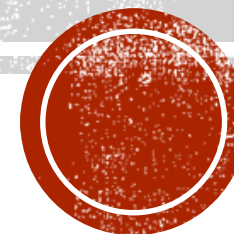


# **WAIVERS OF INADMISSIBILITY**

## **Updates in Adjustment of Status and Consular Processing**

Rebecca Kitson and Jackie Watson



# COMMON GROUNDS OF INADMISSIBILITY — NONCRIMINAL / WAIVABLE

- Unlawful Presence Bars
  - 3 and 10 year bars
  - INA §212(a)(9)(B)
- Fraud and Misrepresentation
  - INA §212(a)(6)(C)
- Alien Smuggling
  - For spouse, parent, son or daughter only
  - INA §212(a)(6)(E)
- Previously removed
  - INA §212(a)(9)(A)
- Mental Health Bars Related to Drug/Alcohol Use
  - INA §212(a)(1)(A)

# COMMON GROUNDS OF INADMISSIBILITY — CRIMINAL / WAIVABLE

- A controlled substance violation of the laws and regulations of any country or U.S. state related to a single offense of simple possession of 30 grams or less of marijuana;
- Two or more convictions, other than purely political ones, for which the sentences to confinement were a total of five years or more;
- Prostitution;
- Unlawful commercialized vice whether or not related to prostitution.
- Generally found at INA § 212(a)(2)

# COMMON GROUNDS OF INADMISSIBILITY – NONCRIMINAL / NOT WAIVABLE

- False Claims to USC
  - INA §212(a)(6)(C)(ii)
- Marriage Fraud
  - INA §204(b)
- Permanent Bar – waivable after 10 years outside of the US
  - Two ways to trigger – EWI post-removal order or one year of unlawful presence (cumulative and continuous) and subsequent EWI
  - Applies to minors
  - Exception for VAWA Self-Petitioners if connected to abuse or extreme cruelty
  - INA §212(a)(9)(C)



# COMMON GROUNDS OF INADMISSIBILITY — CRIMINAL / NOT WAIVABLE

- Controlled Substance Offenses
- Drug Trafficking
- “Reason to believe” a person is a drug trafficker
  - BIA likens the standard to probable cause in criminal cases (9<sup>th</sup> Cir has a more stringent analysis)
  - Lack of conviction does not necessarily mean this ground doesn’t apply
  - INA § 212(a)(2)(C)
- Certain family members of drug traffickers
  - The spouse, son, or daughter of someone who the agency has reason to believe is a drug trafficker is also inadmissible if within the past five years they knowingly obtained any financial or other benefit from the illicit activity.

# TYPES OF WAIVERS: I-601A PROVISIONAL WAIVER

- What is waived:
  - 3/10 year unlawful presence bars ONLY
- When to use:
  - When a client is consular processing
  - When the client ONLY has the above bars to waive
  - When a case is administratively closed
- When NOT to use:
  - When other grounds of inadmissibility may be present
  - Actively in removal proceedings
  - Adjusting status in the US
- Standard for waiver is extreme hardship to USC or LPR spouse or parent

# TYPES OF WAIVERS: I-601 WAIVER

- Grounds of inadmissibility that may be waived:
  - 3/10 year unlawful presence bars
  - Fraud and misrepresentation
  - Smuggling
  - Health related grounds of inadmissibility
  - Waivable criminal grounds of inadmissibility (i.e., single marijuana possession offense, CIMT etc)
- Standards:
  - Extreme hardship to USC or LPR spouse or parent in the case of the unlawful presence bars and fraud
  - Smuggling – only for spouse, son, daughter, or parent; only for family based petitions (excluding F4); to assure family unity, for humanitarian reasons and in the public interest
  - Mental Health/harmful behavior – discretionary waiver available
  - Criminal (212(h)) – extreme hardship to USC or LPR spouse, parent, son/daughter OR 15 years prior and rehabilitated

# TYPES OF WAIVERS: I-212 WAIVER

- Grounds of inadmissibility that may be waived:
  - Previously removed
  - Permanent bar after 10 years outside of the country
- When to use:
  - Provisional I-212 / I-601A for consular processing
  - Joint filing I-212 / I-601 for consular processing
  - AOS & I-212 for prior removal
    - VAWA Self-Petitioners



# RECENT CHALLENGES IN ADJUSTMENT OF STATUS & WAIVERS

- RFE / NTA memos
  - June 2018
- Timing of submission
  - Pre-emptive
  - Waiting for the officer's determination of inadmissibility
- USCIS determinations of 3/10 year bars applying after the time has run in the US
- Preconceived intent

# RECENT CHALLENGES IN CONSULAR PROCESSING & WAIVERS

- Revocation of I-601A Provisional Waiver determinations
  - Public Charge – Changes to Foreign Affairs Manual since January 2018
  - Reason to believe issues
  - Smuggling
  - Drug Use/Abuse
    - Careful of states where medical/recreational marijuana use is legal
- Legal Net – only for legal errors, not for overturning factual determinations
- Granting of requests to expedite waivers has become rare
- RFEs

# BEST PRACTICES

- Screen your clients well for all grounds
  - Careful with previous overstays!
- Manage expectations with consular processing
- Evaluate for reasons to expedite
- Be creative with affidavits of support and prepare to address public charge issues
- Discuss marijuana use
- FOIA, FOIA, FOIA!!
  - All agencies
  - Make sure to routinely appeal