Legal Sidebar

Discretionary Waivers of Criminal Grounds of Inadmissibility Under INA § 212(h)

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Federal immigration laws provide for the exclusion and removal of non-U.S. nationals ("aliens," as the term is used in the Immigration and Nationality Act [INA]) who lack authorization to enter or remain in the United States. The grounds for removal differ depending on whether an alien has already been lawfully admitted into the country. Those who have not yet been admitted—whether applying for a visa from abroad to come to the United States, initially presenting themselves at a U.S. port of entry, or found in the country after entering surreptitiously—may be removed if they fall within any of the grounds of inadmissibility listed under INA § 212(a), including on account of committing enumerated criminal offenses. These inadmissibility grounds—particularly those relating to criminal activity—are cross-referenced by a host of other INA provisions relevant to unadmitted *and* admitted aliens alike, including provisions establishing aliens' eligibility for relief from removal (e.g., asylum) and their ability to adjust to lawful permanent resident (LPR) status. INA § 212(h) enables immigration authorities to waive many criminal grounds of inadmissibility in some circumstances, but a waiver applicant must meet various eligibility requirements, must not be subject to certain bars to relief, and, ultimately, must show that relief is warranted as a matter of discretion. This Legal Sidebar discusses the scope of waiver authority under INA § 212(h).

Discretionary Waivers Under INA § 212(h)

Many grounds of inadmissibility are subject to discretionary waiver. Some of these waivers are primarily available to those seeking to come to the United States temporarily. For instance, the INA authorizes immigration officials to waive most inadmissibility grounds to allow aliens to enter the United States in a temporary, nonimmigrant status. Immigration authorities may also "parole" otherwise inadmissible aliens and allow them to temporarily enter the United States in some circumstances, while still being treated as unadmitted for immigration purposes.

If an alien is seeking to enter the United States to reside here *permanently* as a legal immigrant, or if an alien who is already present in the country as a parolee or as a nonimmigrant seeks to adjust to LPR status, a waiver of inadmissibility grounds may be available in narrower circumstances. One such authority, INA § 212(h), is one of the most significant authorities that immigration officials may exercise with respect to many of the criminal grounds of inadmissibility. As noted below, § 212(h) may only be

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used to waive certain criminal inadmissibility grounds for aliens seeking to enter the United States or to adjust to LPR status; it may not be used to waive the application of criminal bars to other immigration-related benefits, such as cancellation of removal.

Aliens Who May Apply for a Waiver

The INA § 212(h) waiver is available to three categories of aliens: (1) those applying for an immigrant visa abroad through consular processing; (2) those arriving at a designated U.S. port of entry who are applying for admission with an immigrant visa; and (3) those physically present within the United States who are applying for adjustment to LPR status. If an alien fits into one of these categories and satisfies the applicable eligibility requirements discussed below, he or she may secure an immigrant visa, obtain admission, or qualify for LPR status *despite* commission of certain crimes that render the alien inadmissible under INA § 212(a)(2).

Given these criteria, a waiver under INA § 212(h) is typically available only to those persons who are seeking a permanent foothold in the United States, and not those persons who already have obtained LPR status. A § 212(h) waiver may still be relevant to aliens who obtained LPR status in two circumstances.

The first is when an LPR has departed the United States and engaged in specified activity that causes the alien to be treated as an "applicant for admission" under the INA upon his or her return. Although LPRs returning to the United States from abroad generally are not subject to the INA's inadmissibility grounds, there are a number of exceptions. For instance, if an LPR commits a criminal offense listed under INA § 212(a)(2) (which might apply to offenses that occurred before or after initially departing the United States), he or she will be treated as an applicant for admission upon returning to the country. More generally, if an LPR engages in "illegal activity" while abroad, he or she may be denied admission upon return to the United States if the alien falls under the INA's inadmissibility grounds. These returning LPRs might potentially seek an INA § 212(h) waiver if they would be inadmissible under covered criminal grounds of inadmissibility. The Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting federal immigration laws, has held that a returning LPR seeking to overcome a criminal ground of inadmissibility is not required to apply for adjustment of status in conjunction with the § 212(h) waiver. According to the BIA, a grant of the waiver eliminates the criminal ground of inadmissibility and leaves the alien's LPR status intact.

The second instance where an INA § 212(h) waiver might be available to an LPR is when the alien is physically present in the United States and placed in formal removal proceedings. In these circumstances, the LPR may pursue a § 212(h) waiver only in conjunction with an application to adjust status. The BIA has reasoned that the availability of a waiver is limited to cases where an alien is applying for an immigrant visa, admission to the United States, *or* adjustment of status. Thus, the BIA has explained, whereas a *returning* LPR seeking a waiver need not apply for adjustment because the alien is seeking readmission into the United States, aliens present in the United States can only pursue a waiver with an adjustment application. A number of federal courts of appeals have adopted the Board's interpretation of the statute. Thus, for example, if an LPR present in the United States is charged with deportability based on a criminal conviction (e.g., an aggravated felony), the alien, as relief from removal, may apply for a § 212(h) waiver in conjunction with an adjustment application if the criminal conviction triggers a ground of inadmissibility that may be waived under § 212(h).

Although an LPR may pursue an INA § 212(h) waiver in some circumstances, as discussed below, the statute restricts the availability of a waiver for certain LPRs, including, for example, those who were convicted of an aggravated felony after their admission in LPR status.

Criminal Grounds of Inadmissibility Subject to Waiver

Under INA § 212(h), immigration authorities may waive the following criminal grounds of inadmissibility enumerated within INA § 212(a)(2):

1. ***Crimes Involving Moral Turpitude***: A conviction of (or admitting having committed or admitting acts which constitute the essential elements of) a crime involving moral turpitude (e.g., an offense involving an intent to defraud) or an attempt or conspiracy to commit such a crime;
2. ***Multiple Criminal Convictions***: A conviction of two or more offenses for which the aggregate sentences to confinement were five years or more (regardless of whether the conviction was in a single trial, the offenses arose from a single scheme of misconduct, or the offenses involved moral turpitude);
3. ***Prostitution and Commercialized Vice***: Had sought to come to the United States to engage in certain prostitution-related activities or other unlawful commercialized vice (or previously had engaged in prostitution activities within ten years of an application for a visa, admission, or adjustment of status);
4. ***Serious Criminal Activity for Which Immunity was Granted***: The commission of a "serious criminal offense" (e.g., any felony) for which immunity from prosecution was exercised, and as a result of the exercise of immunity, the alien had departed from the United States; and
5. ***Controlled Substance Violations***: A conviction of (or admitting having committed or admitting acts which constitute the essential elements of) a violation of (or a conspiracy or attempt to violate) any law or regulation relating to a controlled substance, *but only* to the extent the offense relates to a single offense of simple possession of 30 grams or less of marijuana.

Eligibility Requirements for a Waiver

An alien applying for an INA § 212(h) waiver must satisfy one of the four requirements specified under the statute to establish eligibility for the waiver.

First, an alien may qualify for a waiver if the criminal activities that make the alien inadmissible occurred more than fifteen years before the alien's application for an immigrant visa, admission, or adjustment of status. Immigration officials must determine that the alien's admission "would not be contrary to the national welfare, safety, or security of the United States," and that the alien has been rehabilitated.

Second, an alien may qualify for a waiver if the alien is inadmissible under INA § 212(a)(2) only on the grounds that the alien has engaged in (or sought to engage in) prostitution-related activities, the alien's admission "would not be contrary to the national welfare, safety, or security of the United States," and the alien has been rehabilitated.

Third, an alien is eligible for a waiver if the alien is the spouse, parent, son, or daughter of a U.S. citizen or an LPR, and the alien shows that the denial of his or her admission would cause "extreme hardship" to the qualifying family member. The BIA has described "extreme hardship" as encompassing "significant hardships over and above the normal economic and social disruptions involved in deportation." According to the BIA, the extreme hardship inquiry considers many different factors, including U.S. citizen or LPR family ties to the United States, the qualifying relative's family ties outside the United States, the conditions in the country to which the qualifying relative would relocate and the extent of the relative's ties to that country, the financial impact of departure from the United States, and any significant health conditions and availability of medical care.

Finally, a waiver may be available if the alien is seeking adjustment of status based on an approved "self-petition" under provisions of the Violence Against Women Act of 1994 (VAWA), as amended, as the battered spouse or child of a U.S. citizen or LPR.

Statutory Bars to Relief

Apart from meeting the eligibility criteria set forth in INA § 212(h), an applicant for a discretionary waiver must not be subject to certain bars to relief. First, the statute provides that no waiver is available to "an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture." The statute also contains certain limitations that apply strictly to *LPRs* applying for a waiver. No waiver may be granted to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" if, "since the date of such admission," the alien either (1) has been convicted of an aggravated felony or (2) "has not lawfully resided continuously in the United States" for at least seven years immediately preceding the start of formal removal proceedings.

In construing the waiver bars that apply to aliens who have "previously been admitted" as LPRs, the BIA originally interpreted these bars to apply to all LPRs who have been convicted of aggravated felonies (or otherwise failed to accrue the seven years of continuous residence), regardless of how they acquired their LPR status. In other words, the bar applied to both aliens who were initially admitted into the United States as LPRs and aliens who later adjusted their status to LPRs post-entry. The majority of the federal circuit courts of appeals disagreed with this interpretation and held that the bar applies only to aliens who were *initially* admitted as LPRs when they entered the United States, and not those who entered under a different immigration status and later adjusted. Ultimately, the BIA reconsidered the issue and held that the § 212(h) bar applies only to aliens who entered the United States as LPRs. The BIA has also ruled that the § 212(h) bar applies to aliens who entered the United States as LPRs at any time in the past, even if that admission was not the alien's most recent acquisition of LPR status.

Discretionary Factors

Even if statutorily eligible for an INA § 212(h) waiver, the alien must still show that he or she should be granted relief as an exercise of discretion. In deciding whether to grant relief, immigration authorities must balance any adverse factors with favorable social and humane considerations presented on the alien's behalf. According to the BIA, adverse factors include the nature and circumstances of the criminal ground of inadmissibility sought to be waived, the presence of additional immigration violations, the existence of a criminal record (including the nature, recency, and seriousness of the crime), and other evidence indicative of an alien's bad character or undesirability as a permanent resident. Favorable considerations include family ties in the United States, long-duration residence in this country, evidence of hardship to the alien and his or her family, military service, employment history, property or business ties, and evidence of rehabilitation.

Federal regulations provide that no favorable exercise of discretion may be granted to aliens who are inadmissible because of "violent or dangerous crimes," except in certain "extraordinary circumstances," such as those involving national security or foreign policy considerations, or cases in which denial of an immigrant visa, admission, or adjustment of status would cause "exceptional and extremely unusual hardship" (a significantly higher standard than the "extreme hardship" standard discussed above) to the alien or his or her relatives. Yet, according to the regulations, "depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion."

Judicial Review of Waiver Determinations

INA § 212(h) provides that no court has jurisdiction to review a decision whether to grant or deny a discretionary waiver. A separate statute, INA § 242(a)(2)(B)(i), also precludes judicial review of "any judgment regarding the granting of" certain forms of discretionary relief, including a § 212(h) waiver. The Supreme Court in *Patel v. Garland* interpreted this statute as barring judicial review of *any* determination relating to the grant or denial of the specified forms of relief, including factual findings made in the course of adjudicating the application. Thus, courts generally lack jurisdiction to review the denial of a § 212(h) waiver, including factual findings underlying that decision.

Under INA § 242(a)(2)(D), however, courts retain jurisdiction to review constitutional claims or questions of law raised in a petition for review of a final order of removal filed in the federal judicial circuit in which immigration court proceedings were completed. Thus, if an alien placed in formal removal proceedings applied for a § 212(h) waiver (e.g., with an adjustment application), the alien may challenge the denial of that waiver in a petition for review of a final removal order that raises constitutional or legal issues (e.g., questions about statutory interpretation). For that reason, reviewing courts have considered challenges to § 212(h) waiver denials in some cases.

Considerations for Congress

INA § 212(h) enables some aliens to pursue an immigrant visa, admission into the United States, or adjustment to LPR status despite a disqualifying criminal conviction. Congress may choose to modify the § 212(h) framework by expanding or narrowing the classes of aliens who may pursue a waiver (e.g., allowing LPRs in removal proceedings to apply on a "stand alone" basis), and the criminal grounds of inadmissibility that may be waived. Congress could also revise the eligibility criteria for a waiver (e.g., allowing applicants to show "extreme hardship" to themselves and not only to a qualifying relative) and the various bars to relief (e.g., clarifying whether the bars applicable to LPRs apply only to those who had entered the United States as LPRs). In recent years, there has been at least one proposal to amend INA § 212(h). In the 117th Congress, the Marijuana Opportunity Reinvestment and Expungement Act (H.R. 3617), which passed the House, would narrow the criminal grounds of inadmissibility that may be waived by removing simple marijuana possession as a waivable offense, because the bill would have otherwise decriminalized marijuana-related offenses under the Controlled Substances Act. The bill had also been introduced and passed the House in the 116th Congress as H.R. 3884.

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