(3)(A)
 - ▶ Smuggling someone other than an Immediate Relative INA 212(a)(2)(H) [Human Traffickers] INA § 212(a)(6)(E) [smuggler]
 - ▶ Suspected of drug trafficking INA § 212(a)(2)(C)

Common grounds

- ▶ Common Grounds for which waiver is available after a proscribed period of time outside the United States:
 - ▶ Substance or alcohol abuser (waiver after 1 year outside U.S. – proof of sobriety strongly recommended) INA § 212(a)(1)(A)(iv)
 - ▶ Failing to attend a removal hearing (waiver after 5 years outside of U.S.) 212(a)(6)(B)
 - ▶ Re-entry after more than a year of unlawful presence or removal order 212(a)(9)(C)(i) and (ii) (waiver after 10 years outside of U.S.)
 - ▶ Biggest issue is often has applicant been consistent with entry dates provided.
 - ▶ Don't forget legal interpretation of unlawful presence for minors
 - ▶ Unlawful Presence before April 1, 1997

After Inadmissibility is Determined, What to File

- ▶ Remember adjudicator of waiver is not adjudicating ultimate application for status so may not have some of the basic evidence needed in the file.

Typical Waiver Packet for Phoenix Lockbox

- ▶ Inadmissibility Sheet from the Consulate
- ▶ G-28
- ▶ I-601 and/or I-212 Forms
- ▶ Filing Fee: ***** n.b. fee increase coming December 2016!
 - ▶ I-601: \$585
 - ▶ I-212: \$585
- ▶ G-325 (optional)
- ▶ Approved Visa Petition
- ▶ Removal Order (if applicable)
- ▶ Criminal Records or Evidence of Ground of Inadmissibility
- ▶ Brief or Legal Statement
- ▶ Table of Contents
 - ▶ Evidence of relationship to Qualifying Relative(s)
 - ▶ Hardship Evidence
 - ▶ Discretion Evidence

Tips

- ▶ Page number evidence, don't use tabs (they're removed for scanners)
- ▶ Be a lawyer – use case law in anticipation of appeal. Authority includes BIA, AAO, and Circuit Court Decisions, especially in domicile in the United States or District where Removal Order issued.

Where to File:

- ▶ Joint I-601/I-212: Phoenix Lockbox
- ▶ USCIS
- ▶ P.O. Box 21600
- ▶ Phoenix, AZ 85036
- ▶ Or
- ▶ USCIS
- ▶ Attn: 601/212 Foreign Filers
- ▶ 1820 E. Skyharbor, Circle S, Suite 100
- ▶ Phoenix, AZ 85034

Filing a stand-alone I-212

- ▶ If filing to permit re-entry after a removal order, you must file at the USCIS office in the jurisdiction where the removal order was issued or if not applicable, then where Applicant intends to live. 8 C.F.R. 212.2(d)
- ▶ If filing I-212 for section 212(a)(9)(C)(i) or (ii) then you must file at USCIS office at jurisdiction where you intend to live. 8 C.F.R. 212.2(d)
- ▶ If the applicant needs both I-212 and I-601 then must file together at Phoenix Lockbox.

If Approved, What Next:

- ▶ Regular I-797 notice sent to attorney and client, and consulate will be notified
- ▶ Procedures vary, but typically another consular appointment will be necessary
 - ▶ New medical exam may be necessary
 - ▶ New biometrics may be necessary
 - ▶ New affidavit of support documents may be necessary
- ▶ Immigrant visa will be issued at embassy, but applicant is not a Lawful Permanent Resident until they appear at a Port of Entry and are admitted by CBP.
- ▶ Waiver only serves purpose of waiving grounds that were enumerated on the application
 - ▶ USCIS could seek to rescind status if different grounds determined later
 - ▶ Removal ground for being inadmissible at time you obtained status. INA § 237(a)(1)(A).
 - ▶ Anything that happens between issuance of the Immigrant Visa and Admission at Port of Entry is not covered
 - ▶ If a K or V visa holder, you can be required to file a new I-601 if new grounds determined at AOS interview

Special Rules for K visa applicants

- ▶ Filing for K then fiancé should be referred to as “prospective spouse” and step-parent is “prospective step parent” in forms and brief
- ▶ Waiver is conditional. Applicant must marry spouse and file Adjustment of Status for waiver to become final.

If the I-601/I-212 is denied

- ▶ File an I-290B with the Administrative Appeals Office (AAO) for appeal or Motion to Reconsider or Reopen.
- ▶ File with the Chicago Lock Box, not with AAO directly
- ▶ Filing fee is \$630
 - ▶ Often it is more economical and faster to file a new waiver, especially if new evidence available
 - ▶ AAO has issued some good decisions so it's worth it to appeal if you have no new evidence



Filing a provisional waiver (I-601A)
when your client is in proceedings

Step 1

- ▶ Step 1: Upon approval of I-130 petition by immediate relative, approach Government Counsel
 - ▶ Cannot file provisional waiver if the applicant is in removal proceedings unless proceedings have been administratively closed (8 C.F.R. §212.7(e)(4))
 - ▶ Try to get OCC to join a motion for administrative closure
 - ▶ Present your equities, brief summary / evidence of hardship that the qualifying relative would suffer
 - ▶ Explain why your client is not inadmissible under other grounds

Step 2

- ▶ Step 2: File unilateral motion for administrative closure with the IJ if OCC declines to sign
- ▶ Cite Matter of AVETISYAN 25 I&N Dec. 688 (BIA 2012)
- ▶ Include plenty of discretionary evidence / evidence of prospective hardship

Step 3

- ▶ Step 3: When IJ is not open to administrative closure
- ▶ Reserve appeal, file with BIA (Matter of Ayebae, 5/1/14)

Step 4

- ▶ Step 4: When proceedings have been administratively closed
- ▶ File I-601A (See Sample Table of Contents)
- ▶ Upon approval of I-601A – File a motion to terminate before applicant goes abroad for consular interview – otherwise departure while proceedings are administratively closed can result in in absentia order!

Filing a provisional waiver (I-601A) when your client has a removal order

- ▶ Reinstatement – client is not eligible if subject to reinstatement (re-entry after prior order) – but USCIS must have actually moved to reinstate the old order to trigger I-601A ineligibility for this ground
- ▶ If your client has a removal order (even in absentia/ Post VD) – may file I-212, await approval, then file I-601A
- ▶ Cannot file I-212 concurrently with I-601A
- ▶ Approaching OCC to reopen and terminate, would be easier, but not likely in most jurisdictions, case specific

Filing a provisional waiver (I-601A) when your client has a removal order

- ▶ Be Careful with in-absentia orders (INA 212(a)(6)(8) and "5 Year Bar" for Failure to Attend a Removal Hearing – if this applies to your client, I-212 will not waive the in-absentia order (post April '97 IIRAIRA orders)
 - ▶ Consular official has discretion to waive the 5 year bar if there were reasonable grounds for not attending the hearing
 - ▶ Can also try to reopen and terminate proceedings in this case to provide less risk to client when leaving for interview
- ▶ Voluntary Departure – your client never left
 - ▶ Converts to removal order – must file I-212, then 601A

Filing a provisional waiver (I-601A) when your client is not in proceedings and when your client does not have a removal order

- ▶ Obtain approval of immediate relative petition (I-130)
- ▶ File I-601A (No requirement for Priority date to be current)
- ▶ Once priority date is current, Begin NVC process, schedule consular interview
- ▶ No EAD eligibility while I-601A is pending
- ▶ Biometrics must be completed

Filing the I-601A Packet

- ▶ Basic Forms : G-28, Form I-601A, Filing Fee (\$670)

- ▶ Address:

- ▶ USCIS
P.O. Box 4599
Chicago, IL 60680

If using carrier:

- ▶ USCIS
Attn: I-601A
131 S. Dearborn, 3rd Floor
Chicago, IL 60603-5517

Sample list of supporting documents


- ▶ Required Docs / Evidence of I-601a eligibility
 - ▶ G-28 / I-601A
 - ▶ Filing Fee (\$670) – for now (No fee waiver available!)
 - ▶ Immigrant Visa fee payment receipt
 - ▶ Copy of I-130 Approval receipt
- ▶ Evidence of Family ties in the United States
 - ▶ Evidence of lawful status
 - ▶ Birth certificates establishing relationship
- ▶ Evidence of Medical Hardship
 - ▶ Medical records
 - ▶ Receipts
 - ▶ Prescriptions

Sample list of supporting documents

- ▶ Evidence of Financial well-being and financial obligations
 - ▶ tax returns
 - ▶ Check stubs, copy of checks or deposits for weekly income
 - ▶ Monthly bills
 - ▶ Bank account statements
 - ▶ Wire transfers abroad
 - ▶ Day-care estimates
 - ▶ Loan / Mortgage Statements
 - ▶ Insurance Statements
- ▶ Educational documents
 - ▶ School records
 - ▶ Diplomas
 - ▶ Enrollment documents

Sample list of supporting documents

- ▶ Personal Considerations
 - ▶ Letters from family and friends stating in detail how qualifying relative would suffer should s/he have to relocate abroad or remain in the US without applicant
 - ▶ Statement from applicant
 - ▶ Statement from Qualifying Relative
 - ▶ Family photos
- ▶ Country conditions
 - ▶ US State Department Reports / Travel warnings
 - ▶ Consular info pages
 - ▶ Photos of living conditions in applicant's birth town
 - ▶ Newspaper articles / crime reports from applicant's home town



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