

WAIVERS AROUND THE WORLD: PRACTICE TIPS FOR INADMISSIBILITY DETERMINATIONS AT U.S. CONSULAR POSTS AND WAIVER ADJUDICATION AT USCIS INTERNATIONAL OFFICES

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Dealing with inadmissibility issues in cases abroad requires a different approach from cases inside the United States. Although you may know clearly where your local U.S. Citizenship and Immigration Services (USCIS) district office draws the line, inadmissibility decisions can be shockingly different overseas. For example: would you believe that a 15-year-old conviction for driving under the influence of alcohol could leave to a finding of inadmissibility? Would you predict that a 25-year-old conviction for shoplifting a tube of hair gel might not qualify for the petty offense exception to criminal inadmissibility? Would you believe that a consulate would seek out and review old I-94W forms from U.S. Customs and Border Protection for the purpose of accusing the applicant of fraud/misrepresentation? Would you think that a conviction entered when the applicant did not appear in front a judge, commonplace in some countries, would *not* trigger inadmissibility? Based on the unpredictability of these and other decisions, it is important to go back to the drawing board when preparing any application for submission abroad that has potential inadmissibility issues. This article will provide some general information on best practices for waiver applications submitted abroad, with a particular focus on the immigrant visa context.

INITIAL CONSIDERATIONS: DETERMINING INADMISSIBILITY AND WAIVER ELIGIBILITY

A first step to understanding how waiver applications are processed abroad is knowing how inadmissibility and waiver decisions are made. While USCIS ultimately adjudicates all waiver applications submitted abroad, the Department of State (DOS) usually serves as the “gatekeeper” for these cases. A consular officer, through an in-person interview with the visa applicant, is the front-line government officer reviewing each case. This consular officer is the one who will determine whether your client is admissible or inadmissible to the United States. Once a visa applicant has been deemed inadmissible, the consular officer is also the person who decides whether the applicant is *prima facie* eligible to apply for a waiver of inadmissibility. USCIS officers may receive and adjudicate waiver applications only after DOS has made these initial decisions.

Sometimes consular reactions to cases will highlight fundamental gaps between your and DOS officers’ reading and understanding of inadmissibility laws. This will inevitably happen as you break new ground in

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your exposure to new consular arenas; however, an ounce of prevention can be worth a pound of cure if you are able to keep an open mind and anticipate all the potential arguments and pitfalls in each case.

Get to Know Your Consular Post

When working on a complex case abroad, nothing is more important than gathering as much information as possible about the receiving consular post. AILA resources are a good place to start to seek post-specific information. AILA's Rome District Chapter is also an important resource for practice information outside of the United States. The chapter issues post-specific liaison reports and has post-specific mentors.¹ Contact information for the chapter's officers and global immigration resources can be accessed through AILA's website.² Lastly, information may simply be available online on the consular post's website.

Standards regarding what makes an applicant inadmissible can vary widely from country to country. Some policies determining inadmissibility may be set in place by supervisors at particular U.S. consular posts, who instruct officers to investigate and focus on specific facts that are not equally scrutinized elsewhere in the world. For example, officers at the U.S. Consulate in Ciudad Juarez—mindful of the frequency with which persons cross the U.S.-Mexico border without inspection—carefully examine each applicant's entries to and exits from the United States to detect unlawful presence.³ Many visa applicants, including minor children whose unlawful presence in the United States was unwitting, are subjected to the harsh un-waivable (except in certain Violence Against Women Act cases) "permanent bar" of Immigration and Nationality Act (INA) §212(a)(9)(C); admission of persons subject to the permanent bar may be sought 10 years after the alien's last departure and requires the consent of the secretary of Homeland Security for the alien to re-apply for admission. Be sure to carefully examine all of your clients' dates of travel to and from the United States since 1997, (as well as their manner of entry) to anticipate these issues when screening any case for processing in Ciudad Juarez.

Other posts, such as the U.S. Embassy in London, focus closely on fraud and misrepresentation issues.⁴ Officers scrutinize past visa applications and even I-94W cards of visa applicants through internal record searches; if they detect any failure to disclose information or false answer, it may result in an INA §212(a)(6)(C)(i) finding of fraud or material misrepresentation. As these fraud findings are often based on prior statements or applications presented in a different context, be sure to scrutinize whether such alleged misrepresentation is in fact "material."⁵ Many false answers, omissions or failure to disclose information, though misrepresentations, are not material and therefore should not trigger inadmissibility.

While these are just isolated examples, they illustrate the different issues that arise in consular cases and how differently some consular posts screen for inadmissibility. Be sure to obtain all the information you can about the receiving post before presenting your case.

Research Foreign Laws Affecting Inadmissibility

Inadmissibility determinations can also vary country to country due to local laws. For instance, you should carefully examine sentencing provisions of foreign criminal laws to be sure the petty offense exception⁶ to crimes involving moral turpitude (CIMT) inadmissibility can apply to your case. The sentencing laws of some Commonwealth countries' criminal codes do not delineate lesser sentences for minor offenses, as opposed to very serious crimes. An applicant convicted in Australia of stealing a T-shirt is punished under the same section of the Australian Criminal Code Act 1995 as someone who stole a Mercedes. This theft statute carries a maximum sentence of 10 years. Regardless of the value of the object stolen or the punishment actually imposed, any applicant with a theft conviction under this law will be ineligible for the petty offense exception

¹ See www.aila.org/content/default.aspx?docid=24475.

² See www.aila.org/content/default.aspx?docid=24475.

³ See generally Immigration and Nationality Act (INA) §212(a)(9)(B) and 9 *Foreign Affairs Manual* (FAM) 40.92 Notes; INA §212(a)(9)(C) and 9 FAM 40.93 Notes.

⁴ See generally INA §212(a)(6)(C) and 9 FAM 40.63 Notes.

⁵ See 9 FAM 40.63 N4 and N6.3-3.

⁶ See INA §212(a)(2)(A)(ii)(II).

because the maximum penalty possible exceeds one year of imprisonment.⁷ Suddenly, an apparently innocuous offense can trigger a need for an INA §212(h) waiver.

Beyond mere variations between U.S. and foreign laws, also keep in mind that foreign legal systems can be fundamentally different. In many countries, some conduct is considered illegal that would never be a crime in the United States. This is especially true in countries like Iran where individuals may be convicted for “mixing unrelated genders in a public place” or in Turkey for “failure to return [a] checkbook as notified by [a] bank.” These foreign offenses should only trigger criminal inadmissibility if the consular post determines the conviction, as defined by foreign statute, to “involve moral turpitude” according to U.S. standards.⁸ In analyzing these cases, it is important to first obtain the actual wording of the foreign criminal code describing the violation in English. Submission of the actual wording to post is fundamental to your ability to argue the offense is not a CIMT.⁹ Further, it is important to be familiar with the country’s criminal procedures. Many countries, including Turkey, issue criminal convictions in absentia, which may be insufficient to trigger inadmissibility.¹⁰ If in absentia convictions are commonplace in the applicant’s country, be aware and ask your client appropriate questions from the beginning of the case, as it may not occur to the applicant to communicate this to you.

Foreign laws may also affect the way your client thinks about or discloses events that could trigger inadmissibility. In the United Kingdom, for example, under the Rehabilitation of Offenders Act, a conviction becomes “spent” after seven years. Assuming an individual has no subsequent convictions; after a conviction is spent it does not legally need to be disclosed to U.K. authorities in any context. As a result, British nationals often respond in good faith to consular officers that they have never been convicted, even if they have a spent conviction in their past. In London, this response may set up a visa applicant for a finding of INA §212(a)(6)(C)(i) inadmissibility due to fraud/misrepresentation.¹¹ You should be sensitive to these issues and counsel your clients that U.S. immigration laws may require more disclosure of their complete criminal history than laws in their home country.

How to Rebut or Challenge an Inadmissibility Determination

Just as inadmissibility standards vary, so does the ability of attorneys to communicate with different consular posts to discuss inadmissibility decisions. If you believe your client was erroneously deemed inadmissible, the best plan of action is to directly contact the consular post via fax, e-mail or their other preferred method of communication. Address your message to the chief of the consular section, the chief of the NIV/IV unit, or another supervisor of the interviewing officer, as appropriate.¹² Be *brief*. DOS and Department of Homeland Security (DHS) officers abroad often deal with dozens, or even hundreds, of visa applications each day. You need to make sure that whoever reads your message will capture the essence of your argument in less than two minutes. Cite to legal authority to support your position but be sure not to ignore or omit a citation to the *Foreign Affairs Manual* (FAM), as this will be the consular officer’s primary point of reference. If

⁷ 9 FAM 40.21(a) N7.3 states, in pertinent part: “it is necessary only to look to the law, foreign or domestic, of the jurisdiction where the acts were committed. It is not necessary to refer to federal or other U.S. standards to distinguish between felonies and misdemeanors.” Cf. *Matter of Scarpulla*, 15 I&N Dec. 139, 141 (1974) (holding that an applicant’s eligibility for the petty offense exception based on a foreign conviction should be drawn according to the analogous criminal statute under the U.S. Code or the D.C. Code, and that foreign convictions which were the equivalent of misdemeanors would qualify for the petty offense exception to inadmissibility).

⁸ 9 FAM 40.21(a) N2.1.

⁹ See *id.* (stating that “[t]he presence of moral turpitude is determined by the nature of the statutory offense for which the alien was convicted, and not by the acts underlying the conviction”); see also 9 FAM 40.21(a) N6.1.

¹⁰ See 9 FAM 40.21(a) N3.4-2.

¹¹ See 9 FAM 40.21(a) N3.2-1 (noting that “not all expungements or pardons serve to relieve the individual of the effects of the conviction for immigration purposes”); *Matter of Roldan*, 22 I&N Dec. 547 (BIA 1999).

¹² Names of Consular Section chiefs can be found in the Department of State (DOS) “Key Officers List,” posted online and updated regularly. See www.state.gov/documents/organization/111812.pdf.

you receive a response from post upholding the inadmissibility determination and you still believe they are wrong, you may request an Advisory Opinion from DOS' Visa Office.¹³

IV WAIVERS: PREPARATION FOR SUBMISSION AND ADJUDICATION ABROAD

Adjudication of I-601 waivers abroad occurs at USCIS international offices, divided among three regions: the Americas,¹⁴ Europe/Africa/Middle East,¹⁵ and Asia/Australia.¹⁶ Unless the U.S. embassy or consulate where the visa interview took place houses a USCIS international sub-office—most do not—the I-601 application will be transferred from the consular post for adjudication at a regional USCIS office or sub-office. If the waiver application is approved, the interviewing embassy or consulate will receive the file back from USCIS and issue the immigrant visa.

Attorneys working on consular IV waiver cases should consult the *Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers*, issued by USCIS on April 28, 2009.¹⁷ This handbook contains procedural details regarding waiver filing,¹⁸ request for evidences and notice of intent to denials,¹⁹ as well as appeals and motions to reopen/reconsider waiver denials.²⁰ It is also one of the few government publications on waivers that brings together statutes, case law, and the FAM in one manual.

Managing Client Expectations

One of the most important responsibilities for the lawyer who is handling an application for an immigrant visa waiver is to properly set and manage the client's expectations. The more the client understands about the process, the easier it generally is for him or her to cope with the frustration, anxiety and uncertainty that is inevitable during the waiver application process.

At the outset, a frank and open discussion with the client is critical to obtain his or her trust and confidence, obtain all relevant facts, and make a recommendation of the best strategy to pursue. During this discussion, it is extremely important to be as realistic as possible as to the probability of ultimate success. This is also the appropriate opportunity to provide a timeline, so that the client has realistic expectations, not only about the process itself, but also of how long the period of uncertainty is likely to be. The timeline should include information regarding how long it should take to compile documents, prepare the I-601 and supporting documents for submission, and wait for USCIS to adjudicate the waiver once it is submitted. Keep in mind that the timeline for adjudication can vary greatly depending on USCIS caseload, proximity of the receiving consular post to the adjudicating USCIS sub-office, the speed at which post packages and transfers the file to USCIS, and other factors specific to the location of filing abroad. Providing a clear timeline at the beginning of each case will help to ease client frustrations.

¹³ See AILA InfoNet at Doc. No. 08121971 (posted Dec. 19, 2008), VO Inquiry Form.

¹⁴ The USCIS Americas Region is headquartered at a district office in Mexico City, with sub-offices located in Ciudad Juarez and Monterrey, Mexico; Guatemala City, Guatemala; San Salvador, El Salvador; Tegucigalpa, Honduras; Panama City, Panama; Havana, Cuba; Port-au-Prince, Haiti; Santo Domingo, Dominican Republic; Kingston, Jamaica; and Lima, Peru. See USCIS International Map, available at www.uscis.gov/USCIS/Images/AboutUS/international_map_12nov09.pdf. In 2009, USCIS also opened an International Adjudications Support office based out of its Asylum Office in Anaheim, CA, with an initial focus "on adjudicating non-health-related [I-601 waiver applications] from USCIS's office in Ciudad Juarez," published on AILA InfoNet at Doc. No. 09052072 (posted May 20, 2009), USCIS Opens International Adjudications Support Branch in California.

¹⁵ The USCIS European Region (also overseeing Africa and the Middle East) is headquartered in Rome, Italy, with sub-offices in London, UK; Frankfurt, Germany; Moscow, Russia; Athens, Greece; Amman, Jordan; Accra, Ghana; Nairobi, Kenya; and Johannesburg, South Africa. See USCIS International Map, *supra* note 14.

¹⁶ The USCIS Asia Region (also overseeing Australia) is headquartered in Bangkok, Thailand, with sub-offices in Beijing and Guangzhou, China; Seoul, South Korea; Ho Chi Minh City, Vietnam; Manila, Philippines; and New Delhi, India. See *id.*

¹⁷ AILA InfoNet at Doc. No. 09061772 (posted June 17, 2009).

¹⁸ *Id.* at 8–9.

¹⁹ *Id.* at 13–15.

²⁰ *Id.* at 55–58.

Although there is no way to avoid the frustration and anxiety that is inherent in any client going through the immigrant visa waiver process, if the client knows what to expect, both from a process and timing perspective, he or she will hopefully find the process more tolerable than an applicant who has no idea what to expect.

Building Evidence to Support the Case

The viability of many immigrant visa waiver applications hinges on a finding of “extreme hardship.”²¹ Often, when a client first considers the concept of extreme hardship, they think that no such hardship exists in their case. With careful questioning by an experienced lawyer, facts can be elicited that can form the basis of a strong argument of extreme hardship. Winning strategies for waiver cases can be built on information, such as health of the anchor relative, lifestyle, responsibility for care giving to the relative’s family members, financial status, career, and employment possibilities.

When submitting an application for an immigrant visa waiver, it is important to include supporting documentation which will corroborate your client’s assertions of hardship. Since the adjudication will ultimately be based on credibility of the evidence, it is critical to support each claim with as much empirical verification as you can.

Personal Statement of Anchor Relative

The anchor relative should submit a statement that specifies, in great detail, the extreme hardship that he or she would endure, if the waiver were to be denied. The anchor relative should “speak from the heart” in this statement, presenting an emotional appeal, but at the same time citing specific factual hardships that would result from a denial. Many anchor relatives feel anger and frustration and want to include expressions of these emotions in the personal statement, but these expressions should be heavily tempered or avoided altogether. A well-written personal statement of two to three pages which sets forth facts of extreme hardship in a compelling manner is much more persuasive than a rambling five- to 10-page expression of all the inequities of the family’s circumstances. If there is an anchor relative child, a handwritten letter can be extremely compelling.

Other Supporting Documentation

Careful consideration should be given to the most credible documentation that can be submitted to substantiate the anchor relative’s claim of extreme hardship. It is not enough to state that extreme hardship would be suffered. Each claim must be supported by independent and credible documentary evidence.

If, for example, the extreme hardship is based on a medical condition of the anchor relative, letters from treating physicians and medical records should be submitted. Information regarding access to medical care (or lack thereof) in the applicant’s home country should also be submitted. Do not overlook the fact that forced separation or relocation to another country will likely have psychological effects on the anchor relative. It is often advisable to have the anchor relative undergo a psychological evaluation and include the evaluation report as a supporting document. If a child is the anchor relative, or if the anchor relative spouse has children from the present or prior relationship, medical and psychological evaluations of the children are helpful in establishing extreme hardship for the parent. In almost every case presented abroad, a U.S. citizen will face the prospects of forced separation from a spouse or forced relocation to a foreign country, both of which will cause anxiety. This anxiety should be as well-documented as possible, with particular attention to the country where the applicant is residing.

Other supporting documentation may include country reports issued by DOS or an intergovernmental organization, expert opinions from criminal lawyers or information to establish the financial hardship that the anchor relative would suffer if the waiver were denied. If the anchor relative would not be able to obtain employment in the applicant’s home country, it is important to submit information to substantiate this claim.

²¹ See, e.g., INA §§212(a)(9)(B)(v), 212(h) & 212(i). It is critical to note and discuss with your client that a particular relative must suffer “extreme hardship.” This relative can be a U.S. citizen or lawful permanent resident (LPR) spouse or parent, or only in cases of an INA §212(h) waiver of criminal inadmissibility, a U.S. citizen or LPR child.

Tying Extreme Hardship to Local Country Conditions

When taking on a consular waiver case, lawyers are often in a unique position to access information regarding potential hardships because the applicant (and maybe even the anchor relative) is residing outside the United States. The U.S. citizen spouse of the waiver applicant may have already traveled abroad to be with the applicant while the case is pending. In these situations, the anchor relative is already aware of the difficulties of living abroad as a U.S. citizen and it is imperative to put that local knowledge to use.

Be creative in defining hardship according to the country and the locality. Ask the anchor relative and the applicant about hardship-inducing local laws or procedures. Are there any local conditions affecting particular religions or ethnic/racial groups? Are local education and health standards adequate? Treat DOS country reports as only a start; in other words, even though local laws or conditions do not amount to a violation of human rights, they may cause extreme hardship to the anchor relative. Examples of these conditions include:

- *Local laws on work authorization for the anchor relative.* The right to work is fundamental and being unable to work is a very persuasive hardship factor. Many countries, including Turkey, do not grant work authorization to a foreigner by virtue of being married to a local national. If that is the case, do not assume it is easy for a U.S. citizen to obtain a work permit through another category. Some countries make obtaining work permits nearly impossible and may even have an outright ban for certain professions (particularly licensed professionals, such as lawyers, teachers, doctors, etc.) If this is the case, submit the denial notice for the work permit application as hardship evidence.
- *Local laws on social issues (e.g., head scarves).* Some countries, even in Europe, may ban certain practices that would be legal in the United States. For example, countries such as France, Russia, Tunisia, and Turkey ban the wearing of a headscarf to varying degrees. If the anchor relative is a devout Muslim for whom wearing a headscarf is a religious mandate, being legally unable to do this would clearly be a tremendous hardship. In these cases, you should consider submitting a detailed explanation of the laws and how that ban affected your client, including discrimination in obtaining employment and prohibition on attending schools of higher education.
- *Access to local religious institutions.* Not all countries have the breadth of religious institutions that exist in the United States. If the anchor relative practices a religion for which there is no local organization, this may add to his or her extreme hardship. A letter from the anchor relative's priest/rabbi/imam where he or she had practiced in the United States would be important. Some countries even legally ban religious meetings of groups that are not registered with local authorities. In certain countries in the Middle East, meeting and praying as a member of an unrecognized religion, or merely talking such a religion to a local may be an administrative or criminal violation.
- *Complete loss of career options for anchor relative.* Aside from the impossibility of obtaining work authorization in some countries, many countries have not developed certain professions to the level of the United States. In these situations, anchor relatives who are professionals in fields, such as specialized medicine, finance or investment, high technology, might stand to completely abandon their career if they were to reside in the applicant's home country. If the anchor relative were forced to give up their profession, this might be an extreme hardship.
- *Discrimination based on race/ethnicity/nationality.* Countries that are extremely nationalistic or racially homogeneous may pose great hardship to anchor relatives. In these cases, be sure to describe any discrimination experienced in the relative's personal statement and also cite to any blatantly discriminatory laws or practices in the country.

As illustrated by the above examples, the main point is to be creative and describe the effect of local conditions on the anchor relative. Although no single factor may be determinative, your waiver application will stand out for these personalized hardship claims and taken cumulatively, these may meet the extreme hardship requirement.

CONCLUSION

The key to success in waiver practice outside the United States is familiarity with local practices and conditions. First, get to know the receiving U.S. consular post and the protocol in determining inadmissibility.

Research and understand local laws that may affect inadmissibility in the case. Second, manage the client's expectations adequately for processing their visa application outside of the United States. Prepare the application and supporting documentation with a particular focus on local country conditions that would cause hardship to the anchor relative abroad. Most importantly, be creative, flexible and resourceful throughout the process. Although waiver cases abroad are not easy, they are rewarding and engaging because they present so many opportunities to learn about different countries and different interpretations of U.S. immigration law.