

I-601 Waivers and Extreme Hardship: Strategies for Writing a Convincing Narrative for  
an Application for Waiver of Grounds of Inadmissibility  
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Under the Immigration and Nationality Act of 1996 are various provisions for the I-601 Application for Waiver of Grounds of Inadmissibility, formerly titled Application for Waiver of Ground of Excludability. This memo addresses the structure and content of an Application for Waiver of Grounds of Inadmissibility under INA § 212(a)(9)(B)(v), 212(h), and 212(i). It highlights the merits of various arguments often proffered in the argument of Extreme Hardship.

Court decisions addressing the I-601 waiver may change the existing law or create new law. Counsel are advised to independently confirm whether the law in their circuit or BIA decisions have changed existing law or precedent since the date of this memo.

**What is an Application for Waiver of Grounds of Inadmissibility and Who Is a Qualifying Relative?**

An Application for Waiver of Grounds of Inadmissibility is filed by an alien in the event that an alien has been denied admission to the United States. Different sections of INA § 212 allow for the application of a waiver of inadmissibility. Waivers must establish that a qualifying relative will suffer “extreme hardship” if the alien is not admitted. So who is the qualifying relative? It depends on the ground of inadmissibility. A waiver for prior unlawful presence (INA 212(a)(9)(B)(v)) or misrepresentation (INA 212(i)) requires it to be established 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,” whereas a waiver for criminal history (INA 212(h)) requires it to be established “that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.” A US citizen fiancé(e) may also be a qualifying relative [9 FAM 41.81 N9.3(a) and 8 CFR 212.7(a)(1)(i)]. For the purposes of this memo the Application for Waiver of Grounds of Inadmissibility will be referred to as an I-601.

**Voluntarily Entering into the Foreign-Filed Waiver Process**

If you have a client who entered without inspection (EWI) and is now married or engaged to a US citizen, consider voluntarily entering into the waiver process after first eliminating adjustment of status (AOS) under INA 245(i) and Cancellation of Removal (COR). Always be sure to explain to your client the risks associated with voluntarily entering into the waiver process. Bear in mind that for foreign-filed waivers, the alien must remain abroad while the 601 is in process, which in some places can take 6-12 months or more, depending on the location. The most noted exception to this lengthy processing time is Juarez, discussed below. The entire process commences with an I-130 or I-129F filing as the I-601 would be filed at the consulate following an immigrant visa or K visa interview.

### **HIV Waivers and Health Grounds of Inadmissibility**

While the I-601 form is also used for HIV waivers, the content of these arguments is completely different. An HIV waiver's focus is health insurance. This memo is not meant to provide guidance on HIV waivers or any waivers for health grounds of inadmissibility.

### **Who adjudicates Applications for Waivers of Grounds of Inadmissibility?**

I-601 waivers filed at a consulate are adjudicated by a representative of CIS, not any consular officer. The consulate may sometimes make a recommendation on whether to approve or deny an I-601, but it is the CIS office that makes the decision. The Officer-in-Charge (OIC) at the CIS office abroad is the I-601 adjudicator. At some busy CIS offices, there is more than one CIS adjudicator, but all decisions are signed by the OIC. When there is more than one adjudicator, they will attempt to make their decisions consistent within that CIS office, with the OIC setting the standard.

Not every country has a CIS office. To see which CIS office has jurisdiction over waivers filed in a particular country, check the USCIS Overseas Office Locator: [https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office\\_type=OS](https://egov.uscis.gov/crisgwi/go?action=offices.type&OfficeLocator.office_type=OS)

For in-country filings, the immigration officer handling the adjustment of status case often makes the decision on the I-601, though sometimes a supervisor will handle the I-601. Waivers may also be filed before a judge when adjusting status in court. The judge then adjudicates the waiver.

### **What are applicable legal arguments for an Application for Waiver of Grounds of Inadmissibility?**

All arguments for Applications for Waivers of Grounds of Inadmissibility are based on the precept that there is a qualifying relative who will suffer "extreme hardship" if the Alien's admission is denied. "Extreme hardship" is very vaguely defined as greater than the normal hardship the qualifying relative can be expected to experience if the Alien is denied admission. It is important to prove both why the qualifying relative cannot move abroad AND why the qualifying relative cannot simply live in the US without the Alien. It is not enough to say that the qualifying relative will miss the Alien's company as this is considered "normal" hardship, not extreme hardship.

Below are some examples of Extreme Hardship arguments. Here they are separated into levels, with Level 1 being the strongest arguments and Level 4 being the weakest. At some USCIS offices abroad, one Level 3 argument and a few Level 4 arguments may be sufficient. At other USCIS offices, an approval will not be issued unless there is at least one Level 1 argument presented. For most offices, it's best to have at least one Level 2 and a few Level 3 arguments presented in the waiver. You are unlikely to win a waiver case with only Level 4 arguments, though that's not to say it's impossible. For the purpose of this memo "Relative", is always the qualifying relative. The list below is by no means exhaustive. It is provided to give the reader an idea of what might be a stronger argument vs what might be considered a weaker argument.

Level 1 arguments:

- (a) Relative has a MAJOR medical condition (e.g. brain tumor, multiple sclerosis, cerebral palsy) which makes Relative unable to move abroad and for which Relative absolutely needs Alien in the US to help take care of him/her,
- (b) Relative is caring for an elderly, chronically ill, or disabled relative who needs constant care and whose condition is bad enough that Relative either MUST live with the relative or Relative MUST spend at least an hour a day assisting the relative with things like hygiene or physical therapy, and this makes Relative unable to move abroad and makes him/her really need Alien in the US to help him/her care for his/her relative and manage his/her other responsibilities, or
- (c) Alien's country is in a state of active war or major political upheaval.

Level 2 arguments include:

- (a) Relative is the primary caregiver for his/her child(ren) from a prior relationship and the child(ren)'s other parent will not allow the children to be taken out of the country AND the child(ren) have formed an emotional attachment to Alien
- (b) Relative has a serious medical condition that makes it very difficult for Relative to move abroad and Relative needs Alien to provide help (e.g. Relative needs to have major surgery sometime in the next year, with an expected recovery time of several months),
- (c) Relative is caring for a moderately disabled relative who normally can care for him/herself but occasionally has episodes in which he/she needs a lot of help from Relative and during those times Relative, in turn, needs help from Alien,
- (d) a relative is unusually financially dependent on Relative (e.g. Relative's mother has just gone through a nasty divorce with Relative's father in which she got nothing and because she has never worked, she doesn't qualify for social security, so Relative is supporting her in the entirety for the rest of her life),
- (e) Relative has a child that he/she is about to put through college (note, some offices consider this a stronger argument, some consider it a weaker one), or
- (f) Alien's country is on the verge of major political unrest or negative political change or the country is known for oppression of one sort or another (e.g. Relative is a Christian woman and Alien is from Saudi Arabia), or it is in the infant stages of post-war recovery.

Level 3 arguments include:

- (a) Relative is the non-custodial parent of a child from a prior relationship and has an actual relationship with that child and the child's other parent will not allow Relative to take the child out of the country but Alien does not have a relationship with the child at this time,
- (b) Relative a significant condition that makes it inconvenient to move out of the country (e.g. severe asthma and Alien spouse lives in Mexico City),
- (c) Relative been diagnosed by a licensed psychologist/psychiatrist with clinical depression due to Alien's immigration problems – note: even thoughts of suicide do not raise this argument to Level 2,

- (d) Relative and Alien have young children together or Relative has full custody of Relative's child and can bring him/her abroad and Alien's home country has bad public health conditions and bad public education,
- (e) Relative's job requires a license in both the US and abroad and it will be very difficult to get licensed abroad (e.g. attorney, medical doctor),
- (f) Relative has job skills that are very specific to the US (e.g. a tax accountant with extensive familiarity with US tax law),
- (g) Alien's country has a very bad economy,
- (h) Relative has a close relative who is partially dependent on Relative financially (e.g. Relative's mom gets social security but needs Relative's extra \$500 per month to stay in her present apartment) or physically (e.g. Relative's mother functions well now, but her health has been declining and it is expected she will need more of Relative's help in the near future).

Level 4 arguments include:

- (a) Relative has debts they wouldn't be able to pay if they moved abroad,
- (b) Alien's country has a high unemployment rate,
- (c) Alien's country has a high crime rate,
- (d) Relative has been despondent due to the situation, but hasn't sought professional help,
- (e) Relative's parents are aging.

I cannot stress enough that it is insufficient to prove that Relative has elderly or sick relatives. You must show the link between the medical condition and the waiver, i.e. you must prove that the elderly or sick person needs the qualifying Relative to remain in the US and, preferably, that the Alien is also needed in the US.

Many clients who do their own research are advised by others on the internet to include a psychological self-scoring test, called Holmes-Rahe. In my opinion, this is not worth including. It is also probably not worth including the argument that the couple wants to have children in the future (but are not currently pregnant) and either the wife is getting older or the foreign country has a high infant mortality rate.

Whenever a waiver claims a relative is dependent on Relative either for direct care or for money, Counsel must explain why no other relative such as one of Relative's siblings can provide the same care or support.

The reality is adjudicators are currently each creating their own guidelines using only the case law for reference. The problem is that the case law is inconsistent, in my humble opinion. The case law generally says that because each case is unique, the adjudicator has broad discretion to decide what constitutes extreme hardship. Statements along these lines appear in many decisions. The statements effectively discourage USCIS from creating the kind of list I just presented.

### **How much supporting documentation is sufficient?**

A waiver packet should include: forms, brief or attorney letter, and supporting documents. In some locations, the only form you need to file is the I-601. Other locations also require a G-325A for the applicant. Still other offices will require all vital records related to the case and police reports translated into English, even when the applicant has not criminal history. Check with the consulate in advance to see what will be required. The brief or attorney letter should be around 10-15 pages and the supporting documents should number 20-50 pages. That being said, there are attorneys that have repeat success with briefs shorter than 5 pages. If it is absolutely necessary to supply more than 50 pages of supporting documents, then do so, but at some point one will experience the law of diminishing returns where there is the risk of annoying the adjudicator with too much to read, thereby outweighing any or all benefits of including a given document. The catch is that the Administrative Appeals Office prefers to see more evidence than any initial CIS adjudicator wants and prefers for all evidence to have been submitted in the initial filing. Keep in mind that the intent is to convince the adjudicator the first time around, so aim to please the adjudicator, not the AAO. A shorter packet can receive approval if there are a few pieces of very good evidence and a very strong argument.

### **What constitutes sufficient evidence?**

Any argument presented in the I-601 must be supported with good evidence. There should be non-personal documents, such as country reports, and personal documents such doctors' letters and psychologist letters. For non-personal documents it's best to cite US government sources, as the US government adjudicator will have more trouble dismissing them. Common sources are the Consular Information Sheets, the CIA Factsheets, and the National Institutes of Health medical encyclopedia. Bear in mind that for foreign filings, the OIC is most likely quite familiar with country conditions in the countries over which he/she has jurisdiction and really doesn't need to see a few hundred copies of the same country reports each month. Country reports are much more important for I-601 filings within the US and when filing a case for a national of a country from which the OIC may see fewer waiver applications (see Consulate Shopping below). Use newspaper articles and NGO reports sparingly when information needed cannot be found from a US government source. Certain adjudicators have openly 'dismissed' this attorney's non-US government sources in their denials, even when the reports come from reputable sources such as Amnesty International.

For personal documents, confirm all letters are signed and dated. They do not need to be notarized unless it is hard to believe that the person signing the letter would make that statement. Attorney-certified photocopies may be sent, but sending the original and keeping the copy is preferable. Doctors' letters should describe the medical condition, the patient's physical limitations (e.g. no driving), the need for assistance, the need for continued medical care, and (if applicable) the physician's personal knowledge of the alien's prior role in providing direct assistance to the patient. Psychologist letters should describe the condition, how the psychologist arrived at that diagnosis, the relationship between the waiver process and the condition, the likely psychological effects of waiver denial, the frequency of the patient's visits, the medications the patient is on (if any), and

the plan for future treatment. Some attorneys include the doctor's or psychologist's resume. This attorney rarely finds this helpful or necessary. Some lab reports or medical notes may be appropriate depending on the case.

Cases are proven with the supporting documents, not with the brief. The purpose of a brief is to make sense out of the supporting documents and place the case into legal context. Good supporting documents are paramount to getting approval. Make the legal section short for foreign filings. Most of what the OIC does is adjudicate I-601s. They are familiar with case law. For in-country filings where the adjudicators process the spectrum of applications, a legal section may be more important.

The qualifying relative's letter is required. This attorney usually includes it as a supporting document. For personal documents in the form of a letter, guide the person in writing the letter, but don't write it for him/her; it needs to be in their own words. Beware of clients pulling letters off of the internet to use as a model for what they need to write. The OICs frequent the internet, too, and they are aware of the content of letters that have been publicly posted. If the OIC suspects the letter was copied off the internet, rather than authored by the person who signed it, the letter will be given less weight and the credibility of the entire packet may be at risk.

#### **What kind of evidence can I provide to prove rehabilitation for a criminal waiver?**

- time since last conviction, generally more serious convictions and/or repeat offenses require more time since last conviction
- statements of the criminal court regarding chances of alien repeating the crime (sometimes the court actually comes out and says the defendant is unlikely to reoffend)
- expungements and pardons (don't get you out of ground of inadmissibility, but they're great proof of rehabilitation, 9 FAM 40.21(b) N4:1-3(b)(4) actually refers to them as "rehabilitative" statutes)
- letter from parole officer, policeman, judge or other law enforcement official stating that from their experience they 'know' when someone is likely to reoffend and this guy won't reoffend
- letter from psychologist stating that crime was result of psychological problem and now the person is better (this is especially useful for history of shoplifting without economic motivation)
- evidence of changed life conditions, e.g. alien committed offenses when he/she was young, foolish, unemployed, childless, and/or single, but now person is older, wiser, married, employed and/or has kids
- letter from clergy stating this person has changed
- evidence that alien is in position of trust with money (if financial crime) or trust with children (if violent or alcohol-related crime) and that the people who placed him in this position of trust KNOW the alien's criminal history
- evidence of successful completion of alcohol or drug treatment program if alcohol or drugs were a factor in the crime (BEWARE OF ADDICTION GROUNDS OF INADMISSIBILITY - ALIEN MUST BE CLEAN AND SOBER FOR THREE YEARS)

- for recent first-and-only offenses of a less serious nature, if the punishment was light, bring that up

### **How much should I charge the client for this?**

If you prefer to charge a flat fee as I do, assume that this will take 20-40 attorney hours for most cases and charge accordingly. A well-prepared waiver application is a major undertaking.

### **What can be expected from different Offices?**

Over the past few years I have been stating that the most important factor in determining the chances of approval is where the case is filed. However, as time passes and I see more and more decisions, patterns become clearer. I now advocate the theory that the primary reason why approval rates are different at different offices is because the most common grounds of inadmissibility vary from office to office. For example, offices in Eastern Europe and the Middle East may see a lot more cases where the alien had a denied asylum claim that lead to an order for Removal that the alien disregarded. Such a scenario would be much less common in Ciudad Juarez where most of the case will involve simple unlawful presence only. If different grounds of inadmissibility are treated differently when it comes to evaluating the waiver application case, then this is the cause of the variation in approval rates, rather than the level of lenience of the adjudicating officers.

### **Mitigating and Aggravating Factors**

As was described in the preceding section, the ground of inadmissibility can be a major factor in predicting chances of approval. Likewise, there may be other mitigating and aggravating circumstances that effectively change the required level of hardship you would need to show in order to be granted the waiver. Based on my experience and what I've seen written in some decisions, I've compiled the following list of mitigating and aggravating factors:

#### Mitigating

- Applicant voluntarily entered into the foreign-filed waiver process.
- Applicant's only violation is unlawful presence and applicant entered the US as a child, brought by his/her family
- Applicant had a bona fide, reasonable belief that he/she was complying with the law
- Applicant and Petitioner's marriage has already been lengthy at the time of the waiver application
- Applicant and Petitioner have child(ren) in common
- Applicant and Petitioner had prior miscarriage(s) that would have been a child in common

#### Aggravating

- Qualifying relative is from the same country as the alien, having immigrated to the US as an adult (immigrating as a child doesn't seem to be an aggravating factor)
- Applicant is only eligible for waiver because violation occurred before Congress eliminated the waiver for that type of violation

- Applicant lied in the current immigration process
- Applicant has multiple instances of misrepresentation
- Applicant violated Voluntary Departure
- Applicant ignored an Order for Removal
- Applicant has arrests for which he/she was not convicted
- Applicant exhausted lengthy deportation defense procedures prior to proceeding abroad
- Applicant accused of marriage fraud either now or in the past, even if accusation was flimsy
- Applicant previously married to a different USC petitioner
- Petitioner spouse or Applicant spouse previously had multiple marriages
- Petitioner's or applicant's divorce immediately preceded current marriage

Whether or not a given aggravating factor *should* be an aggravating factor is beyond my control. Even if I think it shouldn't be an aggravating factor, if I've seen it used against the applicant in the narrative of a denial, it made it onto my list here. If you have any mitigating factors, be sure to bring them up. If you have an aggravating factors, be sure to explain them thoroughly in an attempt to minimize their impact. Remember that aggravating and mitigating factors are not about hardship; but they do affect how much hardship you will need to show.

### **Waiver Pilot Program in Ciudad Juarez**

Beginning March 6, 2007, I-601 waiver applicants in Mexico benefit from the Waiver Pilot Program in which they may be able to obtain waiver approval less than 48 hours from the time of filing. This is a very exciting program as it makes the process much more practical for many applicants who normally would be unwilling or unable to leave their families, especially small children, for an extended period of time in order to go through the waiver process voluntarily.

At the K or immigrant visa interview, once the alien is found inadmissible, he/she will be able to file the I-601 at a waiver appointment at the consulate as early as three days following the interview. The waiver packet will be adjudicated the same day, while the Applicant waits. If it is *clearly approvable*, the alien will be able to get his/her K or immigrant visa either the same day or the next day. So, whereas before an applicant had to remain in Mexico for the better part of a year while the waiver was adjudicated, now they may only need to wait a week or two.

Waiver appointments must be made by phone by calling 1-800-919-1754 from the US or 01-477-788-70-70 from Mexico. Have a credit card handy because they will charge you \$7 for the call. As soon as you know your consular appointment date make your waiver appointment to take place no earlier than three days following the consular appointment. Beware that there is a backlog of several months for the waiver appointment, so if you don't learn of your consular appointment until a few weeks before it is to take place, you might not be able to schedule the waiver appointment close to the consular appointment and you may have to wait several months in Mexico in between appointments. Nonetheless, do not make your waiver appointment until you know your consular

appointment as making an appointment that you later have to cancel will simply make appointment backlogs worse for everyone.

At the waiver appointment, the waiver must be *clearly approvable*, which means it is now more important than ever to prepare a quality waiver packet for Mexican cases with plenty of supporting documentation. If the packet is not clearly approvable, it will not be denied, but it will be referred to the normal waiver process, which could take six months or more. If your case gets referred, this should be an indication to you that you need to amend the packet to make it stronger. Some cases, no matter how well you prepare, may not be clearly approvable due to the facts of the case. For example, if your client is a convicted felon then regardless of the hardships and the evidence, it is a case that may require more careful consideration.

Those with waiver packets pending prior to March 6, 2007 may not withdraw their pending packets and re-file under the Waiver Pilot Program. If it is found that this is happening, the Program may be terminated for everyone. Those with already-pending waiver packets will see shorter processing times as the CIS office spends less time reviewing expedite requests and more time looking at the pending waivers. It is also an abuse of the Program to make an Infopass appointment at the Juarez consulate for anything other than filing an I-601 waiver packet. Because of the Waiver Pilot Program, your clients should plan to spend at least a week in Juarez.

#### **Can an I-601 be filed within the US?**

It is not possible to file the waiver in the US if the alien entered EWI because there is an AOS problem under INA 245(a), which the I-601 will not cure. Also, if the client entered on a K visa and is not adjusting through the K visa petitioner, there is a problem under INA 245(d), which the I-601 will not cure and the alien must file abroad. But if the client doesn't have any problems adjusting under INA 245, it may be possible to file the I-601 in the US. The adjudication of local filings seems to have no rhyme or reason. It all depends on the individual immigration officer who reviews the case. Make the case as strong as possible.

#### **Can Fiance(e)s file as qualifying relative?**

Yes, fiancé(e)s can file an I-601. See 9 FAM 41.81 N9.3(a) and 8 CFR 212.7(a)(1)(i).

#### **How does one file for Deportees?**

For aliens outside the US, if the alien needs to file an I-212 and an I-601, file them *together* at the consulate. Don't file the I-212 at the district office and then file the I-601 at the consulate. 8 CFR 212.2(d). The need to file an I-212 in addition to an I-601 does not mean that a waiver packet will be any different than if a client needs only the I-601. In essence it means another form needs to be completed and another fee paid. However, extreme hardship needs to be proven only once.

### **How does one file with Multiple Grounds of Inadmissibility?**

If the client needs waivers under INA 212(a)(9)(B)(v), INA 212(h) and INA 212(i), only one I-601 form is needed and one waiver packet, and the fee paid once. An extra fee is needed only if the client has a deportation and a I-212 must be filed as well.

### **Consulate Shopping**

If filing at an office other than the alien's home country, it is possible to encounter problems getting the client a visa to enter that third country. If it's Europe, keep in mind that for European Union (EU) countries, there are certain nonimmigrant visas that if issued by any EU country, are honored by all EU countries, even if another EU country has denied the alien a visa before. Contact the US consulate of that country to make sure the client doesn't need a visa from *that* country.

Most consulates will not take waiver cases for third country nationals unless the client resides in that country. The major exception is the "homeless" case where the US has no consulate in that country and no one specific consulate has been designated for nationals of that country to go to, OR the alien is stateless. If the client has a credible fear of returning to his/her home country, it is reasonable to contact many consulates to investigate which of them might take the case. Contact the consulates directly to ask, or work with the National Visa Center (NVC) when the case is at that point in the process. If Counsel has an opportunity to inquire at many consulates and the NVC assigns a consulate Counsel doesn't want to work with, contact NVC and make a request for a specific consulate. Bear in mind that filing in Canada is not necessarily the best option due to administrative problems in Vermont. Also keep in mind that EU nationals can often live and work in another EU country fairly easily. Juarez has a policy to not take waiver cases for third country nationals unless the client has legally resided in Mexico for one year prior to the interview.

If the alien and qualifying relative approach the attorney prior to marriage and the alien is from a country that does not have a high approval rate for waivers, consider having the clients marry in a third country with a more favorable approval rate and file for a K3, going through consular processing in that third country. According to 9 FAM 41.81 N3(c), this is an option.

### **How can a case be expedited?**

Every client wants his/her case expedited. Making an expedite request on every case interferes with the efficiency of any office and slows down the procedure for everyone. An attorney wants to be a zealous advocate for their client, but try not to make expedite requests unless there is a truly urgent, serious situation. Let the client know at the outset of the representation that your office will not be making an expedite request.

If there is an unusually compelling Level 1 argument and the alien is currently present in the US, reconsider Cancellation of Removal. If the alien is eligible except for the 10-year requirement, explore the possibility of requesting Deferred Action until the 10-year mark. Such an option carries risk, but if its an unusually compelling case, its something to consider.

**Things to watch out for: INA 212(a)(9)(C), INA 212(a)(6)(C)(ii) and Medical Exam**

Always, always, always confirm a client won't be found inadmissible under INA 212(a)(9)(C) prior to either sending the client out of the country or taking money to prepare a waiver. If the client is not sure whether he/she was formally deported or just refused entry, run an FBI fingerprint check (<http://www.fbi.gov/hq/cjisd/fprequest.htm>). The FBI report will list all deportations, but if the alien was merely refused entry, the incident will not appear on the report. For clarification on when INA 212(a)(9)(C) applies, see Madeleine Albright's April 1998 cable regarding unlawful presence, which can be found as AILA Infonet document 98040490. Review sections 35-41. While there is some debate on the subject, the cable appears to clarify that the exceptions to unlawful presence found in INA 212(a)(9)(B) apply to INA 212(a)(9)(C) and that (9)(C) is only triggered upon an entry or attempt to enter without inspection, as opposed to any attempt to enter illegally, following deportation or more than one year unlawful presence in the aggregate. However, while the policy at the US consulate in Juarez formerly appear to comply with this interpretation, recently there has been a change and now unlawful presence accumulated prior to age 18 is being counted toward INA 212(a)(9)(C).

Always be sure to ask your client if he/she ever claimed to be a US citizen for immigration purposes. This is a permanent ground of inadmissibility for which there is no waiver, INA 212(a)(6)(C)(ii). The US consulate in Juarez is diligent in finding aliens who have committed this particular violation.

There have been some concerns related to the drug history questions asked during the medical exam down in Juarez. Read AILA Practice Alert document 06020110 so you can properly prepare your clients. If the alien reveals virtually any drug experimentation in the past three years, he/she risks a finding of inadmissibility as a drug abuser or addict and will be ineligible to apply for a waiver of that particular ground of inadmissibility. He/she will have to show three years of sobriety. This does not appear to comply with the Foreign Affairs Manual. Direct any complaints to the Centers for Disease Control, Division of Global Migration and Quarantine, National Center for Infectious Diseases, Centers for Disease Control and Prevention, 1600 Clifton Road, Mailstop E-03 Atlanta, GA 30333. If you disagree with the finding, ask the consular officer to file an Advisory Opinion request with CDC. Other than that, there's nothing the Department of State can do for you, and you do not have the option to file the Advisory Opinion request directly with CDC yourself.

**How to approach Rehabilitation, Moral Character and Apologies**

A criminal waiver can be approved on rehabilitation alone in some cases. Look at INA 212(h) and see the section above regarding evidence of rehabilitation. Other than the criminal waivers, I-601 waivers should focus on the extreme hardship to the relative and not the moral character of the alien. Generally speaking, for waivers of unlawful presence, OICs do not need nor want lots of letters saying what a great person the alien is. However, depending on the facts of the case, it is sometimes beneficial include character letters if there is something extraordinary about the alien's character. Even

then, be conscious of the size of the packet and how much the adjudicator is being asked to read.

If the applicant clearly and intentionally violated the law, apologizing for the violation may be a good idea. If the alien is contesting the ground of inadmissibility or thinks he/she didn't do anything wrong (e.g. a 'notario' committed the fraud without alien's knowledge), DO NOT have the alien apologize. An apology is an admission of guilt. In any argument of minimal responsibility for the ground of inadmissibility, apologizing destroys that argument.

### **Contesting Ground of Inadmissibility**

If contesting the ground of inadmissibility, but with a deadline for I-601 submission and/or the belief the challenge to the finding will be unsuccessful, go forward in filing the I-601, stating in the opening paragraph that there is no concession of inadmissibility. Include the argument against the finding in the brief. This may not win over the consulate, but may win over the CIS officer. CIS can't over-rule the consulate's decision on inadmissibility, but if the CIS adjudicator agrees with the argument's reasoning, he/she will take that into consideration when deciding the waiver.

There's nothing in the law that prevents the filing of a Motion to Reconsider or an Advisory Opinion request regarding the finding of inadmissibility, at the same time that the I-601 is filed.

### **Inquiries**

Contact the various offices via phone or email for administrative concerns only. Don't attempt to argue the merits of the case over the phone. Discourage the client from attempting to contact the CIS him/herself. Many of the offices don't appreciate such phone calls as it takes them away from time spent deciding cases. As well, a good relationship with all offices only helps the chances of an adjudication happening quickly and to the clients benefit. Processing times are subject to change without notice.

Keep the number of inquiries to a minimum as they tend to slow down the progress of work at the CIS office. If you are concerned about making sure the waiver has been received, contact USCIS no earlier than thirty days after filing. If filing any addendums directly with the CIS office following their receipt of the waiver packet, you may inquire within a few days of when it is expected they received the addendum to confirm its receipt and that it has made it to the correct file. Avoid making another inquiry until the case is outside the normal processing time. Following that, make subsequent inquiries no earlier than 30 days after the most recent prior inquiry. Discourage the client from making inquiries on his/her own without express approval from Counsel.

### **Deadlines**

An I-601 cannot be filed abroad prior to the immigrant visa or K visa interview. For an AOS include the I-601 packet with the AOS packet, if desired. For consular filings, the interview is the earliest date the I-601 can be filed. It is not the latest date. Some consulates, most notably Rio de Janeiro, have a policy that they will never accept the I-

601 on the date of the interview, and the applicant must make a second in-person appointment to come back and file the waiver packet, even though this is a burden for many clients. For consulates that will accept on the day of the interview, if the applicant is not ready to file, they will typically be told they have 30 days to file. This deadline is normally easy to extend up to one year.

Rather than extending that deadline, you may choose to “fee in” by filing the form and the fee and possibly a bare minimum of supporting documents if the consulate demands it. The consulate will forward the case to the CIS office, getting the client’s case in the ‘queue’ for adjudication. While it’s in the queue, a more solid waiver packet can be compiled and submitted to the CIS office as an “addendum” or “amendment” up until the time the adjudicator reviews the case, whenever that may be. The advantage to the fee-in-amend-later strategy is that it cuts processing time while preparing a quality packet. The disadvantages are that (a) the consulate occasionally makes a recommendation on whether to approve or deny and they can’t make a considered recommendation if they don’t see the packet, and (b) by submitting things separately there is a greater risk that amendments don’t make it to the right file. Always be sure to include the consular case number on the cover letter when sending amendments directly to the CIS office. If the client doesn’t contact your office until he/she has already been found inadmissible, the fee-in-amend-later strategy is preferable. Be careful of using this strategy for USCIS offices with a rapid turnover rate, such as Frankfurt. You cannot use the fee-in-amend-later strategy for the Waiver Pilot Program in Ciudad Juarez as a decision will be made in less than 48 hours.

For in-country filings, sometimes the client does not know he will be found inadmissible until the adjustment interview. CIS will typically give the client 30 days to file the I-601. In this situation, extensions are not always granted and the fee-in-amend-later strategy is not recommended as a decision on the merits can be made immediately upon filing.

### **Can denials to Applications for Waiver of Grounds of Inadmissibility be appealed?**

An appeal following an administrative denial to an Application for Waiver of Grounds of Inadmissibility must be made to the Administrative Appeals Office (AAO). It must be filed within 30 days of the date of the denial. Note that it is possible to fee-in-amend-alter with the appeal. In such a case it is necessary to submit the I-290B and filing fee within 30 days of the denial (33 if mailed), but on the form there’s a box that can be checked indicating that the representing attorney will send the brief directly to the Administrative Appeals Office within 30 days. As the waiver decision is discretionary, it is very difficult to win an appeal. AAO does not like to overturn the discretionary decision on I-601 waivers. AAO discourages new arguments being presented on appeal that were not in the original I-601 packet, but new or ‘updated’ evidence is generally acceptable.

Once an appeal is filed, and forwarded to the AAO in Washington, DC, it is out of the hands of the CIS office that denied the case. The OIC does not have more access to information about the appeal than the attorney. Direct inquiries to the AAO, not the office that denied the case.

Due to the lengthy processing time for appeals (can be 18 months or more) and low chance of success, consider refiling a de novo I-601 packet instead, especially if the client attempted the first I-601 pro se and it is clear that a better packet can be compiled. The law is unclear on whether it is possible to file a de novo I-601 based on the same immigrant visa or K visa case. Some consulates will allow simply re-filing, but most will require starting over with a new visa petition. Most of the consulates within the jurisdictional area of the Vienna USCIS office will allow a re-filing of the I-601 without a new petition. Always inquire to be sure. Even starting over with a new immigrant visa petition may get a decision faster than an appeal. Also, having to start over with a new visa petition allows time to put together a better waiver packet. The process will allow for several months, rather than the 30-60 days given for preparing an appeal.

For an in-country I-601 denial, the appeal will probably not stop the client from being placed into proceedings as the I-485 would also be denied. There is nothing to lose by attempting to get Deferred Action following the I-601 denial. Other tactics for how to handle immigration proceedings following I-601 denial are beyond the scope of this advisory.

The I-290B is normally filed with the consulate, but in a few parts of the world it is filed with the CIS office. Be sure to review the instructions on the denial notice.

Any Motion to Reconsider will be automatically converted into an appeal if the CIS office denies the Motion. Normally no notice of the decision on the Motion to Reconsider is given if it is denied. It is only possible to know it has been converted into an appeal by making inquiries. Consider carefully filing a Motion to Reconsider before the OIC if claiming Abuse of Discretion before the AAO. It's hard to fashion an Abuse of Discretion argument that is not a bit insulting to the OIC who made the decision. This person is going to read the Motion and may remember Counsel's name the next time one of Counsel's waivers crosses his/her desk.

If you think you may be able to win a Motion to Reconsider with new evidence, you must explain why the new evidence was not submitted in the first place. OICs will not entertain a de novo I-601 filed as an MTR. Even if you have a good reason for not submitting the new evidence prior to the denial, the new evidence should still be limited. The more it looks like a de novo I-601, the less likely the OIC will be to vacate his original decision.

### **Prepare in Advance or Wait?**

If there is any question as to whether the client will actually be found inadmissible, Counsel may choose to wait until the finding of admissibility is made at the consulate interview or the AOS interview prior to working on the waiver. If the client is found inadmissible having waited will add at least 30 days to the entire process because it will take at least that long to prepare the waiver. However, if the client is not found inadmissible, the client will have saved thousands of dollars in attorney's fees.

## **APPENDIX: CASE LAW**

These are cases in which the definition of Extreme Hardship is discussed. This is not an exhaustive list, but most of these cases are Suspension of Deportation or Cancellation of Removal cases or are about the waiver under INA 212(h). Especially useful is O-J-O.

Matter of W, 9 I&N Dec. 1 (BIA 1960)  
Matter of Shaughnessy, 12 I&N 810 (BIA 1968)  
Matter of Anderson, 16 I&N Dec. 596 (BIA 1978)  
Matter of Ngai 19 I&N Dec. 245 (Comm. 1984)  
Matter of I-G-E, 20 I&N Dec. 880 (BIA 1994)  
Matter of Pilch, 21 I & N Dec. 627 (BIA 1996)  
Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996)  
In re O-J-O-, 21 I&N Dec. 381 (BIA 1996)  
Matter of Monreal, 23 I & N Dec. 56 (BIA 2001)  
In re Kao and Lin, 23 I & N Dec. 45 (BIA 2001)  
Matter of Recinas, 23 I&N Dec. 467 (BIA 2002)

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