U.S. CITIZENSHIP AND IMMIGRATION SERVICES

IMMIGRANT WAIVERS
Procedures for Adjudication of Form I-601
For Overseas Adjudication Officers[1]

April 28, 2009

[1] Guidance from the Vermont Service Center Adjudicator's Manual, the Rome Handbook, and the Office of Chief Counsel training materials was significantly relied on in developing these procedures. In addition, the Office of Policy and Strategy, Office of Chief Counsel, and Administrative Appeals Office provided significant assistance in the drafting of the procedures.

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Form I-601, *Application for Waiver of Ground of Inadmissibility*

I. Introduction

The Form I-601, *Application for Waiver of Ground of Inadmissibility,* is used by applicants for immigrant visas, non-immigrant fiancé visas, V visas, and adjustment of status to request a waiver of the following grounds of inadmissibility in the Immigration and Naturalization Act (INA):

- Section 212(a)(1) – health-related grounds;
- Section 212(a)(2) – criminal and related grounds,
- Section 212(a)(3)(D) - immigrant membership in a totalitarian party;
- Section 212(a)(6)(C) – misrepresentation in immigration matters;
- Section 212(a)(6)(E) - smugglers;
- Section 212(a)(6)(F) - subject to civil penalty;
- Section 212(a)(9)(B) – unlawful presence in the U.S. for at least 180 days, beginning on or after April 1, 1997, followed by departure from the U.S.

Form I-601 is also used to waive certain grounds of inadmissibility when an applicant is seeking immigration benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA), the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), and under the Temporary Protected Status (TPS) or Violence Against Women Act (VAWA) program. Because officers at international USCIS offices are not likely to encounter these types of waiver applications, this SOP will only briefly address them.

II. Authorities and Resources

A. Applicable Statutory and Regulatory Provisions

1. Grounds of Inadmissibility and Waiver Provisions

The statutory and regulatory authority of USCIS to grant waivers is outlined in the chart below. International offices are unlikely to encounter waivers of inadmissibility that are based on HRIFA, NACARA, TPS, and VAWA; however, information regarding those provisions is included below for informational purposes.

Type of Inadmissibility	Inadmissibility Ground	Waiver Authority	Regulation / Notes
Health-related	212(a)(1)	212(g)	8 CFR 212.7(b)
Criminal-related	212(a)(2)	212(h)	212.7(d)
Immigrant membership in a totalitarian party	212(a)(3)(D)	212(a)(3)(D)(iv) (for close family members)	
Misrepresentation	212(a)(6)(C)	212(i)	
Smugglers	212(a)(6)(E)	212(d)(11)	
Subject of civil penalty	212(a)(6)(F)	212(d)(12)	
Unlawful presence	212(a)(9)(B)	212(a)(9)(B)(v)	
Previous immigration violation by approved VAWA self Petitioner	212(a)(9)(C)	212(a)(9)(C)(iii)	NOTE: Reinstatement under 241(A)(5) does not apply to these applicants.
Prior Removal and previous immigration violations by NACARA 202 or HRIFA beneficiaries	212(a)(9)(A) and (C)	LIFE ACT amendments, PL 106-554, section 1505	8 CFR 245.13(c) and 8 CFR 245.15(e). NOTE: Reinstatement under 241(a)(5) does not apply to these applicants
Almost Any Ground of Inadmissibility for Applicants for TPS	212(a) inadmissibility grounds that apply may be waived, **except for** the following: • 212(a)(2)(A); • 212(a)(2)(B); • 212(a)(2)(C) relating to drug offenses, except for a single offense of simply possession of 30 grams or less of marijuana; • 212(a)(3)(A); • 212(a)(3)(B); • 212(a)(3)(C); or • 212(a)(3)(E).	244(c)(2)	8 CFR 244.3

The regulations governing the waiver application requirements, such as jurisdiction and filing procedures, can be found at 8 CFR 212.7.

It is important to note that there are no waivers available for certain scenarios that are commonly encountered in the overseas context. For example, an applicant applying for a waiver based on having accrued unlawful presence in the U.S. may also be inadmissible for having failed to attend an immigration court hearing. Therefore, officers must carefully review the record to identify all grounds of inadmissibility. Various scenarios that may be common in the overseas context and for which no waivers are available are identified throughout this manual.

2. Motions to Reopen and Motions to Reconsider

Regulations governing motions to reopen and motions to reconsider are found at 8 CFR 103.5.

3. Appeals

Under DHS Delegation Memo 150.1, paragraph II(U), a Form I-601 applicant may appeal a USCIS decision denying the Form I-601 to the USCIS Administrative Appeals Office (AAO). The applicant does so by filing Form I-290B, *Notice of Appeal* to the AAO. Regulations governing appeals of denials of Form I-601 are found at 8 CFR 103.3 and 212.7(a)(3).

B. BIA Decisions

Precedent BIA decisions provide guidance on inadmissibility grounds, extreme hardship, and discretion. See training materials for the most recent BIA decisions relevant to extreme hardship, inadmissibility grounds, and the exercise of discretion.

C. Foreign Affairs Manual

The grounds of inadmissibility and the administration of these grounds by the U.S. Department of State are described in Title 9 of the Foreign Affairs Manual (FAM) Section 40 of the U.S. Department of State. Details about DOS administration are found in the accompanying notes. Of particular use are the following:

- 9 FAM 40.11 Notes (Medical grounds)
- 9 FAM 40.21(a) and (b) Notes (Crimes involving moral turpitude and controlled substances)
- 9 FAM 40.63 Notes (Material misrepresentation)
- 9 FAM 40.92 Notes (Unlawful presence)
- 9 FAM 40.93 Notes (Aliens unlawfully present after immigration violation)
- An abridged list of all grounds of inadmissibility can be found at 9 FAM 40.6, Exhibit 1.

D. Adjudication Tools (Appendices)

1. Inadmissibility Grounds and Waivers Chart (Appendix 1)
2. Adjudication Worksheet (Appendix 2)
3. Unlawful presence calculation cribsheet (Appendix 3)

4. A-file document request list (Appendix 4)
5. Templates (Appendix 5)
6. Appeal Checklist (Appendix 6)

III. Validity of an Approved Waiver

A. Valid Only for the Crimes, Events, or Incidents Specified in the Waiver Applications

Under 8 CFR 212.7(a)(4), an approved waiver is only valid for those crimes, events, or incidents specified in the application for a waiver. Except as specified in Sections III(B), (C) or (D) of these procedures, or for individuals granted Temporary Protected Status (TPS), once granted, the waiver is valid indefinitely, even if the recipient of the waiver later abandons or otherwise loses lawful permanent resident status.

If an individual had been in the United States on TPS status and the status was granted after a waiver of inadmissibility was approved, the applicant is required to obtain a new waiver when applying for other benefits, if still inadmissible. The waiver granted for TPS purposes is valid only for TPS purposes.

B. Validity of a Waiver Granted to an Alien who Obtains Lawful Permanent Residence on a Conditional Basis under INA 216

Any waiver that is granted to an alien who obtains lawful permanent residence on a conditional basis under INA 216 shall automatically terminate concurrently with the termination of such residence pursuant to INA 216. Separate notification of the termination of the waiver is not required when an alien is notified of the termination of residence under INA 216, and no appeal may be taken from the decision to terminate the waiver on this basis. However, if the individual is found not to be deportable in a removal proceeding based on the termination, the waiver shall again become effective. 8 CFR 212.7(a)(4).

C. Conditional Grant of a Waiver to K-1 and K-2 Visa Applicants

Although the K classification is a nonimmigrant classification and is generally eligible for an INA 212(d)(3)(A) nonimmigrant waiver, DHS regulations permit the K visa applicant to file a Form I-601 to obtain an *immigrant* waiver of admissibility. 8 CFR 212.7(a). USCIS has jurisdiction of section 212(d)(3)(A) requests in the case of K nonimmigrants. A separate 212(d)(3)(A) application and fee is not required when a section 212(d)(3)(A) request originates with a Department of State officer. 8 CFR 212.4(a)(1). Generally, a consular officer may forward to USCIS both a Form I-601 packet (for the immigrant waiver) and a Form OF-221, *Two-Way Visa Action and Response*, recommending a grant of a nonimmigrant waiver. (9 FAM 41.81 N9.3). If the consular officer submits an OF-221 along with the Form I-601 and USCIS staff approve the Form I-601, USCIS staff should also approve the OF-221. If the Form I-601 is denied, staff should also deny the OF-221. Because a K-1 (and K-2) applicant does not yet have the requisite relationship to a United States citizen, to qualify for an immigrant waiver, the approval of the Form I-601 is granted on a conditional basis. That is, USCIS makes a final determination on the eligibility for an immigrant waiver from inadmissibility once the applicant (or the applicant's spouse) has celebrated a bona fide marriage to the U.S. citizen who had filed

the K visa petition. If the applicant establishes eligibility for the waiver when seeking a K-1 or K-2 visa, the adjudicator conditionally approves the application. The condition imposed on the approval is that the applicant (or the applicant's parent) and the U.S. citizen who filed the K visa petition will celebrate a bona fide marriage within the statutory time frame of three (3) months, from the day of the applicant's (or the applicant's parent's) admission into the United States. Despite the conditional approval, USICS may ultimately deny the Form I-601 if the applicant (or the applicant's parent) does not marry the United States citizen who filed the K visa petition or if the applicant (or the applicant's parent) does not seek and receive permanent residence on the basis of that marriage.

D. Conditional Grant of Approval of Form I-601 under 8 CFR 204.313(g)(1)(ii) for Intercountry Adoption of a Convention Adoptee

The grant of a waiver of inadmissibility in conjunction with the provisional approval of a Form I-800 is conditioned upon the issuance of an immigrant or nonimmigrant visa for the child's admission to the United States based on the final approval of the same Form I-800. If the Form I-800 is finally denied or the immigrant or nonimmigrant visa application is denied, the waiver is void.

E. Reconsideration of the Grant of Form I-601

According to 8 CFR 212.7(a)(4), nothing in 8 CFR 212.7 shall preclude a Director from reconsidering a decision to approve Form I-601, if the decision to grant the waiver is determined to have been made in error. Upon its own motion to reconsider, USCIS would issue to the applicant a Notice of Intent to Revoke with the possibility to respond to the adverse information.

IV. Filing with the Department of State (DOS)

An applicant for an immigrant visa or "K" nonimmigrant (fiancé(e) or spouse) or V visa who is inadmissible and seeks a waiver of inadmissibility files the application for waiver, Form I-601, with the U.S. Consulate's Immigrant Visa Section (IV) that is considering the visa application. 8 CFR 212.7(a)(1)(i). When a consular officer determines that the alien is admissible except for the grounds for which a waiver may be sought, the consular officer informs the applicant of the requirement to file a Form I-601. The alien must file the application at the consular post, which receipts the fee and then forwards the application to USCIS for a decision. Consular posts should send to overseas USCIS offices only those waiver applications where there are no other grounds of inadmissibility that cannot be overcome. The FAM makes clear that the determination of whether or not to grant a request for an immigrant waiver lies solely within the jurisdiction of DHS. Even if the consular officer does not believe an applicant is eligible for a waiver, DOS must submit the waiver request to the DHS at the applicant's insistence to allow DHS to determine waiver eligibility. See e.g., 9 FAM 40.21(A) PN2.1 *Making Waiver Requests Directly to Department of Homeland Security (DHS*).

If the application is filed to waive a communicable disease of public health significance, and the applicant is incompetent to file, a qualified family member may file the waiver application on the applicant's behalf. 8 CFR 217.7(b)(1). For any other use of Form I-601, 8 CFR 103.2(a)(2) permits a duly appointed guardian to sign the Form I-601 on behalf of an incompetent person.

The waiver packet forwarded to USCIS will usually include a questionnaire and may include a recommendation from the consular officer. The U.S. Consulate's IV Section should have advised the applicant why a waiver is needed. It is not uncommon for an applicant to have several grounds of inadmissibility and need more than one type of waiver. The FAM procedural notes provide detailed guidance on what documents the DOS should provide when transferring the Form I-601 packet to USCIS. See e.g., 9 FAM 40.21(A) PN2 *Waiver of Ineligibility under INA 212(h).*

If the applicant has been excluded, deported or removed from the United States and seeks admission again, the applicant may also need to file Form I-212, *Application for Permission to Reapply for Admission into the United States After Deportation or Removal.* See 8 CFR 212.7(a)(i). If the applicant has already been granted permission to reapply for admission by a domestic office, the applicant is not required to file another Form I-212 with the Form I-601.

V. USCIS Receipt of Waiver

A. USCIS Reviews Application for Completeness and Fingerprint Checks

When the application is received, USCIS staff reviews it to confirm that it was properly signed by the applicant or a qualifying family member and that there is evidence that the fee was paid. If it was not signed the application is returned to DOS. If there is no evidence the fee was paid USCIS staff should contact DOS to verify if the fee was paid and if not DOS should contact the applicant to pay the appropriate fee and submit evidence to the overseas office. If no response has been received within 10 (ten) working days the application will be returned to DOS. USCIS staff will also notify the applicant of the action taken. (See Appendix 5 for sample notification letter)

The application packet should also include a set of fingerprints or results of the fingerprint check conducted by the FBI after submission of the prints by DOS. If the fingerprints have not been taken, DOS must be contacted and have the applicant fingerprinted. If no response has been received within 10(ten), USCIS staff will return the application to DOS and notify the applicant of the action. See Appendix 5 for sample notification letter. If hard copy fingerprints are in the packet, USCIS forwards them to the Nebraska Service Center at the following address:

Department of Homeland Security
Nebraska Service Center –NSC
P.O. Box 87258
Lincoln, NE 68501-2521

The following address should be used for cases where a courier/express delivery company is used:

Nebraska Service Center
Department of Homeland Security
Fingerprint Clearance Coordination Center
850 S Street
Lincoln, NE 68508

NOTE: Fingerprints are not required with an application for a waiver of a ground of inadmissibility under INA 212(g) (8 U.S.C. 1182(g)). However, if the applicant has been previously in the United States or in any case where there is reason to believe that a prior criminal record may exist, staff may request that DOS submits a set of the applicant's fingerprints along with the waiver application.

If there is evidence of an arrest or conviction for criminal activity, staff review the packet to determine whether court dispositions, or a DOS explanation as to why there are no conviction records are attached. If neither are there, the Field Office Director determines whether to return the packet to DOS, to issue a Request for Evidence (RFE) to the applicant, or to process the application without the court dispositions in those cases where access to the court dispositions would not impact the decision (e.g., for immigration violations or criminal activity that would not present an inadmissibility ground). A full English translation must be submitted with a document in a language other than English that is submitted in support of the waiver application. In addition, there must be a certification from the translator attesting to his or her competence as a translator and certifying that the translation is complete and accurate. See 8 CFR 103.2(b)(3).

Notify the applicant that the I-601 and I-212 applications were received from post. See Appendix 5 for sample notification letter.

B. USCIS Updates Database

Staff input information regarding the application into the local District Office database. If the application has been returned to DOS as incomplete, note in the database that the application was rejected, the date it was returned to DOS, and the reason why.

C. Background Checks

1. DHS database checks

Prior to adjudication of the waiver, USCIS staff research the Central Index System (CIS) to determine whether an A-file exists for the applicant. If there is a record of an A-number, staff will note the A-number on the Form I-601 and also:

- Review the EOIR screen through RAPS, EARM, or CIS to determine whether the applicant has been previously placed in removal/deportation proceedings before EOIR;
- Review CIS, CLAIMS, the EOIR screen and, where appropriate, RAPS to determine whether the applicant has applied for asylum or adjustment of status and, if so, note the dates the applications were pending;
- Review EARM for any information regarding prior deportations;
- Review CIS for NAILS record(s). If CIS indicates that there is a NAILS record IBIS must be queried to determine the nature of the NAILS record, even though some of the information may already be contained in results of a CLASS check Events that result in the NAILS hit may have occurred between the IV application/CLASS check and the time the waiver is adjudicated.

Where appropriate, staff may also access ADIS and/or USVisit to determine whether there is

evidence of prior entries into and exits from the United States.

Generally, there is no need to check IBIS because DOS will have completed a CLASS check. See memo dated 3/23/05 entitled *Discontinuation of IBIS Alias Name Checks for Petitions and Applications When the Beneficiary and Dependents are not Physically Present in the United States* (appendix 8). However, if a review of the record indicates that the applicant has used an alias name that was not checked in CLASS, USCIS staff must conduct an IBIS check of the alias and document the results on the Adjudication Worksheet.

The above mentioned systems checks are not the only systems available to the officer. Any system may be checked if deemed necessary.

2. Fingerprint checks

Normally, DOS obtains electronic fingerprints from the applicant, forwards them to the FBI, receives the FBI response and includes it in the waiver packet provided to USCIS for adjudication. There may be some cases where USCIS receives hard copies of the fingerprints. In those cases, USCIS sends the fingerprint cards to the Nebraska Service Center as noted in section V.A. above. If USCIS submits the fingerprints to the FBI, the response will be uploaded into FBI Query and USCIS staff can check FBI Query for the response.

If the FBI response is provided by DOS and there is a hit indicating a crime involving moral turpitude, the RAP sheet should also be included in the waiver packet along with court dispositions or an explanation as to why court dispositions are not available, per guidance in the FAM. See 9 FAM 40.21(A) PN2.3. If USCIS submitted the fingerprints to the FBI and finds an IDENT hit in FBI Query, USCIS staff should retrieve the RAP sheet from BBSS and, where the hit appears to relate to criminal activity that could be a grounds for inadmissibility, request from the applicant a disposition for any criminal activity, if such has not already been provided by DOS (see section V.A).

If the fingerprints are rejected by the FBI, USCIS staff arrange for the applicant to be fingerprinted a second time, either by requesting the applicant to return to the USCIS overseas office, or by coordinating with the DOS embassy or consulate where the applicant resides to re-take the prints. If the fingerprints are rejected a second time, the applicant must provide the rejected fingerprint sworn statement, a “no record” statement from the police department in each locality where he or she has resided during the last five (5) years and provide any records relating to an arrest or conviction.

D. Requesting the A-file

If an A-file exists, staff may request the A-file from the File Control Office (FCO) holding the file or request that relevant documents that may be included in the A-file be sent to the office. There may be information in the file that will indicate other grounds of inadmissibility or other evidence relevant to the waiver determination, including evidence that assists the adjudicator in determining inadmissibility grounds, eligibility for the waiver, and whether discretion should be exercised in the applicant’s favor. If the applicant is statutorily ineligible and the officer can make this determination from the systems and documentation, the A file does not need to be requested.

VI. Adjudication of the Waiver(s)

A. Overview

1. Identification of ground(s) of inadmissibility

First, it is incumbent upon the adjudicator to make a determination that the applicant is inadmissible and identify all inadmissibility grounds that apply; the adjudicator should not assume that the Consular Officer correctly identified the inadmissibility grounds. If additional inadmissibility grounds are identified, they should be noted in the decision. See Appendix 1 for a list of inadmissibility grounds that should be considered.

2. Determination that applicant is admissible

If the adjudicator determines that the Consular Officer erred and that the applicant is in fact admissible to the United States, the application should be returned to the DOS and the applicant notified. The database should be updated to reflect that the application has been closed and returned to DOS because the applicant is admissible.

3. Identification of inadmissibility grounds based on events not included in the Form I-601

If the adjudicator identifies additional inadmissibility grounds based on events that are not included in the Form I-601 (for example, there is evidence in the record of a material misrepresentation to gain an immigration benefit, but the consular officer only noted an unlawful presence inadmissibility ground and the applicant only addressed that in the Form I-601), the adjudicator must advise the applicant to submit a revised Form I-601 to address the additional eligibility grounds. The applicant should be given 45 days to submit a revised Form I-601, without fee, directly to the USCIS office that is adjudicating the waiver. If the applicant also needs to obtain consent to reapply, and, from the evidence filed with the Form I-601, the adjudicator believes that the Form I-601 would probably be approved, if the Form I-212 were filed and approved, the adjudicator should inform DOS and give the applicant an opportunity to file Form I-212, with the appropriate fee with the consular office, and provide the applicant 45 days to file. If the adjudicator concludes that the Form I-601 would be denied, regardless of whether a Form I-212 were approved, the adjudicator may deny the Form I-601 without asking the applicant to file a Form I-212 also. If the applicant fails to timely submit a revised I-601, or I-212, as applicable, and no extension of time has been granted, the Form I-601 should be denied as a matter of discretion, because the applicant remains inadmissible based on the inadmissibility ground not addressed in the waiver application, or for failure to obtain consent to reapply for admission.

4. Identification of inadmissibility ground for which no waiver is available

If the applicant is inadmissible under some ground for which no waiver is available, the Form I-601 should be denied, because the applicant is ineligible to apply for a waiver, and consequently no purpose would be served in granting the application. *See Matter of J- F- D-*, 10 I&N Dec. 694 (INS 1963). Any inadmissibility ground, for which a waiver is not available, should be cited in the denial letter as the basis for the denial. This denial may still be appealed to the AAO.

5. Waiver available for all applicable inadmissibility grounds

Once the inadmissibility ground(s) has been established, the adjudicator determines whether a waiver is available. If a waiver is available for each applicable inadmissibility ground included in the application, the adjudicator determines whether the applicant meets all the requirements of the waiver and merits a favorable exercise of discretion.

6. Request for Additional Evidence and Notice of Intent to Deny.

If additional information is required in order to adjudicate a Form I-601, a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) may be issued to an applicant as a matter of discretion. 8 CFR103.2(b)(8).

- An RFE may be issued to request missing initial or additional evidence from an applicant; the timeframe for response to an RFE cannot exceed 12 weeks. 8 CFR103.2(b)(8)(iv).

- A NOID may be issued based on evidence of ineligibility and it is mandatory when derogatory information is known to USCIS, but which may not be known to the applicant. The regulations provide an applicant with a maximum of 30 days to respond to a NOID. 8 CFR103.2(b)(8)(iv).

An RFE or NOID is not necessary in every case prior to adjudication, and a USCIS adjudicator may approve or deny an I-601 without first issuing a RFE or NOID unless required pursuant to 8 CFR 103.2(b)(16). (See following section (c) ii).

Guidance relating to when to issue a RFE or a NOID is set forth below. For more info regarding RFEs and NOIDs please see chapter 10.5 of the *Adjudicator's Field Manual.*

(a) Denial without RFE or NOID in light of Evidence of Clear Ineligibility

An application may be denied without first issuing an RFE or NOID when evidence of ineligibility is clear, such as when an applicant is categorically ineligible for the benefit being sought. Examples include, but are not limited to, the following:

- An applicant does not have a qualifying family member and is required to establish extreme hardship to a qualifying family member in order to be eligible for a waiver.
- The applicant has a conviction for drug trafficking for which no waiver is available.

An application may also be denied without an RFE or NOID if the evidence submitted does not meet a statutory or regulatory standard and there is no reason to expect that, given the opportunity, an applicant can produce additional evidence to cure the ineligibility. Examples include, but are not limited to the following:,

- The only evidence of hardship submitted by a qualifying relative is that he/she does not want to relocate to the country to which the relative has been deported.
- The only evidence of hardship is that the applicant does not speak the language of the country to which the applicant has been deported.

(b) Record is Complete and Case is Approvable

When a record contains evidence that fully satisfies the statutory or regulatory requirements for a particular benefit, the application may be approved based on the existing record without an RFE or NOID.

(c) Issuance of an RFE or NOID

Except in those instances in which the issuance of a NOID is mandatory, as described in 8 CFR 103.2(b)(16), the issuance of an RFE or a NOID is generally discretionary.

With respect to whether or not to use discretion to issue an RFE or NOID, keep in mind that overseas applicants are generally informed by consular officers of the basic requirements for a waiver, and the need to submit documentary evidence. Consular officers also are expected to check that all required documentary evidence is included in the waiver packet. On the other hand, issuing an RFE or NOID can help avoid additional costs to applicants in terms of re-filing a waiver or appealing a decision; It may also lessen workload burdens to USCIS in terms of processing and re-adjudicating a case that could have been resolved with more complete information.

i. RFE: As a general rule overseas USCIS adjudicators should issue an RFE when there is a reasonable likelihood that submission of additional evidence could impact the outcome of the adjudication, or, in other words, if the record does not contain the information necessary to make a thorough and correct decision.

An RFE is most appropriate when initial evidence or parts of the initial evidence are missing. Examples include, but are not limited to, the following:

- The applicant has not presented any information at all regarding the alleged "extreme hardship" that a qualifying family member would suffer if the wavier was denied.

  For example, if no letter or affidavit asserting hardship and reasons for hardship has been submitted, a RFE should be issued[2].

- The applicant merely asserts extreme hardship, without providing any information or evidence about the nature and source of the claimed hardship.

  For example, an REF should be issued if an applicant raises a health condition as part of the hardship claim, but has failed to submit documentation that would likely lead the officer to approve the case.

ii. NOID: A NOID is required when the adjudicator intends to deny the application based on evidence or derogatory information known to USCIS, but not necessarily known to the applicant. The purpose is to give the applicant a chance to review and respond to that evidence. 8 CFR

[2] In the field office in Ciudad Juarez, applicants are informed orally and in writing of the need to submit additional evidence when their applications are not readily approvable on the day of filing. In such cases, an RFE is not required. However, adjudication officers have the discretion to issue a more particularized request for evidence, where appropriate.

103.2(b)(16).

> Example: In conducting a background check the officer finds evidence that the applicant was arrested for a crime that would make the applicant ineligible for a waiver, and the applicant did not reveal that arrest in his or her application.

Even when a NOID is not required by regulation, there may be circumstances in which it is appropriate to issue a NOID in order to give the applicant an opportunity to respond to a potential adverse decision before the decision becomes final. Officers should exercise discretion and issue a NOID when there is a reasonable chance that the response to a NOID would resolve the officer's concerns about lack of evidence or apparent ineligibility.

It is possible to include an RFE in a NOID, by requesting additional evidence on certain points and explaining the anticipated basis for denial on others grounds.

(d) Evaluation of Responses to RFE or NOID

Applicants must submit all requested materials together at one time, along with the original RFE or NOID. If an applicant submits only some of the requested evidence, USCIS will treat such submissions as a request for a decision on the record. Upon receipt of response to an RFE or NOID, an adjudicator should review the response and all relevant evidence and issue a final decision. 8 CFR 103.2(b)(11).

(e) Failure to Timely Respond to an RFE or NOID. If an applicant does not respond to an RFE or a NOID by the required date, USCIS may:

- Deny the application as abandoned; or
- Deny the application on the record; or
- Deny the application for both reasons.

See 8 CFR 103.2(B)(13)

As a matter of policy the overseas field offices should deny the I-601 waiver application based on the record in order to provide the applicant with the opportunity to appeal the case to the AAO.

A denial due to abandonment may not be appealed, but an applicant may file a motion to reopen. See 8 CFR 103.5.

7. Summary of process.

In sum, the adjudication requires the following steps:

Step 1:	Review record and relevant DHS databases to identify all applicable inadmissibility grounds
Step 2:	Determine whether waiver is available for each inadmissibility ground (if the applicant is also inadmissible on a ground for which a waiver is not available, the application should be denied as a matter of discretion). Request revised Form I-601, if necessary, to address

	inadmissibility grounds that could be waived and are not addressed in the application, or a Form I-212 if the applicants needs consent to reapply.
Step 3:	If a waiver is available, determine whether the applicant meets the eligibility requirements
Step 4:	If the applicant meets the eligibility requirements for a waiver for each applicable inadmissibility ground, determine whether the application should be granted as a matter of discretion

The decision should clearly reflect each of the applicable steps.

B. Health Related Grounds

Medical waivers should be done as expeditiously as possible for humanitarian reasons. Health-related waivers are generally adjudicated the same way as other waivers, but there are some important distinctions:

- The Centers for Disease Control (CDC) plays a role, as noted below; and
- No showing of hardship to qualified family member is required. (The applicant still has to have the required familial relationship in order to file the waiver)

All applicants applying for immigrant visas are required to undergo a physical and mental examination. See INA 221(d). A panel physician is responsible for the examination. The panel physician conducts the examination and testing required to assess the applicant's medical condition and then completes Form DS-2053, Medical Examination for Immigrant or Refugee Applicant; Form DS-3024, Chest X-Ray and Classification Worksheet; Form DS-3025, Vaccination Documentation Worksheet, and Form DS-3026, Medical History and Physical Examination Worksheet. DOS cannot find an applicant inadmissible under INA 212(a)(1) without a report from the panel physician. The panel physician does not have the authority to determine whether an alien is actually eligible for a visa. DOS uses results of the required medical examination to determine the alien's eligibility for such a visa. See 9 FAM 40.11 N4.1 Role of Panel Physician, for more detail.

1. Health-related inadmissibility provisions

INA 212(a)(1)(A)(i)
(Communicable disease of public health significance)

The alien has a communicable disease of public health significance, as defined by the Secretary of Health and Human Services (HHS).

- "Communicable disease of public health significance" is defined at 42 CFR 34.2(b) and includes 8 medical conditions.
- HIV[3] is listed in the INA and the HHS regulations as a communicable disease of public health significance. (See section below for special considerations for individual infected with HIV).

[3] All applicants for immigrant visas who are 15 years of age or older are tested for evidence of HIV.

INA 212(a)(1)(A)(ii)
(Immigrants lacking proof of all of the required vaccinations)

The alien seeks admission with an immigrant visa, fiancé visa or V visa, or is applying for adjustment of status, and has not presented documentation of having been vaccinated against vaccine-preventable diseases.

- Required vaccines: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, haemophilus influenza type B, hepatitis B, varicella, pneumococcal, and influenza. (See 9 FAM 40.11 N7.3 for updates to the list.)
- Required vaccines also include any other vaccines recommended by the Advisory Committee on Immunization Practices (ACIP).

Exception: There is an exception for certain adopted children under age 10 applying for immigrant visas under INA 201(b) (IR3s and IR4s). *See* INA 212(a)(1)(C).

- The adoptive parent must sign an affidavit attesting that the child will be vaccinated within 30 days of admission or when it is medically appropriate.
- Adoptive parents who cannot sign the affidavit in good faith because of religious/moral objections must apply for a waiver for the child.

INA 212(a)(1)(A)(iii)(I) & (II)
(Physical or mental disorders with associated harmful behavior)

The alien has been determined (in accordance with regulations prescribed by the Secretary of HHS in consultation with the Attorney General):

- To have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or
- To have had a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others.

INA 212(a)(1)(A)(iv)
(Drug abuse and drug addiction)

The alien has been determined (in accordance with regulations prescribed by the Secretary of HHS) to be a drug abuser or addict. **Note that this ground cannot be waived under INA 212(g).** An alien who is inadmissible under INA 212(a)(1)(A)(iv) remains inadmissible until it is determined, under HHS rules for medical examinations, that his or her drug abuse or addiction is in remission.

2. Waivers under INA 212(g). See also 8 CFR § 212.7(b).

INA 212(g)(1)
(Communicable

INA 212(g)(1) authorizes USCIS to exercise discretion in deciding whether to waive the grounds of inadmissibility under INA 212(a)(1)(A)(i) relating

disease waiver) to a communicable disease of public health significance if the applicant meets the requirements noted below. Decisions on waiver applications remain discretionary, and must be adjudicated only after a careful review of all positive and negative factors.

To be eligible to apply for the waiver, the applicant must be:

- The spouse, parent, unmarried son or daughter, or the minor unmarried lawfully adopted child of a U.S. citizen (an "IR-3" or "IH-3" or "IH-8" immigrant, IR-4, IH-4, IH) of:
  - A U.S. citizen,
  - An alien lawfully admitted for permanent residence, or
  - An alien who has been issued an immigrant visa.

or

- A VAWA self-petitioner -- eligible for classification as a self-petitioning spouse or child under INA 204(a)(1)(A)(iii) or (iv) or 204(a)(1)(B)(ii) or (iii) of the INA, including derivative children of the alien. (This includes self-petitioning spouses and children eligible for classification under INA 204(a)(1)(A)(v) or 204(a)(1)(B)(iv))

or

- A fiancé(e) of a U.S. citizen or the fiancé(e)'s child

NOTE: As indicated in chapter 41.3(a) of the Adjudicators' Field Manual, USCIS interprets the reference in section 212(g)(1) to "unmarried son or daughter" as embracing both those sons and daughters who qualify as "children" because they are not yet 21 years old and sons and daughters who are over 21, so long as they are not married. Also, USCIS interprets "minor unmarried lawfully adopted child" as a clarifying, not as a restricting provision. Therefore, an alien is eligible to apply for this waiver if the alien qualifies as the "child" of a citizen or permanent resident (or an alien who has received an immigrant visa) under any provision of section 101(b)(1) of the Act. This includes, orphans and Hague adoptees who seek admission in class IR-3 (orphan adopted abroad) or IH-3 (Hague adoptee adopted abroad) and as well as orphans and Hague adoptees who seek admission as IR-4 (orphans) and IH-4 (Hague adoptees) immigrants whose adoption will be finalized in the United States.

There are additional waiver requirements under 8 CFR 212.7(b), according to the specific medical condition that makes the applicant inadmissible under INA 212(a)(1)(A)(i). 8 CFR 212.7(b)(3) provides requirements for aliens excludable due to tuberculosis. 8 CFR 212.7(b)(4) provides requirements for aliens inadmissible due to certain mental conditions. Certain assurances required of the aliens are also spelled out in 8 CFR 212.7(b)(5).

Additionally, the Center for Disease Control (CDC) is involved in the waiver process, as explained in section 3 below.

INA 212(g)(2) (Vaccination Waiver)

A waiver of "vaccination" inadmissibility may be approved if:

- The alien receives the needed vaccination against the vaccine-preventable disease or diseases for which the alien has failed to present documentation of previous vaccination. INA 212(a)(g)(2)(A). For this waiver to be approved, the individual does not need to file Form I-601; rather, the grant of the waiver is based on Form I-693, Report of Medical Examination of Aliens Seeking Adjustment of Status. For more information, please *see* AFM chapter 41.3(d).
- A civil surgeon, medical officer, or panel physician, as those terms are defined in 42 CFR 34.2, certifies that such vaccination would not be medically appropriate. INA 212(a)(g)(2)(B). For this waiver to be approved, the individual does not need to file Form I-601. The grant of the waiver is based on Form I-693, Report of Medical Examination of Aliens Seeking Adjustment of Status. For more information, please *see* AFM chapter 41.3(d).
- The Secretary of the DHS determines that requiring such vaccination would be contrary to the alien's religious beliefs or moral convictions. INA 212(a)(g)(2)(C). This is the only provision under which the filing of Form I-601 is used.

When adjudicating this waiver, the adjudicator should determine whether

1) the opposition is sincere and
2) the belief stems from religious or moral convictions.

- Sincerity: To protect only those beliefs that are held as a matter of conscience, adjudicators assess the subjective good faith of an adherent. While an individual may ascribe his or her opposition to vaccinations to a particular religious belief or moral conviction that is inherently opposed to vaccinations, the question then turns to whether that claimed belief or moral conviction is truly held, i.e., whether it is applied consistently. Generally, the applicant must be opposed to vaccinations in any form. The fact that the applicant has received certain vaccinations but not others is not automatic grounds for denial, depending on the reasons provided for having received them. For example, the applicant's religious or moral beliefs may have changed substantially since the date the particular vaccinations were administered, or the applicant may be a child who may have already received certain vaccinations under the routine practices of an orphanage. These examples do not limit the adjudicator's authority to consider all credible circumstances and accompanying evidence.

- Religious/moral convictions: Even if the beliefs are found to be sincere conclusions about vaccinations, they must stem from religious/moral convictions, and must not have been framed in terms of a particular belief so as to gain the legal remedy desired; i.e., a waiver under INA 212(g)(2)(C). This second requirement should be handled with sensitivity. On the one hand, case law notes that the

individual's religious beliefs must be balanced against the benefit of society as a whole. On the other hand, these same cases also note the importance of being mindful that vaccinations offend certain individuals' religious beliefs.

These requirements may be established through the sworn statement submitted by the applicant. Additional corroborating evidence, if available and credible, may also be considered.

INA 212(g)(3) (Waiver of physical or mental disorder with associated harmful behavior)

A waiver of inadmissibility based on a determination that the applicant poses a threat due to a physical or mental disorder may be approved by the Secretary of the DHS after consultation with the Secretary of HHS, and under such conditions as the Secretary of DHS may prescribe by regulation. This type of waiver may be approved only after consultation with the Secretary of HHS, which requires involvement of CDC, as explained in section 3 below. Also, there are additional waiver requirements under 8 CFR 212.7(b).

In addition to the application, the applicant should submit a complete medical history and a report that addresses the following:

(a) The applicant's physical or mental disorder, and the behavior associated with the disorder that poses, posed, or may pose in the future a threat to the property, safety, or welfare of the applicant or other individuals. The report should also provide details of any hospitalization, institutional care, or any other treatment the applicant may have received;
(b) Findings regarding the applicant's current condition, including, if applicable, reports of chest X-rays and a serologic test, if the applicant is 15 years of age or older, and other pertinent diagnostic tests;
(c) Findings regarding the current mental or physical condition, including a detailed prognosis that should specify, based on a reasonable degree of medical certainty, the possibility that the harmful behavior is likely to recur or that other harmful behavior associated with the disorder is likely to occur; and
(d) A recommendation concerning treatment that is reasonably available in the United States and that can reasonably be expected to significantly reduce the likelihood that the physical or mental disorder will result in harmful behavior in the future.

Drug Abuser or Addict Waiver

There is no provision in INA 212(g) for the granting of a waiver to an individual who has been found inadmissible under INA 212(a)(1)(A)(iv) due to drug abuse or drug addiction. (Though a waiver for nonimmigrant purposes is available under INA 212(d)(3).)

An individual who has been found inadmissible under INA 212(a)(1)(A)(iv) due to drug abuse or drug addiction is not precluded from undergoing a reexamination at a later date at his/her own cost.

If, upon reexamination, the civil surgeon or panel physician certifies, per the applicable HHS regulations and CDC's Technical Instructions, that the individual is in remission, the ground of inadmissibility under INA 212(a)(1)(A)(iv) no longer applies.

3. Considerations for Determining Eligibility for 212(g) Waiver

The role of CDC

USCIS may grant the waiver in accordance with the terms, conditions, and controls considered necessary AFTER consulting with the Secretary of HHS. Before USCIS makes a final determination on the waiver application, CDC must first issue an endorsement of review. Note that the CDC's endorsement of review does not constitute waiver approval. Rather, the purpose of the endorsement is for CDC to verify that the applicant (or person assuming responsibility on his/her behalf) has identified a suitable health care provider in the United States.

This health care provider is required to submit to CDC, within 30 days of the date the applicant is admitted on an immigrant visa or granted adjustment of status, the results of a comprehensive medical evaluation. In addition, the applicant (or person assuming responsibility on his/her behalf) must formally agree to submit to all further examinations or treatment as may be required.

The consular officer should have had the applicant complete page one of the application and have sent it to the CDC. The applicant must sign a statement indicating he or she will comply with the terms and conditions imposed, such as going to a health care provider and submitting to treatment. The sponsor must have statement B signed by a health care provider in the U.S.

Note: Please keep in mind that the CDC only wants COPIES of everything, not originals, as they have been returning originals to the field and state that they may no longer be able to return them.

Special Considerations for individuals infected with HIV

The National Institutes of Health Revitalization INA of 1993, which became effective on July 10, 1993, amended INA 212(a)(1)(A)(i) to mandate that a communicable disease of public health significance now includes "infection with the etiologic agent for acquired immune deficiency syndrome." Accordingly, aliens infected with the HIV virus continue to be inadmissible unless they are eligible for a waiver of inadmissibility. The CDC has created an HIV supplement to be used for immigrant visa and adjustment of status

applicants that must be endorsed by the applicant and the health care provider. If an individual is found inadmissible under INA 212(a)(1)(A)(i) on account of HIV infection and he or she submits documentation establishing the requisite family relationship specified under INA 212(g) , adjudicators should consider the relevant discretionary factors to determine whether the waiver should be granted. Consistent with established policy, discretion will be exercised favorably only if the applicant can also establish that:

(1) the danger to the public health of the United States created by his or her admission is minimal;

(2) the possibility of the spread of the infection created by his or her admission to the United States is minimal; and

(3) there will be no cost incurred by any level of government agency of the United States without the prior consent of that agency.

See, Immigrant Waivers for Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection, Aleinikoff, Exec. Assoc. Comm., HQ 212.3-P (Sept. 6, 1995)

Evidence

Examples of the evidence considered sufficient to meet discretionary criteria noted above include, but are not limited to:

- Evidence that the applicant has arranged for medical treatment in the United States,
- The applicant's awareness of the nature and severity of his/her medical condition,
- Evidence of counseling,
- The applicant's willingness to attend educational seminars and counseling sessions, and
- The applicant's knowledge of the modes of transmission of the disease.

Access to publicly funded medical treatment for HIV does not automatically mean that the alien is ineligible for a positive exercise of discretion.

- Aliens who are participating in a government-funded study must submit a letter from the agency conducting the study confirming their participation and the extent of medical coverage provided.
- Aliens whose medical treatment will be funded by any government agency (local, state, or federal) must submit a letter of consent from that agency or his/her designee.

C. Criminal related grounds

1. Criminal-related inadmissibility provisions for which waivers may be available

INA

The alien has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a

212(a)(2)(A)(i)(I) (CIMT)

crime involving moral turpitude (CIMT). An alien cannot be found inadmissible based on admission with respect to a crime for which the alien has been tried and acquitted, or, for which, charges have been dismissed by a court. 9 FAM 40.21(a) N5.2

INA 212(a)(2)(A)(ii) describes a few exceptions to the general rule that a crime involving moral turpitude makes an alien inadmissible, as noted below.

EXCEPTIONS:

- Purely political offense:
  - Defined in DOS regulations at 22 CFR 20.41(a)(6).
  - Includes offenses that resulted in a conviction obviously based on fabricated charges or predicated on repressive measures against racial, religious, or political minorities.

- INA 212(a)(2)(A)(ii)(I):
  - Only 1 CIMT was committed, and
  - The alien was under age 18 at the time, and
  - The CIMT was committed and the alien was released (if confined) more than 5 years before the date of application for a visa, admission, or adjustment of status.

- INA 212(a)(2)(A)(ii)(II):
  - Only 1 CIMT was committed, and
  - The maximum penalty possible did not exceed 1 year, and
  - If convicted, the sentence imposed did not exceed 6 months (regardless of the time actually served).

212(a)(2)(A)(i)(II) (Controlled substance violation)

The alien has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

INA 212(a)(2)(B) (Multiple convictions)

The alien has been convicted of 2 or more offenses (other than purely political offenses), regardless of whether the offenses involved moral turpitude, for which the combined sentences to imprisonment were 5 years or more.

NOTE: If an alien has been convicted of two or more crimes that do not involve moral turpitude, prostitution, or controlled substances, and

	the alien was sentenced to **less than** 5 years of imprisonment, the alien is not inadmissible based on those convictions.
INA 212(a)(2)(C) (Controlled substances traffickers)	The alien is known or reasonably believed to be, or to have been, an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or to be or to have been a knowing aider, assister, abettor, conspirator, or colluder with others in the illicit trafficking in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)). **NOTE**: The spouse, son, or daughter of any alien who is a controlled substance trafficker is also inadmissible under INA 212(a)(2)(C) if within the past 5 years, the spouse, son, or daughter obtained any financial or other benefit from the illicit activity, and knew, or reasonably should have known that the financial or other benefit was the product of such illicit activity.
INA 212(a)(2)(D) (Prostitution and commercialized vice)	The alien ➢ Is coming to the U.S. solely, principally, or incidentally to engage in prostitution, or ➢ Has engaged in prostitution within 10 years of the date of visa application, admission, or adjustment of status, or ➢ Directly or indirectly procures or attempts to procure prostitutes or persons for the purpose of prostitution, or ➢ Within 10 years of the date of application for a visa, admission, or adjustment of status, procured or attempted to procure, or import prostitutes, or persons for the purpose of prostitution, or ➢ Receives or within such 10-year period received, the proceeds of prostitution, or ➢ Is coming to the U.S. to engage in any other unlawful commercialized vice, whether or not related to prostitution.
INA 212(a)(2)(E) (Criminals who have asserted immunity)	The alien has committed a serious criminal offense (as defined in INA 101(h)) in the U.S., has asserted diplomatic immunity to avoid prosecution, has left the U.S. as a consequence of the crime, and has not subsequently submitted fully to the jurisdiction of the U.S. court having jurisdiction over the crime.

2. Considerations for Determining Applicability of Inadmissibility Ground

Moral Turpitude	Black's Law Dictionary contains the following definition of moral turpitude: "[A]ct of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to

	accepted and customary rule of right and duty between man and man….Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others….The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita." Reckless conduct or a conscious disregard of substantial risk can equal moral turpitude. *Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981*); Matter of Medina*, 15 I &N Dec. 611 (BIA 1976), aff'd sub nom. *Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977). Crimes involving negligent conduct, where the offender failed to be aware of a substantial risk involved in the conduct, are generally not found to involve moral turpitude. *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992). Statute, not conduct, controls whether a crime is a CIMT. *Matter of Short*, 20 I&N Dec 136, 137 (BIA 1989). Classification of the crime as a felony or misdemeanor does not control whether a crime is a CIMT. *Matter of Abreu-Semino*, 12 I&N Dec. 775, 777 (BIA 1968). To determine whether a conviction is for a crime involving moral turpitude: (1) look to the statute of conviction under the categorical inquiry; (2) if the categorical inquiry does not resolve the question, engage in a modified categorical inquiry and examine the record of conviction , including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction is inconclusive, consider any additional evidence deemed necessary or appropriate. Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008). While murder, bank robbery, and rape, seem obviously to be CIMTs, there are some less serious crimes that are nonetheless CIMTs. For example, petty larceny and tax evasion may be CIMTs. Similarly, other offenses, depending on the circumstances, may or may not be CIMTs; for example, sometimes manslaughter and assault are crimes involving moral turpitude, and sometimes they are not, depending on the Statutory language. Some guidelines regarding specific categories of crimes are provided below. In addition, an extensive outline of types of crimes as CIMTs, and the case law regarding those crimes, can be found in the Adjudicator's Toolbox at: http://uscis.dhs.gov/dao/documents/cimt.doc However, if an adjudicator is uncertain whether the crime involves moral turpitude, attorneys from the Office of Chief Counsel should be consulted.

Crimes against the gov't	CIMT: Counterfeiting, perjury, willful tax evasion, using mail to defraud, welfare fraud. NOT CIMT: False statements <u>not</u> amounting to perjury.
Crimes against the individual	CIMT: Murder, voluntary manslaughter, kidnapping, assault with intent to rob or kill, assault with a deadly weapon, assault against a police officer. NOT CIMT: Involuntary manslaughter (unless "recklessness" in the sense of wanton disregard of a known risk is an element of the offense), possession of weapons offenses (no intent to use), joyriding, and disorderly conduct.
Crimes against property	CIMT: Blackmail, forgery, robbery, burglary, extortion, malicious destruction of property. Not CIMT: Possession of stolen property where guilty knowledge is not essential, damaging private property where no evil intent is required by the governing law where the offense occurred.
Driving under the influence	Simple Driving Under the Influence (DUI) is <u>not</u> a CIMT. Aggravated DUI <u>can</u> be a CIMT, if the statute under which the alien was charged has an element of knowingly driving while intoxicated, or knowing that one's license was suspended. <u>Matter of Torres-Varela</u>, 23 I&N Dec. 78 (BIA 2001).
Definition of conviction INA 101(a)(48)(A)	The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.
Evidence	➢ If an alien has not been convicted of a crime, his or her admission of the essential elements of the crime may render him or her inadmissible. When an inadmissibility determination is based on commission of the essential elements of a crime involving moral turpitude, the FAM requires consular officers to make the verbatim transcript of the proceedings under oath and to follow specific rules of procedures described in 9 FAM. 40.21(a) N5.1. If such a transcript is not provided with the Form I-601 packet, Field Office Directors should reach out to the

	Chief of the Immigrant Visa Section to ensure that the transcript is provided. ➢ If the alien has been convicted of a crime that appears to render the alien inadmissible, and there is not an official record of the conviction in the record of proceeding, the official record should be requested from the alien. In cases of convictions involving moral turpitude, the FAM requires DOS to ensure that certified copies of the items listed in 9 FAM 40.21(A) PN1.1 (1), (2) and (3) (with translations where necessary), are attached to Form I-601. If the court records are not available, the consular officer must prepare a statement to that effect as an attachment to Form I-601. See FAM 40.21(A) PN2.3
How long ago the crime was committed	If the crime is related to prostitution and was committed more than 10 years ago, the applicant may be admissible. *See* INA 212(a)(2)(D) If a CIMT was committed more than 5 years before the date of application and the applicant was under 18 at the time it was committed, the applicant may be admissible, provided the applicant was convicted of only one CIMT. *See* INA 212(a)(2)(A)(ii)(II).
The age of the applicant at the time the crime was committed	An adjudication of juvenile delinquency is not a conviction, whether the adjudication occurred in the United States or abroad. If a person was tried and convicted in the United States as an adult, however, the offense may qualify as a conviction. For offenses outside the United States, the Federal Juvenile Delinquency Act may be consulted to determine whether what appears to be an adult conviction should be deemed to be juvenile delinquency. If the applicant was under 15 when the crime was committed, the crime is considered juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA) and the applicant is admissible. If the applicant was 15, 16, or 17 when a **non-violent** non-drug offense was committed, the offense may be considered juvenile delinquency under the FJDA and the applicant is admissible.
Expungements and pardons	If a conviction has been expunged or pardoned, check with counsel to determine whether it still provides an inadmissibility ground.
Vacated convictions	If a court vacates a conviction on the merits or for a constitutional or statutory defect, then there may be no conviction for immigration purposes (though the applicant may still be inadmissible if the applicant admits to having committed acts that constitute inadmissibility grounds). See *Matter of Sirhan*, 13 I&N Dec. 592. Check with counsel if it appears that the

	conviction was vacated solely to relieve the alien of the immigration consequences of the conviction.
Suspended Sentences	INA section 101(a)(48)(B) states: "Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." This provision was added in 1996 with IIRIRA. Therefore, if a court provides a sentence but subsequently suspends the sentence the subsequently suspended sentence is a sentence actually imposed for purposes of INA section 212(a)(2). See *Matter of S-S- 21 I&N Dec. 900 (BIA 1997)*; See pre-IIRIRA case: *Matter of Esposito, 21 I&N Dec. 1 (BIA 1995).*

3. Waivers for Criminal Activity – INA 212(h)

A waiver for the criminal-related inadmissibility grounds is authorized under INA 212(h) of the INA. As outlined below, there are two ways to establish eligibility for a waiver of the criminal-related inadmissibility grounds.

Waivers of INA 212(a)(2)-- Without a Qualifying Relationship ("Rehabilitation waiver")

First, an applicant may be eligible for a waiver if he or she meets each of the following three requirements:

- The alien is only inadmissible under subparagraph (D)(i) (engaging in prostitution) or (D)(ii)(procuring prostitution) **or** the activities for which the applicant is inadmissible occurred more than 15 years before the date of the application for a visa; **and**
- The applicant's admission to the U.S would not be contrary to the national welfare, safety, or security of the U.S.; **and**
- The applicant has been rehabilitated.

Waivers of INA 212(a)(2) --With a Qualifying Relationship

The waiver may be granted for an alien who establishes that:

- refusal of admission to the U.S. would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse, parent, child or son or daughter, or the K visa petitioner would experience extreme hardship if the applicant were denied admission, **and**

- a waiver is warranted as a matter of discretion.

There is no requirement for any passage of time subsequent to the commission of the crime, such as the 15-year requirement in the "rehabilitation waiver."

Waivers of INA 212(a)(2) NOT

A waiver under INA 212(h) is not available to:

- Any alien who is inadmissible for murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act

Available

involving torture,

- A LPR who has been convicted of an aggravated felony as defined in INA 101(a)(43);
- An alien who is already an LPR, unless the LPR has lawfully resided in the U.S. for a continuous period of at least 7 years (**note**: it is not necessary for the LPR to have been an LPR for the entire 7 year period, thus, time residing in the U.S. lawfully in a status other than LPR status can be included in determining whether the alien has lawfully resided in the U.S. for the 7 year period. *See Matter of Rotimi,* 24 I&N Dec. 467 (BIA 2008);
- An alien inadmissible for involvement in controlled-substance trafficking, or for violating law relating to controlled substances, except an alien who is inadmissible for a single offense of simple possession of 30 grams or less of marijuana;
- An alien inadmissible under INA 212(a)(2)(G) (foreign government officials who have committed severe violations of religious freedom);
- An alien inadmissible under INA 212(a)(2)(H) (related to significant trafficking in persons); and
- An alien inadmissible under INA 212(a)(2)(I) (related to money laundering).

Conviction for a Violent or Dangerous Crime

If the alien has been convicted of a violent or dangerous crime, the discretion to grant a waiver may not be exercised in favor of the alien unless the alien establishes that an extraordinary circumstance warrants approving the waiver. (Note: Violent or dangerous crime is defined on a case by case determination and it includes crimes such as murder, assault with a deadly weapon and armed robbery. End note.) Extraordinary circumstances may exist if the case involves national security or foreign policy consideration, or if denial of the admission of the alien would result in exceptional and extremely unusual hardship. Even if this standard is met, the waiver may still be denied. *See* 8 CFR 212.7(d). If the adjudicator believes that discretion should be exercised favorably in a case involving violent or dangerous crime, concurrence must be provided in writing by the Chief or Deputy Chief of International Operations before the application is approved.

D. Immigrant Membership in a Totalitarian Party and Waiver – INA 212(a)(3)(D)(i)

1. Totalitarian Party Related Inadmissibility Provision

INA 212(a)(3)(D)(i)

An immigrant, who has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), whether domestic or foreign.

Exceptions – INA 212(a)(3)(D)(ii)

There are several exceptions available for this ground of inadmissibility (and one waiver, *see* immediately, below). An applicant does not need to file a Form I-601 in order to claim an exception. If the requirements of an

and (iii) exception are met, the ground of inadmissibility no longer applies.

- INA 212(a)(3)(D)(ii) provides an exception for involuntary past or present membership, if the membership was or is involuntary, or is or was solely when the alien was under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

- INA 212(a)(3)(D)(iii) exception for past membership, if the alien is not a threat to the security of the United States AND
  (A) the membership or affiliation terminated at least 2 years before the date of the application for visa or adjustment of status; or
  (B) the membership or affiliation terminated at least five (5) years before the date of the application for a visa or adjustment of status, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date.

2. Waiver for Totalitarian Party Membership -- 212(a)(3)(D)(iv)

Waiver of INA 212(a)(3)(D)(i)

The waiver may be granted if

- the alien is the spouse, parent, son, daughter, brother or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence, or the fiancé of K visa petitioner; AND
- the alien is not a threat to the security of the United States; AND
- the waiver should be granted for humanitarian purposes, to assure family unity, or it is otherwise in the public interest; AND
- favorable exercise of discretion is warranted.

E. Misrepresentation – INA 212(a)(6)(C)(i)

1. Inadmissibility Provisions Based on Misrepresentation

INA 212(a)(6)(C)(i) (Material fact to gain benefit under INA)

The alien, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure, or has procured, a visa, other documentation, or admission to the U.S. or other benefit provided under the INA.

This ground of inadmissibility includes a false claim to U.S. citizenship, if the false claim was made before September 30, 1996. For false claims made on or after that date, see the discussion of INA 212(a)(6)(C)(ii).

Defense of Timely Retraction: While there is a statutory waiver available

for this charge, the alien may also use as a defense to this charge the fact that he or she timely retracted the misrepresentation. If the alien timely retracts the statement, the individual is not in need of a waiver. The retraction of the fraud or of the concealment or misrepresentation of a material fact has to be voluntary to work as a defense; that is, the alien must correct his or her testimony voluntarily prior to being exposed by the adjudicator. *Matter of R-R-*, 3 I&N Dec. 823 (BIA 1949). Admitting to the fraud or misrepresentation after DOS or USCIS has challenged the veracity of the claim is not a timely retraction.

If the alien timely retracted the misrepresentation, the alien in not in need of an I-601 waiver; the adjudicator should properly document the timely retraction.

INA 212(a)(6)(C)(ii) (False claim to citizenship)

After September 30, 1996, the alien falsely represents, or has falsely represented, himself or herself to be a citizen of the U.S. for any purpose or benefit under the INA (including INA 274A) or any other federal or state law.

- An exception may be made for an individual who is making a representation described above, if each natural or adopted parent is or was a citizen and the alien permanently resided in the U.S. prior to attaining the age of 16, and reasonably believed at the time of making the representation that he or she was a citizen. INA 212(a)(6)(C)(ii)(II). This exception was added by the Child Citizenship Act of 2000, **and it applies retroactively**, as if it had been included in the IIRIRA version of the provision.

- **There is no waiver available under INA 212(i) to an individual who makes a false claim to citizenship on or after September 30, 1996.** However, if an alien made a false claim to citizenship **prior** to September 30, 1996, the alien may be inadmissible under INA 212(a)(6)(C)(i), and therefore, may need to apply for a waiver under INA 212(i).

- As for INA 212(a)(6)(C)(i) inadmissibility, a timely and voluntary retraction may be a defense to this inadmissibility provisions. See requirements in section above.

- The alien is not inadmissible under this section if he or she falsely claims to be a non-citizen national of the United States. Nationals are defined at INA 101(a)(22). A false claim to be a non-citizen national, whether made before, on or after September 30, 1996, may still make the alien inadmissible under INA 212(a)(6)(C)(i), if the false claim meets the requirements for INA 212(a)(6)(C)(i) outlined below.

2. Considerations for determining inadmissibility

Requirements for INA 212(a)(6)(C)(i)

- Fraud or willful misrepresentation must have been made to a U.S. government official;
- Misrepresentation must be related to a material fact; and
- Misrepresentation must have been made to obtain a visa, other documentation, or admission to the United States (such as reentry permit, border crossing cards, U.S. passports), or other benefits provided under the INA.

Definition of Other Documentation

Pursuant to the FAM, the "other documentation," in addition to visas, refers to documents required at the time of an alien's application for admission. This includes such documents as:

- Reentry permits;
- Border crossing identification cards;
- U.S. Coast Guard identity cards; and
- U.S. passports.

Note: Although the FAM suggests that an application for an advance parole is not an application for a travel or entry document, the DHS position is that an advance parole document *is* a travel document. Such documents as applications for extensions of stay are not considered to be applications for entry documents under INA 212(a)(6)(C)(i), but, as discussed below, are considered applications for some "other benefit." Other types of documents, such as Form I-20, *Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students,* petitions, and labor certification forms are documents in support of a visa application. Consular officers judge these documents in the light of their effect on a visa application, but do not consider them, in themselves, to be "other documentation" within the meaning of INA 212(a)(6)(C)(i). See 9 FAM 40.63, N9.1

Definition of Other Benefit

According to the FAM, the term "other benefit" refers to any immigration benefit or entitlement provided for by the INA and may in a given case include:

- Requests for extension of stay, change of NIV status, permission to re-enter, waiver of INA 212(e) requirement, alien employment certification, advance authorization to re-enter, voluntary departure, adjustment of status, stay of deportation;
- Application for Forms I-20, *Certificate of Eligibility for Nonimmigrant (F-1) Student Status for Academic and Language Students,* and DS- 2019, *Certificate of Eligibility for Exchange Visitor (J-1) Status;* and
- All petitions applicable only to misrepresentations made by the petition's beneficiary or by an agent representing such beneficiary.

See 9 FAM 40.63, N9.2

Definition of Fraud

According to the Board of Immigration Appeals (BIA), a finding of "fraud" requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive a consular or immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). (This is not required for "misrepresentation," see below.)

Definition of Misrepresentation

- A misrepresentation is an assertion or manifestation that is not in accordance with the facts. A material misrepresentation includes a false misrepresentation concerning a fact that is relevant to the alien's entitlement. It is not necessary that there was intent to deceive or that the officer believed and acted upon the false representation. *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975).

- A misrepresentation requires an affirmative act taken by the alien, which can be in the form of oral false statements during an interview, written false statements on an application or petition, or the submission of evidence containing false information. *Matter of L-L-*, 9 I&N Dec. 324(BIA 1961); *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994).

NOTE: In practice, the distinction between "fraud" or misrepresentation" is not greatly significant. If the evidence shows that the alien made the misrepresentation with intent to deceive, and that the officer believed and acted upon the misrepresentation, then, under *Matter of G-G-*, the alien is inadmissible on the fraud theory. But even assuming there is no intent to deceive or the officer did not believe the alien or act upon the representation, *Matter of Kai Hing Hui* makes clear that the alien is still inadmissible, if the misrepresentation was willful and material.

Definition of Willfully

The term "willfully" should be interpreted as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *Matter of G-G-*, 7 I&N Dec. 161(BIA 1956).

Definition of Material

The test whether a misrepresentation is material is derived from the Supreme Court decision of *Kungys v. U.S.*, 485 U.S. 759 (1988), and in the context of a proceeding to revoke naturalization. According to this decision, a statement is material if it has been shown to be predictably capable of affecting the decision of the decision making body.

A misrepresentation made in connection with an application for a visa or

other document, or in connection with an entry into the United States, has a natural tendency to influence the decision on the person's case, if either:

1) the alien is inadmissible/removable/on the true facts; or
2) the misrepresentation tends to cut off a line of inquiry, which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he or she is inadmissible. *Matter of S-and B-C-*, 9 I&N Dec. 439 (BIA 1961).

Test of Materiality

The adjudicator should administer the test as follows:

1) Consider whether the evidence in the record supports a finding that the alien was inadmissible on the true facts. If it does, the misrepresentation is material. If it does not, proceed to 2.
2) (a) Consider, whether the misrepresentation tended to shut off a line of inquiry that was relevant to the alien's eligibility. If it did, proceed to number 2(b). If not, the misrepresentation is not material.
   (b) If a relevant line of inquiry had been cut off, consider whether the inquiry might have resulted in a proper determination of inadmissibility (*Matter of S- and B-C-*, 9 I&N Dec. 436, at 447-449 BIA 1960, AG 1961). If yes, the misrepresentation was material.

A misrepresentation generally is material only if it enabled, if acted upon, or would have enabled the alien to receive a benefit for which he or she would not otherwise have been eligible. *See Kungys v. United States*, 485 US 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998).

Burden of Proof

When an applicant is seeking an immigration benefit, the burden of proof is always on the applicant to establish that he or she is not inadmissible; this is also true in the case of a possible inadmissibility under INA 212(a)(6)(C)(i). The burden never shifts to the government to prove admissibility during the adjudication of a benefit application, including an application for a waiver. INA 291; *Matter of Arthur*, 16 I&N Dec. 558 (BIA 1976).

However, there must be some evidentiary basis for a USCIS conclusion that an alien is inadmissible under INA 212(a)(6)(C)(i). If there is no evidence that the applicant obtained or sought to obtain some benefit under the INA, the adjudicator should not find inadmissibility under INA 212(a)(6)(C)(i).

If, however, there is any evidence that would permit a reasonable person to conclude that the alien may be inadmissible under INA

212(a)(6)(C)(i), then the alien has the burden of establishing at least one of the following facts:

- That there was no fraud or misrepresentation; or
- That any fraud was not intentional or with the intent to deceive, or that the misrepresentation was not willful; or
- That any fraud or any concealed or misrepresented fact was not material; or
- That the fraud or misrepresentation or concealment was not made to procure a visa, admission, or some other benefit.

Requirements for INA 212(a)(6)(C)(ii)

- Only applies to false claims to U.S. citizenship made on or after 9/30/96.

- Covers false claims made to a State or Federal official for *ANY* State or Federal benefit. Not limited to immigration benefits.

- Covers false claims made to U.S. government or to private individuals, such as an employer (because INA 274A covers the verification of employment eligibility, and statements made during the I-9 process can be made to a private or a Government employer)**.**

- The claim can be in writing, oral, under oath, or not under oath**.**

NOTE: Claiming falsely to be a non-citizen national of the United States does not render an individual inadmissible under INA 212(a)(6)(C)(ii)(I). A false claim to be a non-citizen national, whether made on, before, or after September 30, 1996, could make the alien inadmissible under INA 212(a)(6)(C)(i), if all requirements are met, not INA 212(a)(6)(C)(ii).

NOTE: Although falsely claiming to be a citizen could result in a civil penalty under INA 274C or a criminal conviction under 18 USC 911, no such conviction is necessary to be inadmissible under INA 212(a)(6)(C)(ii). If an individual was convicted of such an offense or penalty, then clearly the record is sufficient to find inadmissibility under INA 212(a)(6)(C)(ii). However, the ground of inadmissibility applies when evidence indicates that the alien knowingly made the false claim in order to obtain the benefit, regardless of whether there is a conviction.

NOTE: Form I-9 asks an individual whether he or she is a "citizen or a national." Therefore, if an alien marks this section to claim employment eligibility, the adjudicator must evaluate whether the individual meant to claim to be a "citizen" of the United States. If he or she merely claimed to be a "national" of the United States, the individual would not be inadmissible under INA 212(a)(6)(C)(ii). Nationality is defined in INA 101(a)(22).

Definition of False The applicant knowingly misrepresents that he or she is a citizen of the United States, when he or she is actually not a citizen.

3. Waiver for Misrepresentation – INA 212(i)

Waiver of INA 212(a)(6)(C)(i) The waiver may be granted for an alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, has sought to procure, or has procured, a visa, other documentation, or admission to the U.S. or other benefit under the INA, if the alien establishes that:

- refusal of admission to the U.S. would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent, or to the K visa petitioner, **and**
- a waiver is warranted as a matter of discretion.

NOTE: There is no provision for a waiver under INA 212(i) for immigrant purposes, for an alien who is inadmissible under INA 212(a)(6)(C)(ii) for falsely representing himself or herself to be a U.S. citizen on or after September 30, 1996. However, if the false claim to U.S. citizenship was made prior to September 30, 1996, and was made to a U.S. Government official to procure an immigration benefit under the INA, it is treated as a misrepresentation under INA 212(a)(6)(C)(i) and the applicant is eligible to apply for a waiver under INA 212(i).

F. Smugglers – INA 212(a)(6)(E)

1. Inadmissibility provision related to smuggling aliens

INA 212(a)(6)(E)(i) An alien, who at any time knowingly has encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of the law.

NOTE: For the ground to apply, the alien must act knowingly, that is, the alien must be aware of facts sufficient that a reasonable person in the same circumstances would conclude that his or her encouragement, inducement, or assistance could result in the illegal entry of the alien into the United States. Additionally, the smuggler must act with the intent that the alien achieve the illegal entry.

NOTE: The mistaken belief that the alien was entitled to enter legally can be a defense to inadmissibility for suspected smuggler.

2. Considerations for inadmissibility ground related to smuggling aliens

Definition of Encourage, Induce, Assist, Abet, or Aid

Any affirmative action that leads an alien to enter the United States illegally can be classified as encourage, induce, assist, abet, or aid.

Examples: Offering a job to an alien under circumstances that make clear that the alien will have to enter illegally to accept the job offer; or physically transporting or bringing the alien across the border; or making a false written or oral statement on behalf of another alien at the time of the entry.

NOTE: Under the pre-1990 version of the smuggling provision, an alien was only inadmissible if the smuggling was done "for gain." Under current law, "for gain" is no longer an element. Also, it is irrelevant what motives caused the alien to engage in the smuggling activity.

Definition of "any other alien to enter or to try to enter the United States in violation of the law."

Any other alien includes any alien, even a close family member and minor child, who would not be entitled to be admitted to the United States.

NOTE: Under the pre-1990 version of the smuggling provision, an alien was not inadmissible, if he or she smuggled close family members based on a motive of close affection and not for financial gain. This was eliminated with the Immigration Act of 1990. To alleviate some of the harshness of the new provision, a waiver is available under INA 212(d)(11) addressing the smuggling of family members.

3. Waiver for Smugglers - INA 212(d)(11)

Waiver of INA 212(a)(6)(E)(i)

Referring to INA 212(d)(11), INA 212(a)(6)(E)(iii) provides for a wavier of this ground of inadmissibility. To be eligible for this waiver, the alien must establish that:

(1)(A) the alien is an alien lawfully admitted for permanent residence, who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible as a returning resident pursuant to INA 211; OR
(B) the alien is seeking admission (or adjustment of status) as an immediate relative, or as a first, second, or third family based preference immigrant (and the relationship must have existed at the time of the offense); AND

(2) the alien encouraged, induced, assisted, abetted, or aided the unlawful entry only of an individual who at the time of such action, was the alien's spouse, parent, son, or daughter and the alien has not encouraged, induced, assisted, abetted or aided the unlawful entry of

any other individual; AND

(3) the application should be granted to assure family unity, or that it is otherwise in the public interest; AND

(4) a favorable exercise of discretion is warranted.

G. Subject of Civil Penalty – INA 212(a)(6)(F)

1. Inadmissibility provision related to final order for false documents

INA 212(a)(6)(F) An alien who is the subject of a final order for violation of INA 274C.

Definition of final order What constitutes a "final order" under INA 274 depends on how INA 274C was adjudicated.

- When DHS issues a notice of intent to fine under INA 274C, the person has sixty (60) days to request a hearing before an administrative law judge. If the person does not request a hearing, the DHS decision to impose a civil penalty under INA 274C is the final order (8 CFR 270.3(f) and 28 CFR 68).

- If the person makes a timely request for a hearing before an administrative law judge, the judge's order imposing a fine is the final order unless the Chief Administrative Hearing Officer of the Executive Office for Immigration Review modifies or vacates the order, or unless the case is referred to or accepted for review by the Attorney General. *See* 8 CFR 270.3(f) and 28 CFR 68.

Definition of 274C INA 274C makes it unlawful for a person or entity to knowingly and for the purpose of or in order to satisfy any requirement of the INA,
(1) forge, counterfeit, alter, or falsely make any document;
(2) use, attempt to use, possess, obtain, accept, or receive any forged, counterfeit, altered, or falsely made document;
(3) use, or attempt to use, any document lawfully issued to a person other than the possessor (including a deceased individual). *See* INA 274C(a)(1) through (3).

INA 274C(a)(4) makes it unlawful to knowingly accept or receive any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with INA 274A(b).

2. Waiver related to final order for false documents- INA 212(d)(12)

Waiver of INA 212(a)(6)(F)(i) Under INA 212(d)(12) the alien may obtain a waiver by establishing the following:

(1)(A) The alien is already lawfully admitted for permanent residence, and temporarily proceeded abroad voluntarily and not under an order of deportation or removal, and who is otherwise admissible to the United States as a returning resident under INA 211(b); OR (B) is seeking adjustment of status as an immediate relative or as a family based immigrant (and the relationship existed at the time of the fraud); AND

(2) The alien has not been the subject of any prior civil money penalty under INA 274C; AND

(3) The alien committed the offense that resulted in the civil money penalty solely to assist, aid, or support the alien's spouse or child (and not ANY other individual); AND

(4) The grant of the waiver would serve humanitarian purposes or to assure family unity; AND

(5) A favorable grant of discretion is warranted.

Check for other grounds of inadmissibility

Check whether other grounds of inadmissibility under INA 212 of the Act exist. It is possible that an alien who is convicted of document fraud under INA 274C of the Act, may also be subject to other grounds of inadmissibility such as INA 212(a)(6)(C)[Misrepresentation] or 212(a)(6)(E)[Smugglers].

H. Unlawful Presence - INA 212(a)(9)(B) and (C)

1. Inadmissibility Provisions Based on Unlawful Presence

Inadmissible under INA 212(a)(9)(B)(i)(I)

If an alien has resided unlawfully in the U.S. for an un interrupted period of more than 180 days but less than 1 year and then voluntarily departed, prior to the initiation of removal proceedings, he or she is inadmissible to the U.S. for a period of 3 years from the date of departure.

NOTE: If removal proceedings are initiated before the alien has been in the U.S. for more than a year, and the alien leaves after initiation of the removal proceedings pursuant to a grant of voluntary departure, but before the alien has been unlawfully present for more than one year, the alien is not subject to the three year bar. This is based on language in the statute itself, which provides that someone with more than 180 days continuous unlawful presence, but not more than a year of unlawful presence is inadmissible only if he or she leaves before a removal proceeding has been initiated. Thus, pursuant to statute, if the alien leaves after removal proceedings are initiated (e.g., the NTA is filed with EOIR and served on the applicant), INA 212(a)(6)(9)(B)(i)(I) no longer applies. However, in this case, there is a chance that the alien is inadmissible for failure to having attended a removal proceeding (INA

section 212(a)(6)(B)) and may also be inadmissible based on an in absentia order of removal (INA section 212(a)(9)(A)). Therefore, carefully check whether other ground of inadmissibility may apply in this case.

Also, if the person stays more than one year, the person is inadmissible under INA 212(a)(9)(B)(i)(II) which applies regardless of whether the applicant is in proceedings or not.

See, 9 FAM 40.92 N2.1, INA 212(a)(9)(B)(i)(I) Departure Prior to Commencement of Proceedings Required.

Inadmissible under INA 212(a)(9)(B)(i)(II)

If an alien resided unlawfully in the U.S. for an uninterrupted period of one year or more, then voluntarily departed or was removed from the United States, he or she is inadmissible to the U.S. for a period of 10 years from the date of departure or removal.

NOTE: INA 212(a)(9)(B)(i)(II) does *not* include the "prior to the initiation of removal proceedings" language that is included in 212(a)(9)(B)(i)(I). Thus, if the alien has been unlawfully present for one year or more, the 10-year bar of inadmissibility applies whether or not removal proceedings were ever initiated against the alien, and even if the alien left once the proceedings were initiated.

2. Time Counted as Unlawful Presence

General time that counts as unlawful presence

Unlawful presence includes any time spent in the U.S. after April 1, 1997 after the alien's authorized stay expires, and any time spent in the U.S. after April 1, 1997, following entry without inspection or parole, unless one of the exceptions noted in section 3 below applies.

Unlawful presence must be uninterrupted and alien must have left the U.S.

The stay of the alien during which he or she accrues unlawful presence must be uninterrupted, and the alien must have subsequently departed from the U.S. for the alien to become inadmissible under INA 212(a)(9)(B). The alien is not inadmissible under INA 212(a)(9)(B) if the alien has accrued the requisite amount of unlawful presence but never departs the U.S.

Example: If an alien spent 90 days unlawfully in the U.S., departed from the U.S., spent 2 weeks abroad, returned to the U.S., spent 100 days unlawfully in the U.S., and departed from the U.S., the alien would not be inadmissible under INA 212(a)(9)(B)(i)(I). Despite having a total of 190 days of unlawful presence in the U.S., the alien did not have at least 181 continuous and uninterrupted days of unlawful presence in the U.S.

NOTE: An intervening period of authorized stay (such as an alien's time in lawful TPS status) is not considered an interruption. For example, an alien enters the United States unlawfully and after 90 days of unlawful presence applies for and is granted TPS. The alien loses his TPS status two years later. The alien reverts back to his prior "status" and continues to accrue unlawful presence. For purposes of the 3 and the 10 year bar, the intervening period of authorized stay does not count as an interruption of presence that starts the clock over again.

Duration of Status

Nonimmigrants admitted for duration of status accrue unlawful presence only after DHS or an immigration judge finds a status violation. (See discussion of violation of status, below).

Since Canadian nonimmigrants generally are not issued Forms I-94, they are treated as admitted for duration of status, and accrue unlawful presence only after DHS or an immigration judge finds a status violation.

Time spent during the pendency of a petition or application

With the exception of the applications specified in section 3 below, the filing of a petition or application does not grant an alien a period of stay authorized; therefore, during the pendency of the petition or application, unless specifically noted above, an alien will continue to accrue unlawful presence.

Time spent in the United States after his or her status expired.

In general, and unless otherwise protected, an alien will commence to accrue unlawful presence after his or her status (as evidenced on Form I-94, Arrival/Departure Record) expires.

Time spent in the United States after having violated status, if determination of status violation is made prior to the expiration of Form I-94

If the Director determines during the adjudication of an immigration benefits petition or application, or the immigration judge during removal proceedings, that the alien has violated his or her status, the individual will start to accrue unlawful presence the day after the determination of having violated his or her status, if this determination was made prior to the expiration of the I-94.

NOTE: Although an alien may become removable because of the status violation, unlawful presence does not commence to accrue on the date of the violation (or when removal proceedings are initiated based on the violation).

Time spent in removal proceedings

The initiation of a removal proceeding has no affect, either to the alien's benefit or to the alien's detriment, on the accrual of unlawful presence (but the initiation of removal proceeding may impact whether an alien is inadmissible under INA 212(a)(9)(B)(i)(I)[the 3-year bar]. If the alien was already accruing unlawful presence when the removal proceeding was initiated, the alien will continue to accrue unlawful presence, unless the alien comes to be protected from the accrual of unlawful presence (such as by renewing an adjustment or asylum application, or receiving a grant of voluntary departure or TPS). If the alien was not accruing unlawful presence when the removal proceeding began, the alien will continue to be protected from the accrual of unlawful presence, until the expiration date on a date-certain Form I-94 or until the immigration judge (or the Board, on appeal) holds that the alien has violated his or her immigrant or nonimmigrant status, whichever is earlier.

Aliens under an order of supervision

If an alien is under an order of supervision, the individual is not in a period of stay authorized.

3. Time NOT Counted as Unlawful Presence

Unlawful presence prior to April 1, 1997

Any presence in the U.S. prior to the effective date of the IIRIRA unlawful presence provisions on April 1, 1997, is not counted as "unlawful presence" for purposes of determining admissibility.

Age under 18

Time spent by a child while under age 18 in the U.S. is not counted as unlawful presence. *See* INA 212(a)(9)(B)(iii)(I).

Asylum Applicants

Time during which a bona fide asylum application is pending (including any appeals) is not counted as unlawful presence, unless the alien works without authorization during that period of time. *See* INA 212(a)(9)(B)(iii)(II). If it appears an asylum application was not bona fide, the HQ Asylum Division should be consulted to make the determination.

Timely filed application for Change or Extension of Status ("Tolling")

If an alien, who was lawfully admitted or paroled, files a timely application for change or extension of status, the alien will not accrue unlawful presence during the pendency of the application under INA 212(a)(9)(B)(iv), if each of following requirements are met:

- The alien has been previously lawfully admitted or paroled into the U.S.
- The application was timely filed;
- The application is not frivolous (has an arguable basis in law and fact); and

- The applicant has not engaged in any unauthorized employment before or during the pendency of the application.

The statutory provision allows for the tolling of the unlawful presence for up to 120 days, for purposes of the 3 year bar ***only***. However, to address large backlogs, USCIS extended this tolling of unlawful presence by policy. Pursuant to USCIS policy, the unlawful presence period is tolled not only for purposes of the 3-year bar, but also for purposes of the 10-year bar, and may be tolled beyond the 120 day period, as long as the application was timely filed and remains pending. March 3, 2000 Office of Field Operations memorandum, *Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act* (AD 00-07).

If the application is denied, the individual will commence to accrue unlawful presence the day after the denial. If the denial is based on the fact that the application was frivolous, not bona fide, or because the alien had worked without authorization, the alien is deemed to have accrued unlawful presence the day after his or her status (as evidenced on Form I-94, Arrival/Departure Record) expired. If the application was filed untimely, and is ultimately denied, unlawful presence begins to accrue on the date the request is denied.

If the application is approved, whether filed timely or untimely, the individual is not deemed to have accrued any unlawful presence.

Pending Adjustment of Status

An alien who has properly filed an affirmative application for adjustment of status application with USCIS under INA 245 will be considered lawfully present from the time of the acceptance of the filing. If the application is denied and there is a legal basis to renew the application before the immigration judge, the alien does not accrue unlawful presence through any administrative stages of review.

NOTE: If the alien files for adjustment of status while in removal proceedings as a form of relief from removal (filing the adjustment application defensively), the alien will continue to accrue unlawful presence. *See* AFM 30.1(d)(2).

Pending Application for Legalization, or Special Legislation for Adjustment of Status

Unlawful presence does not accrue while the following applications are pending:

- Application for legalization, special agricultural worker and lawful temporary residence (pending includes through administrative appeal process, if any)

- Application for temporary and permanent residence by

Cuban-Haitian entrants under section 202(b) of Public Law 99-603 (pending includes through administrative appeal process, if any)

- Application for adjustment of status under NACARA and HRIFA, whether filed affirmatively with USCIS or defensively with EOIR

- Application for Registry under INA 249

Battered Applicant and his or her child(ren)

The unlawful presence provisions do not apply to a person unlawfully in the U.S. who meets the requirements set forth in INA 212(a)(6)(A)(ii), as long as there is a substantial connection between the battery or cruelty and the applicant's unlawful presence in the U.S. *See* INA 212(a)(9)(B)(iii)(IV).

NOTE: USCIS has taken the position that an alien, who applies for adjustment of status may do so regardless of INA 212(a)(6)(A) inadmissibility because of the wording of INA 245(a). Also, according to the wording of statutory provision, INA 212(a)(6)(A) inadmissibility ends once an individual departs the U.S. However, simply because 212(a)(6)(A) inadmissibility is not applicable in the overseas context, or irrelevant once the approved VAWA self-petitioner applies for adjustment of status in the United States, does not mean, that the effects of the illegal entry (accrual of unlawful presence, or illegal entry after previous immigration violations) do not apply (although these may have been connected to the battery or cruelty experienced by the VAWA self-petitioner and his or her children). A VAWA self-petitioner who, by repeated violations of the Act, has made his or herself inadmissible under INA 212(a)(9)(B) or (C), may obtain adjustment or a visa only if the VAWA self-petitioner applies for and is granted, the related forms of relief from inadmissibility (Cf. INA 212(a)(9)(A)(iii); (B)(iii)(IV); (C)(iii)).
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Victims of Trafficking

The unlawful presence provision does not apply to someone who demonstrates that severe form of trafficking was at least one central reason for the unlawful presence in the U.S. *See* INA 212(a)(9)(B)(iii)(V).

While present in legal immigration status

In general, if an alien is granted a period of authorized stay, regardless of an alien's entry or immigration history, the alien will not accrue unlawful presence during the period of the grant or status. However, at the end of the period of stay authorized, the alien will revert back to accruing unlawful presence unless he or she is otherwise protected. The following periods are stay authorized (list is not comprehensive):

- Granted nonimmigrant status (note that an applicant in Duration of Status (D/S) will not accrue unlawful presence unless there is a determination of status violation)

- Voluntary departure
- Refugee status
- Asylee status
- Grants of withholding or deferral of removal under the United Nations Convention against Torture
- Grants of TPS and Deferred Enforced Departure

Alien granted deferred action status

If an alien is granted deferred action status, the alien is in a period of stay authorized, and therefore does not accrue unlawful presence. *See* Johnny N. Williams Memorandum, "Unlawful Presence" (June 12, 2002).

4. Waiver for Unlawful Presence – INA 212(a)(9)(B)(v)

Waiver of INA 212(a)(9)(B)

The waiver may be granted for an alien who establishes that:

- refusal of admission to the U.S. would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent, or the K visa petitioner **and**
- a waiver is warranted as a matter of discretion.

Extreme hardship and discretion are discussed in more detail in section VI, I below.

NOTE: The qualifying relative must be the U.S. citizen or lawful permanent resident spouse or parent or the K visa petitioner. A U.S. citizen child is not a qualifying relative for which the waiver can be sought. However, the child's hardship can be a factor in the determination whether the qualified relative experiences extreme hardship. See section VI.J.

5. Issues to Watch for When Determining Eligibility for INA 212(a)(9)(B)(v) Waiver

Watch for INA 212(a)(9)(C) inadmissibility

Sometimes, individuals who accrued unlawful presence in the U.S. may also be inadmissible under INA 212(a)(9)(C), for which there is not a waiver (other than for VAWA self-petitioners) and for which consent to reapply for admission may be required. Two groups are covered under INA 212(a)(9)(C):

- Aliens who entered without admission (or attempt to enter without admission) after accruing more than 1 year of unlawful presence in the aggregate.
- Aliens who enter without admission (or attempt to enter without admission) after removal.

Aliens who are inadmissible under INA 212(a)(9)(C)(i) cannot obtain approval for consent to reapply under INA 212(a)(9)(C)(ii) unless they have been abroad for at least 10 years since their last departure from the United States.

NOTE: Parole, by definition, is not an admission, but a parolee is deemed, for immigration purposes, to still be an applicant for admission. Thus, if the alien was paroled into the United States under INA 212(d)(5)(A), after having accrued unlawful presence in excess of one year or after having been removed, the alien is not inadmissible under INA 212(a)(9)(C) on the basis of his or her presence pursuant to that parole. The alien may, however, be inadmissible based on some other entry or attempted entry without admission.

Watch for INA 212(a)(6)(B) inadmissibility

Some individuals who accrued unlawful presence in the U.S. may have been placed in removal proceedings and failed to attend those proceedings. Unless the alien can establish that there was reasonable cause for the failure to attend the proceedings, he or she is inadmissible for 5 years from the date of departure or removal and there is no waiver available for that 5 year inadmissibility period.

A consular officer does not make the finding of inadmissibility because it is already made by an in absentia order being issued or by the alien departing or being removed. The consular officer may determine that the applicant had reasonable cause and find him/her admissible. a consular officer doesn't really make the finding of inadmissibility – it is already made by an in absentia order being issued and the alien departing or being removed.

This is addressed in a June 17, 1997, memo from *Paul Virtue, Acting Executive Associate Commissioner, Additional Guidance for Implementing Sections 212(a)(6)(B) and 212(a)(9)(B) of the Immigration and Nationality Act (the Act).* Aliens placed in proceedings on or after April 1, 1997, who can establish that failure to attend or remain in attendance at a removal proceeding was for reasonable cause are not inadmissible under section 212(a)(6)(B) of the Act. The alien would establish reasonable cause before the immigration judge, if seeking to reopen the proceeding; to the consular officer, if applying for a visa; to the inspecting officer, if applying for admission; or to the Service's adjudicating officer, if applying for adjustment of status before the Service. The burden rests with the alien to establish there was reasonable cause for not attending or remaining at the removal hearing.

Applicant may also need to apply for consent to reapply with a Form I-

If the applicant was deported or removed, or left the U.S. while under a final order of deportation or removal, the applicant may also be required to submit a Form I-212, *Application for Permission to*

212 *Reapply for Admission into the United States After Deportation or Removal*, if the alien is seeking admission within the period for which consent to reapply is required under INA 212(a)(9)(A). If the applicant files a Form I-212, a separate decision must be made on the application. (See I-212 SOP).

6. VAWA self-petitioner's waiver under INA 212(a)(9)(C)(iii)

It is expected that overseas adjudicators generally will not encounter these cases, as applications will be filed with domestic offices. However, the information is provided for those rare circumstances in which an overseas adjudicator may need to apply the provisions explained below, as well as for informational purposes.

INA 212(a)(9)(C) inadmissibility

Two groups of aliens may be inadmissible under INA 212(a)(9)(C):

- Aliens who entered without admission (or attempt to enter without admission) after accruing more than 1 year of unlawful presence in the aggregate.
- Aliens who enter without admission (or attempt to enter without admission) after removal.

NOTE: Parole, by definition, is not an admission, but a parolee is deemed, for immigration purposes, to still be an applicant for admission. Thus, if the alien was paroled into the United States under INA 212(d)(5)(A), after having accrued unlawful presence in excess of one year or after having been removed, the alien is not inadmissible under INA 212(a)(9)(C) on the basis of his or her presence pursuant to that parole. The alien may, however, be inadmissible based on some other entry or attempted entry without admission.

Special waiver for VAWA self-petitioners

Ordinarily, and not in VAWA context, an alien who is inadmissible under INA 212(a)(9)(C)(i) must seek consent to reapply under INA 212(a)(9)(C)(ii), which cannot be approved until he or she has been absent from the United States for 10 years.

INA 212(a)(9)(C)(iii), however, provides a waiver, which may be sought instead of consent to reapply, by a VAWA self-petitioner. The 10-year absence requirement for a Form I-212 case does *not* apply to a Form I-601 filed under INA 212(a)(9)(C)(iii). Also, if this individual is in the U.S., USCIS determined by policy that the reinstatement provision of INA 241(a)(5) does not apply.

Form I-601 filed by a battered alien may be approved if:

- The alien who filed the form is a VAWA self-petitioner;
- The alien demonstrates a connection between the battery or

extreme cruelty and his or her removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States; and

- The alien warrants a waiver in the exercise of discretion.

In order for the alien's removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States to be considered sufficiently "connected" to the battering or extreme cruelty, the evidence must establish that the battering or extreme cruelty experienced by the VAWA self-petitioner caused the action in INA 212(a)(9)(C)(i) of the INA rendering him or her inadmissible. In other words, the evidence should establish that the self-petitioner would not have departed, been removed from, reentered or attempted to reenter the United States in the absence of the battering or extreme cruelty. To meet this evidentiary standard, the evidence submitted must demonstrate:

- The circumstances surrounding the act, including the relationship of the abuser to the self-petitioner and the abuser's role in the act; and
- The requisite causal relationship between the act and the battering or extreme cruelty.

In order for a connection to be found, the battery or extreme cruelty must have been perpetrated by the self-petitioner's qualifying USC or LPR spouse, intended spouse, former spouse, or parent. The act rendering the self-petitioner inadmissible under INA 212(a)(9)(C)(i) may occur prior to and/or during the marriage to the self-petitioner's qualifying USC or LPR spouse.

If the self-petitioner establishes that there was battering or extreme cruelty during the marriage or prior to the marriage to the qualifying USC or LPR spouse, the adjudicating officer may find that the self-petitioner has established the required "connection" to the unlawful presence, departure or removal, or the illegal entry, even if it occurred prior to the marriage.

When determining whether a sufficient connection exists between the alien's action(s) under INA 212(a)(9)(C)(i) and the battery or extreme cruelty suffered by the alien, the adjudicating officer should consider the full history of the domestic violence in the case, including the need to escape an abusive relationship. The adjudicating officer should consider all credible evidence that is in compliance with the provisions of section 384 under section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1367, as amended, when making this determination. The credibility and probative value of the evidence submitted by the self-petitioner is a determination left to the discretion of the adjudicating officer.

If the Form I-601 is approved, the alien is no longer inadmissible under INA 212(a)(9)(C) of the INA, and will not be required to file a Form I-212 before the alien may reapply for admission. A denial does not preclude an

alien from filing a new Form I-601 with additional evidence, or filing a Form I-212. The Form I-212, unlike the Form I-601, could be approved only if the alien has been abroad for at least 10 years.

NOTE: Because inadmissibility grounds are distinct and separate, a VAWA individual, who has previously been removed (whether or not there was a connection to the extreme cruelty or battery) and subsequently reentered the United States, will still need Form I-212 to waive inadmissibility for the prior removal under INA 212(a)(9)(A).

I. Evidence

There is no specific requirement for the amount of evidence necessary to establish eligibility for a waiver. However, this section provides some guidelines on the type of evidence adjudicators should be aware of and consider.

1. Qualified Relative

If the qualifying relative is the same relative who petitioned for the applicant to immigrate, then a USCIS officer has already determined that the relationship exists and that decision does not need to be revisited. However, if there is evidence that the relationship does not exist, the adjudicator should take that into account and, where appropriate, coordinate with the applicable USCIS Office to assess whether the approval of the I-130 should be revoked. If the qualifying relative whom the applicant claims will experience hardship is different from the relative who filed the I-130, the applicant must provide credible documentation establishing the existence of the relationship and, if the LPR/USC status of the qualifying relative cannot be established through USCIS systems, the applicant should be asked to provide such evidence.

2. Extreme Hardship

The application and letter explaining hardship or other grounds for eligibility, where applicable, may be sufficient to support eligibility for the waiver if detailed and credible. However, in most cases, the applicant will need to provide supporting documentary evidence (e.g., medical records, if the hardship claim is based on medical evidence; financial records if the hardship claim is based on financial considerations) to establish eligibility. If the adjudicating officer determines that the applicant has a colorable claim for establishing extreme hardship but has failed to provide sufficient supporting evidence, the officer should issue a Form I-72, Request for Additional Evidence.

Once extreme hardship is established as an eligibility threshold, the extreme hardship becomes a factor of the discretionary determination for approval of the waiver. Extreme Hardship is described in detail in section VII.J. of these procedures.

3. Discretion

The discretionary determination of eligibility is the last step in the adjudication of the application.

Discretion is described in more detail below in section VII. K.

J. Extreme Hardship to a Qualified Relative

Eligibility for most of the immigrant waivers requires a showing of extreme hardship to a qualified relative (hardship is not required for a health-related waiver and, if the applicant establishes alternative grounds related to rehabilitation for a criminal-related waiver). The "extreme hardship" standard is always the same, whether it is used for unlawful presence purposes of whether it is applied to an applicant seeking the waiver of a criminal ground. However, there may be stronger negative factors to consider in the analysis of discretion in cases involving criminal activity or misrepresentation. For a waiver of a criminal-related inadmissibility, the extreme hardship may be not only to a USC or LPR parent or spouse, but also to a USC or LPR child. The adjudication should pay close attention to who can qualify as a "qualified relative." If hardship is claimed to an individual other than a qualified relative, such as hardship to the applicant or to other relatives, the information may be considered, but only to the extent that such hardship results in hardship to the qualifying relative. Additionally, hardship to qualified relatives, other relatives, or the alien may be part of the adjudicator's discretionary analysis, too. *See* Discretion, section VII.K. below.

Extreme hardship is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship, which include:

- the presence of a lawful permanent resident or United States citizen spouse or parent in this country;
- the qualifying relative's family ties outside the United States;
- the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries;
- the financial impact of departure from this country; and
- significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Id. at 565-566. The BIA indicated that these factors relate to the applicant's "qualifying relative." *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and that the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." It further stated that "the trier of fact must consider the entire range of factors concerning hardship in their totality" and then "determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

In other cases of extreme hardship, it has been found that the mere loss of employment, the inability to maintain one's present standard of living or to pursue a chosen profession, or separation of a family member or cultural readjustment, in and of themselves, do not constitute extreme hardship *Matter of Pilch,* (BIA Interim Decision #3298); *Marquez-Medina v INS*, 765

F.2d 673 (7th Cir. 1985); *Bueno-Carillo v. Landon*, 682 F2d 143 (7th Cir. 1982); *Chokloikaew v INS*, 601 F.2d 216 (5th Cir. 1979), *Banks v INS*, 594 F.2d 760 (9th Cir. 1979; *Matter of Kojoory*, 12 I&N Dec. 215 (BIA 1967). However, these factors in aggregate, could establish extreme hardship in some cases.

Because the term extreme hardship is not defined and flexible, the adjudicator must look at each application and evaluate it on a case-by-case basis. All relevant factors should be considered and addressed in the decision. If the applicant fails to establish extreme hardship, then the application must be denied and discretion need not be considered.

K. Discretion

If extreme hardship is established (or, for some waivers, if extreme hardship is not required), the adjudicator must consider whether, as a matter of discretion, the application should be approved or denied. The applicant must establish that the favorable factors outweigh the unfavorable ones. The finding of extreme hardship is not only a requirement that must be met before the issue of discretion is considered, but once found, it is a favorable discretionary factor. However, any fraud or criminal activity that led to the inadmissibility finding is a negative factor that may warrant denial as a matter of discretion, even if there is extreme hardship.

Additionally, regulations provide that, in general, discretion will not be exercised favorably in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or when an alien clearly demonstrates that denial of the application would result in "exceptional and extremely unusual hardship." Depending on the gravity of the underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion. See 8 CFR 212.7(d). If the adjudicator believes that discretion should be exercised favorably in a case involving violent or dangerous crime, concurrence must be provided in writing by the Chief or Deputy Chief of International Operations before the application is approved.

Some of the favorable factors found in case law are:

- Family ties in the United States and the closeness of the underlying relationship
- Unusual hardship to the applicant or to the lawful permanent resident or United States citizens, or relatives and employers
- Evidence of reformation and rehabilitation
- Length of lawful residence in the United States and status held during that residence (particularly where the alien began his or her residency at young age)
- Evidence of respect for law and order, good moral character, and intent to hold family responsibilities (such as affidavits from family, friends, and responsible community representatives)
- Considerable passage of time since deportation or removal
- Deportation or removal for less serious reasons
- Absence of significant undesirable or negative factors
- Eligibility for waiver of other exclusionary grounds

Some of the unfavorable factors to consider are:

- Evidence of moral depravity, or criminal tendencies reflected by an ongoing or continuing police record, the nature, recency and seriousness of the criminal violations, if any
- Repeated violations of immigration laws, willful disregard for other laws
- Likelihood of becoming a public charge
- Pervious instances of fraud in dealings with service or false testimony
- Mandatory grounds of inadmissibility for which no waiver exists or for which the alien is not eligible
- Absence of close family ties or hardships
- Spurious marriage to a USC for the purpose of gaining an immigration benefit
- Serious violations of immigration laws which evidence a callous attitude without hint of reformation of character
- Nature and underlying circumstances of the exclusion ground at issue
- The presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country

Upon review of the record as a whole, the adjudicator should balance the equities and adverse factors to determine whether exercise of discretion should be favorably exercised. In *Matter of Mendez-Morales,* 21 I&N Dec. 296 (BIA 1996) the BIA held that the adjudicator must evaluate the evidence presented as a whole and explain why or why not discretion is exercised in favor of the applicant. Whether discretion can be exercised favorably depends on each case and its nature and circumstances surrounding the case. When there are serious negative factors, the applicant should be required to introduce offsetting favorable evidence.

Also the underlying significance of the adverse and favorable factors should be taken into account. For example, if an alien has a relative in the United States, the qualifying relationship must be evaluated. The equity of a marriage and the weight given to any hardship to the spouse may be diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien may be deported. On the other hand, a lengthy and stable marriage should not only be given weight in evaluating extreme hardship, but also is a positive equity in evaluating discretion. Similarly, if the alien has a history of employment, it is important to consider the type of employment and its length and stability. When looking at an alien's presence in the United States, the nature of his or her presence during this period must be evaluated, too. For example, a period of residency marked by imprisonment may diminish the significance of the period of residency significantly.

VII. Documenting the Decision

A. Approval

Only the District Director or Field Office Director has the authority to approve decisions and the decisions should be signed by or for them and include their name and title in the decision. If the waiver is approved, the adjudicator must complete the following:

Step	Action
1	Prepare the following: ➢ Form I-601 Adjudication Worksheet (Appendix 2). ➢ Form I-607 (will be placed on top of Form I-601 for placement in the file). ➢ Form I-603 (will be given to the consulate). ➢ Approval notice (will be mailed to applicant). (NOTE: the I-601 Adjudication Worksheet should be placed on the right side of the file and the rest on the left side of the file. If the applicant has an A-Number, it should be noted on the Form I-607. If the applicant does not have an A-Number, note on the I-607 "On immigrant visa."
2	Stamp I-601 with approval stamp in lower right corner and sign. (local office policy may require supervisory review before this step).
3	Update the local database to note the case was approved and the date of approval.
4	Notify the applicant [8 CFR 212.7(a)(3)] and any representative of record. The waiver is valid only for the grounds and events specified in the application and is valid indefinitely [8 CFR 212.7(a)(4)].
5	Provide Form I-603 to the appropriate Consular IV section.
6	Return any A-file to the National Records Center. **National Records Center** **150 Space Center Loop** **Lee's Summit, MO 64064**

B. Denial

Only the District Director or Field Office Director has the authority to deny waivers and the decisions should be signed by or for them and include their name and title in the decision.

Step	Action
1	If the applicant does not already have an A-File, create one.
2	Complete Form I-601 Adjudication Worksheet. In sections II, IV, and VI, write "see decision letter," where the explanation of the inadmissibility finding and basis for the decision are detailed.

3	Prepare Form I-292, *Decision*, with the decision written on the attachment. (*See* Appendix 5 for templates). Denial notices must include the following: 1. Statement of applicable inadmissibility provision(s) and how it applies to the specific facts of the case. 2. Discussion of the requirements to establish eligibility for the relevant waiver. 3. Discussion of the claim made by the applicant related to eligibility for the waiver and documents submitted in support of the waiver. ➢ If the applicant has established the qualifying relationship, but failed to establish extreme hardship to that relative, this should be noted and the claim/evidence presented by the applicant acknowledged and discussed. ➢ If the applicant established extreme hardship, but failed to establish that favorable discretion was warranted, the officer must list the positive factors and the negative factors that were presented and explain that the negative factors outweighed the positive factors. 4. Information on how to file *Notice of Appeal or Motion*.
4	Include a Form I-290B, *Notice of Appeal or Motion*, with each denial.
5	Stamp I-601 with denial stamp in lower right corner and sign. (Local policy may require supervisory review before this step.)
6	Update the local database to note the case was denied and the date of denial.
7	Mail denial letter and I-292 with attachments to applicant (care of the qualified family member, where appropriate) with copy to any representative of record.
8	Notify DOS of the denial by forwarding an e-mail or fax of the I-292.
9	Denials should be held in the office for 60 days while the office waits for any motions to reopen or reconsider or appeals.
10	If no MTR or appeal is received, send A-file to the National Records Center. **National Records Center** **150 Space Center Loop** **Lee's Summit, MO 64064**

C. Referral (for Ciudad Juarez sub-office cases only)

The sub-office in Ciudad Juarez (CDJ) has instituted procedures to permit same-day approval of clearly approvable waiver applications, thus enabling a significant number of applicants to

receive their immigrant visas on the day of filing the Form I-601. However, applications that are not clearly approvable on the same day of adjudication, because the adjudicator believes they should be denied, or they require greater scrutiny or additional supporting documentation, are "referred" to another adjudicator either in CDJ or another Mexico City District sub-office, for further consideration and adjudication. In such cases, the officer who first reviews the application to make this determination, starts the Adjudication Worksheet and completes as much of it as appropriate with the evidence before the officer. The officer also completes Part VIII, identifying any apparent issues for the officer to whom the case will be referred, for further resolution. The referring officer places his or her initials at the top of the Worksheet in the section, "Referral Officer Initials" and also notes the referral date. The officer who adjudicates the decision places his her initials in the section, "Decision Officer's Initials."

VIII. Motions to Reopen or Reconsider

See AFM Chapter 10.17

IX. Appeals

A. Filing Requirements for Appeals to the Administrative Appeals Office

1. General

Denials of applications for waivers may be appealed to the Administrative Appeals Office (AAO). Appeals must be timely filed on Form I-290B, *Notice of Appeal or Motion*. When the appeal is received, it should be reviewed to determine if it was properly filed. This includes confirming that the appeal was filed timely, the form was properly signed by the applicant, and the fee was paid. Please note that the applicant must sign his or her appeal. However, a parent or legal guardian may sign for a person who is less than 14 years old and a legal guardian may sign for a mentally incompetent person. See 8 CFR 103.2(a)(2). If the application is not properly filed, it should be rejected. There is no refund of the fee in any case. See 8 CFR 103.3(a)(2)(v). The receipt of each appeal must be noted in the local database, as well as action taken (e.g., forwarded to the AAO, treated as a MTR, or rejected).

The most recently updated Form I-292 for denials sent to the AAO may be found at page 21 in Appendix 5, 601 Adjudication Templates, of the I-601 SOP or can be downloaded from: https://dhsonline.dhs.gov/portal/jhtml/dc/sf.jhtml?doid=122172.

This Form includes the latest zip-code addressing information for USCIS HQ Offices in Washington DC. Form I-292 may be modified to accommodate local variations in fee payment requirements imposed by the Department of State cashiers in each location.

2. Determining timeliness

The appeal must be filed within 30 days of the date of service of the decision. See 8 CFR 103.3(a)(2)(i). If the notice is sent by mail, three days are added for a total period of 33 days. *See* 8 CFR 103.5a(b). FODs must make every effort to ensure that the dates on the denial letters accurately reflect the date of service. However, if the date on the denial letter does not properly reflect the date of service and is prior to the date of actual service, and the applicant filed within

33 days of the date of actual service, a memo to the AAO must be provided explaining the reason the appeal was found to be filed timely, including the date of actual service and any evidence of the date of service that is different than the date on the letter (for example, a print-out from the database reflecting date of service or a post-marked envelope submitted by the applicant with the appeal).

In addition, it is important to note that, under 8 CFR 1.1(h), if the period for filing an appeal ends on a Saturday, Sunday or legal holiday, the appeal period is extended to the first day after the end of the appeal period that is not a Saturday, Sunday or legal holiday. In the remarks section of the I-290B, the officer should indicate whether the last day of the appeal period was a legal holiday, either in the local country or in the US. The AAO will take such holidays into consideration in determining whether the appeal was timely filed. (e.g. if the 33rd day was a Saturday or a Sunday, and Monday was a local or U.S. holiday, the appeal will be considered as timely filed the next business day, in this case Tuesday.)

Field Office staff should stamp the date the appeal is received in the office, especially if the fee is not deposited on the same day as receipt. Field offices should also add the mailing envelope from the applicant to the file or record of proceeding.

3. Filings by attorneys/representatives

If the only problem with the filing is that it has been filed by an attorney or representative without a properly executed G-28 and the adjudicator determines that favorable action is warranted, staff should ask the attorney or representative to submit the G-28 within 15 days of the request. If the Form G-28 is not submitted, the adjudicator may, on a service motion, make a new decision favorable to the applicant without notifying the attorney or representative. If favorable action is not warranted, the appeal should be forwarded to the AAO and staff should send notice to the attorney or representative directing him or her to submit the Form G-28 directly to the AAO. See 8 CFR 103.3(a)(v).

4. More than One Box Checked in Part 2: Information on Appeal or Motion

An applicant or his or her attorney may check more than one box in Part 2 of the I-290B. For example, the applicant may indicate that he is filing an appeal but is submitting the brief directly to AAO (box B) and a motion to reopen and reconsider (box F).

B. Review of Appeal

An adjudicator must review each appeal, regardless of whether it is timely filed.

1. Timely filed appeals

If the Form I-290B was timely filed, the adjudicator must determine within 45 days whether or not favorable action is warranted. If favorable action is warranted, the adjudicator should treat the appeal as a motion to reopen or reconsider and take favorable action. If favorable action is not taken, the appeal must be forwarded to the AAO. If more than 45 days have passed, the adjudicator still has discretion to reopen the proceedings on a Service motion under 8 CFR 103.5(a)(5)(i) in order to make a new decision favorable to the affected party. *See* 8 CFR

103.3(a)(2)(iii).

If a decision is made to grant the Form I-601 and Form I-212, if any, after reopening/reconsidering the prior decision, the waiver(s) should be granted and there is no need to forward the case to the AAO. If the reviewer determines not to take favorable action, the appeal should be forwarded promptly to the AAO with the Record of Proceedings.

2. Untimely filed appeals

There is no exception based on good cause or extraordinary circumstances that would permit the AAO to accept an untimely appeal. This includes appeals that are untimely due to problems with mailing applications outside the U.S.

However, if an untimely appeal meets the requirements of a motion to reopen or motion to reconsider, the appeal must be treated as a motion and a decision made on the merits of the case. See 8 CFR 103.3(a)(2)(v)(B)(2). If a decision is made to grant the application after reopening/reconsidering the prior decision, the waiver(s) should be granted and there is no need to forward the appeal to the AAO. If a decision is made to again deny the application after reopening or reconsidering the prior denial, the applicant must be sent another denial letter with a Form I-290B notifying him or her of the right to appeal.

If the untimely appeal does not meet the requirements of a motion to reopen or motion to reconsider, as described in 8 CFR 103.5(a)(3), it generally should be rejected as untimely. No fee is refunded. See 8 CFR 103.3(a)(2)(v)(B)(1). However, USCIS retains the right to reopen a case on its own motion. Therefore, a FOD may, as a matter of discretion, reopen an untimely application in order to deny the application again to give the applicant another opportunity to file a timely appeal of the second denial, if there are compelling reasons to do so. The FOD may also, as a matter of discretion, reopen the application to approve it if the evidence presented clearly establishes that a grant is warranted. For example, an applicant may not have submitted sufficient supporting documents at the time the application was filed even though the documents were readily available, and the adjudicator may determine that the filing fails to meet the requirements of a motion to reopen. Nonetheless, if the applicant clearly establishes eligibility, the FOD may exercise discretion to reopen the application and approve the case. The applicant can always simply file a new Form I-601 with DOS.[4] However, approval upon a service motion to reopen may be more efficient.

C. Preparation of Record of Proceeding

The preference of the AAO is to receive the entire A-file, in which case there is no need to prepare a separate Record of Proceedings (ROP). If an ROP is to be sent, prepare it according to the instructions in Chapter 3, Section E, of the Records Operation Handbook.

Arrange all documents in either the A-file or the ROP chronologically, with the earliest submitted documentation on the bottom and the most recently submitted documentation on the top. The only exception to this chronological order concerns a brief filed in support of a Notice of Appeal. Any brief submitted should be placed below the Form I-290B.

[4] If an application has been denied and is already at the AAO on appeal, consult the supervisor for proper procedure.

1. Documents supporting Application/Petition, including Consular documents (Bottom)
2. Application (Form I-601 and I-212, if any)
3. G-28 submitted in conjunction with Form I-601 or I-212, if any
4. Decision letter with any research documents supporting officer's decision if different than that submitted by applicant. (i.e.- Public Records searches; A-file info sent from NRC, etc.)
5. Applicant's brief, if any
6. Form I-290B
7. Additional form G-28 filed with Form I-290, if any (Top)

In those instances in which the office does not have the A-file, the documents listed above must be provided to the AAO in a T-file as the record of proceedings.

D. AAO Determination

1. Standard of review

If the applicant fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal, the AAO will summarily dismiss the appeal pursuant to 8 CFR 103.3(a)(1)(v) (e.g., the applicant provides no brief or specific statement of error and simply states that discretion was abused or that he or she disagrees with the decision). If sufficient information is provided to avoid summary dismissal, the AAO reviews the decision *de novo* and considers any additional information submitted by the applicant.

2. Dismissal of appeal

If the application for a waiver cannot be granted, the AAO will dismiss the appeal, but may in its decision point out issues of error found in the adjudicator's decision. The AAO will notify the applicant and any representative of record and return the A-file to the Field Office with the decision in the A-file. The FOD should review the decision and, if errors are identified, take any appropriate remedial action, such as additional training, to prevent similar errors from occurring in the future. The local database should be updated to indicate that the appeal was dismissed and the A-file forwarded to the National Records Center.

3. Sustaining the appeal

If the AAO determines that the appeal should be sustained and the waiver granted, the AAO will send a notice of the approval to the applicant and any representative of record, put the decision in the A-file, and return the A-file to the Field Office that denied the waiver application. The Field Office is responsible for preparing the Form I-607, Form I-603, and approval letter and for notifying the Consulate Section of the decision for issuance of the immigrant visa. The FOD should carefully review the decision and, if errors are identified, take any appropriate remedial action, such as providing additional training, to prevent similar errors from occurring in the future. If the decision addresses novel areas of law, the decision should be forwarded to the Field Office Director for dissemination to HQIO, the other Field Office Directors and all FODs. The local database should be updated to reflect that the appeal was sustained and the A-file forwarded to the National Records Center.

X. Special Issues

A. Withdrawal

An applicant may withdraw the application at any time prior to the final decision. See 8 CFR § 212.7(a)(2). Any request to withdraw should be made in writing. Upon receipt of the written request, staff mark the case as closed in the local database and notify the appropriate consulate.

B. Simultaneous Filing of Form I-601 and Form I-212

If the applicant has been excluded, deported or removed from the United States and seeks admission again, the applicant may also need to file Form I-212, *Application for Permission to Reapply for Admission into the United States After Deportation or Removal.* See 8 CFR 212.7(a)(i). If the applicant has already been granted permission to reapply for admission by a domestic office, the applicant is not required to file another Form I-212 with the Form I-601. However, if the applicant is required to file the Form I-212 and has done so, the adjudicator should first adjudicate the Form I-601. If the Form I-601 is denied, then the Form I-212 should be denied as a matter of discretion, given that it would serve no purpose to be approved because the applicant is not eligible for the Form 601 waiver. *See, e.g., Matter of J- F- D-*, 10 I&N Dec. 694 (INS 1963). The adjudicator will write a separate denial for the I-212 and will prepare a separate cover letter. The two decisions cannot be combined into one document, although, many of the sections will have similar language. The two denials may be mailed in the same envelope.

Note that the Form I-212 is filed under INA 212(a)(9)(A)(iii) if the alien has been removed, and seeks to reapply for admission within the consent to reapply period in INA 212(a)(9)(A)(i) or (ii). But a Form I-212 may also be necessary under INA 212(a)(9)(C)(ii), if the alien returned to the United States (or attempted to do so) without admission, after a prior removal or a prior period of unlawful presence. How to process the Form I-212 and Form I-601 depends on which consent to reapply provision applies to the case.

Generally, if the Form I-601 is approved, the Form I-212 filed under INA 212(a)(9)(A)(iii) will also be approved, since approval of the Form I-212 involves the exercise of discretion and, by deciding to approve the Form I-601, the adjudicator has determined that the alien merits a favorable exercise of discretion. If a situation arises in which an adjudicator exercises discretion favorably to approve a Form I-601, but does not believe that discretion should be exercised in the applicant's favor for the Form I-212 approval, the Field Office Director should contact the Deputy District Director for further guidance.

If the Form I-212 is filed under INA 212(a)(9)(C)(ii), however, it cannot be approved unless the alien has been abroad for at least 10 years since the last departure. If the Form I-212 is denied under INA 212(a)(9)(C)(ii), the Form I-601 should also be denied, as a matter of discretion. *See, e.g., Matter of J- F- D-*, 10 I&N Dec. 694 (INS 1963).