RETURNING TO THE UNITED STATES AFTER DEPORTATION

A Guide to Assess Your Eligibility

post-deportation human rights project

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1 INTRODUCTION[1]

This guide was written for people who were removed (deported) and who want to return legally to the United States. You should know that it is very difficult to return to the United States after deportation. It is not a realistic option for the majority of people, at least not for many years.

Some people can, however, successfully return to the U.S. This guide identifies the most common ways someone who has been deported can return, and provides basic information to allow you to assess your situation. If, after reading the information in this guide, you think that you might have a way to legally return to the U.S., please contact the Post-Deportation Human Rights Project for an assessment of your case and referrals or an experienced immigration attorney to assist you.[2]

This guide discusses:

- Returning to the U.S. permanently with an immigrant visa;
- Returning to the U.S. temporarily with a non-immigrant visa;
- Filing motions to reopen or reconsider your immigration case;
- Other limited protection and humanitarian alternatives.

If you are currently in removal proceedings or if you are still living in the U.S., this guide is not intended for you. You can obtain guides on defenses to removal from other organizations, including the Florence Project (www.firrp.org) and Casa de Maryland (www.casademaryland.org) and you should contact a qualified immigration attorney or non-profit organization to assist you throughout your removal proceedings.

***WARNING:* This guide provides general information about immigration law and is not legal advice. It is not a replacement for legal advice from a trained attorney. Many of the questions discussed here involve complicated areas of the law, and answers will depend on the particular details of your case. In addition, immigration laws and regulations change frequently. By the time you read this, some of the information may no longer be accurate. We strongly recommend that you consult with a qualified immigration attorney licensed to practice law in the United States before filing any application to return to the U.S.**

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[1] This guide was prepared by the Post-Deportation Human Rights Project (PDHRP), a non-profit legal project based at the Center for Human Rights and International Justice at Boston College.

[2] Beware of individuals that offer their assistance but who are not licensed attorneys. They sometimes use the title "notario" or "immigration consultant," but they are not authorized to practice law in the United States. The process of returning to the United States after deportation is complex, and you should only rely on the assistance of a licensed attorney.

IMPORTANT! It is **illegal to re-enter the U.S. without permission**. If you have previously been ordered removed and you enter or attempt to enter without permission, the government can quickly deport you again without giving you the opportunity to see a judge. This process is called **reinstatement of removal**. Generally, you will be able to see an immigration judge only if an immigration officer finds that you are afraid of being persecuted or tortured in your country.

IMPORTANT! Entering the United States without authorization can also have **criminal consequences**, including **fines** and **jail time**.

2 WAS I ORDERED REMOVED (DEPORTED)?

It is important to find out whether you had an order of removal when you left the United States. The type of order you had when you left can affect which options are available to you now. You may have been given a "removal order" or granted "voluntary departure." (If you were put into immigration proceedings before April 1, 1997, you might have a "deportation" or "exclusion" order. Check with an immigration attorney to see if this distinction makes a difference in your case). If you were granted voluntary departure by the immigration authorities or an immigration judge (meaning you were given a date by which to leave the U.S. and you paid for your own ticket back to your country), you do not have a removal order if you left by the deadline set by the immigration authorities or the immigration judge. However, if you did not leave by the deadline, your voluntary departure order turned into an order of removal.

You should be able to find out if you had an order of removal by calling the automated immigration court hotline at 001 (800) 898-7180 where you can listen to recordings. This hotline will only have information about you if you were in proceedings in immigration court. Press 1 for instructions in English or press 2 for instructions in Spanish. Enter your "A number," which is the 9 digit "alien registration" or file number that should be on every document you received from immigration (if your number only has 8 digits, enter 0 first, followed by your number). Press 1 to confirm you entered the numbers correctly and press 1 again to confirm if you hear the system spell your name. You will reach a menu with a few options. Press 3 to get information about the status of your case, including when and where an Immigration Judge or the Board of Immigration Appeals (BIA) ordered you removed. The hotline will not have any information on motions to reopen or reconsider, or on appeals filed with the federal Circuit Court.

3 HOW CAN I GET A COPY OF MY IMMIGRATION AND CRIMINAL RECORDS?

You should get copies of your immigration records and documents related to your criminal history (if you have one) to assess your options for returning to the U.S.

[A] IMMIGRATION COURT RECORDS

To get a copy of your immigration court file, send a letter to the Executive Office for Immigration Review (EOIR). A sample letter, which shows the EOIR address, is included as Appendix B. Your request must be in writing and include your original signature. EOIR keeps records related only to your proceedings in Immigration Court and the Board of Immigration Appeals. Your EOIR file will not include applications for visas, adjustment of status, or any appeals to federal court. If you were ordered removed by an immigration (ICE) officer through the process of "expedited removal," "administrative removal," or "reinstatement of removal" and never saw an immigration judge, or if you signed an order of removal and did not go to immigration court, you might not have an EOIR record.

TIMING: In most cases, you will receive your file within one or two months.

FEE: There is no fee if your file contains less than 100 pages, and most cases do not require a fee. If your file is more than 100 pages, there is a ten cent fee per page. By submitting your request, you are agreeing to be responsible for charges of up to $25.

[B] U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) RECORDS

Your USCIS file will include any documents you filed with USCIS or the former INS, such as applications for visas and adjustment of status. Submit Form G-639 to make your request. You can print out Form G-639 by visiting: www.uscis.gov/files/form/g-639.pdf. If you are outside the U.S., your request must be signed by you at the very bottom of page 2 of the form under the paragraph titled "Executed outside the United States."

You can either e-mail or mail your request to USCIS. An e-mailed request must include a scanned copy of your original signature as an attachment. E-mail requests to: uscis.foia@dhs.gov. Mail requests to:

U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P. O. Box 648010
Lee's Summit, MO 64064-8010

TIPS FOR COMPLETING FORM G-639:
Section 1: Check "Freedom of Information Act."

Section 2: If you are filling out the form, you are the requester. If a family member is submitting this form on your behalf, they should fill in their personal information in this section. It's better if only family members with lawful U.S. status complete this section.

Section 3: If a family member is submitting the form on your behalf, write your name and sign in this section.

Section 4: Write "A copy of my complete alien file." You can also include the names of specific applications or forms that you previously filed with USCIS or INS if known (for example, a family petition or asylum application).

Section 5: Fill in your personal information. You must include your name, date of birth and A number in order for USCIS to locate and match your file to you. You may choose to provide or not provide other specific information.

Section 6: You do not need to check a box.

Section 7: Sign and date the form in this section. A family member CANNOT sign for you.

Section 8: If it is not possible for you to get the form notarized, sign instead at the bottom, where it says "Executed outside the United States."

TIMING: It can take several months to receive the file.

FEE: There is no fee if your file contains less than 100 pages, and most cases do not require a fee. If your file is more than 100 pages, there is a ten cent fee per page. By submitting your request, you are agreeing to be responsible for charges of up to $25.

[C] CRIMINAL RECORDS

If you have ever been arrested or have ever been charged with a criminal offense in the United States – even if you were never convicted – you should get a copy of your criminal history record, often called a "rap sheet." The record will show the section of the criminal law under which you were charged and the "disposition" (the final outcome) of each case, including what sentence you received. This information is very important in figuring out whether you can return to the United States.

State Criminal History Records

Every U.S. state has a different procedure for requesting criminal history records. For example, some states require your fingerprints. Some require the request form to be signed by you and notarized. Each state has a different fee. Certain states make criminal history records available online. Appendix C has links to the website of each state explaining how to request your criminal record.

A state criminal record will only show arrests and convictions from that state, so if you were arrested or charged with a crime in more than one state, you must get copies of your criminal history record from each state.

Federal Criminal History Records
If you were arrested or charged with criminal offenses in more than one state, or if you ever had federal charges brought against you, you may get a copy of your complete criminal history record through the Federal Bureau of Investigation (FBI). The FBI obtains its information from the individual state criminal justice agencies. It is better to get state records directly from the state when possible because the FBI records are sometimes incorrect or incomplete.

To get your FBI criminal background check, you must submit an Applicant Information Form, complete a set of fingerprints, and pay $18. You should contact your nearest U.S. Embassy or Consulate to arrange to have your fingerprints taken, as there is a special "fingerprint card" on which these must be done. The $18 payment may be by money order or cashier's check, made payable to the "Treasury of the United States," or by credit card using the FBI's Credit Card Payment Form. You can find more information at: http://www.fbi.gov/about-us/cjis/background-checks. The FBI may take up to 12 weeks to respond to your request. Send your request for an FBI background check to:

FBI CJIS Division – Record Request
1000 Custer Hollow Road
Clarksburg, WV 26306

4 CAN I COME BACK TO LIVE IN THE UNITED STATES PERMANENTLY?

If you have been ordered removed and have left the U.S., it will probably be extremely difficult to obtain permission to permanently return. In order to do so, you will need two things: an approved visa petition, and a waiver of inadmissibility. If you are applying to return to the United States permanently, you will be applying for an **immigrant visa (this is the same thing as a green card).** People who have been removed from the United States have unique challenges to overcome before they can get an immigrant visa.

[A] APPROVED VISA PETITION

There are two main ways to get an immigrant visa when you are outside the United States: family-based immigration and employment-based immigration.

This guide does not focus on **employment-based immigration**, but you should know that there are five categories of employment visas that lead to permanent resident status: [1] priority workers (which includes people with extraordinary ability in the sciences, arts, education, business, or athletics, researchers and professors, and multinational managers or executives; [2] professionals with advanced degrees or exceptional ability in the sciences, arts, or business; [3] skilled and unskilled workers; [4] certain special immigrants (including religious workers and foreign medical workers); and [5] foreign investors. For any of these categories, an employer must first submit a petition to USCIS and – for some categories – approval by the Department of Labor is also needed.

In **family-based immigration**, a sponsoring relative files a petition for you. Your relative must fit one of the following descriptions:

- If your sponsoring relative is a U.S. citizen, then that person can be your: spouse, son or daughter over the age of 21, parent, or brother or sister.
- If your sponsoring relative is a Legal Permanent Resident (LPR), then that person can be your: spouse, parent if you are under 21, or parent if you are 21 or older and not married.

If you are the spouse or child of a U.S. citizen, or the parent of a U.S. citizen who is 21 or older, a visa will be available quickly. For all others, the wait-time after the petition is filed can be many years.

If you have a U.S. citizen fiancé(e), he or she can also file a petition for you to get a fiancé visa (also called a K visa). This is not an immigrant visa, but many of the requirements are similar.

> ***Example:*** *Maria was deported to the Philippines. She has a husband in the U.S. who is undocumented. She also has a 7-year-old daughter who is a U.S. citizen. Maria really wants to return to the U.S. to watch her daughter grow-up. She has no other family in the U.S. Can she get a family sponsored immigrant visa to live permanently in the U.S.?*
>
> *Answer: No. Maria does not have a U.S. citizen or LPR relative that can sponsor her for a visa. Her daughter may be able to file a petition for her when her daughter reaches the age of 21.*

[B] WAIVERS OF INADMISSIBILITY

Having a family-member to sponsor you is only part of the puzzle. Another important step in the family-based immigration process is your interview at the U.S. embassy or consulate in your country. You will meet with a Consular Officer who will decide if you are eligible for a visa by determining if there is anything in your past that makes you "inadmissible." A finding of inadmissibility means that you are ineligible for a visa. If inadmissible, you will not be given a visa to enter the U.S. unless you are eligible for and granted a "waiver." Requesting a waiver is like asking for special permission.

There are many different things – immigration violations, medical conditions, criminal activity, political activity, and more – that can make you inadmissible. **You will need to get a waiver approved for each inadmissibility reason that applies to you.** The four most common types of inadmissibility you should be aware of are:

- having been removed (deported)
- having criminal convictions
- having been in the U.S. unlawfully
- having committed immigration fraud

Unfortunately, some types of inadmissibility can never be waived.

[1] Inadmissibility Based on a Past Deportation

The Problem
The fact that you were ordered removed and that you left the U.S. – whether through deportation or on your own – makes you ineligible for a visa for a certain period of time. The general rule is that if you are deported, you are not eligible to return to the United States for 10 years. However, different periods of time may apply depending on your situation.

How Long Will I Be Ineligible for a Visa?
The chart below shows the most common scenarios. You will be ineligible for a visa for the longest period of time that describes your situation, but you can request a waiver to try to come back before your ineligibility period is finished (see the next section).

5 years (but you can request a waiver)	**10 years** (but you can request a waiver)	**20 years** (but you can request a waiver)	**Permanently ineligible** (but you can request waiver after 10 years)
• You were put into expedited removal proceedings (without seeing an Immigration Judge) at the border, near the border, or at a seaport or airport; OR • You were a lawful permanent resident with a criminal conviction and you were put in removal proceedings when you returned from a trip abroad.	• You were ordered removed by an Immigration Judge; OR • You left the U.S. on your own while you were in immigration court proceedings; OR • You left the U.S. after the Immigration Judge ordered you removed "in absentia" (without you attending the hearing).	• You have been removed from the U.S. more than once.	• You were removed from the U.S. because you were convicted of an aggravated felony (but you can request a waiver); OR • You were deported and then you reentered or tried to reenter the U.S. without permission (but you can request waiver after 10 years); OR • You reentered or tried to reenter the U. S. after previously having been in the U.S. unlawfully for a total of more than one year (but you can request waiver after 10 years).

Can I Do Anything to Come Back Earlier?
If you are trying to get an immigrant visa during the period of time that you are ineligible, you may request an "I-212 waiver."

You can generally submit an I-212 application at any time. However, your application will probably be stronger if a few years have gone by since your removal. If you are subject to the permanent bar because you were deported and then you reentered or tried to reenter the U.S. without permission, or you reentered or tried to reenter the U. S. after previously having been in the U.S. unlawfully for a total of more than one year, you can only apply for an I-212 waiver after you've been out of the country for 10 years.

If your I-212 is denied, you have the option of waiting outside the U. S. for the 5, 10 or 20 years that apply to you before applying for a visa to return. After the applicable period, you will no longer be inadmissible on this ground and you will not need to submit an I-212 application. You cannot, however, "wait out" the permanent bars.

USCIS will look at all of your circumstances in deciding whether you should be given an I-212 waiver to return to the U.S. The factors they will consider include:

- Your moral character
- How much time has gone by since your removal (more time is better)
- The need for your employment or other services in the U. S.
- The length of time you previously lived in the U. S.
- Your respect for law and order
- Evidence that you have been rehabilitated if you have a criminal record
- Your family responsibilities
- Your inadmissibility under other sections of law
- The hardship to you and to others that would result from not letting you return

An attorney can help you decide what specific evidence is necessary to support an I-212 application. There are many important requirements and filing procedures that are not discussed here.

[2] Inadmissibility Based on Crimes

The Problem
Your criminal history can make you inadmissible. Even if you were not convicted, formally admitting to acts that make up certain crimes can still make you inadmissible. It may not matter if the crimes took place in the U.S. or in another country. And, it may not matter if the crime took place many years ago. If your conviction was vacated, it is possible that immigration can no longer use it to find you inadmissible.

Which Crimes Make Me Ineligible for a Visa?

Crimes Involving Moral Turpitude (CMT): In general, *committing or admitting to committing* (see the definition of "admission" in the glossary) one CMT will make you inadmissible. However, there are two exceptions.

- Petty Offense Exception: If you only have one CMT, it will not make you inadmissible if: the *maximum possible sentence* for that crime was not more than one year, AND the *sentence you actually received* was 6 months or less (this includes a suspended sentence). To figure out the maximum possible sentence for your crime, check your state's criminal laws or consult with an attorney.

- Juvenile Exception: A CMT will not make you inadmissible if: you were under 18 years old when you committed the crime, AND the crime occurred more than 5 years before you applied for a visa to the United States.

Drug Crimes: You are inadmissible if you *committed or admitted to committing* a violation of any controlled substance law or regulation of the U.S. or another country. You are also inadmissible if there is "reason to believe" that you are or have been a drug trafficker (even if you don't have any trafficking convictions), or that you financially benefited in the past from the drug trafficking of your spouse or parent.

Multiple Criminal Convictions: You are inadmissible if you have been convicted of two or more offenses and the combined sentences (including suspended sentences) for the offenses added up to five years or more. These crimes can be anything, and do not have to be CMTs.

Other types of crime that can make you inadmissible: prostitution-related offenses, human trafficking, and money laundering.

> *NOTE*→ When calculating the length of a sentence for immigration purposes, you should include any time that was "suspended" (meaning that you did not actually have to serve in jail).
>
> *NOTE* → Many "aggravated felonies" are also CMTs or drug offenses, so even if you were not deported for a CMT, your conviction may still make you inadmissible.

Despite My Crime, Can I Become Eligible for a Visa?

If you were convicted of (or admitted committing) a crime that makes you inadmissible, you need to be granted a 212(h) criminal waiver to become eligible for a visa. It is difficult to qualify for a 212(h) waiver, and you should consult with an attorney. For a quick self assessment, follow this three step test:

Step 1: Determine Waiver Eligibility Based on Type of Criminal Offense
You cannot get a 212(h) waiver, and therefore will not be able to return to live in the U.S. permanently, if:

- You were convicted of or admitted to committing any drug crime other than a single offense for possession of 30 grams or less of marijuana; **or**

- You have been convicted of or admitted to committing murder or acts of torture.

Step 2: Rules for Former LPRs (green card holders)
Even if you are eligible under Step 1, there are additional rules that apply to people who used to be LPRs. If you have ever been an LPR, you generally cannot apply for a 212(h) waiver if:

- You were ever convicted of a crime classified as an **aggravated felony** under immigration law; **or**

- You did not lawfully continuously reside in the U.S. for 7 years before your removal proceedings began.

Step 3: Determine if you Satisfy Waiver Requirements
Even if you meet the requirements of Step 1 and Step 2, you will still need to establish one of the following to be granted a waiver:

- If the criminal activities happened more than 15 years ago or if you are inadmissible only due to prostitution offenses, you must show that: it would not be harmful to the U.S. to allow your return, AND you have been "rehabilitated." Being rehabilitated means that you are a productive member of society and you are no longer involved in criminal activity; **or**

- That not allowing you to return to the U.S. would result in "extreme hardship" to your husband, wife, parent, son or daughter who is an LPR or U.S. citizen (see information about extreme hardship in the box on p. 14); **or**

- You qualify as a "battered spouse" under certain provisions of the immigration laws.

If you were convicted of a "violent or dangerous" crime, you need to meet Steps 1, 2, and 3, and you also need to show additional "extraordinary circumstances" to be granted a waiver. This is an extremely difficult test to meet.

NOTE→ Even if you meet all the requirements in Steps 1, 2, and 3, the government can still decide not to grant you a waiver. USCIS has a lot of freedom in deciding to grant or deny waivers and will weigh all the positive facts against the negative facts in each case.

Example: *Ali lived in the U.S. as a lawful permanent resident for several years. He is married to a U.S. citizen and both of his children are U.S. citizens. Ali was removed to Turkey two years ago because of a shoplifting conviction that was categorized as an "aggravated felony" because he received a one year suspended sentence. Ali's wife has sponsored him for an immigrant visa and the visa petition has been approved. Will Ali be able to return through his wife's petition?*

Answer: Ali is inadmissible because his criminal conviction is also a crime of moral turpitude. He is not eligible to apply for a 212(h) criminal waiver because he is a former lawful permanent resident and he has been convicted of an aggravated felony. He cannot come back to live permanently in the U.S.

Example: *Michel, who was never a lawful permanent resident, was deported to Haiti. He would like to come back to the U.S. to be with his parents, who are U.S. citizens. Michel was twice convicted of simple possession of a very small amount of marijuana. He has never been brought to court for anything else in his life. Michel's mother has sponsored him for an immigrant visa and the visa petition has been approved. Will Michel be able to return through his mother's petition?*

Answer: No. Michel is not eligible for a 212(h) waiver because of his drug crimes. Though a single conviction for simple possession of 30 grams or less of marijuana can be waived, Michel has two drug convictions. He cannot come back to live permanently in the U.S.

[3] Inadmissibility Based on Unlawful Presence in the U.S.

The Problem

You may be inadmissible if you spent certain periods of time "unlawfully present" (present without permission) in the U.S. One common example of "unlawful presence" is if you crossed the U.S. border without permission and then stayed in the U.S. Another common example is if you entered with a visitor's visa and stayed beyond the time you were authorized.

How Long Will I Be Ineligible for a Visa?

It is important to count the weeks and even the days that you were in the U.S. unlawfully to know what the inadmissibility consequences will be.

- If you were unlawfully present in the U.S. for **more than 180 days but less than one year** AND you <u>left voluntarily before you were put in removal proceedings</u>, you have a **3 year bar to readmission.**

- If you were unlawfully present in the U.S. for **one year or more**, you have a **10 year bar to readmission**. In this case, it does not matter if you left voluntarily, had voluntary departure, or were deported.

> *NOTE* → "Unlawful presence" is also a problem if you reentered or tried to reenter the U. S. illegally after previously having been "unlawfully present" for a total of more than one year. If that is the case you have a "permanent bar." To figure out whether you have a permanent bar, you add up ALL the periods of unlawful presence you had before you reentered or tried to reenter illegally. See pages 8-9.

What Time Counts as Unlawful Presence?

In some situations, the time you spent inside the U.S. without permission will not count against you when adding up your days of unlawful presence. The rules are complicated, and are not explained in detail here. For example: time during which you were under 18 years old, time during which you had a good-faith asylum application pending, and time during which you were lawfully admitted as a nonimmigrant will generally not count against you. There is also a special exception for battered spouses and children. There are many more rules, and an immigration lawyer can help you accurately calculate your time of unlawful presence.

> *NOTE* → If you are in unlawful presence when you are put in immigration proceedings, your time in immigration proceedings continues to count against you.

Can I Do Anything to Come Back Earlier?

Having a 3 or 10 year bar is like a penalty. You either need to wait the 3 or 10 years, or you can request special permission to come back earlier. This is called an "unlawful presence waiver." Remember that if you were deported from the U.S. or left while you were under an order of deportation, you will also have a separate bar because of this (see p. 7-9).

To be eligible for the unlawful presence waiver, you need to show that not allowing you to return to the U.S. would cause "extreme hardship" to your husband, wife, or parent who is a U.S. citizen or LPR (see information about extreme hardship in the box on p. 14). Extreme hardship to a U.S. citizen or LPR son or daughter does not count, though you can argue that hardship to your children creates hardship for your spouse or your parents. If you qualify as a "battered spouse" you can show extreme hardship to a parent or child, as well as to yourself.

> ***Example**: Julia crossed the border without papers in 1998 and stayed in the U.S. for a year and a half. She returned to Mexico on her own in 2000, and then crossed the border again in 2002. In 2004, she married a U.S. citizen and had a child. In 2006, Julia was removed to Mexico. Julia's husband has sponsored her for an immigrant visa and the visa petition has been approved. Can Julia come back to be with her family?*

Answer: Julia is inadmissible because she illegally reentered the U.S. after being unlawfully present in the U.S. for more than a year. She is required to wait 10 years outside the U.S. after her removal before applying for an I-212 waiver. Julia is also inadmissible for 10 years because she has more than one year of unlawful presence. By the time she is allowed to apply for an I-212 waiver for an immigrant visa, however, she won't need an unlawful presence waiver because she will have already "waited out" her unlawful presence penalty.

WHAT IS "EXTREME HARDSHIP"?

To prove "extreme hardship," you must show that your family member is going to suffer more than the normal difficulties that come from being separated from a loved one. Showing hardship to yourself does not count. The normal experiences of financial difficulties or the challenge of moving to another country are usually not enough by themselves to establish "extreme hardship." You need to show hardship to your relative if you remain separated and hardship to your relative if he or she joins you in your country. Remember that different relatives will matter for different types of waivers.

Here are examples of some circumstances that, by themselves or when combined with others, can help you show extreme hardship, but every situation is different and there may be other circumstances in your case that can help you show extreme hardship.

- Your relative has a serious medical or psychological condition, or disability that cannot be properly treated in your home country, and this relative cannot live in the U.S. without you.
- Your relative cares for someone in the U.S. who is elderly or has a serious medical condition and that person cannot function without your relative's care in the U.S.
- Your relative has many close family members in the U.S., and he or she only has a few or no family relationships in your home country.
- Your country is experiencing active war or political turmoil that makes it very dangerous for your relative to move there.
- Your relative is the primary caregiver to children in the U.S. from a different partner, and the children's other parent will not allow them to move to your country.
- Your relative would have no job opportunities in your country because she/he has a profession or license that is very specific to the U.S. (such as a lawyer or doctor).
- Your relative's children would be very harmed by the poor public health and public education systems in your country.

NOTE → An immigration lawyer can help you decide what specific evidence is necessary to support a 212(h) criminal, unlawful presence, or fraud waiver application. There are many important requirements and filing procedures that are not discussed here.

For all waiver applications, it is important to provide as much proof of hardship as possible. After you show extreme hardship, an immigration officer will weigh all the favorable and unfavorable facts in your case in deciding whether to grant you a waiver. The officer will consider many factors, including your family and community ties, criminal history and rehabilitation, history of employment, and history of immigration violations.

[4] Inadmissibility Based on Misrepresentation or Fraud

The Problem
You may be inadmissible if you made a misrepresentation to a U.S. government official to get a visa or other document to enter the U.S. or to get any other immigration benefit. The misrepresentation must have been "material," meaning that you would not have been eligible for the visa or other benefit under the real facts, or that your misrepresentation made it so that the official was not able to discover facts that may have made you ineligible.

Despite My Fraud, Can I Become Eligible for a Visa?
You can apply for an immigration fraud waiver. You must show that not allowing you to return to the U.S. would create "extreme hardship" to your husband, wife, or parent who is a U.S. citizen or LPR (see information on proving extreme hardship in the box on p. 14). Extreme hardship to a U.S. citizen or LPR child does not count, though you can argue that hardship to your children creates hardship for your spouse or your parents. If you qualify as a "battered spouse" you can show extreme hardship to a parent or child, as well as to yourself.

[5] Inadmissibility that Cannot be Waived

Some inadmissibility problems cannot be waived. For example, if you are inadmissible for a criminal conviction that cannot be overcome with a 212(h) waiver, then you will not be able to get an immigrant visa.

Here are two more examples of activities that make you inadmissible and for which there is no waiver:

- **False Claim to United States Citizenship:**

You are inadmissible to the U.S. if you have falsely claimed that you were a U.S. citizen to obtain a benefit under any state or federal law. This is true even if you made this representation to someone who is not a U.S. government official (for example, your employer or your school). This is a very serious violation and there is no waiver available that would make you eligible for an immigrant visa. There is no period of time after which this ground of inadmissibility does not apply. Therefore, if the government determines that you made a false claim to U.S. citizenship, you will never be granted an immigrant visa.

There are three situations in which you may have a defense:

- If you made a false claim to citizenship, but then quickly took it back or corrected it before it was discovered and brought to your attention; or
- If you made the claim before September 30, 1996 you may be eligible for a waiver; or
- If you permanently resided in the U.S. before you turned 16, each of your parents are or were U.S. citizens, and you believed that you were a U.S. citizen too when you made the claim.

You should contact an attorney to help you in making these arguments if they apply to you.

- **You Did Not Attend an Immigration Hearing**

If you did not attend an immigration court hearing and the immigration judge ordered you removed *in absentia* (meaning in your absence), you are inadmissible for 5 years. You might not have this penalty if you had "reasonable cause" for not showing up. Reasonable cause can include serious illness or hospitalization, but traffic delays and getting lost are usually not enough. The five years begin counting from the time you are deported from or leave the U.S. During those five years, you are not eligible for a visa and there is no waiver available. After the five years, you will no longer be inadmissible on this ground, and you will not need a waiver of inadmissibility for your failure to appear (though you may still need a waiver for other reasons).

This ground of inadmissibility only applies to individuals who were in removal proceedings (meaning you received a Notice to Appear after April 1, 1997). It does not apply to people who were in deportation or exclusion proceedings (meaning you were placed into immigration proceedings before April 1, 1997). This ground of inadmissibility also does not apply if you can prove that you did not receive notice of the hearing date.

5 CAN I VISIT THE UNITED STATES?

You may want to visit the U.S. on a temporary basis with a **non-immigrant visa.** Examples of non-immigrant visas include tourist visas, student visas, and certain types of work visas. The same inadmissibility grounds apply when you're requesting a non-immigrant visa, but most inadmissibility grounds can be waived for a non-immigrant visa even if they cannot be waived for an immigrant visa.

To get a non-immigrant visa, you will need to do two things: 1) prove that you intend to return to your country of residence,[3] and 2) obtain a waiver of inadmissibility.

If you have been deported in the past, you need to follow these steps even if you live in a country where people are usually allowed to visit the U.S. without a visa.

[3] Certain types of visas that are technically "non-immigrant visas" can be granted to individuals who may also have immigrant intent (meaning the desire to immigrate permanently in the United States). These include the H, L, O, and P visa which are different types of visas for temporary workers. Each of these visas has different eligibility requirements. You can learn more about the different types of visas for temporary workers here: http://travel.state.gov/visa/temp/types/types_1275.html. If you qualify for one of these visas, you will not need to prove that you intend to return to your country of residence, but you will still need a waiver of inadmissibility if you are inadmissible.

[A] PROVING THAT YOU INTEND ON RETURNING TO YOUR COUNTRY

When you apply for a non-immigrant visa, you will be asked to attend an interview at a U.S. embassy or consulate in your country. At the interview, you must convince the officer that you are going to return to your country within the time limit you are given. This is called having non-immigrant intent. Demonstrating non-immigrant intent can be very difficult if you lived in the U.S. for many years, if you previously violated immigration laws, or if you have close family members (such as a spouse or young children) who are still in the U.S.

If you cannot convince the officer that you intend to return to your country, your visa application will be denied, and the decision cannot be appealed. You can, however, try again in the future.

You can show non-immigrant intent by showing that you have strong ties to your current country of residence. In most cases, it is easier to prove this if you have lived outside of the U.S. for a long time after your deportation.

Examples of ties to current place of residence include:

- Job;
- Owning a house, business, or other property;
- Bank account;
- Community ties;
- Family members who live with you and/or depend on you in your country of residence.

[B] WAIVER OF INADMISSIBILITY

Only if you convince the consular officer that you will return to your country will the officer look to see whether you are otherwise eligible for a visa. If the consular officer determines you are inadmissible, he will then consider you for a waiver of inadmissibility for non-immigrants, also called a 212(d)(3) waiver.

Almost every ground of inadmissibility (except for grounds related to terrorism and national security) can be waived when applying for a non-immigrant visa. This includes inadmissibility based on a removal order, criminal convictions (including an aggravated felony), unlawful presence, and grounds of inadmissibility that cannot be waived when applying for immigrant visas (such as false claims to U.S. citizenship and certain criminal grounds that cannot be waived for immigrant visas).

The office reviewing your request for a waiver will look at the following factors:

- Your reasons for wanting to visit the U.S.
- The risk of harm to the U.S. if you are allowed to visit
- The seriousness of your prior violations of criminal or immigration law

You do not need to show extreme hardship. In fact, such hardship might actually work against you. For example, if the consular officer thinks that there are family members in

the U.S. who cannot survive without you, your application may be rejected because the officer believes you intend to remain in the U.S.

6 MOTIONS TO REOPEN AND RECONSIDER

If you lost your immigration case and it is not on appeal, it may be possible, in very limited circumstances, to reopen your case even after you have been deported or otherwise left the U.S. Reopening your case means that the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA) – whoever had your case last – agrees to take another look at your situation and make a new decision. Reopening your case is different from appealing your case. **The information below applies to individuals who have already been deported or who have left the United States. If you are still in the United States and have been ordered removed and wish to reopen your case, different rules may apply.**

Motions to Reconsider and Motions to Reopen are different in their main purpose, though both ask the IJ or BIA to take another look at your case. A Motion to Reconsider can be filed when there has been a change in law or when the judge made a mistake in applying the law to your case. A Motion to Reopen can be filed when new facts or evidence that were not available at the time of the original decision are discovered.

The law gives you the right to file one motion to reconsider and one motion to reopen. A Motion to Reconsider must be filed within 30 days of the final decision ordering removal. A Motion to Reopen must be filed within 90 days of the final decision ordering removal. There are some exceptions to these limits that are discussed below. The IJ and the BIA can also decide to reopen a case at any time even if the motion was filed outside of these time and number limits. The IJs and the BIA rarely grant motions to reopen or reconsider and therefore most people who pursue this option will not obtain or regain any immigration status in the U.S.

If you filed a motion to reconsider or reopen while in the U.S. and you then left or were deported before the IJ or BIA made a decision on your motion, it is possible that your motion would be considered withdrawn based on decisions of the federal courts in different areas. If that is the case, no decision based on that motion will be made about whether your case deserves reconsidering or reopening.

If you have already left the U.S., filing a motion to reopen or reconsider is extremely difficult. In some areas of the country, federal courts have ruled that individuals who have departed the U.S. may not file motions to reopen or reconsider that are filed outside of the time and number limitations. If your case was in an area of the country where the federal courts have ruled this way, your motion will be denied.

At present, the federal Circuit Courts have different opinions about whether a person who has left the United States has the right to file a motion to reopen or reconsider, so the rule that will apply to your case will depend on where (in what immigration court) you were

ordered deported. This area of law is very complex and subject to change. **If you read the below material and you think you might have a good reason for filing a motion to reconsider or reopen, then contact the PDHRP or an immigration attorney licensed to practice in the U.S. These cases are extremely difficult, and it is strongly advisable that you pursue a motion only with the assistance of a licensed immigration attorney.**

Situations in Which a Motion Could be Appropriate:

(1) **Vacated Conviction:** Many people are deported because of criminal convictions. If the conviction that led to your deportation has been vacated by the criminal court, then you may be able to reopen your immigration case. (If your conviction has been vacated, this will also usually mean that your conviction will no longer make you ineligible for a visa. So, if you have a relative who can petition for you, you could be eligible for an immigrant visa.) However, the conviction must have been vacated because something went wrong in your original criminal court proceedings. For example, if your criminal attorney did not tell you about the immigration consequences of pleading guilty and your conviction was vacated because of that, a motion to reopen may be appropriate. Getting an automatic pardon after a certain period of time (unless the pardon is by the U.S. President or the governor), or getting the conviction expunged or vacated for immigration reasons or because you have rehabilitated is not enough. If you have not yet had a conviction vacated, but think you might have a reason to do so, a criminal attorney licensed to practice law in the state of your conviction can help you determine if you have a valid reason to vacate your conviction.

(2) **Ordered Removed *In Absentia* (in your absence):** If an immigration judge ordered you removed because you did not go to an immigration hearing, you may be able to reopen your case if you can show that there were "exceptional circumstances" for missing the hearing. "Exceptional circumstances" usually mean that you or an immediate family member were seriously ill, or there were similar serious circumstances that prevented you from going to your hearing. You may also be able to reopen if you did not attend your hearing because you did not receive notice of the hearing.

(3) **Change in Law After Your Case Is Decided:** There are many situations in which the immigration law or the interpretation of the law changes after your case has been decided and the change would have led to a different result in your case. For example, some people are removed as "aggravated felons." Certain convictions that used to be categorized as aggravated felonies, like simple drug possession, are no longer considered aggravated felonies by the courts. If you were removed as an aggravated felon but the crime you were convicted of is no longer considered to be an aggravated felony due to a change in law, then you might have additional immigration relief available to you that you did not have before, and you may be able to reopen your case. If you think your case falls into this category, please contact PDHRP as we may be able to provide you with additional guidance.

(4) **Ineffective Assistance of Counsel:** In some situations, showing that your immigration attorney provided you with ineffective legal assistance, and showing that the outcome of your case would have been different if you had had better legal assistance, can be a reason for filing a motion to reopen. Generally, you have to show that you acted quickly in seeking to reopen your case after discovering your attorney's ineffective assistance.

(5) **Changed Country Conditions:** Under the immigration law, you can request that your case be reopened if the conditions in your country change and you wish to request asylum. This may not be possible, however, for individuals who are already outside the U.S. You should consult with an attorney if there is a change in government, a new outbreak in violence or some other change in your country that makes you fear that you will be persecuted.

7 OTHER ALTERNATIVES

[A] U VISA FOR VICTIMS OF SERIOUS CRIMES

If you were the victim of a crime while you were in the U.S., you may be able to obtain a U visa. **U visas are for victims who suffer severe harm as the result of a serious crime, have information about the crime, and cooperate with law enforcement to investigate or prosecute the crime**. Only victims of certain serious crimes can apply for U visas. Some recognized crimes include: domestic violence, trafficking, murder, rape, kidnapping, sexual assault, or witness tampering.

Almost all grounds of inadmissibility can be waived when you are applying for a U visa. Even grounds of inadmissibility that cannot be waived when applying for an immigrant visa (for example, drug related convictions) can be waived in a U visa application. USCIS will balance the positive and negative factors in your case and grant a waiver if it determines that it is in the public interest to allow you to return to the U.S. USCIS will consider the number and seriousness of the crimes you committed in making its decision. If you committed a violent crime, USCIS will grant a waiver only in extraordinary circumstances.

[B] WITHHOLDING OF REMOVAL AND PROTECTION UNDER THE CONVENTION AGAINST TORTURE

There are some situations in which a person who has been deported fears that his life or freedom is in danger in his home country. This person might feel that his only option is to return to the U.S. to seek protection, despite the possible immigration and criminal risks involved. Generally, an individual who is in the U.S. may apply for protection in the form of asylum. To get asylum, one has to show a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. When a person who has been previously deported returns to the U.S. without permission, he or she

is subject to **reinstatement,** which means that he or she can quickly be deported again without seeing a judge. A person in reinstatement cannot apply for asylum, but can apply for other types of protection as described below. **Returning to the U.S. without permission may also lead to serious immigration and criminal consequences** (see the box on p. 3).

If you are put in reinstatement proceedings, you will have an opportunity to explain why you are afraid of returning to your country to an immigration officer. If you are found to have "reasonable fear" of persecution or torture, your case will be referred to an immigration judge and you can then ask the immigration judge for protection in the form of withholding of removal or protection under the Convention Against Torture (CAT). To be eligible for "withholding of removal" you must show that it is more likely than not that you will be persecuted due to your race, religion, nationality, political opinion or your membership in a particular social group. Fear of returning or remaining in one's country due to economic conditions, crime, or natural disaster, for example, are generally not recognized reasons for being granted protection in the form of withholding of removal or CAT. To be eligible for protection under CAT, you must show that it is more likely than not that you will be tortured by the government, for any reason, if you are sent back to your country. If granted withholding or CAT, you are allowed to legally remain in the U.S. and get work authorization. However, these forms of status do not lead to a green card and do not allow you to petition for your family to join you in the U.S.

NOTE → This area of law is very complex, and the information provided here is very basic and there is much more to know about asylum, withholding, and CAT. You should consult with an attorney if you find yourself in this very difficult situation.

[C] HUMANITARIAN PAROLE

If you need to visit the U.S. temporarily for an emergency reason, and you were unable to obtain a nonimmigrant visa and inadmissibility waiver, you can try to get humanitarian parole. The U.S. government grants humanitarian parole very rarely and only for extraordinary reasons, such as: young children needing to be reunited with relatives in the U.S., needing urgent medical treatment that is not available in your country, or needing to visit a dying family member in the U.S.

Humanitarian parole gives you permission to temporarily stay in the United States for the duration of your emergency (not more than 1 year). It does not lead to permanent status. If you stay in the U.S. past the authorized time, you risk being put into removal proceedings.

8 APPENDIX

[A] EXPLANATION OF TERMS USED IN THIS GUIDE

Admission of Crime: When you voluntarily admit to facts that would make you guilty of a crime after an official has explained the nature of the crime to you in plain terms. This is more than a simple admission – there is a formal procedure that must be followed in order for your statement to be considered an "admission" that makes you inadmissible. A formal admission may have consequences similar to those of a conviction, even if you were not convicted.

Aggravated Felony: This is the most serious immigration law category of crime. Aggravated felonies make you ineligible for almost all forms of immigration relief and make it difficult to return to the U.S. The immigration laws consider many state and federal offenses "aggravated felonies", including some state misdemeanors even if no jail time was served. Some examples of crimes that are generally classified as aggravated felonies are: rape, murder, drug and firearm trafficking, theft (if you received a sentence of a year or more), and many crimes involving the risk of use of force against another person or property. There are many other crimes that can be classified as aggravated felonies.

Board of Immigration Appeals (BIA): Agency within the Department of Justice that reviews Immigration Judge decisions that have been appealed by either the government or the person in immigration proceedings. BIA decisions can be appealed to the federal courts.

Crime Involving Moral Turpitude (CMT): Courts have described CMTs as including behavior that is vile, depraved, intrinsically wrong, and contrary to society's accepted rules of morality. Whether your criminal activity or conviction will be considered a CMT will depend largely on the criminal law under which you were convicted and, perhaps, the facts of your case. Courts have found many different types of crimes to be CMTS, including: fraud offenses, sex offenses, murder, theft, shoplifting, forgery, and some types of assault.

Criminal Conviction: Under immigration law, a criminal conviction is defined differently than it is under criminal law. A conviction exists if (1) there has been a formal judgment of guilt, or (2) there has been a guilty verdict by a judge or jury or a plea of guilty or no contest <u>and</u> the person received some punishment (such as a jail sentence, fine, community service, or probation). A "conviction" may exist for immigration purposes even if it would not be considered a conviction under the state criminal law.

Criminal Sentence: Amount of time a person is ordered imprisoned. This includes the period of time during which a sentence is suspended (meaning that you did not have to spend the time in jail).

Executive Office for Immigration Review (EOIR): Federal agency within the Department of Justice responsible for adjudicating immigration cases. EOIR includes the immigration courts and the BIA.

Extreme Hardship: Level of hardship that must be shown to qualify for certain waivers. The hardship usually has to be experienced by certain relatives, depending on the waiver requested. This is a high standard that cannot be met solely by showing financial hardship. See box on p. 14.

Inadmissibility: You are inadmissible, meaning not eligible for a visa, if you fall into one of many listed categories, including having certain criminal convictions or having spent time in the United States without authorization.

Motion to Reconsider: Document filed with the Immigration Judge or BIA asking that a decision be reexamined because the law was applied incorrectly.

Motion to Reopen: Document filed with the Immigration Judge or BIA asking that the case be reopened to consider new evidence that was not previously available.

Unlawful Presence: Being in the United States without legal status or authorization. See p. 12-13.

United States Citizenship and Immigration Services (USCIS): Federal agency within the Department of Homeland Security that processes immigration applications and grants or denies waivers of inadmissibility.

Vacatur of Criminal Conviction: When a criminal conviction is set aside as if you had never been convicted. For a vacatur to have any effect in immigration, the conviction must have been vacated because something went wrong in your original criminal court proceedings.

Voluntary Departure: A person who is granted voluntary departure is not given a removal order, but must leave the U.S. by a certain deadline, pay for his or her own ticket, and make his or her own travel arrangements. A person who left by the voluntary departure deadline does not need an I-212 waiver before being eligible to return to the U.S., though he or she may need a waiver for other inadmissibility problems. If the person did not leave by the deadline, however, the voluntary departure order turned into an order of removal.

Waiver of Inadmissibility: An application requesting special permission to receive a visa even though you are inadmissible.

[B] SAMPLE LETTER TO REQUEST YOUR IMMIGRATION COURT FILE

Date: ______________________

Office of the General Counsel
Attn: FOIA Service Center
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

To Whom it May Concern:

I write on behalf of ____, A#____________________,
who requests, under the Freedom of Information Act/Privacy Act (5 U.S.C § 552) that s/he have access to all federal agency records that are applicable to his/her case.

You may send the requested information to:

Name of person receiving information _________________________________

Mailing Address: ______________________________

____

____

Thank you very much in advance for your compliance with this request.

Sincerely,

I authorize the release of all documents relating to my EOIR file to the person indicated above. Thank you in advance for your compliance with this request.

____________________________ ____________________________
Signature Date

____________________________ ____________________________
Date of Birth A#

[C] GETTING YOUR STATE CRIMINAL RECORD

Click on the links to obtain information on how to get your criminal record in each state.

- Alabama
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Georgia
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi
- Missouri
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin
- Wyoming

[D] RESOURCES FOR DEPORTEES

Post-Deportation Human Rights Project (PDHRP)

www.bc.edu/postdeportation
(617)552-9261
PDHRP provides information and limited direct representation for deportees. We are available to talk about whether any of the options discussed in this guide may be available to you. It is best to have documents about your immigration proceedings and your criminal history (if you have one) when calling us.

Other resources in the United States

- *Legal Aid Society,* New York (www.legal-aid.org/en/civil/civilpractice/immigrationlawunit.aspx): the Immigration Law Unit provides consultation and representation to immigrants in deportation defense, family-based petitions, and naturalization.
- *Committee for Public Counsel Services*, Massachusetts (www.publiccounsel.net): provides post-conviction relief to individuals who were represented by a public defender in Massachusetts.
- *Immigrant Defense Project,* New York (www.immigrantdefenseproject.org/): provides expertise on issues of immigration consequences of criminal convictions.

Guides published by other organizations

- *Financial Handbook for Families Facing Detention and Deportation*, Families for Freedom (www.familiesforfreedom.org, (646) 290-5551): Suggestions for handling your finances and protecting your social security benefits in case of detention or deportation.

- *Are You a United States Citizen?* Florence Immigrant and Refugee Rights Project, (www.firrp.org, (520) 868-0191): Instructions for determining whether you are a citizen and challenging removal.

- *Deportation Resources Manual*, Alabama Appleseed (www.alabamaappleseed.org, (334) 263-0086): Basic information about detainees' rights, locating detained family members, protecting financial assets, and getting out of detention.

- *How to Get Legal Status Through Your Family Member – Now or in the Future*, Florence Immigrant and Refugee Rights Project (www.firrp.org, (520) 868-0191): Ways to obtain legal status through family members with status in the U.S.

- *How to Get Out of Detention After You've Been Ordered Deported*, Catholic Legal Immigration Network & Political Asylum/Immigrant Representation (PAIR) Project (www.pairproject.org, (617) 742-9296): Information about seeking release from detention in Massachusetts, Rhode Island, Maine, Vermont or New Hampshire if you are no longer challenging your deportation.

- *Self-Help Manual for People Detained by the Immigration Service*, Political Asylum/Immigrant Representation (PAIR) Project (www.pairproject.org, (617) 742-9296): General information about immigration hearing procedures, bond, and applying for relief from removal.

Some country-specific resources for deportees

There are an increasing number of organizations that work with individuals who have been deported. This list includes only a few of these organizations.

- **Cambodia**: Returnee Integration Support Center (www.risccambodia.org, (855) 11-736-123 – Phnom Penh)
- **Cape Verde**: Instituto des Comunidades (www.ic.cv, (238) 260-7900 or 7911 – Cape Verde)
- **Dominican Republic**: Bienvenido Seas (http://bienvenidoseasrd.blogspot.com, (809) 798-4326 or (809) 688-8417 – Santo Domingo)
- **El Salvador**: Homies Unidos (http://homiesunidos.org/, (503) 22265-2071 or (503) 7965-6520 – San Salvador)

- **Guatemala**: CONAMIGUA (http://conamigua.gob.gt/); Mesa Nacional para las Migraciones en Guatemala (MENAMIG – menamig@intelnet.net.gt); Proyecto de Migración y Derechos Humanos (proy_migracionzacualpa@yahoo.com)
- **Haiti**: Alternative Chance (www.alternativechance.org, (212) 613-6033 – New York answering service or (509) 3-871-0400 - Haiti)
- **Honduras**: International Institute for Migration (www.iom.int, (504) 220-1100 - Tegucigalpa)
- **Jamaica**: Family Unification Resettlement Initiative (FURI) (http://familyunification.net/, (646) 698-2172 – New York, (876) 930-0359 – Kingston)
- **Mexico**: Kino Border Initiative, Jesuit Refugee Services (http://www.kinoborderinitiative.org/es, (520) 287-2370 – Nogales, Arizona)