"I'm Sorry...So Sorry...": The Fundamentals of Nonimmigrant & Immigrant Waivers

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Is Your Client Inadmissible?

- Does your client have a communicable disease or a does your client have a physical or mental disorder that makes him or her harmful to others? INA §212(a)(1)
- Is your client a drug abuser? INA §212(a)(1)
- Is your client likely to become a public charge? INA §212(a)(4)

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Is Your Client Inadmissible?

- Has your client committed or been convicted of a crime of "moral turpitude" or has your client been convicted of a drug related crime? INA §212(a)(2)(A)
- Has your client been convicted of multiple crimes with a combined sentence of five years or more?
  INA §212(a)(2)(B)
- Has your client been convicted of certain specified crimes, such as prostitution or drug-trafficking?
  INA §212(a)(2)(C) - (H)

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Is Your Client Inadmissible?

- Is your client a family member of a drug trafficker and benefited from the trafficking?
- Is your client a national security risk or a terrorist? INA §212(a)(3)
- Has your client been a Nazi, or a member of a totalitarian party or otherwise participated in genocide?
- INA §212(a)(3)(D) and (E)

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Is Your Client Inadmissible?

- Has your client committed immigration fraud or other immigration violations such as entering without inspection?
  INA §212(a)(6)
- Has your client been in the U.S. unlawfully or has your client been deported or removed from the U.S.?
  INA §212(a)(9)

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Is Your Client Eligible for a Waiver?

- Non-immigrant waivers are more flexible in some ways than immigrant waivers.
- With the exception of a single possession of marijuana (less than 30 grams), drug offenses are not waivable for immigrant visas.
- For the most part, false claims to U.S. citizenship are not waivable.

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Is There a Waiver for Non-Immigrant Visa Applicants?

- The non-immigrant visa waiver is found at INA §212(d)(3).
- There is no set form for this waiver.
- This waiver is more amorphous than the immigrant visa waivers and as a result, may appear more lenient because the applicant can address a broader range of factors – humanitarian or otherwise.

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Is A Waiver Required?

- Despite the fact that the person was convicted of a crime, even one involving moral turpitude, a waiver may not be required. There are several exceptions to the waiver requirement, which allow the visa to be issued without a waiver.
- Youthful Offender Exception
- Petty Offense Exception (Sentencing Clause)
- Political Offense Exception

NOTE: These exceptions do not apply to drug offenses!

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Youthful Offender Exception

- Applicants who were convicted of offenses before their 18th birthdays are not considered to have committed crimes and are, therefore, not inadmissible unless tried and convicted as an adult for a felony involving violence.
- This exception does not apply to offenses that are punishable by imprisonment for more than a year or by the death penalty.

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Youthful Offender Exception

- If the conviction occurs after the applicant's 18th birthday, a waiver still may not be required if:
  - The application committed only one Crime Involving Moral Turpitude (CIMT) and the applicant was released form any confinement more than 5 years before the application for a visa or for admission to the United States.

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Petty Offense Exception

- If an applicant has committed only one CIMT, the maximum penalty for the offense does not exceed one year and the term of imprisonment the applicant received did not exceed six months, this exception (sometimes called the Sentencing Clause Exception) may apply.

  NOTE: This requires analysis of the statue under which the applicant was convicted.

- If the applicant was convicted of multiple counts of a CIMT resulting in only one conviction, this exception does not apply.

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Political Offense Exception

- If an applicant was convicted of an offense in an act of oppression by a hostile government or regime, a waiver may not be required.
- Such convictions must "obviously" be based on fabricated charges or predicated on repressive measures against racial, religious or political minorities.
- The imposition of disproportionate punishment also falls under this exception.

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NIV Waivers

- Section 212(d)(3)(A) of the INA is the section that waives most inadmissibilities in the NIV context
- Once it has been established that there is a conviction for a CIMT that is not eligible for an exception or for a drug offense, a waiver application will be required.
- There is no set form for this waiver – the applicant submits the relevant evidence proving eligibility for the waiver.

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NIV Waivers

- Once a finding of ineligibility for a visa based on a ground of inadmissibility is made by a consular officer, the officer must *recommend* waiver and send the recommendation to the DHS for review.
- The DHS reviews the case and the officer's findings and, if they agree that a visa should be issued, they grant the waiver and contact the interviewing post to issue the visa.

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Recommending the Waiver

- The decision to recommend a waiver is based on several factors. These were articulated in *Matter of Hranka,* 16 I. & N. Dec. 491; 1978 BIA and are codified in the FAM
- They include:
  - Seriousness of the offense
  - Recency of the offense
  - Potential harm to the U.S.
  - Potential benefit to the U.S.
  - Reason for travel to the U.S.

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Suggested Documentation

- As there is no form for a waiver under 212(d)(3)(A) waiver, the following should be provided:
- A concise legal memo arguing the merits of the case under the relevant criteria
- Documents pertaining to the conviction – court records, police certificates, letters from foreign lawyers
- Documents establishing reasons for travel to the U.S.
- Evidence of rehabilitation/benefit to the U.S.

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Timing and Approval Rates

- The recommendation for a waiver is usually made by the interviewing officer on the day of the interview
- The DHS is currently taking approximately 20 weeks to review waiver applications
- The DHS tends to agree with the officer recommending the waiver unless information comes up in the DHS system that the officer did not see
- Current refusal and waiver rates are available at http://www.travel.state.gov/pdf/FY2011NIVWorkloadbyVisaCategory.pdf

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Is There a Waiver Available for Immigrant Visa Applicants?

- For Immigrant Visas, waivers of most grounds of inadmissibility are filed on form I-601.
- The INA provides for the most common waivers at sections 212(g) for health grounds, 212(h) for criminal grounds , 212(i) for fraud grounds, and 212(a)(2)(9)(v).
- The immigrant visa waivers described above require a showing of extreme hardship to a qualifying relative.

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Processing an IV Waiver at Consulate vs. Within the U.S.

- If client not admitted or paroled and is not 245i eligible, must process abroad
- If client entered by fraud or has criminal grounds and is in the U.S. now, try adjusting status first even if you think chances are low
- When an applicant processes abroad, the Doctrine of Consular Nonreviewability applies – this means that the decision of the consular officer cannot be reviewed by a court

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Processing Times and Approval Rates – IV Waivers of Inadmissibility

- Government's goal for foreign-filed cases is six months. Times generally vary from three to eighteen months and can fluctuate quickly and dramatically
- An in-country waiver with AOS can take anywhere from an hour to two years, but usually one month. NEVER RUSH AN IN-COUNTRY WAIVER WHERE EAD IS ISSUED.
- Approval rates both within US and outside US are high for simple unlawful presence (around 80%+) and low for fraud and criminal history (under 50%)

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Required Documentation – IV Waiver

- Form and fee
- Letter from qualifying relative (signed and dated)
- Criminal records where there is criminal history
- Translations of anything not in English
- For any qualifying relative who is NOT the petitioner, you need proof of legal relationship and proof of USC or LPR status.

PLEASE NOTE THAT THERE IS NO OTHER STANDARD, REQUIRED DOCUMENTATION

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Suggested Documentation – IV Waiver, General

- Attorney's brief or letter or 'roadmap', which organizes and describes the evidence
- 2-3 photos of applicant and qualifying relative (does not prove hardship, but humanizes packet)
- Page separators with exhibit number on each
- Page numbers or exhibit number on bottom

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Suggested Documentation: Medical or Mental Illness Argument (other than stress/depression)

- Letter from the doctor or psychiatrist describing diagnosis, symptoms, prognosis, limitations, and what help the person needs. Medical terms and layman's terms.
- LIMITED NUMBER of medical records (e.g. 5-20 pages). Prefer medical records with a narrative. Do not submit 100 pages of incomprehensible lab results.
- Article describing the condition in layman's terms
- Letters with lay testimony from people who know the patient describing their own first-person observations of how the condition affects the person's life and what kind of help he/she needs

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Suggested Documentation: Qualifying Relative Needs Alien's Income

- One detailed, estimated monthly household budget with the alien's income and one without (note: credit cards are a method of payment, not an expense)
- Copies of bills only for unusual expenses, past due notices, or evidence that credit card bill is for past necessity being paid now (e.g. tuition)
- Letter offering future employment to alien upon his return with valid visa. Should be on letterhead, signed and dated. Should state salary and nature of employment.
- Proof that alien previously contributed to household income, e.g. joint tax return
- Recent paystub for QR showing current income

This argument usually only works when QR makes $20K or less if no kids, or $40K or less with kids depending on area of country.

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Suggested Documentation: Qualifying Relative Can't Find Work Abroad

- If QR is a professional or skilled laborer, get letter from QR's employer in the U.S. describing in what way QR's skills, experience, license and/or value as an employee are specific to the US
- If QR has a license or is a highly regulated professional, get documentation on what he/she would have to go through to get licensed abroad
- If QR is unskilled, get articles on conditions and wages for unskilled labor where alien lives. Compare to cost of living articles.
- If QR has attempted to find work abroad, document attempts to find work
- If QR would face sexism or racism in his/her profession abroad, get articles about this and/or job announcements specifying gender, and/or letters from people in that occupation abroad
- If QR's job does not exist abroad, get articles about that

Note: language barrier is rarely strong as it is considered temporary

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Suggested Documentation: Discrimination - Gender, Race & Religion

- Country condition articles (2-3 as specific as possible)
- Detailed narrative from QR describing his/her experience with the discrimination during visits to alien's country. If QR has never been there, get a narrative from alien regarding his/her observations of such discrimination in home country.
- If possible, 2-3 letters from people in alien's country providing compelling anecdotes of the discrimination

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Suggested Documentation – High Crime

- Detailed narrative from QR and/or alien describing his/her own personal experience and observations of violent crime in alien's country (as opposed to news stories or general fear)
- Documentation of some medical condition that makes QR more vulnerable to mugging than the average person
- Police report regarding direct victimization of QR or alien in the past, even if it was not in alien's country as this will make them more sensitive to concerns about crime
- Psychologist letter regarding PTSD after QR or alien was victim of a serious crime
- News reports or country condition reports (2-3 as specific as possible)

Note: It's hard to make this argument merely by indicating that the alien's country has a high crime rate. You have to make it personal to the couple. Why is it worse for them? What's happened in the past that makes them more sensitive to these concerns?

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Suggested Documentation – Stress, Anxiety and Depression

- Letters from QR's employer and co-workers (or teachers/students) describing the impact of the stress of the immigration case on job performance (or school performance)
- Job performance evaluations (or grade reports) indicating a decline in performance since the immigration case commenced
- Letters from people who know QR well describing their own detailed, concrete, first-person observations of how the stress is taking a toll on QR
- Letter from clergy describing counseling
- Letter from therapist (optional) describing ongoing therapy for stress. If you're going to get such a letter, it should describe ongoing therapy, rather than 'an evaluation' based on 1-3 visits. If it is not ongoing therapy, you must provide a compelling reason why it is not ongoing and (if it is a money issue) convince the reader that therapy really should be ongoing. Should describe how often patient is seen, diagnosis, symptoms, prognosis, and how the problem will be resolved by alien's return.
- Copies of prescriptions (optional) for stress-related medications.

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The Role of the Attorney

- Ask questions to ascertain waiver requirement/eligibility and other options
- Explain risks (and get client to sign a statement indicating they understand the risks)
- Ask questions to elicit story and determine which hardship arguments to use
- Provide client with a detailed list of documents to go get for the waiver, tailored to that particular client
- Review the documents to make sure they prove what they need to and possibly send client out for more
- Write a brief or letter describing the arguments and how the evidence proves those arguments (good old fashioned advocacy)
- Put the packet together in an organized manner so it is easy to navigate and the reader can quickly find the most relevant documents and prepare the client for the interview
- Be prepared to follow up with the government if the outcome is not positive

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Questions & Answers

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