

Immigrant Waivers of Inadmissibility: Challenges and Practice Tips

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Common Waivers for Immigrants

- INA 212(h): Waiver for certain criminal grounds
- INA 212(i): Waiver for fraud
- INA 212(a)(9)(B)(v): Waiver of 3/10 year unlawful presence waiver
- INA 212(a)(9)(C)(ii): Waiver of permanent bar after ten years
- Quasi- waiver: I-212 Permission to reapply for prior removal

Background

- Grounds of Inadmissibility expanded by IIRIRA
- Unlawful presence became a grounds that required a waiver
- Eligibility to Adjust in the US for permanent residence limited since 4/30/01 sunset of 245 (i) adjustment
- Many otherwise eligible immigrants must travel abroad and apply for a waiver there

Impact of Unlawful Presence Bar

- People travel overseas with date certain for Consular appointment
- Waiver takes much longer – 6 months to a year, or more
- Separated from US family throughout that time
- Uncertainty of date of return lead many to go underground and avoid the process

Impact of Permanent Bar

- Persons with one year of unlawful presence who travel in and out of the country unlawfully (or who are removed and reenter unlawfully) face a bar that has NO waiver for ten years from date of last departure
- INA §212 (a)(9)(c) (ii)
- Must wait ten years abroad before can even attempt waiver

Waiver Process for Immigrants - Overview

- If in US file I-601 with USCIS at time of adjustment
- May have long adjudication times, but applicant remains in US during processing
- Outcomes uncertain
- Not all have the qualifying relative needed
- Extreme hardship narrowly interpreted by many Districts
- Discretion subject to varying interpretations

Immigrant Waiver Process

- If in US and denied, can appeal to AAO
- Processing times running 26 months
- Remain with family in US
- Extreme Hardship and Discretion difficult to establish/variable adjudication standards applied

Waiver Process Overseas

- Applicant with US residence and family must leave the country to Consular Process if not eligible to adjust
- Have appointment for Consular Interview
- Present application, then pay fee and file for waiver
- Forwarded to USCIS overseas offices
- Processing times and adjudications vary by post

Immigrant Waivers Overseas

- Canadians – I-601s sent to VSC
- Mexico –in Juarez, triage system for waiver filing, separate appt made to file waiver and have it reviewed same day. Result at CDJ is that approx. 80% of those are approved. Rest go to line for further review, decided at various USCIS offices.

Immigrant Waivers Overseas

- Non Mexico/Canada cases – go to a USCIS office overseas designated for that country. (See USCIS office locator – 20 + locations)
- Wide variance in processing time, interpretations of hardship and discretion
- Variance in filing processes
- Gap between DOS filing time and when recorded as received by USCIS

Waiver Process Overseas

- If denied, can appeal to AAO
- Appeals running 26 months
- Filing overseas variable by post
- Remain separated from family throughout

Waiver Analysis

- Is your client inadmissible? Practice Pointers on How/Where to argue does not apply
 - Identify ground of inadmissibility
 - What are statutory elements
 - Is there an exception?
 - If it does apply, is there a waiver?
- If your client qualifies, assess the merits to determine if he/she should move forward.

Extreme hardship to qualifying relative

- To spouse and parents for fraud and unlawful presence bar
 - To spouse, parents and children – INA §212(h)
 - Explain how EH will affect qualifying relative, NOT applicant ; also show hardship to non-qualifying relative affects qualifying relative
- How EH defined by different offices of USCIS?**

What is extreme hardship?

- No statutory or regulatory definition – relevant factors developed through case law (some VAWA related factors in regulations)
- Depends on facts and circumstances of each case
- “Greater than the hardship normally expected”
- No single factor must be extreme – but cumulatively must meet level of EH

Case law and extreme hardship

- Matter of Anderson, 16 I&N Dec. 596 (BIA 1978)
 - Age; length of residence in the US; family in the US abroad and status; health factors; financial impact; other means of immigrating; immigration violations; position on community; economic, political factors in home country.

Case law and extreme hardship (cont'd)

- Matter of Cervantes, 22 I&N Dec. 560 (BIA 1999) – factors to establish hardship for fraud waivers
- Matter of Jean, 23 I&N Dec. 373 (BIA 2002) – noncitizens with “violent or dangerous crimes” seeking 212(h) or 209(c) waiver will need to establish extraordinary circumstances and exceptional or extremely unusual hardship for waiver

Case Law from AAO

Unpublished decisions on AILA Infonet doc.

11090132, 8/10/11: 212(i) granted, EH found

- USC husband would be separated from applicant, and husband had numerous U.S. family including grandfather, ten siblings, four children;
- Fear for safety in Mexico (husband had recently been to Juarez and witnessed cartel shoot out);

Extreme Hardship – Unpublished AAO Decision 8/10/11

- Presented evidence that family in Mexico had no means to support applicant, and relatives in fear of drug violence;
- Psychological eval of USC husband showed history of depression, anxiety, suicidal tendency without wife in US;
- Discretion: granted based on family ties, no criminal record, severity of hardship to husband

Hardship factors

- Separation if qualifying relative remains in US
- Adjustment problems if qualifying relative accompanies noncitizen home
- Factors must be evaluated cumulatively to meet level of extreme hardship

Health factors

- Ongoing, specialized treatment for physical or mental condition
- Availability of treatment in home country
- Funds for medical care or insurance

Financial factors

- Future employability in home country
- Loss due to sale of home or business/practice
- Decline in standard of living
- Ability to recoup short term loss
- Extraordinary costs (special education, health care, etc.)
- Cost of care for elderly/disabled family members

Education factors

- Loss of opportunity for higher education
- Lower quality or limited scope of educational options
- Foreign language requirement resulting in loss of grade
- Availability of special internships or training programs
- Need for special education

Personal factors

- Close relatives in US vs. foreign country
- Separation from spouse or children
- Age
- Community ties in US and length of residence

Special factors

- Cultural, language or religious
- Ethnic obstacles
- Fears of persecution
- Social ostracism
- Access to social institutions

Discretionary factors

- Waivers require favorable exercise of discretion
- Ex: how different USCIS apply discretion
- Weigh all favorable and unfavorable factors
- Waiver may be denied if applicant has established extreme hardship but unfavorable factors
- Waiver may be granted if no clear extreme hardship but favorable factors

Use of experts

- Country condition expert
- Psychological evaluation
- Educational expert

Challenges for Practitioners

- Overseas USCIS offices vary greatly as to procedures and processing time
- Information on waivers very limited with overseas cases
- Unclear what level of hardship different USCIS offices require for approval
- Appeal to AAO takes more than 2 years, uncertain outcome

Process Changing?

- USCIS announced that filing location for overseas waivers likely to move to US “soon”
- Where adjudications would take place?
- Will applicants be permitted to file prior to departing the U.S. For consular processing?

Resources/Tips

- National Immigration Project -
<http://www.nationalimmigrationproject.org>
- Administrative Appeals Office decisions available at
<http://uscis.gov>
- Bender's Immigration Bulletin -
www.lexisnexis.com/community/immigration-law/
- Interpreter Releases

Resources/Tips

- County conditions
 - US Department of State
 - CIA World Factbook
 - Human rights Organizations: Human Rights Watch, Amnesty
 - World Bank – EdStats
 - World Health Organization – Country Reports
 - UNICEF – Innocenti Research Centre