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***RETURNING TO THE UNITED STATES FOLLOWING REMOVAL:  
A GUIDE TO NON-IMMIGRANT VISAS***<sup>1</sup>

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**I. Introduction**

Hundreds of thousands of people are deported from the United States every year. Most are unable to return to the United States on an immigrant visa, due to a variety of factors. Some lack a way to obtain a new immigrant visa, and others face grounds of inadmissibility for which they are unable to obtain a waiver.

In some cases, however, a *non-immigrant* visa may provide a way for a person to return to the United States following removal. If the applicant is able to meet the general requirements for such a visa, a waiver of inadmissibility may be sought under Section 212(d)(3) of the Immigration and Nationality Act (“INA”). Non-immigrant waivers are available for a broad range of inadmissibility grounds. Under certain circumstances, even an applicant with a “lifetime bar” (for example, a former lawful permanent resident deported due to an aggravated felony conviction) may obtain such a waiver.

This Practice Advisory discusses the legal standard for obtaining a waiver of inadmissibility in conjunction with a non-immigrant visa and practical tips for navigating the application process.

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Although much of the information contained here applies to any applicant with potential grounds of inadmissibility, this advisory focuses in particular on individuals with prior removal orders.

## **II. Non-Immigrant Waivers**

For a non-citizen who has been removed from the United States and who is not a citizen of Canada,<sup>3</sup> returning to the United States on a non-immigrant visa is a three-step process.

### **Step 1: Meet Basic Visa Requirements**

Before the consulate will consider any inadmissibility waiver issues, an applicant must establish that he or she is otherwise eligible for the particular visa being sought. Some non-immigrant visas, such as student or employment visas, require applicants to meet a long list of requirements. Others, such as an H-1B visa, require a prospective employer to file a petition which must be approved before an applicant can apply for the visa. Most non-immigrant visas also require “non-immigrant intent,” which can be difficult for a deportee to establish (see below). General information about visas is available at [http://travel.state.gov/visa/visa\\_1750.html](http://travel.state.gov/visa/visa_1750.html), and statistics about visa issuance rates can be found at [http://travel.state.gov/visa/about/report/-report\\_1476.html](http://travel.state.gov/visa/about/report/-report_1476.html). We strongly advise practitioners to think hard about these eligibility issues in advance, before turning attention to the waivers discussed below. Cases such as these invite close scrutiny at all levels.

In most cases, an applicant will appear at the consulate for a scheduled visa interview after electronically completing a visa application.<sup>4</sup> At the interview, the applicant will have to establish eligibility for the particular visa. The statutory definitions of certain common non-immigrant visa categories, such as B (visitors) and F (students) require proof of “a residence in a foreign country which [the applicant] has no intention of abandoning.”<sup>5</sup> In addition, INA 214(b) specifies that applicants for most types of non-immigrant visas are presumed to have the intention to immigrate to the United States.<sup>6</sup> Applicants may seek to overcome this presumption by showing that they have strong ties to the country in which they are currently residing (for example: steady employment, family ties, property ownership). They must have a credible narrative that demonstrates a plan to return after a short visit to the U.S., consistent with the non-immigrant visa they seek.

A person who has been removed from the United States will likely find it difficult to overcome the presumption of immigrant intent. Former lawful permanent residents often have extensive ties to the United States, including close family members, and will have to persuade the consular officer that they have equally strong ties to the country of residence. Indeed, the closer a person’s ties are, and the greater their equitable case for a waiver might be, the harder it may be

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<sup>3</sup> The procedure for Canadian citizens is described on page 8.

<sup>4</sup> Applicants/attorneys should consult the website of the particular consulate for guidance on local procedures. A guide to consulate websites can be found at <http://www.usembassy.gov/>.

<sup>5</sup> See, e.g., INA § 101(a)(15)(F). Treaty-based non-immigrant visas – E, TN, and H-1B1 – require only that the applicant show an intent to leave the U.S.; they do not require proof of a foreign residence.

<sup>6</sup> See below for a discussion of “dual intent” visas.

to overcome the presumption of immigrant intent. Those who previously entered the United States without inspection or overstayed a visa will also have to persuade the consular officer that they will abide by the terms of their visa.

At the interview, the consular officer will make an on-the-spot assessment of whether the applicant has established non-immigrant intent – generally after speaking with the applicant for just a few minutes. If the officer denies the application on these grounds, the request for a waiver of inadmissibility will not even be considered. It is therefore extremely important for the applicant to provide compelling evidence of non-immigrant intent at the interview. Applicants should bring to the interview any documents showing ties to the country of residence, including proof of employment; recent bank statements; documents showing ownership of property; birth certificates, marriage certificates, school records, and other documents showing family ties in the country of residence. Depending on timing, a specific U.S. itinerary and a round-trip ticket may be helpful, too.

Consular officers may or may not be willing to look at supporting documents relating to non-immigrant intent. It is therefore very important for the applicant to be prepared to make a credible and persuasive statement at the interview regarding his or her intention to return to the country of residence.

All visa denials are reviewed by a consular supervisor, and an applicant may submit additional evidence to overcome a denial. Attorneys may seek an advisory opinion on any legal issue by sending a request to [Legalnet@state.gov](mailto:Legalnet@state.gov).

***Practice Tip: Dual Intent Visas***

H-1B visas (skilled workers) and L visas (intra-company transfers) are “dual intent” visas and are exempt from the requirement that an applicant show non-immigrant intent.<sup>7</sup>

These visas are difficult to obtain and most applicants will not be eligible for them.

However, for someone who is ineligible for an immigrant visa and cannot establish non-immigrant intent due to a large number of immediate family members or other strong ties to the United States, a dual-intent visa may be worth serious consideration.

***Practice Tip: Departure Bonds***

Federal regulations permit a consular officer to require the posting of a bond to ensure that an applicant for a non-immigrant visa complies with the terms of the visa.<sup>8</sup>

However, it is current DOS policy to employ such bonds rarely, if ever.<sup>9</sup> Thus, while an applicant may offer to post such a bond, it is unlikely to have any influence on the outcome of the application.

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<sup>7</sup> INA 214(b); 22 C.F.R. § 41.11. K and V visas are not subject to the presumption of immigrant intent. However, such visas require an applicant to meet the standard for an immigrant visa waiver of inadmissibility, rather than the waiver standard discussed in this Practice Advisory.

<sup>8</sup> 22 C.F.R. § 41.11(b)(2).

<sup>9</sup> 9 FAM 41.11 PN 1.1.

## Step 2: Obtain Consular Recommendation for Waiver

Once an applicant has met the requirements for a particular visa, the consular officer will consider the applicant's admissibility under INA § 212. For those who have been removed from the United States, the most common grounds of inadmissibility include:

- a previous removal order (§ 212(a)(9)(A))
- criminal grounds (§ 212(a)(2))
- fraud or misrepresentation (§212(a)(6))
- previous unlawful presence in the United States (§212(a)(9)(B))

Applicants should bring to the visa interview all documents relating to potential grounds of inadmissibility, including removal orders and other documents relating to removal proceedings,<sup>10</sup> and certified dispositions of all criminal convictions from all jurisdictions.

Virtually all grounds of inadmissibility (with the exception of those related to terrorism and national security) can be waived for the purposes of a non-immigrant visa. Section 212(d)(3) of the INA permits the Department of Homeland Security<sup>11</sup> to grant a nonimmigrant visa to an applicant who has been recommended for temporary admission by the Secretary of State or by a consular officer. The factors to be considered, as established in the 1978 Board of Immigration Appeals case, *Matter of Hranka*, are 1) the risk of harm to society if the applicant is admitted; 2) the seriousness of the applicant's prior immigration law, or criminal law, violations; and 3) the nature of the applicant's reasons for wishing to enter the United States.<sup>12</sup> An applicant does not need to show a particularly compelling reason for visiting the United States. An ordinary reason (such as visiting a family member or conducting business) is sufficient.<sup>13</sup>

The Foreign Affairs Manual ("FAM") instructs consular officers to recommend such waivers liberally:

**You should not hesitate to exercise this authority [to recommend a waiver] when the alien is entitled to seek waiver relief and is otherwise eligible for a visa, and when the granting of a waiver is not contrary to U.S. interests.** The proper use of this authority should serve to further our immigration policy supporting freedom of travel, exchange of ideas, and humanitarian considerations, while at the same time ensuring, through appropriate screening, that our national welfare and security are being safeguarded.<sup>14</sup>

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<sup>10</sup> These documents may be requested from the Executive Office for Immigration Review ("EOIR") under the Freedom of Information Act ("FOIA"). For further information, see <http://www.usdoj.gov/eoir/efoia/mainfoia.html>.

<sup>11</sup> Although the statute says that the authority resides with the Attorney General, this authority has been transferred to the Department of Homeland Security pursuant to the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135

<sup>12</sup> *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978).

<sup>13</sup> *Id.*

<sup>14</sup> 9 FAM § 40.301, N3 (emphasis added).

The FAM also makes clear that an applicant need not show extraordinary circumstances:

Eligibility for such a waiver is not conditioned on having some qualifying family relationship, or the passage of some specified amount of time since the commission of the offense, or any other special statutory requirement. The law does not require that such waiver action be limited to exceptional, humanitarian or national interest cases. Thus, while the exercise of discretion and good judgment is essential, generally, consular officers may recommend waivers for any legitimate purpose such as family visits, medical treatment (whether available abroad), business conferences, tourism, etc.”<sup>15</sup>

However, it should be noted that waivers are highly discretionary; therefore, more compelling reasons for a visit may be powerful factors in the applicant’s favor.

There is no special application form for the waiver and no application fee. It is strongly recommended, however, that the applicant bring to the interview a concise (1-2 page) cover letter requesting the waiver and highlighting the facts that support the favorable exercise of discretion, along with originals and photocopies of all relevant supporting documents. Applicants should also bring letters of support from members of the community that attest to the applicant’s ties to the country of residence and, for applicants with prior criminal convictions, to the person’s rehabilitation and good character.

As noted above, consular officers may or may not look at supporting documents. It is therefore extremely important for the applicant to be prepared to explain the circumstances that led to the prior removal or to any other grounds of inadmissibility, and to discuss life changes (such as overcoming a drug addiction, establishing a new career, starting a family) that will persuade the consular officer that such circumstances will not occur again.

***Practice Tip: Know Your Consulate***

Each consulate has its own way of doing things. If you do not have prior experience with a particular consulate, it is highly recommended that you consult the Visa Processing Guide published by the American Immigration Lawyers Association (AILA). AILA members should also take advantage of the AILA mentoring system and contact AILA attorneys who have identified themselves as having experience with the consulate in question. It is also sometimes possible to contact a consulate directly and speak with a consular office there in advance about any special requirements or procedures.

***Practice Tip: Cover letters***

Generally speaking, a cover letter for a non-immigrant visa waiver application in cases requiring proof of “non-immigrant intent” should have a very different emphasis from a cover letter submitted with a waiver application for an immigrant visa. In particular, such letters should *not* emphasize chronic hardship experienced by the applicant’s family members in the United States, since the need for the applicant’s presence in the United States may lead the consulate to question whether the applicant has non-immigrant intent. Rather, the emphasis should be on the evidence that the applicant will not be a harm to

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<sup>15</sup> 9 FAM § 40.301, N3.

the United States; on the applicant's rehabilitation (if the applicant has a criminal record); and on the applicant's ties to the country of current residence. One exception to this rule is that compelling, temporary, time-specific needs relating to family members (for example, an applicant's desire to see an elderly or seriously ill family member who cannot travel) are appropriate to include.

The consular officer will inform an applicant at the time of the interview whether the consulate will recommend a waiver. If so, the consulate will transmit the waiver application to the Department of Homeland Security (see Step 3, below). The consular officer may recommend a waiver for a maximum period of one year, with multiple entries.<sup>16</sup> For a first-time applicant, however, it is likely that the consulate will recommend a single-entry of shorter duration.

If the consular officer declines to recommend a waiver, the applicant has the right to request that the consulate forward the waiver request to the Department of State ("DOS") for review.<sup>17</sup> DOS has independent authority to submit waiver recommendations to DHS.<sup>18</sup> A denial by DOS is not administratively reviewable and judicial review is also extremely unlikely to be successful.

### **Step 3: Adjudication by the Department of Homeland Security**

If the consular officer recommends a waiver, the consulate will transmit the waiver request to the DHS Admissibility Review Office ("ARO") in Virginia.<sup>19</sup> This process is done electronically, via the Admissibility Review Information Service, and therefore an applicant's supporting documents and cover letter are not forwarded to DHS.

The ARO adjudication will be based on the *Matter of Hranka* factors: 1) the risk of harm to society if the applicant is admitted; 2) the seriousness of the applicant's prior immigration law, or criminal law, violations; and 3) the nature of the applicant's reasons for wishing to enter the United States.<sup>20</sup>

The ARO reports that in the vast majority of cases, processing time for waiver applications that have received consular recommendations is less than thirty days.<sup>21</sup> However, applicants with complex inadmissibility issues may encounter a 2-4 month adjudication period. The consulate

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<sup>16</sup> Where an applicant seeks a waiver for more than one year, the case must be referred to the Department of State for a recommendation prior to adjudication by the ARO, except in cases in which the applicant has already been granted at least two year-long waivers and the case meets other specifications. *See* 9 FAM 40.301 PN 6.2-3.

<sup>17</sup> 9 FAM 40.301 PN 1(b).

<sup>18</sup> 9 FAM 40.301 N 6.2.

<sup>19</sup> 9 FAM 40.301 PN1(a). NB: The information regarding the application process that appears in 8 C.F.R. § 212.4 is out of date and reflects an earlier era when applications were forwarded to regional Department of Justice offices overseas.

<sup>20</sup> *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978).

<sup>21</sup> Information reported by Michael D. Olszak, Director, Admissibility Review Office and John Klow, Program Manager/Chief Lead, Admissibility Review Office, at the American Immigration Lawyers Association Fall 2008 Conference, Savannah Georgia, Sept. 26, 2008.

will inform the applicant of the ARO's decision. There is no means to expedite a waiver request. Status inquiries may be sent to the ARO at [attorneyinquiry.waiver.aro@dhs.gov](mailto:attorneyinquiry.waiver.aro@dhs.gov).

The ARO reports an approval rate of 92% of cases in which consular recommendations have been received. In reality, the approval rate is probably somewhat higher, since the "non-approval" category includes cases in which the ARO determines that the person is not actually inadmissible and therefore does not need a waiver.<sup>22</sup>

A denial by the ARO may be appealed to the Board of Immigration Appeals.<sup>23</sup>

***Practice Tip: Subsequent Entries***

For those granted a single entry visa, a subsequent visit to the United States will require an entirely new visa application and waiver request. Once a waiver has been recommended, however, it is likely that subsequent requests will be approved, if circumstances have not changed and the applicant has complied with the terms of the previous visa. The consulate is instructed by the Foreign Affairs Manual to recommend a waiver "unless there is new derogatory information, a material change in the purpose of their trip, or some other material change in circumstances relevant to the factors to be considered under 212(d)(3)(A)."<sup>24</sup> In addition, adjudication by the ARO of subsequent applications should be relatively fast. FBI name checks obtained by the ARO are maintained indefinitely; thus, subsequent waiver requests will be processed by the ARO without the need to wait for a response from the FBI if there is evidence of a completed name check in the record.<sup>25</sup>

***Practice Tip: Changing from One Visa Status to Another***

Nonimmigrant waivers are specific to the visa category for which they were issued and therefore cannot be transferred from one nonimmigrant category to another. Someone who changes visa status from within the U.S. may remain and work in the U.S. as authorized by the change of status since the waiver relates to admissibility, but will not be able reenter the U.S. under the original waiver following a departure.<sup>26</sup>

### **III. Non-Immigrant Waivers for Canadians**

In most cases, Canadian citizens do not need visas for temporary visits to the United States.<sup>27</sup> Their waiver cases therefore fall under INA § 212(d)(3)(A)(ii) rather than § 212(d)(3)(A)(i).

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<sup>22</sup> *Id.*

<sup>23</sup> 8 C.F.R. § 1003.1(b)(6).

<sup>24</sup> 9 FAM 40.301 N 6.4.

<sup>25</sup> See "Admissibility Review Office Advises AILA on New FBI Name Check Procedure," AILA InfoNet Doc. No. 05050977 (posted May 9, 2005)

<sup>26</sup> See "Bednarz Letter," AILA InfoNet Doc. No. 94031791 (posted Mar. 17, 1994)

<sup>27</sup> Canadian landed immigrants, and Canadian citizens who require visas (i.e., K and E-visa applicants) fall under the process outlined in Part II, and should request a waiver of inadmissibility at a U.S. consulate.

Although the substantive standard for obtaining a waiver of inadmissibility is the same for Canadian citizens, the application process is quite different.

Waiver applications by Canadian citizens may be filed in person at ports of entry (“POEs”) along the U.S.-Canadian border; at “preclearance centers” in a number of Canadian cities; and in some cases by mail. A complete list of locations, along with detailed information about application procedures, can be found on the Customs and Border Patrol website at [http://www.cbp.gov/xp/cgov/travel/id\\_visa/indamiss\\_can\\_info.xml](http://www.cbp.gov/xp/cgov/travel/id_visa/indamiss_can_info.xml).

Application requirements may vary among the different locations, so applicants are advised to check local requirements. One example of required documents (from the Vermont POE) is as follows: Form I-192 (Application for Advance Permission to Enter as a Non-Immigrant) along with filing fee of \$545; Form G-325 (Biographic Information); fingerprint cards from the Royal Canadian Mounted Police; certified copy of criminal record; proof of Canadian citizenship; two letters from reputable members of the community attesting to the applicant’s good character; a letter from the applicant’s current employer indicating occupation and length of employment; a letter from the applicant explaining the circumstances leading to the inadmissibility; and, for those seeking admission for medical reasons, a description of the treatment sought, financial arrangements for the treatment, and why the treatment cannot be obtained outside the U.S. Forms I-192 and G-325 may be downloaded from the USCIS website or obtained from the place where the application will be submitted.

Regardless of where an application is filed, it will be adjudicated by the Admissibility Review Office. As of this writing, waiver applications filed by Canadian citizens are taking 4-6 months to adjudicate. Status inquiries may be sent to the ARO at [attorneyinquiry.waiver.aro@dhs.gov](mailto:attorneyinquiry.waiver.aro@dhs.gov).

A denial by the ARO may be appealed to the Board of Immigration Appeals.<sup>28</sup> In addition, a person who is denied a waiver at a port of entry may seek to renew the waiver request in removal proceedings before an Immigration Judge.

***Practice Tip: Form I-212***

Those who are inadmissible based on a prior removal order (INA § 212(a)(9)(A)) and seek to return to the United States on an *immigrant* visa must file Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. This application should *not* be necessary for someone who seeks to enter as a *non-immigrant*, because a waiver under § 212(d)(3) will overcome § 212(a)(9)(A) as well as most other grounds of inadmissibility contained in § 212(a). There are reports that some Canadians seeking waivers under § 212(d)(3)(A)(ii) have been required to submit Form I-212 instead of or in addition to Form I-192. If you encounter this issue, please contact the Post-Deportation Human Rights Project at 617-552-9261 or [pdhrp@bc.edu](mailto:pdhrp@bc.edu).

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<sup>28</sup> 8 C.F.R. § 1003.1(b)(6).