# INADMISSIBILITY WAIVERS

*by Erica L. Tomlinson, Laura W. Brown, and Jonathan D. Montag*[*]

## DOES YOUR CLIENT EVEN NEED A WAIVER?

Before beginning the complex analysis of whether your client is eligible for one of the many inadmissibility waivers available under the INA, it is prudent to investigate whether she qualifies for an exception to any ground of inadmissibility. There are several situations in which an applicant for admission may not be barred despite a criminal conviction, a period of unlawful presence, or other immigration violation.

### The Petty Offense Exception

Certain criminal convictions for crimes involving moral turpitude (CIMT) do not require a waiver under the statutory exception at INA §212(a)(2)(A)(ii) known as the "petty offense exception." Under this section, a foreign national is not inadmissible for having been convicted of or having committed a CIMT if the maximum penalty possible did not exceed imprisonment for one year, and if convicted, the foreign national was not sentenced to a term of imprisonment in excess of six months.[1] Certain misdemeanor offenses fall into this category, including petty theft in California.[2]

In addition, some criminal statutes are divisible, meaning that only certain sections of the statute implicate acts that could be found to be CIMTs. Counsel can argue that the foreign national was convicted under the section of the statute that does not describe the morally depraved act, thereby removing the conviction entirely from the ground of inadmissibility for CIMTs. For California convictions, the Ninth Circuit has held that convictions (known as "wobblers") that have been reduced from felonies to misdemeanors under Cal. Penal Code §§17 and 19 qualify for the petty offense exception because a California misdemeanor has a maximum possible sentence of one year.[3]

Importantly, the statute states that the petty offense exception applies only where the foreign national has committed "only one crime."[4] The BIA

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*Articles do not necessarily reflect the views of the American Immigration Lawyers Association.*

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[1] INA §212(a)(2)(A)(ii)(II). The statute also contains another less-frequently used exception to this ground of inadmissibility, which exempts a foreign national from inadmissibility if she committed one CIMT when under 18 years of age, and the crime was committed and any confinement completed more than five years before the application for admission. INA §212(a)(2)(A)(ii)(I).

[2] Cal. Penal Code §488/490.

[3] *La Farga v. INS*, 170 F.3d 1213 (9th Cir. 1999); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003).

[4] INA §212(a)(2)(A)(ii)

has interpreted this language broadly to mean "only one *such* crime," *i.e.*, a CIMT.[5] Therefore, if a foreign national was convicted of a CIMT that qualifies for the petty offense exception, but was also convicted of another crime that was not a CIMT (and which did not render the foreign national inadmissible elsewhere under INA §212(a)(2)), then that person may still benefit from the petty offense exception. Notably, any violation of a law relating to controlled substances may *not* be exempted under the petty offense exemption, regardless of the degree or the nature of the sentence imposed.[6]

### The Expungement Exception

Post-conviction rehabilitative relief (sometimes known as "expungement" in California under Cal. Penal Code §1203.4) no longer erases a conviction for immigration purposes, with one exception. In the Ninth Circuit, state rehabilitative relief will eliminate a first simple possession drug conviction for immigration purposes if the state offense is equivalent to an offense described in the Federal First Offenders Act (FFOA).[7] Such relief also will eliminate the negative immigration consequences of lesser drug offenses, such as being under the influence, possessing paraphernalia, or giving away a small amount of marijuana.[8]

### Deportable But Not Inadmissible

Certain criminal offenses can render a foreign national deportable, but not inadmissible. This distinction is important when a foreign national is applying for admission to the United States or is seeking adjustment of status in removal proceedings. In these situations, only INA §212—and not INA §237—can bar the person from admission. For instance, a firearms conviction may make a person deportable under the firearms ground of removal at §237(a)(2)(C), but it does not make a person inadmissible under §212. Therefore, he or she may adjust status (if otherwise eligible) and is no longer be deportable.[9] Similarly, a person convicted of a certain crimes that would qualify as deportable offenses under the domestic violence ground of removal at INA §237(a)(2)(E), may not trigger a ground of inadmissibility. For instance, the Ninth Circuit found that misdemeanor domestic assault under the Arizona Penal Code did not categorically involve moral turpitude.[10]

Even certain crimes that qualify as aggravated felonies for purposes of INA §237 deportability do not always make a foreign national ineligible for relief, if he is applying for a relief such as adjustment of status where the inadmissibility grounds at INA §212 apply. For instance, a person deportable for a conviction of theft in the third degree (shoplifting) under the Washington Penal Code who received a one year suspended sentence (an aggravated felony under INA §101(a)(43)(G)), still may be eligible to apply for adjustment of status with a waiver of inadmissibility for the crime involving moral turpitude pursuant to INA §212(h), as discussed later in this article.

### Exceptions to the Three-Year Unlawful Presence Bar

In certain circumstances, the three-year bar to readmission after a period of unlawful presence of more than180 days but less than one year does not apply. For instance, as discussed below, a foreign national who was unlawfully present in the United States for more than six months, but less than one year, and who was granted voluntary departure by the immigration judge, will *not* be subject to the three-year bar. Furthermore, U.S. Citizenship and Immigration Services (USCIS) has indicated that a foreign national who triggers the three-year bar with a departure from the United States—but who subsequently returns to the United States pursuant to a grant of parole before three years have elapsed—will still become eligible for admission three years after the initial departure. In other words, the time spent in the United States in the authorized parole status will not toll the counting of the three years after the departure.[11]

## UNLAWFUL PRESENCE

An applicant for admission to the United States may be found inadmissible because of her previous

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[5] *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 594–96 (BIA 2003).

[6] INA §212(a)(2)(A)(i)(II) and (ii).

[7] *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000); *see also* K. Brady, *Defending Immigrants in the 9th Circuit*, §.3.4(C), p.107. (9th Ed. 2007).

[8] K. Brady, *Defending Immigrants in the 9th Circuit*, §3.4(C), p.107. (9th Ed. 2007).

[9] *Matter of Rainford*, 20 I&N Dec. 548 (BIA 1992).

[10] *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc).

[11] Letter from R. Divine, Chief Counsel USCIS to D. P. Berry and R. Y. Wada (July 14, 2005) (on file with authors).

unlawful presence in the United States. There are three grounds of inadmissibility based on unlawful presence: two are found in INA §212(a)(9)(B), and one follows at §212(a)(9)(C). Although they use similar language and are near to one another in the code, they differ in important ways.

Section 212(a)(9)(B)(i)(I) of the INA provides that a foreign national who "was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States ... prior to the commencement of proceedings ... and again seeks admission within [three] years of the date of such alien's departure or removal," is inadmissible. This is known as the "three-year bar."[12]

Likewise, §212(a)(9)(B)(i)(II) provides that a foreign national who "has been unlawfully present in the United States for one year or more, and who again seeks admission within [10] years of the date of such alien's departure or removal from the United States" is inadmissible. This is known as the "10-year bar."

A waiver is available for both the three- and ten-year bars,[13] however, counsel must be certain that the unlawful presence ground of inadmissibility that applies is §212(a)(9)(B), *not* §212(a)(9)(C). Section 212(a)(9)(C) states that a foreign national who has *either* been unlawfully present in the United States for an aggregate period of more than one year, *or* has been ordered removed, *and then* enters or attempts to re-enter the United States without being admitted, is inadmissible. This ground of inadmissibility cannot be waived until the foreign national has spent 10 years outside the United States (except in some cases of domestic violence), and is known as the "permanent bar."[14]

Immigration practitioners and USCIS adjudicators face the issue of a foreign national's inadmissibility due to unlawful presence in the United States more and more frequently today because foreign nationals present in the United States after an entry without inspection, who are not grandfathered under §245(i), can no longer apply to adjust status in the United States.[15] Instead, if these individuals want to apply for lawful permanent resident status, they must do so at a U.S. consular post abroad. The act of leaving the United States to seek admission as a lawful resident triggers the unlawful presence bars, so counsel must carefully consider the bars when advising foreign nationals about consular processing.[16]

**What Counts as Unlawful Presence?**

A foreign national's presence in the United States is unlawful if he or she entered the United States without inspection, or if he or she stayed beyond the period of authorized stay as a nonimmigrant.[17] For purposes of determining whether an individual is inadmissible based on his or her unlawful presence, counsel must analyze only periods of unlawful presence on or after April 1, 1997.

The period of unlawful presence contemplated by INA §212(a)(9)(B) for the three– and ten-year bars must be continuous; it is not constructed in the aggregate. For example, an individual who had two months unlawful presence following a nonimmigrant visa overstay in 2000, and who entered without inspection in 2008 and has now accrued four months of unlawful presence, is not (yet) subject to the three-year bar because he or she has just four months of continuous unlawful presence. He or she should consider departing the United States before accruing six months of continuous unlawful presence.

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[12] It is important to note that §212(a)(9)(B)(i)(I)—the three-year bar—applies only to voluntary departures prior to the commencement of removal proceedings. This means that a foreign national who was unlawfully present in the United States for more than six months, but less than one year, and who was granted voluntary departure by the immigration judge, will *not* be subject to the three-year bar. *See* Pub. L. No. 104-208, Update No. 36: 212(a)(9)(A)–(C), 212(a)(6)(A)–(B), 98 State 060539 (Apr. 4, 1998), *published on* AILA InfoNet at Doc. No. 98040490 (*posted* Apr. 4, 1998).

[13] INA §212(a)(9)(B)(v).

[14] INA §212(a)(9)(C)(ii).

[15] Generally, INA §245(i) permits foreign nationals who entered the United States without inspection and are the beneficiaries of visa petitions filed on or before April 30, 2001, to adjust status in the United States upon the payment of a $1,000 penalty fee.

[16] This section focuses on those individuals applying for immigrant visas at U.S. consular posts. Other related issues, such as whether §245(i) trumps the unlawful presence bars, are outside the scope of this article. For more on this topic, see "Duran Gonzalez Q&A by AILF and Co-Counsel," *published on* AILA InfoNet at Doc. No. 07123165 (*posted* Dec. 31, 2007).

[17] INA §212(a)(9)(B)(ii). For more about how unlawful presence can be accrued, such as by violating the terms of a laser visa, see K. Walker, R. Freedman, and C. Mesrobian, "Spotting the INA §212(a)(9)(C) R.O.U.S.," *Immigration and Nationality Law Handbook* 415 (AILA 2007–08 Ed.).

In contrast, the one-year period of unlawful presence contemplated by INA §212(a)(9)(C) for the permanent bar is constructed in the aggregate.[18] For example, consider an individual who had two months unlawful presence following a non-immigrant visa overstay in 2000, then entered without inspection in 2004, and stayed for six months, next entered without inspection in 2006, and stayed for five months, and finally returned without inspection in 2008. She would now be subject to the permanent bar because she has accrued an aggregate period of one year or more of unlawful presence, and subsequently entered the United States without inspection. The permanent bar of §212(a)(9)(C) is constructed to harshly punish those who repeatedly violate U.S. immigration law.

### Exceptions to Unlawful Presence[19]

The statute provides six exceptions to the accrual of unlawful presence under §212(a)(9)(B) for the three- and ten-year bars.[20] First, minors under age 18 do not accrue unlawful presence. Second, applicants for asylum do not accrue unlawful presence so long as they are not employed without authorization.[21] Third, beneficiaries of the family unity program do not accrue unlawful presence. Fourth, battered spouses and children will not accrue unlawful presence where there is a direct connection between the unlawful presence and the individual being battered or subjected to extreme cruelty. Fifth, victims of human trafficking will not accrue unlawful presence where the trafficking was at least one central reason for the alien's unlawful presence in the United States. Sixth, foreign nationals who have been lawfully admitted or paroled into the United States, have filed a timely and nonfrivolous application for a change or extension of status, and have not been employed without authorization, will not accrue unlawful presence for a period not exceeding 120 days.

The only statutory exception to the accrual of unlawful presence in the aggregate under §212(a)(9)(C) for the permanent bar is for battered spouses and children where there is a direct connection between the unlawful presence and the individual being battered or subjected to extreme cruelty.[22] Notably, until as recently as summer 2008, some consulates including Ciudad Juarez, Mexico, also applied the "minor exception" of INA §212(a)(9)(B) to unlawful presence findings under INA §212(a)(9)(C). Unfortunately, at present time neither USCIS nor the consulate at Ciudad Juarez (and possibly other consulates) apply the "minor exception" to inadmissibility determinations for the permanent bar under INA §212(a)(9)(C).[23]

## INA §212(a)(9)(B)(v) UNLAWFUL PRESENCE WAIVERS

Section 212(a)(9)(B)(v) authorizes the attorney general in his discretion to waive inadmissibility due to unlawful presence if the intending immigrant is the spouse, son or daughter of a U.S. citizen (USC) or lawful permanent resident (LPR), and if she can show that her USC or LPR spouse or parent would suffer extreme hardship if the waiver were denied. The §212(a)(9)(B)(v) waiver generally parallels the §212(i) fraud and misrepresentation waiver, as well as the §212(h) criminal waiver. One notable exception is that the §212(h) waiver also includes children as qualifying relatives, but the §212(i) and §212(a)(9)(B)(v) waivers do not.

### Qualifying Relatives

As clearly stated in the statute, the only qualifying relatives for the unlawful presence waiver are spouses and parents. Hardship to USC or LPR children is not considered directly, but should still be presented as it affects the qualifying relative. For example, a USC spouse could suffer extreme hardship if forced to care for his disabled child without the aid of his wife, if forced to consider leaving that child with relatives in order to join his wife in her native country, or if forced to consider bringing that child to a foreign country where medical care may be inferior.

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[18] INA §212(a)(9)(C)(i)(I).

[19] For a thorough table addressing what is, and is not, considered unlawful presence, see Unlawful Presence Chart, M.A. Tokuhama-Olsen, L.A. O'Connor, D.N. Simmons, *published on* AILA InfoNet at Doc. No. 07060771 (*posted* June 7, 2007).

[20] *See* INA §212(a)(9)(B)(iii).

[21] It is not enough to simply have an I-589 pending; rather, the applicant must prove that she did not work without authorization by submitting copies of receipt notices and employment authorization documents (EADs). Where an applicant cannot prove that she did not work without authorization, she should be prepared for the possibility that she may be found inadmissible.

[22] INA §212(a)(9)(C)(iii).

[23] A. Peck, "Practice Alert–Unlawful Presence Under INA §212(a)(9)(C) Applied to Minors," *published on* AILA InfoNet at Doc. No. 08081872 (*posted* Aug. 18, 2008).

### Extreme Hardship Factors

It cannot be stressed enough that a waiver will not be granted merely due to the fact that a qualifying relationship exists.[24] "Extreme hardship" must be established. "Extreme hardship" is a term of art that has been considered by the Board of Immigration Appeals (BIA) in several contexts, including suspension of deportation and waivers of inadmissibility. Over time, lists of "typical factors" relevant in determining extreme hardship have developed, including the following:

> [T]he presence of LPR or USC family ties to 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 to such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to the unavailability of suitable medical care in the country to which the qualifying relative would relocate.[25]

The list above is not exclusive, and in fact other cases consider many other factors.[26] The adjudicator must consider all relevant factors—even those "common results" of separation such as the fact of separation itself or financial difficulties that in themselves are insufficient to warrant approval of an application[27]—in the aggregate.[28]

Because of the frequency with which waivers are necessary at consular posts, several USCIS field offices have developed form letter handouts that explain the typical factors relevant in determining extreme hardship. The Ciudad Juarez, Mexico, field office form letter explains that extreme hardship can be demonstrated in many aspects of the qualifying relative's life such as:

*Health*—Ongoing or specialized treatment requirements for a physical or mental condition; availability and quality of such treatment in your country, anticipated duration of the treatment; and whether a condition is chronic or acute, or long– or short-term.

*Financial Considerations*—Future employability; loss due to sale of home or business or termination of a professional practice; decline in standard of living; ability to recoup short-term losses; cost of extraordinary needs such as special education or training for children; and cost of care for family members (*i.e.*, elderly and infirm parents).

*Education*—Loss of opportunity for higher education; lower quality or limited scope of education options; disruption of current program; requirement to be educated in a foreign language or culture with ensuing loss of time for grade; and availability of special requirements, such as training programs or internships in specific fields.

*Personal Considerations*—Close relatives in the United States and/or the applicant's country of nationality/residence; separation from spouse/children; ages of involved parties; and length of residence and community ties in the United States.

*Special Factors*—Cultural, language, religious, and ethnic obstacles; valid fears of persecution, physical harm, or injury; social ostracism or stigma; and access to social institutions or structures.

*Other*—Any other information that explains how the applicant's personal circumstances may qualify as imposing extreme hardship on the qualifying U.S. citizen or U.S. legal permanent resident relative.[29]

It is important to remember that a waiver will not necessarily be granted just because evidence falling under the categories for extreme hardship is submitted. A successful waiver application must also explain *how* the hardship factor causes or will cause extreme hardship to the qualifying relative if the applicant is barred from the United States for three– or ten-years. For example, the AAO dismissed one waiver appeal because, although the self-represented applicant sub-

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[24] *Matter of Ngai*, 19 I&N Dec. 245, 256 (BIA Comm'r 1984).

[25] *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565–66 (BIA 1999). *Matter of Cervantes-Gonzalez* is the "extreme hardship factor" authority most cited by the AAO in its decisions on I-601 waiver appeals. *See, e.g.*, Unpublished AAO decision, "AAO Finds Record Lacks Detail of Extreme Hardship for Schizophrenic, Unemployed Husband," *published on* AILA InfoNet at Doc. No. 08022270 (*posted* Feb. 22, 2008).

[26] *See, e.g., Matter of O-J-O*, 21 I&N Dec. 381 (BIA 1996) (Holmes, D., concurring).

[27] *Matter of Ngai*, 19 I&N Dec. 245 (BIA Comm'r 1984).

[28] *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

[29] USCIS, Ciudad Juarez, Mexico, Form Letter for I-601 Waiver Applicants (Nov. 26, 2007). An earlier version of this letter including the same hardship information was *published on* AILA InfoNet at Doc. No. 05081760 (*posted* Aug. 17, 2005).

mitted evidence that her USC spouse was schizophrenic, her waiver application did not contain:

> ... detailed information regarding the hardship the applicant's absence is causing her husband. ... [F]or example, whether her inadmissibility has caused his condition to worsen in some way, or whether the applicant's proximity is necessary for her husband to function at an acceptable level. [Or whether] suitable treatment for her husband would be unavailable [in her native country].[30]

While this decision by the AAO may appear harsh, it shows how important it is to present a complete and well-developed case, and not just a stack of documents, no matter how obvious the case may appear. To that end, USCIS officer in Charge Warren Janssen has stated that his office likes to see a cover letter that sets forth the facts that support the extreme hardship claim, lists the supporting documentation, and is not clouded with case citations or legalese.[31]

Counsel should know that it is possible to prepare a successful waiver application: the average approval rate at the Ciudad Juarez field office has been cited as about 75 percent.[32] It may also be helpful to consider two AAO waiver decisions. In one, extreme hardship was found based on the qualifying spouse's worries for her children's health and educational opportunities, her inability to afford health services, her request for public assistance in the United States following the applicant's departure, her symptoms of depression and anxiety, and the applicant's good character references and job offers in the United States.[33] In another, extreme hardship was determined, in part, based on the qualifying spouse's potential loss of LPR status were he to join his wife in her native country, and the extreme hardship he would suffer if required to assume the role of primary caregiver and breadwinner to the couple's young children who suffer from learning disabilities.[34]

[30] Unpublished AAO decision, "AAO Finds Record Lacks Detail of Extreme Hardship for Schizophrenic, Unemployed Husband," *published on* AILA InfoNet at Doc. No. 08022270 (*posted* Feb. 22, 2008).

[31] Charles Wheeler, "Update from Ciudad Juarez," *published on* ILW.com at *www.ilw.com/articles/2007,1220-wheeler.shtm.*

[32] *Id.*

[33] Unpublished AAO decision (Oct. 31, 2007) (on file with authors).

[34] Unpublished AAO decision (Jan. 2, 2008) (on file with authors).

**Discretion**

Waivers of inadmissibility are not automatic; they are granted at the discretion of the attorney general.[35] Generally, the adjudicator will weigh the favorable factors against the unfavorable factors in order to determine whether a favorable exercise of discretion is merited. While establishing extreme hardship to a qualifying relative is the key "favorable factor" for a successful waiver application, counsel should not overlook additional favorable factors related directly to the applicant. Counsel can submit evidence of favorable factors including: lack of a criminal record, property ownership, payment of taxes, passage of time since the applicant's unlawful entry to the United States, voluntary departure from the United States, positive character references, and proof of community involvement.[36] This additional evidence may help tip the scales in the applicant's favor.

## A FEW PRACTICAL TIPS FOR PREPARING A SUCCESSFUL WAIVER APPLICATION

First, counsel must prepare the applicant and her family for the process. At all consulates other than Ciudad Juarez, waiver applications can be filed at the time of the immigrant visa appointment if the applicant has anticipated the waiver, or thereafter, often with an open filing appointment provided at the initial appointment. At Ciudad Juarez, the applicant must make a separate appointment to file the waiver application by calling the Teletech Call Center.[37] The applicant does not have to wait until after the initial appointment to request an appointment to submit her waiver.

The waiver application can remain pending at the USCIS field office for many months, and the applicant cannot return to the United States until her waiver and immigrant visa are approved.[38] How long

[35] *See* INA §§212(a)(9)(B)(v), 212(h), and 212(i).

[36] *See, e.g.,* unpublished AAO decision (Oct. 31, 2007) (on file with authors); unpublished AAO decision (Jan. 2, 2008) (on file with authors); and unpublished AAO decision (Feb. 20, 2008) (on file with authors).

[37] 1-900-476-1212 ($1.25 per minute) or 1-800-919-1754 (if your telephone service provider does not allow 1-900 calls) from the United States.

[38] Some applicants, such as individuals with temporary protected status (TPS) can request advance parole and return to the United States while their application is reviewed by USCIS abroad, but they will have to travel to the consular post a second time to receive the immigrant visa if the case is approved.

will this be? Mexican nationals have the advantage of a special pilot program for waiver processing. Since March 2007, the USCIS field office at Ciudad Juarez, has offered same-day adjudication of "clearly approvable" waiver applications with great success.[39] An applicant participating in the pilot program can expect to be in Mexico for at least one week, and probably not longer than six weeks, if her waiver is "clearly approvable."[40] If additional evidence is requested, or the waiver is retained for further review, she can expect her case to remain pending from six to 12 months.[41] Counsel may find discussions on AILA InfoNet's Message Center forums informative if preparing a waiver for a country or field office with which she does not have previous experience.[42]

Second, counsel must prepare a quality waiver application packet. The waiver application should consist of: Forms G-28, I-601, and G-325A for the applicant; counsel's cover letter stating who the qualifying relatives are, reviewing the favorable "extreme hardship" factors, explaining why the applicant merits a waiver in the exercise of discretion, and listing the supporting evidence; and, the supporting evidence including a sworn declaration from each qualifying relative explaining in her own words how she will suffer extreme hardship if her relative's waiver is denied. A sworn declaration from the applicant may be included if it is necessary for him to explain any behavior or express rehabilitation or remorse for past acts, such as in the case of a §212(i) waiver for fraud.[43]

## FRAUD AND MISREPRESENTATION

Section 212(a)(6)(C) states that an applicant for admission to the United States is inadmissible if she, "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 into the United States or other benefit provided under this Act."[44] A determination of inadmissibility under this section may close the door forever on an applicant for admission. Counsel must first determine whether the charge of inadmissibility stands. If so, while some applicants will be out of luck, §212(i) of the INA authorizes the attorney general in his discretion to waive inadmissibility due to this type of fraud or misrepresentation if the intending immigrant is the spouse or son or daughter of a USC or LPR, and if she can show that her USC or LPR spouse or parent would suffer extreme hardship if the waiver were denied. The §212(i) waiver generally parallels the §212(a)(9)(B)(v) unlawful presence waiver, as well as the §212(h) criminal waiver. As noted above, only the §212(h) waiver (of these three waivers) includes children as qualifying relatives.[45]

An applicant for admission to the United States may also be inadmissible if it is determined that on or after September 30, 1996, she "falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law."[46] The only exception to this permanent bar to admission is for a foreign national who permanently resided in the United States prior to age 16, whose parents were citizens of the United States, and who reasonably believed she, too, was a citizen.[47] In all other cases where a foreign national is found to have made a false claim to U.S. citizenship on or after September 30, 1996, she is permanently barred from admission to the United States.

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[39] Announcement—New USCIS Waiver Processing Pilot in Ciudad Juarez, *published on* AILA InfoNet at Doc. No. 07030565 (*posted* March 5, 2007).

[40] In September 2008, applicants scheduling their I-601 appointments were given appointments about one month later, thus the estimate of one to six weeks.

[41] Some cases already in the system are taking about 12 months to be adjudicated, however USCIS Ciudad Juarez Officer in Charge Warren Janssen stated at the AILA Northwest Regional Conference on February 8, 2008, that his office hopes to reduce the processing time for cases retained for further processing to six months.

[42] *See http://messages.aila.org/.*

[43] For a list of documents counsel should consider submitting with a waiver application, *see* K. Walker, R. Freedman, and C. Mesrobian, "Spotting the INA §212(a)(9)(C) R.O.U.S.," *Immigration and Nationality Law Handbook* 415 (AILA 2007–08 Ed.).

[44] INA §212(a)(6)(C)(i).

[45] A foreign national who has already been admitted to the United States may be charged as removable under §237(a)(1)(A), for having been inadmissible due to fraud or misrepresentation at the time of her admission or adjustment of status. The waiver of removal available through §237(a)(1)(H) is different: there is no requirement to establish extreme hardship, and the list of qualifying relatives includes children. This waiver is beyond the scope of this article.

[46] INA §212(a)(6)(C)(ii)(I).

[47] INA §212(a)(6)(C)(ii)(II).

### Was the Fraud/Misrepresentation Bar Correctly Applied?

Counsel should carefully review the facts and circumstances surrounding the foreign national's alleged fraud or willful misrepresentation of a material fact, and if possible, argue that the bar does not apply. In *Kungys v. United States*,[48] the Supreme Court listed four elements that together indicate a willful misrepresentation. Although these elements were developed in the context of denaturalization proceedings, they are widely applied across other fraud and/or misrepresentation cases. The elements are: 1) misrepresentation or concealment of some fact; 2) the misrepresentation was willful; 3) the fact was material; and 4) the misrepresentation was made to seek or procure admission or another benefit under the INA.[49] The requirements often mix with one another.

#### *Was There a Misrepresentation of Concealment of Some Fact?*

The threshold question is whether the government has presented evidence "that a statutory disqualifying fact actually existed."[50] In essence, therefore, the fact must be one that would have made the applicant inadmissible if revealed. In *Forbes v. INS*, the Ninth Circuit found that an immigrant visa applicant's failure to disclose an arrest that did not result in a conviction did not make him inadmissible (and, in this case, therefore deportable) because the arrest, without a conviction, would not have disqualified the applicant.[51]

#### *Was the Misrepresentation Willful?*

A willful misrepresentation is a misrepresentation that is deliberate, voluntary, and knowingly false.[52] The Department of State's (DOS) *Foreign Affairs Manual* (FAM) also addresses willful misrepresentation, defining "willful" as: "knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise ... it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement."[53]

#### *Was the Fact Material?*

The test for materiality is whether the fact has a "natural tendency to influence the decision."[54] Materiality goes hand-in-hand with the threshold question of whether a "statutory disqualifying fact" actually existed, and in fact the two are often considered in the same breath.[55] Considering a simple misrepresentation that often occurs, the Fifth Circuit has held that false testimony in an asylum interview about an address—the applicant said that he lived in California, when in fact he lived in New Mexico—was "immaterial because his address had no bearing on his receipt of immigration benefits."[56]

#### *Was the Misrepresentation Made in Order to Seek or Procure Admission to the United States or Another Immigration Benefit?*

Did the applicant misstate something *in order to* obtain some benefit, or for some other reason? A misrepresentation may have been made for another reason "such as embarrassment, fear, or a desire for privacy."[57] There is also an important distinction between misstatements that are simply contained in an application for a benefit, as opposed to misstatements designed to influence the outcome of the application. For example, the Fifth Circuit has stated: "Although the asylum application itself sought to obtain immigration benefits, we cannot conceive how this misrepresentation [providing a false address], even if deliberate, was intended to influence the asylum officer's decision."[58]

## INA §212(i) FRAUD/MISREPRESENTATION WAIVER

If counsel cannot argue that the fraud or misrepresentation bar does not apply, or if the adjudicator does not accept counsel's argument, the foreign national may be able to apply for a waiver of inadmis-

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[48] 485 U.S. 759 (1988)

[49] 485 U.S. at 767. Note that the fourth requirement listed in *Kungys* is specific to denaturalization—that the naturalized citizen actually procured citizenship as a result of the misrepresentation—and is modified here to reflect the language of INA §212(a)(6)(C).

[50] *Forbes v. INS*, 48 F.3d 439, 443 (9th Cir. 1995), *citing Kungys v. United States*, 485 U.S. 759, 783 (1988).

[51] *Forbes*, 48 F.3d at 443.

[52] *Forbes*, 48 F.3d at 442; *see also Olea-Reyes v. Gonzales*, 177 Fed. Appx. 697, 699 (9th Cir. 2006).

[53] 22 CFR §40.63 n5.1.

[54] *Kungys v. United States*, 485 U.S. 759, 772 (1988).

[55] *See Forbes*, 48 F.3d at 443, *citing Kungys*, 485 U.S. at 783.

[56] *Gonzalez-Maldonado v. Gonzales*, 487 F.3d 975, 978 (5th Cir. 2007).

[57] *Kungys*, 485 U.S. at 780.

[58] *Gonzalez-Maldonado*, 487 F.3d at 978.

sibility. Section 212(i) of the INA authorizes the attorney general in his discretion to waive inadmissibility under §212(a)(6)(C)(i) if the intending immigrant is the spouse or son or daughter of a USC or LPR, and if she can show that her USC or LPR spouse or parent would suffer extreme hardship if the waiver were denied. The same factors described in the unlawful presence section above apply to these waivers.

## CRIMINAL WAIVERS FOR ALIENS IN REMOVAL PROCEEDINGS

There is a huge class of aliens who need waivers of criminal grounds of inadmissibility—returning LPRs who are placed in removal proceedings. Some of these permanent residents were placed in removal proceedings after apprehension at a port of entry because of subsequent conduct at the border, such as attempting to smuggle an alien into the United States. Others are apprehended because of prior conduct, such as a criminal conviction that occurred after admission as an LPR. Such arriving aliens[59] are inadmissible and need waivers to be readmitted to the United States. The primary form of relief for these aliens is INA §240A(a), cancellation of removal for certain permanent residents (which covers LPRs who are either inadmissible or deportable).

However, some aliens who are ineligible for cancellation of removal (because they lack the requisite period of residence in the United States or have already received cancellation of removal or §212(c) relief)[60] can still seek a waiver under the INA §212(h). Aliens already present in the United States who are placed in removal proceedings under INA §237 can sometimes convert their deportability problem into an inadmissibility problem by adjusting status in removal proceedings and employing the INA §212(h) waiver. Additionally, some LPRs placed in removal proceedings based on older convictions who are ineligible for cancellation of removal (for example, those who have convictions for aggravated felonies), still may be eligible for former §212(c) relief in certain limited circumstances.

[59] "Arriving alien" is defined at 8 CFR §1.1(q), and generally refers to an applicant for admission coming or attempting to come into the United States at a port of entry, or an alien seeking transit through the United States at a port of entry, or an alien interdicted in international or United States waters and brought into the United States by any means.

[60] INA §240A(c)(6).

### INA §212(h) Waiver

On its face, INA §212(h) applies to aliens subject to the grounds of inadmissibility at INA §212(a)(2)(A)(i)(I), a crime of moral turpitude; §212(a)(2)(B), multiple criminal convictions relating to aliens convicted of two or more offenses for which the aggregate sentences of confinement were five years or more; §212(a)(2)(D), prostitution and commercial vice; §212(a)(2)(E), aliens who were immunized from prosecution for certain serious criminal offenses and then departed the United States; and §212(a)(2)(A)(i)(II), conviction or admission of a controlled substance insofar as it relates to a single offense of simple possession of 30 grams (1.057 ounces) or less of marijuana.

An alien subjected to one of the above enumerated grounds must also meet other criteria to be eligible for relief. There are three separate kinds of waiver. First, when the activities that caused the inadmissibility occurred over 15 years earlier, (or, at any time, in the case where the prostitution[61] and/or commercialized vice grounds of inadmissibility at INA §212(a)(2)(D)(i) and (ii) are the sole grounds at issue), the waiver is available by showing rehabilitation and that admission is not contrary to the national welfare, safety or security of the United States.[62] No showing of extreme hardship to any relative is needed in this situation.

Second, in all other cases (except VAWA self-petitioners) the waiver is available only if the alien is the spouse, parent, son, or daughter of a USC or LPR and denial of admission would cause extreme hardship to the qualifying relative.[63] The showing of extreme hardship follows the same lines as previously discussed for other waivers above.

Finally, independent of the extreme hardship to qualified relatives just mentioned, the waiver is available to battered spouses and children permitted to immigrate or adjust status under the battered spouse and children provisions of the law.[64]

[61] There has been remarkable long-standing ambiguity as to what the prostitution inadmissibility ground encompasses. Recently, in *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008), the BIA explained that the ground addresses procuring others to be prostitutes, and not simply soliciting one.

[62] INA §212(h)(1)(A).

[63] INA §212(h)(1)(B).

[64] INA §212(h)(1)(C).

### *Aliens Ineligible for §212(h) Relief*

The statute states that the following persons cannot seek relief: (1) an alien convicted of or who admits having committed acts that constitute murder or criminal acts involving torture; (2) an alien admitted for permanent residence if since the date of such admission the alien has been convicted of an aggravated felony; or (3) an alien admitted for permanent residence if the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States.[65]

The latter two bases of ineligibility are reminiscent of the bars to cancellation of removal found at INA §240A(a). Congress may have included these bases of ineligibility to preclude permanent residents from obtaining relief through §212(h) when §240A(a) cancellation was unavailable. It is significant that the stop-time provisions[66] of cancellation of removal are not fully tracked in §212(h). As a result, an alien who is barred from §240A(a) relief because of the stop-time provisions could still remain eligible for §212(h) relief. It is also important to note that the §212(h) waiver for a permanent resident requires seven years of lawful residence, whereas §240A(a) cancellation requires seven years of residence *after a lawful admission*, whether the residence subsequent to the lawful admission is legal or not.[67]

On its face, the bar to §212(h) relief to permanent residents with aggravated felony convictions or less than seven years of lawful residence raises an interesting equal protection issue. Advocates have argued that it should be constitutionally suspect that aliens first seeking permanent residence—sometimes without ever having set foot in the United States—are eligible for a §212(h) waiver, while aliens who are permanent residents and conceivably have developed closer and deeper ties to the United States often cannot apply for such relief even when facing the same ground of inadmissibility. However, several circuit courts have decided that there is no equal protection problem significant enough to void the restriction.[68]

It should also be noted that while an aggravated felony at any time, even before one becomes a permanent resident, bars §240A(a) cancellation, the aggravated felony bar to §212(h) only applies to aggravated felonies since admission for permanent residence. Thus, a person who has committed an aggravated felony before receiving permanent residence can receive a §212(h) waiver. Finally, the §212(h) waiver cannot be used for drug crimes except for a single crime involving 30 grams or less of marijuana. An alien cannot waive inadmissibility for any other drug-related convictions or admitted acts.[69]

### *Obtaining the §212(h) Waiver*

The §212(h) waiver is available either in conjunction with an application for adjustment of status, or as a stand-alone waiver for a returning lawful permanent resident seeking to overcome a relevant ground of inadmissibility.[70]

Being eligible to apply for a waiver does not imply that one merits a waiver, or that an immigration judge or INS adjudicator will grant the waiver. To receive the waiver (except for those who fall under the less-common first or third categories of the waiver discussed above), an applicant must demonstrate extreme hardship to a USC or LPR spouse, parent, son, or daughter. It is noteworthy that the relatives whose extreme hardship must be consid-

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[65] INA §212(h)(2).

[66] *See* INA §240A(d)(1). The stop-time provision that applies to §240A(a) cancellation stops the accrual of time after commission of certain acts triggering removability or inadmissibility.

[67] INA §212(h)(2); INA §240A(a)(2).

[68] Using the rational basis test, courts have concluded that it is rational for Congress to give an alien one bite at the permanent residence apple, and once they jeopardize their residence (through committing a removable offense), Congress's interest in having them removed expeditiously is a rational reason to treat them differently than aliens who have never had permanent residence. Another explanation for permitting the anomaly is that Congress can rationally impose a higher standard of conduct on a permanent resident, reasoning that along with permanent residence comes added responsibilities. Another rationale is that similarly-situated non-permanent residents can receive a waiver because Congress' barring permanent residents from such relief is just the first step in a remedial scheme to bar relief to criminals, and Congress should not be thwarted from making small steps toward its ultimate goal. The circuit court cases rejecting the equal protection argument are *Umanzor-Lazo v. INS*, 178 F.3d 1286 (4th Cir. 1999); *Lara-Ruiz v. INS*, 241 F.3d 934, 947 (7th Cir. 2001); *Lukowski v. INS*, 279 F.3d 644 (8th Cir. 2002); *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002); and *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001).

[69] INA §212(h); INA §212(a)(2)(A)(i).

[70] *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).

ered include "sons or daughters," and not only "children," as in cancellation of removal for certain non-permanent residents under INA §240A(b). This broadens the class to include sons and daughters of any age (including over the age of 21).[71] A §212(h) waiver is a discretionary waiver, which means even if extreme hardship is demonstrated, relief can still be denied as a matter of discretion.

The leading case discussing the standard for relief for the §212(h) waiver is *Matter of Mendez-Morales.*[72] This case addresses the element of discretion. It adopts the balancing of equities test of *Matter of Marin,*[73] the balancing test used for the §212(c) waiver and §240A(a) cancellation. The BIA notes that the requirements of permanent residence and residence of long duration should not apply, but that the hardship to spouse, parent, son, or daughter necessarily applies, because it is an element of the relief. The case hinged on the elements of remorse and rehabilitation, with the BIA finding that without remorse and admissions of guilt, it would not grant the alien (a sex offender) the waiver. In a dissent, Board Member Lory D. Rosenberg criticized the majority's decision for putting too much emphasis on the *Marin* factors when the key element of the relief is the hardship to close family members. After *Mendez-Morales*, it is clear that to win a waiver, discretion is an important hurdle and not an afterthought once extreme hardship has been demonstrated.

The factor of extreme hardship to the relevant family members was addressed (in the §212(i) context) by the BIA in *Matter of Cervantes-Gonzalez.*[74] Because of the same requirement of extreme hardship, the case is instructive. Hardship factors considered in determining whether an alien has established extreme hardship include, but are not limited to, the following:

- The presence of lawful permanent resident or U.S. citizen family ties to 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;
- The extent of the qualifying relative's ties to such countries;
- The financial impact of departure from this country; and
- Significant conditions of health, particularly when tied to the unavailability of suitable medical care in the country to which the qualifying relative would relocate.[75]

It should also be noted that the regulations (but not the statute) have been amended to indicate the attorney general's policy of not "favorably exercising discretion" to grant §212(h) waivers in cases involving "violent or dangerous crimes, except in extraordinary circumstances" which are briefly discussed in the regulations.[76] To date, challenges to the validity of this regulation have not been successful.[77]

**The §212(c) Waiver**

Former INA §212(c) (which primarily applies to criminal grounds) was the chief form of relief for lawful permanent residents with criminal convictions from 1952 to 1996. That said, in the context of aliens applying for admission to the United States, §212(c) is largely inapplicable. This is because it applies only to permanent residents who have maintained seven years of unrelinquished domicile, had criminal convictions before April 1, 1997, and are applying for admission (or are subject to removal for a ground considered sufficiently equivalent to a ground of inadmissibility). Furthermore, after the Ninth Circuit decision in *Sinotes-Cruz v. Gonzales,*[78] which determined that the stop-time provisions for cancellation of removal do not apply to pre-IIRAIRA[79] convictions, some previously-ineligible LPRs with old convictions can now seek cancellation of removal relief. Also, after *Camins v. Gonzales,*[80] which held that only crimes committed *after* the implementation of IIRAIRA rendered an alien an applicant for admission under INA §101(a)(13)(C), an alien in the Ninth Circuit with a pre-IIRAIRA

[71] INA §101(b)(1).

[72] 21 I&N Dec. 296 (BIA 1996).

[73] 16 I&N Dec. 581 (BIA 1978).

[74] 22 I&N Dec. 560 (BIA 1999).

[75] 22 I&N Dec. 560, 565–66 (BIA 1999).

[76] 8 CFR §212.7(d).

[77] *Mejia v. Gonzales*, 499 F.3d 991 (9th Cir 2007); *Perez Pimentel v. Mukasey*, 530 F.3d 321 (5th Cir. 2008).

[78] 468 F.3d 1190 (9th Cir. 2006).

[79] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. 104-208, 110 Stat. 3009 (1996).

[80] *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007).

conviction is not an applicant for admission at all and should not be denied admission.[81]

With all these limitations on applicability, there are very few scenarios in which an alien applying for admission can use §212(c). For instance, an alien who was previously deported during the period when §212(c) relief was improperly considered unavailable now faces huge obstacles to a new application for admission.

### INS v. St. Cyr *and Impermissible Retroactive Application of the Law*

The passage of IIRAIRA in 1996 eliminated §212(c) from the INA. Aliens argued that elimination of this relief was impermissibly retroactive, since at the time of their convictions they were eligible for relief from removal under §212(c). The government argued that aliens who committed crimes did not do so expecting that they could be forgiven for them. Deportation, the government contended, was a prospective development, a collateral consequence independent of the conviction itself. Thus, in the government's estimation, the retroactive application of §212(c)'s repeal was permissible.

The Supreme Court, in *INS v. St. Cyr*,[82] concluded that the repeal as applied to certain cases was unfairly retroactive. At the outset, the court noted that Congress could write a statute that applied retroactively. To do so, however, Congress, based on fundamental principles of statutory construction, would have to express clearly and unambiguously its intent to apply the statute retroactively.[83] The Supreme Court then analyzed whether the repeal produced an impermissible retroactive effect. Importantly, the Supreme Court analyzed the impermissible effect as applied to aliens who "... were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for §212(c) relief."[84] The Court then concluded that aliens who had pleaded guilty presumably did so to avoid a five-year sentence that would bar them from §212(c) relief. Rejecting the government's argument that the repeal of §212(c) was not impermissibly retroactive because §212(c) is a discretionary form of relief, the Supreme Court stated: "There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation. Prior to AEPDA and IIRAIRA, aliens like *St. Cyr* had a significant likelihood of receiving §212(c) relief. Because [*St. Cyr*] and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of §212(c) relief by IIRAIRA therefore has an obvious and severe retroactive effect."[85]

The Court's decision settled the issue in favor of aliens who pleaded guilty and were rendered deportable when §212(c) was still available. Later, the Department of Justice promulgated regulations[86] in light of the *St. Cyr* decision.[87] These regulations are quite comprehensive in explaining who can seek §212(c) relief and are worthy of careful study should a practitioner believe he or she may have a case where §212(c) relief is needed.

However, between 1997 (the effective date of IIRAIRA) and 2001 (when *St. Cyr* was decided), aliens who were aggravated felons or otherwise ineligible for cancellation of removal were found ineligible for §212(c) relief and were removed. Those fortunate enough to have been denied §212(c) relief but who were not removed later were able to avail themselves of a regulation allowing for reopening—8 CFR §1003.4. However, the regulation had a deadline of April 26, 2005 to file a motion to reopen, and the alien was not eligible to file if he had been physically removed, or had returned after removal without admission or parole. For this reason, the regulation helped very few people; principally aliens who were

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[81] Of course, the alien could be admitted and then placed in removal proceedings charged with deportability under INA §237. Use of §212(c) could be necessary if cancellation of removal is not available. If the conviction is an aggravated felony and his crime does not have a comparable ground of inadmissibility for §212(c) relief, then the applicant may be able to convert his case from one subject to INA §237 grounds of deportability to INA §212 grounds of inadmissibility by seeking adjustment of status in combination with §212(c). *See Matter of Azurin;* 23 I&N Dec. 695 (BIA 2005); *Matter of Gabryelsky*, 20 I&N Dec. 750 (BIA 1993); *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007).

[82] 533 U.S. 289 (2001).

[83] *St. Cyr*, 533 U.S. at 316.

[84] *Id.* at 321. The case also specifically applied to an alien such as St. Cyr, who had become deportable at the time of his conviction. On March 8, 1996, St. Cyr pled guilty to selling drugs, which was a deportable offense at the time of his plea, unlike many other types of aggravated felony crimes that only became deportable offenses after the passage of AEDPA and IIRAIRA.

[85] *Id.* at 325.

[86] 69 Fed. Reg. 57826, 57834 (Sept. 28, 2004).

[87] 8 CFR §1212.3.

not physically removed from the United States because no country would take them. Otherwise, aliens found ineligible for §212(c) between 1997 and 2001 were deported and could not make use of the regulation.

The anomalousness of the situation is breathtaking. The Supreme Court ruled that aliens were improperly denied the opportunity to seek relief and thus wrongly deported, but that only those who were *not* wrongly removed could reopen their cases within a very limited timeframe. However, many of these wrongly-deported aliens returned to the United States without inspection. If found, DHS could reinstate[88] the order of removal. In addition, some aliens also were prosecuted criminally for illegal reentry under INA §274. As far as the criminal proceedings were concerned, the Ninth Circuit concluded that aliens' due process rights were violated at their removal hearings when they were denied the right to seek §212(c) relief; thus, criminal prosecution could not go forward.[89]

### *Limitations on Availability of INA §212(c)*

Based on this finding, one would think there would be only one correct result: that removal cases would universally be reopened for these aliens so a removal hearing in conformity with due process could be provided to the alien. While in some cases Immigration and Customs Enforcement stipulated to reopening removal proceedings or immigration judges reopened proceedings, this is not generally what happened. Instead, aliens were either left in limbo or their faulty removal orders were reinstated. For a few years, reinstating removal orders in such cases was put on hold by the Ninth Circuit in *Morales-Izquierdo v. Ashcroft*.[90] However, this case was overturned by the Supreme Court in *Fernandez-Vargas v. Gonzales*.[91]

In a post-*Fernandez-Vargas* decision, the Ninth Circuit held that remedies are available to those wrongly deported, but that such remedies would be available to those outside the country.[92] With that somewhat optimistic assessment of remedies available to those deported after being denied the opportunity to seek §212(c) relief, it would make sense that the regulations denying reopening to those already deported would be found to be illegal on the ground that they preclude any remedy for constitutionally defective deportations. However, this is not what occurred. The Ninth Circuit addressed this issue in *Avila-Sanchez v. Mukasey*.[93] The court concluded that even though the petitioner's removal order was constitutionally defective, it was still a legal order and could properly be reinstated.[94] Furthermore, regulations prohibiting reopening were also valid because the removal order was legal. As for the noble language in *Fernandez-Vargas* and *Morales-Izquierdo* about the availability of reopening, that ability does not exist under 8 CFR §1003.44, other than for an exceptional few.

The last hope for practitioners dealing with this perverse situation is a straight motion to reopen not relying on 8 CFR §1003.44. Of course there are tremendous obstacles, including, most notably, the time limitation on motions to reopen.[95] However, both an immigration judge[96] and the BIA[97] have the authority to reopen a proceeding sua sponte in exceptional circumstances.[98] The BIA may reopen a

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[88] INA §241(a)(5).

[89] *See, inter alia, United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2003).

[90] 388 F.3d 1299 (9th Cir. 2004).

[91] 126 S. Ct. 2422, 2432 (2006).

[92] *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007).

[93] 509 F.3d 1037 (9th Cir. 2007).

[94] Relying on a former decision in *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001), the *Avila-Sanchez* court wrote: "As we have explained before, the mere fact that the BIA made an interpretation error was insufficient to make its order 'unlawful ....' In [*Alvarenga-Villalobos*], the alien had been deported after having been denied [§212(c)] relief, but returned illegally .... He asserted that because the original determination was erroneous, his deportation was unlawful. We rejected that argument and pointed out that at the time of his deportation, the BIA's action was in accord with the rules that then existed and those were not overturned until over two years later. As we stated: Alvarenga contends that [the provision in question] does not apply to him because the statute applies only to lawful removal orders. However, we need not resolve this issue, because, as we have explained, Alvarenga's deportation order was perfectly lawful under the law at the time he was deported. '[I]t has long been established that final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule.'" *Id.* at 1040.

[95] INA §240(c)(7)(C)(i) ("[a] motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal").

[96] 8 CFR §1003.23(b)(1).

[97] 8 CFR §1003.2(a).

[98] *Matter of J-J-*, 21 I&N Dec, 976 (BIA 1997).

case sua sponte based on a change in law,[99] where the change in law is fundamental.[100]

For a long time it was assumed that motions to reopen could not be filed when an alien has departed the United States based on 8 CFR §1003.2(d)[101] for motions to the BIA, and based on 8 CFR §1003.23[102] for motions to the immigration court. The Ninth Circuit has interpreted these regulations to mean that only aliens in proceedings who depart *before* their cases are over are barred from filing a motion to reopen. Once the case is lost and the alien departs the United States, the alien is free to file a motion to reopen.[103] The Ninth Circuit had previously authorized reopening in other cases after an alien departed without consideration of these regulations.[104]

It seems plausible that an alien who was deported after being found ineligible for §212(c) relief can show that a fundamental change in the law merits reopening. As of now there are no BIA or appellate decisions that show how such a motion would be treated. While the BIA and Ninth Circuit have indicated how a case under the special §212(c) reopening regulation[105] at 8 CFR §1003.44 would be handled, so far there is nothing published about reopening based on the "change in law" theory. Regrettably, there may never be, as the BIA's decisions about reopening sua sponte are not subject to judicial review.[106] However, it is not impossible that because of the due process concerns in this context, a panel will distinguish the limits on judicial review, and command the BIA to reopen the cases of aliens denied the opportunity to seek §212(c) relief.

## OTHER INADMISSIBILITY WAIVERS

### The Nonimmigrant Waiver

All grounds of inadmissibility at INA §212(a) apply to nonimmigrants as well as immigrants. However, there is only one type of waiver for nonimmigrants, which is defined at INA §212(d)(3). This section permits the attorney general to waive all grounds of inadmissibility that apply to a nonimmigrant visa applicant, except for certain grounds relating to security, foreign policy concerns, or persecution and genocide.[107] This section also permits DOS and USCIS (after consultation with the attorney general) to make a discretionary determination that a visa applicant is not barred by certain terrorist grounds of inadmissibility at INA §212(a)(3)(B).[108]

If a nonimmigrant visa applicant is denied a visa under INA §221(g) because she is inadmissible under INA §212, she may apply for a waiver pursuant to this section. Such applications are decided by specific USCIS district offices outside the United States after recommendation for approval by a consular officer.[109] If the applicant is already in possession of a visa and/or is applying for admission at the border, a district director in charge of the port-of-entry determines if a waiver is warranted.[110] In this situation, the applicant must possess proper entry documents and must show that she was not previously aware of the ground of inadmissibility.[111]

The controlling case governing the standard for approving a §212(d)(3) waiver is *Matter of Hranka*.[112] Nonimmigrant waivers are approved as a matter of discretion. The government must consider

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[99] *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998); *Matter of G-C-L-*, 3 I&N Dec. 359 (BIA 2002).

[100] *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999).

[101] 8 CFR §1003.2(d) states, "Departure, deportation, or removal. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

[102] 8 CFR §1003.23 states, "A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion."

[103] *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007); *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2006).

[104] *Cardozo-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977).

[105] *See Avila-Sanchez v. Mukasey*, *supra* note 93.

[106] *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

[107] INA §212(d)(3)(A).

[108] INA §212(d)(3)(B)(i).

[109] 8 CFR §212.4(a)(1).

[110] 8 CFR §212.4.

[111] 8 CFR §212.4(b).

[112] 16 I&N Dec. 491 (BIA 1978).

(1) the risk of harm to society if the applicant is admitted; (2) the seriousness of the applicant's criminal or immigration law violation; and (3) the nature of the applicant's reason for seeking entry.

Theoretically, this waiver could be approved for a nonimmigrant visa applicant who is subject to the three– or ten-year bar at INA §212(a)(9)(B). This waiver could help such an applicant enter the United States after lengthy overstays, even if she has no sponsoring family member for permanent resident status and no qualifying relative for an unlawful presence waiver under INA 212(a)(9)(B)(v). But in reality, it is very likely that the circumstances surrounding the original overstay would render the applicant inadmissible under INA §214(b). That section—the most common basis for NIV denials—creates the presumption that an alien is an intending immigrant unless she can satisfy the consular officer that she only intends to remain in the United States on a temporary basis for the activities permitted by the particular nonimmigrant classification. Nonetheless, certain nonimmigrant categories are *not* subject to §214(b); namely, H-1 and L (and their dependents) and O applicants.[113] Thus, foreign nationals with three- or ten-year bar issues who may be eligible for these nonimmigrant classifications should apply for a nonimmigrant visa waiver in conjunction with their application for admission.

### Waiver of the Two-Year Foreign Residency Requirement

Nonimmigrants who have been in J[114] status may need a waiver to avoid the two-year foreign residency requirement mandated by INA §212(e). This section prohibits the following foreign nationals who have held J status from becoming permanent residents or from obtaining H or L nonimmigrant status unless they have spent two years in their country of nationality or last residence:

- J nonimmigrant whose program was funded by the United States or the person's country of nationality or last residence;
- J nonimmigrant who was a national or resident of a country listed on the USIA Exchange-Visitor Skills List;[115]
- J nonimmigrant who came to the United States for graduate medical training.

The waiver at INA §212(e) allows such individuals to seek a waiver of the two-year residency requirement based on hardship to a USC or LPR spouse or child, or if person would be subject to persecution in her home country on account of protected grounds, and the waiver is found to be in the public interest. This section also allows interested government agencies (or the State Department of Public Health in the case of foreign medical graduates) to petition for the waiver. Alternatively, J visa holders (except for foreign medical graduates) can obtain a "no objection" letter from their own government, which they can use in lieu of the hardship factors described above to apply to USCIS for the waiver.

### Waivers for Refugee Admissions and Adjustments

A foreign national who applies for admission as a refugee may have most grounds of inadmissibility waived under INA §207(c)(3). This section sets forth a waiver for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. This expansive waiver applies to most grounds of inadmissibility covered by INA §212, except for the most serious bars.[116] Similarly, refugees adjusting status pursuant to INA §209(a) are eligible for an identical waiver under INA §209(c). The relatively low standard for satisfying the waiver criteria reflects the humanitarian purpose of the asylum and refugee laws.[117]

### Waivers for Communicable Diseases: HIV Update

INA §212(a)(1)(A)(i) bars from admission foreign nationals who are determined to have a communicable disease of public health significance,

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[113] 8 CFR §214.2(h)(16)(ii); 8 CFR §214.2(l)(16); 8 CFR §214.2(o)(13).

[114] INA §101(a)(15)(J).

[115] 62 Fed. Reg. 2448–2516 (Jan. 16, 1997).

[116] INA §207(c)(3) does not waive inadmissibility for controlled substance traffickers and involved family members, those who engage in espionage or terrorist activities, those who engage in activities that would have adverse foreign policy consequences, and participants in Nazi (or Nazi-allied) persecution or genocide.

[117] *But see Matter of Jean*, 23 I&N Dec. 373 (AG 2002) (determining that a heightened standard should be applied in the case of a "violent or dangerous felony" before a §209(c) waiver could be approved); *Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006) (affirming the validity of the attorney general's application of a heightened standard, but requiring that a clear determination first be made that the conviction was for a "violent or dangerous" offense).

"which shall include infection with the etiologic agent for acquired immune deficiency syndrome," commonly known as AIDS. The INA contains a specific waiver for immigrant visa applicants who are HIV-positive, if the applicant is the spouse, parent, unmarried son or daughter of a USC or LPR or is a VAWA self-petitioner.[118] Nonimmigrants who are HIV-positive must use the waiver at INA §212(d)(3) when applying for admission.

Recently, on July 30, 2008, the president enacted a law that amended INA §212(a)(1)(A)(i) so that the Department of Health and Human Services (HHS) is no longer required to designate HIV infection as a "communicable disease of public health significance."[119] If HHS removes HIV infection from the list of diseases barred by INA §212(a), then HIV-positive individuals would no longer be inadmissible. Such a change would allow HIV-positive individuals from visa waiver-eligible countries to take advantage of that program, and would allow employment– and diversity-based immigrant visa beneficiaries—who often have no qualifying relative for a §212(g) waiver—to obtain permanent resident status. In addition, on September 29, 2008, DHS published a final rule that allows consular officers to grant temporary, nonimmigrant visas to otherwise eligible applicants who are HIV-positive and who will remain in the United States for no more than 30 days.[120]

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[118] INA §212(g)(1).

[119] USCIS Memorandum, L. Scialabba and D. Neufeld, "Public Law 110-293 and inadmissibility due to HIV infection" (Aug. 26, 2008), *published on* AILA InfoNet at Doc. No. 08082861 (*posted* Aug. 28, 2008).

[120] *See www.dhs.gov/xlibrary/assets/hiv_waiver_finalrule.pdf* (Sept. 29, 2008).