THE REALITY OF "EXTREME HARDSHIP" – Winning Techniques and the Online Community Pursuing Waivers of Inadmissibility

INTRODUCTION

I first presented this article in 2012, and a great deal has changed since then. For one, nearly all waivers are now decided stateside. And wonderfully the government has created the Provisional Waiver program so that those who are only inadmissible for unlawful presence can file their waiver and await adjudication inside the United States. As well, *Silva-Trevino* appears to be behind us (though more on that below). Parole in Place has been officially designated as a procedure to help family members of military members and veterans. It is also possible that false claims of U.S. citizenship from minors is being reexamined.

Yet, today approximately half of these waivers are still filed *pro se*. This article aims to help educate attorneys on not just the process, but also the online culture that has grown to support these *pro se* applicants.

INADMISSIBILITY

Under IIRIRA many people find themselves categorized as inadmissible to the U.S. who under prior immigration law would not have been. For example, if a person has more than one year of unlawful presence in the U.S. and they then leave the U.S., they will incur a 10-year bar against re-entry, as they are now inadmissible for 10 years. Other grounds of inadmissibility include prior criminal convictions or even the "reasonable suspicion" someone is a drug trafficker. This affects prospective immigrants trying to enter from outside of the U.S. and also those trying to adjust status within. (See Table One for types of inadmissibility).

Further, a person cannot adjust status from within the U.S. if they have entered without inspection. For those people the only ability to regularize their status may be through a U or T visa, cancellation of removal, or withholding of removal. Often none of these options are available to someone and the only viable option is to leave the U.S. and pursue an Immigrant Visa. For those who leave, a bar of inadmissibility may keep them from returning without a waiver. It is important to evaluate such cases carefully to be sure a waiver is even available, but for many immigrants tired of living undocumented it may be a way to return to the U.S. as a legal immigrant.

A NOTE ON 245(i)

If the client had a labor certification or visa petition filed for them before April 30, 2001 that was "approvable when filed" then it may be used to allow an adjustment within the U.S. on a new petition today. If filed after January 14, 1998, but on or before April 30, 2001, then the beneficiary has to have been in the U.S. since April 30, 2001 (short periods may be excused). But if the filing was before January 14, 1998 then the client does not have to have been in the U.S. since the 2001 date. Certain relatives can also be grandfathered under the law. 245(i) can aid many prior dependents of those with such a prior a labor certification or visa petition, sometimes even if they are now divorced.

ACCRUING UNLAWFUL PRESENCE

Some clients will not have accrued unlawful presence even if they were in the U.S. in violation of their visa. A common scenario is when a student enters with "D/S" on his or her I-94. In such a scenario the client did not begin accruing unlawful presence until or if an Immigration Judge or USCIS finds a nonimmigrant status violation. A less common scenario is when an immigrant has been in the U.S. for more than 180 days accruing unlawful presence but then is given voluntary departure before having 365 days of unlawful presence. The way the law is written this client actually would not be inadmissible. The May 6, 2009 Neufeld Memo discusses many of these scenarios. (See Appendix A).

THE WAIVERS

I-601 waivers are available for certain types of inadmissibility under INA 212. These include: three and ten year bars for unlawful presence, crimes involving moral turpitude (CIMTs), prostitution, simple possession of less than 30 grams of marijuana, certain medical inadmissibility, and misrepresentation. The basis of most arguments is the "extreme hardship" to a qualifying relative, though some can also make use of criminal rehabilitation. I-212 waivers for prior removal are not based only on "extreme hardship" to a qualifying relative, but it can be used to bolster a case. While this article is focused on I-601 waivers much of the information is transferable to I-212 waivers as well.

Sometimes a waiver is not an option. A waiver is not available to those with a prior finding of marriage fraud or a frivolous asylum claim, those found –or even reasonably believed to be – drug traffickers, and in a few other situations. Again, evaluate each case to see if there may be other options, and do not always assume that there is no room to argue a waiver is available. Read more about possible exceptions and arguments under "Complications" *infra*.

THE NEW PROVISIONAL WAIVER I-601A

In March of 2013 the Obama administration decided to help out some of our waiver clients. Those who are only inadmissible for unlawful presence can now remain in the United States while they await the results of their I-601A waiver if their ONLY inadmissibility is for unlawful presence, if they have an Immediate Relative petitioner, and if they meet other criteria.

It is important to understand that if the applicant for the Provisional Waiver (PW) has ANY criminal background that could be seen as a Crime Involving Moral Turpitude (CIMT) or ANY OTHER inadmissibility (fraud, INA 212 (a)(9)(c) inadmissibility, or other) they may not qualify for the PW and still need to return to their country of processing for the immigrant visa. In some cases one may be able to successfully argue that the other inadmissibility finding would be incorrect. The level to which one would be successful with this depends upon the case.

Some other things to note at this time:

- The ONLY change to waiver process at this point is procedural; the law on inadmissibility itself is still the same. Also, an applicant still has to go through the

I-130, NVC process, and consular interview. (See Table Two, the order of the process). The only serious change is the interview is now done AFTER the waiver is processed.

- If at the consular interview another basis of inadmissibility is found, that will negate the approved PW. (I have yet to have this occur so I cannot comment on whether USCIS and the consulate indeed make the Applicant wait for a traditional I-601 to be decided.)
- Such new inadmissibilities can STILL be argued, however. You have to evaluate your possibility of success, and also if the client is willing to wait for what could be a drawn out argument with the consulate.
- Applicants CANNOT come back into the United States without inspection after removal or over a year of unlawful presence that was accrued after 1997 and file the PW
- The medical appointment will still have to occur in the processing country – this means that applicants with tattoos that could be construed as gang related STILL run the risk of a permanent bar without the ability to file waiver.
- Those with a final order of removal (deportation) DO NOT qualify for the PW! You may be able to re-open the immigration court case.
- If the client was removed in absentia, again you can file to reopen a removal case. Some attorneys are reporting great success in reopening these in absentia removals with a Joint Motion together with DHS.

QUALIFYING RELATIVE

Waivers based on the extreme hardship to a qualifying relative are not focused on the potential immigrant's hardship; keep that in mind. All of the submitted evidence should relate directly to the qualifying relative's hardship. Who can be the qualifying relative depends on why a person is being told they are inadmissible.

- For a person who is inadmissible for prior unlawful presence (INA 212(a)(9)(B)(v)) or misrepresentation (INA 212(i)) a qualifying relative is a citizen or lawful resident spouse or parent.
- For a person inadmissible for criminal history (INA 212(h)) a qualifying relative is a citizen or lawful resident "spouse, parent, son, or daughter of such alien."
- A U.S. citizen fiancé(e) may also be a qualifying relative [9 FAM 41.81 N9.3(a) and 8 CFR 212.7(a)(1)(i)].

Note that a qualifying relative <u>does not</u> have to be the petitioner in a waiver case.

SPECIAL FOR PWs – you CANNOT tack on a LPR as a Qualifying Relative in Provisional Waivers when you have another USC Qualifying Relative, they just won't let you. The only Qualifying Relatives for PWs are USCs.

CRIMINAL WAIVERS

Criminal waivers, when available (see Table Three), are available on the basis of rehabilitation as well as hardship to the qualifying relative. Interestingly, as outlined above, children are qualifying relatives in criminal waiver cases only. This does not mean that children are not a factor in considering hardship in non-criminal cases, but in such cases you must constantly show how the child's hardship causes hardship to the

qualifying relative. In criminal cases this should also be illuminated, but the direct hardship to the child is also a factor.

Under INA 212(h) a waiver is available if: activities that create inadmissibility occurred more than 15 years before the date of the application; the admission to the U.S. would not be contrary to the national welfare, safety, or security; and the applicant has been rehabilitated; or alternately, if extreme hardship can be demonstrated to the qualifying relative. It is always advisable to do your best to show rehabilitation as well as hardship. Even if a period of time less than 15 years has passed.

LEGAL BASES

Many people can prove the legal requisite "extreme hardship" through well thought out evidence. The fact of the matter is that it all too often is an extreme hardship to have a family separated. A look at the case law also demonstrates this. While the following cases do not address I-601 waivers they do address the term "extreme hardship" and what difficulties establish it. In *In re O-J-O-*, 21 I&N Dec. 381 (BIA 1996) a repatriating immigrant was found to establish extreme hardship with only proof of his community and social ties coupled with "readjustment" to his old home country. In *In re Bing Chih Kao/In re Mei Tsui Lin*, 23 I&N Dec. 45 (BIA 2001) the BIA stated the language barrier alone was enough hardship to warrant a favorable finding. In the *Santana-Figueroa*, 644 F.2d 1354, 1357 (9th Cir. 1981), merely losing income coupled with losing community ties were enough for a finding of extreme hardship for a repatriating immigrant.

OTHER SOURCES

The main tools for working in the area of consular processing are the USCIS regulations, Department of State cables, USCIS memos, the Foreign Affairs Manual (FAM), the Adjudicators Field Manual (AFM), and past appeals issued by the Administrative Appeals Office (AAO). The latter do not usually influence the adjudicator in finding extreme hardship, but they come in very handy when errors of law are made. An example would be a finding of permanent inadmissibility under INA 212(a)(9)(C) when the client's last entry to the U.S. was before April 1, 1997. (More on 9C inadmissibility below).

PROCEDURE

In Country I-601 Applications

I-601 waivers can be filed within the U.S. if a client has the ability to adjust without returning to their country of origin. If they entered with inspection or qualify under 245(i) or VAWA they may be able to adjust in the U.S. A waiver will still be necessary if they had a prior period of unlawful presence over 180 days, criminal activity, or other bases of inadmissibility. (VAWA applicants may be able to avoid this depending on if the inadmissibility was due to the abuse). A waiver filed within the U.S. can be filed at the time of the adjustment (I-485) or after the adjustment interview. NOTE: Traditionally it was possible to file the I-601 after the interview even when the I-485 is a subsequent filing after a prior denial. Now many USCIS Local offices are requiring that an I-601 be filed in conjunction with an I-485 if this is not the first I-485. Attorneys are encouraged to research how their local office is handling this. Newark, NJ most definitely will not

allow you to await the interview, file the I-601 even if you believe it is unneeded and argue in the filing why you believe that no I-601 is required (and alternately that there is extreme hardship).

Also be aware, that most USCIS offices within the U.S. only allow 30 days after the interview to file the waiver packet. This is a very short time to get together the evidence you want to support your argument and it is advisable to begin preparing the waiver evidence at least a month before the interview to ensure a strong packet. Most offices will allow you to supplement the packet after the first filing, but you never know if that supplement will actually be reviewed with the packet.

Also be aware, the letter from a USCIS local office requesting a waiver often provides an incorrect address for filing! This can cause your client to lose the case! Go online and look up the Direct Filing Addresses at USCIS.gov. Do not look to the instructions either, look to the actual webpage information.

Immigrant Visa Applications

In foreign consulates I-601 waivers are filed after the initial immigrant visa is denied on the basis of inadmissibility. These are now filed through a Lockbox and sent to the Nebraska Service Center for adjudication. Normally a consulate will accept the filing of a waiver anytime within a year of the immigrant visa, but your client often is aware of their inadmissibility prior to the interview and wants to file as quickly as possible. Note: even if it has been over a year it is worth inquiring with the consulate if they will/have kept the case open, they often are amenable to filings years after the case arrived in their office.

Do not depend on procedure remaining the same at a consulate or even being similar from consulate to consulate, nor for the basic Immigrant Visa procedure to remain static. Normally an I-130 or I-129F is filed, then documentation is sent to the National Visa Center (NVC) or the consulate, then a visa interview is scheduled, at which time a person will be told they are inadmissible but may apply for a waiver.

The procedure for the visa interview in CDJ is also ever changing, but at the moment nearly all cases are to be filed with the NVC electronically. Then the intending immigrant must schedule and attend a biometrics appointment. This is done via phone or internet (see Table Four for CDJ appointment information) and only then will the visa appointment be scheduled automatically. Make sure your client brings all original documents, including I-864 and I-864A signature pages, to the interview.

Practice Pointer: If this is a second interview the attorney should contact the consulate to inform them of the reason why another interview is required (medical inadmissibility is now over, 9C bar is now over) and the client will be asked to make an appointment for both biometrics and the interview by going online. (See Table Four). Another I-130 is rarely required.

Special Expedited Foreign Filings

There are still some times when an Applicant can file an I-601 at the consulate. (See Appendix B, USCIS Revised Policy Memo PM-602-0038.1, June 6, 2012) If there is still a USCIS office in the Consulate (more and more rare these days) then consulates allow for same-day submission of a waiver during the visa interview for cases deserving expedited processing. This is truly only for emergencies, someone is dying, or serving in the military under fire. It is advisable to contact the Immigrant Visa Unit Director ahead of time, normally this can be done via email and the NVC can even help with this. Explain the situation and send along all applicable documentation.

I-601A filings

I-601A Provisional Waivers are to be filed at the Chicago Lockbox, not the Phoenix one. They also require the fee receipts from the NVC for the $230 and $88 payments (not the barcode sheet, the receipt); a photocopy of the I-130 Approval; and an extra biometrics fee of $85.

FILING I-212s

A prior removal can create inadmissibility. For an expedited removal the bar is 5 years, though if there is a subsequent removal or an aggravated felony the bar is 20 years. For a removal in immigration court proceedings or a person that departed while there was an outstanding order the bar is 10 years or, again, if there is a subsequent removal or an aggravated felony the bar is 20 years. An order of voluntary departure where the person failed to leave before the date set by the Court also becomes an order of removal. As well, if a person fails to pay the required bond in the required 5 business days for post-conclusion voluntary departure the voluntary departure can become an order of removal. (The exception to this is if the person departs the U.S. no more than 25 days after the failure to post bond and provides proof to the government of leaving and remaining outside the U.S. 8 C.F.R. § 1240.26(c)(4)). In such a situation the intending immigrant can file a 212 Application for Permission to Reapply for Admission.

Where to file

This is one time you do want use the filing addresses on the instructions, that is in fact the only place you will find them on USCIS. Again do not rely on the instructions on filing given to you by the government, it is often wrong. The I-212 is often done along with an I-601 waiver application, as there is often another base of inadmissibility. (However, an I-212 waiver alone does not require a qualifying relative or a showing of extreme hardship, unlike an I-601 waiver.) If filed in conjunction with an I-601 waiver of inadmissibility the applications should be filed together at the Lockbox. If it is a stand alone I-212 Application for a K visa then it is filed at the Phoenix Lockbox. If it is a stand alone I-212 for an Immigrant Visa you must file at the USCIS office having jurisdiction over the place of the original deportation. This can be tricky, as they may reject the filing insisting it is not under their jurisdiction. I have had to enlist Senator's offices to help explain to local USCIS offices that in fact an I-212 was theirs to deal with.

Again, the 212 Application does not require a qualifying relative, but it bolsters an application to argue hardship to relatives. You are trying to show why your client has a strong reason to receive the government's discretion, and you want to make them

sympathetic. Portraying them as having good character also can help, and if it is possible attack the basis of removal. Was the client pushed to sign something after hours of interrogation in secondary inspection? Argue that the removal was unwarranted. Was the removal after an unsuccessful asylum case? Try to paint the client as having a strong asylum case that they lost, and they had an attorney that did not think forward and never asked for voluntary departure (if that is the case).

Factors to be considered in a Stand Alone I-212 include:
(1) Why the Applicant was removed; (2) How long ago the removal was (3) Length of residence in the U.S. (if residence was legal); (4) Moral character; (5) Respect for law and order; (6) Evidence of reformation and rehabilitation; (7) Family responsibilities in the United States; (8) Inadmissibility to the U.S. under other sections of law; (9) Hardship involved to the Applicant and others; (10) The need for the Applicant's work (employment) in the U.S.

THE I-601/I-601A ARGUMENT

The Level of Hardship

Hardship is not really something even a seasoned waiver writer can easily quantify. Sometimes a client clearly meets the standard based on some severe issue of health, but more normally the client presents with multiple smaller hardships that when taken together create the portrait of a person truly struggling. A client now suffering from depression, whose employer will attest they may need to fire them because the client is making errors at work they are so distracted, and who has two children, one who is now struggling in school since their other parent left, will likely succeed in a waiver.

It is advisable for someone beginning to write waivers to explore the online resources discussed in more detail at the end of this article. There many *pro se* applicants have posted winning waiver statements. Clearly, a legal brief will not look exactly like these *pro se* hardship letters, but it can give you insight into what smaller hardships can be aggregated to establish extreme hardship.

Do be aware, what once may have been a strong argument in one case may not be in a future one. Waivers are incredibly client specific. Also realize that you should focus on a client's best hardships and not write about every possible problem. The current violence in Mexico may seem horrible to us, but the adjudicators see it mentioned all of the time and it may not resonate with them. I mention it but normally do not focus on it unless I can show a direct relationship of the violence to my client, where they caught in a gun battle and traumatized? Did they suffer from a violent act in their past that left them with PTSD? Then it is worth discussing the violence in Mexico as a hardship. Similarly, I do not discuss the petitioner's desire for children unless there is some way that it really effects them, have they suffered through multiple miscarriages? Did they lose a child before? Then it is a much stronger argument for hardship worth including in the brief.

The Brief

All of this case law is informative, but do not get bogged down in a legal argument in your brief. I cannot stress this enough – do not write an I-601 like a legal brief. Instead, create a narrative. You need to present the story of your client; you need to show the adjudicator that this person deserves discretionary relief. Always include a few photographs of your clients, together with family, make them real people. Have the qualifying relative write a three to four page personal statement about their hardship. Do not present it in an affidavit form; that is cold and does nothing to express emotion. Allow the client to write about their feelings. They should be writing as though they are explaining step-by-step to a friend what their hardships are and will be if the separation continues. The rest of your brief should also be a narrative, with legal citations kept to a minimum. The majority of adjudicators already feel they know what the definition of "extreme hardship" is and time they spend on your legal arguments is time lost to the narrative of your client's hardship.

The Evidence

The narrative serves to explain the evidence. Is your client ill? Are there parents that they live with? Do not assume that sending a stack of medical records proves this. A couple pages of medical records coupled with a strong one-page statement from a doctor are a hundred times more effective. Are they seeing a counselor? Good. Get a two or three page statement from them. DO NOT send them to a forensic psychiatrist. You want a moving description from someone who really knows your client, not a ten-page template report from one visit that cost an exorbitant fee. You are only shortchanging your client with such impersonal information.

Is the qualifying relative spending more than they earn? Show it with a basic run down of expenses and copies of bills, and explain them. If you cannot explain them (hmm, why do you have three cars you are making payments on?) then do not take this approach. Always think about the adjudicator's possible reaction. Do not argue a mother will suffer extreme hardship from separation from her adult daughter when they live across the country from each other. Always imagine who can speak to the hardship: family, friends, coworkers that see performance slipping. Don't send letters about how in love the couple is or how well the qualifying relative is weathering the storm, send letters about why a spouse is struggling financially or losing focus at work.

Length

The narrative should be clear and to the point, I usually keep mine down to nine or ten pages unless there is a criminal issue or other issue that requires its own section, which normally takes one or two pages on its own. The adjudicator's have about two hours max to review the waiver packet. Organization is key. If you really feel the case merits forty exhibits you need a table of contents or key to explain the evidence. Most of my packets contain twelve to twenty-five exhibits – even the more complicated ones.

Statements from the Immigrant

Statements from the qualifying relative are required for this process, not so statements from the beneficiary. Often, however, a statement can help explain past crimes, can explain why a judge found inconsistencies in a past asylum case, or establish why a client did not attend removal proceedings. Again, I prefer these be written by the client and in a narrative fashion. An affidavit style oath can be a lead in, but the statements should be easy to read, and truth be told, affidavits are normally stilted and that terrible word: cold. Do edit them when necessary. An indignant, angry statement about a past arrest is not helpful, nor are disingenuous statements.

COMPLICATIONS

Some of the worst complications are those that create permanent inadmissibility. These include false claims to U.S. citizenship, a drug conviction or guilty plea after the age of 18, gang membership, a previous finding of marriage fraud or frivolous asylum. There is very little to be done after a finding was made in a prior immigration proceeding that there was a frivolous asylum claim made after April 1, 1997. However, at times the basis of other types of decisions can be argued. It may actually be possible to show a finding of marriage fraud was an error, especially if the marriage is still intact. A vague drug crime can be argued to not be a crime pertaining to possession of a controlled substance, a claim to citizenship may have been completely unwilling, a person may truly not be a gang member. These are difficult to win, but when it is someone's only opportunity to return to his or her family it is almost always worth attempting. Some of these and other complications are discussed below.

Criminal

Criminal past does not mean your client is a lost cause. As my Legislation professor always insisted, "don't be a lazy lawyer!" If a client has any criminal past get the records, do the research, do not assume anything! Some misdemeanors become aggravated felonies in the world of immigration law. Conversely, many crimes appear to be CIMTs, but upon review of the statute and the record are not. I have successfully argued that assault and domestic violence crimes were not CIMTs. This is an area where the law is always changing. You must do your research, even on a crime you investigated in a past case or another jurisdiction.

a. First ask if a crime has an exception to inadmissibility

Under INA 212(a)(2) a person is inadmissible to the U.S. if they have been convicted of, or admit to having committed a CIMT. There are some immediate exceptions under the INA, however. The first is if just one crime was committed before the age of 18, and the crime was committed (and your client released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa and the date of application for admission to the U.S. The second, commonly referred to as the "petty offence exception", is if the maximum penalty possible for the crime of did not exceed imprisonment for one year and, if the client was

convicted, he or she was not sentenced to a term of imprisonment in excess of 6 months (time sentenced, not served). If your client meets these exceptions then there is no need for a waiver. Keep in mind, however, that any charge or arrest can color the adjudicators opinion of your client and should still be discussed in the waiver.

Beware: if there was one single act that appears to meet the petty offence exception but there was more than one CIMT criminal conviction stemming from the case, the exception is not met. Non-CIMTs do not remove a singular CIMT from the petty offence exception, however.

For multiple offenses where there was a conviction and the aggregate sentence to confinement (again, sentence, not actual time served) was more than five years it does not matter if the crime involved moral turpitude or if the convictions came from one criminal case. This section of the INA requires a conviction, however, and an admission to elements is not enough to impose this inadmissibility.

Juvenile delinquency

A juvenile delinquency conviction is normally not a conviction for immigration purposes. If under 15 at the time of the crime the juvenile will not be considered to have a conviction. However, if the child was between 15 and 18 and was tried and convicted as an adult for a felony involving violence, then they ARE inadmissible.

18 U.S.C 1(1) defines felony as an offense punishable by death or imprisonment for a term exceeding one year. 18 U.S.C 16 defines a crime of violence as:
(1) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
(2) Any offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Also be aware, if a foreign crime meets the standards of what constitutes juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA) then it is not a conviction for a "crime" for the purpose of INA. FDJA defines a juvenile as a "person who has not attained his 18th birthday" and defines juvenile delinquency as "the violation of a law of the United States committed by a person prior to his or her 18th birthday which might have been considered a crime if committed by an adult."

Lastly, a client that has even one past juvenile delinquency may be referred to an examining physician to determine if they are inadmissible under INA 212(a)(1) as having a mental disorder. It is advisable to warn your client to be ready for this additional psychiatric examination.

Certain purely political offenses and convictions

There is also an exception to inadmissibility for those convicted for crimes that are purely political. Under 22 CFR 40.21(a) the term political offenses includes "offenses that resulted in convictions obviously based on fabricated charges or predicated upon

repressive measures against racial, religious, or political minorities." As well, the BIA has held that convictions for statutory crimes that are not crimes in the U.S., such as illegal campaigning or organizing, will not be recognized for U.S. immigration purposes.

b. Is it really a CIMT?

Moral Turpitude is defined as conduct which is morally reprehensible and intrinsically wrong, the essence of which is an evil or malicious intent. Such a crime is an act accompanied by a vicious motive or a corrupt mind. See *Matter of P–* , 3 I & N Dec. 56 (CO 1947; BIA 1948); *Matter of F–* , 2 I & N. Dec. 754 (CO 1946; BIA 1947). But what does that mean in reality?

It means every new case must be researched. Just because in one case the crime was in fact a CIMT does not mean it is in this new case. Circuit courts, the BIA, and even the Supreme Court are constantly issuing decisions that recategorize crimes as CIMTs or non-CIMTs. The general rule for this area of consular practice is that the statute controls whether a crime could be determined to be a CIMT. The U.S. Department of State Foreign Affairs Manual (FAM) Volume 9 40.21(a) - Visas, Note 2.1states:

"The presence of moral turpitude is determined by the nature of the statutory offense for which the alien was convicted, and not by the acts underlying the conviction. Therefore, evidence relating to the underlying act, including the testimony of the applicant, is not relevant to a determination of whether the conviction involved moral turpitude except when the statute is divisible (see 9 FAM 40.21(a) N5.2) or a political offense (see 9 FAM 40.21(a) N10)."

A divisible law is one where some sections of the law can result in a conviction without moral turpitude being an element and other sections do require moral turpitude. With such a statute the investigator can look to the act that led to conviction to see which section of the law led to conviction. This is done by looking at the record, however, many things are not "part of the record" (such as police reports) and it is advisable to remind investigators of this. (See more on this under the *Silva-Trevino* section *infra*)

c. Is it really a conviction or admission?

INA 101(a)(48) (8 U.S.C. 1101(a)(48)) defines "conviction" as either:

> "(1) A formal judgment of guilt entered by a court; or
> (2) If adjudication has been withheld, either:
> (a) A finding of guilty by judge or jury; or
> (b) A plea of guilty or nolo contendere by the alien; or
> (c) An admission from the alien of sufficient facts to warrant a finding of guilt; and
> (3) The imposition of some form of punishment, penalty, or restraint of liberty by a judge."

It may be possible to argue that there was no conviction causing inadmissibility or to actually seek post conviction relief. And while expungements are now not generally held to remove inadmissibility the Ninth Circuit Court of Appeals has held that state judicial

expungements do eliminate the conviction if the alien would have been eligible for relief under the Federal First Offender Act or similar statute (*see* 9 FAM 40.21(b) N4.1-2).

Pardons that are full and unconditional and that come from the highest appropriate executive authority will also serve to remove inadmissibility. They cannot be legislative, but have to be by the President, Governor, or if the supreme pardoning authority is a mayor, say in a municipal ordinance, then the Mayor.

For an admission a person must admit to the essential elements of a crime. The BIA has established procedural guidelines for taking admissions. These are outlined in 9 FAM 40.21(a) Note 5, which instructs Consular Officers on admissions of CIMTs, however these guidelines are also applicable to other criminal admissions:
"(1) You should give the applicant a full explanation of the purpose of the questioning. The applicant must then be placed under oath and the proceedings must be recorded verbatim.
(2) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute and statements from the alien. It is not necessary for the alien to admit that the crime involves moral turpitude.
(3) Before the actual questioning, you must give the applicant an adequate definition of the crime, including all essential elements. You must explain the definition to the applicant in terms he or she understands; making certain it conforms to the law of the jurisdiction where the offense is alleged to have been committed.
(4) The applicant must then admit all the factual elements, which constituted the crime (Matter of P--, 1 I&N Dec. 33).
(5) The applicant's admission of the crime must be explicit, unequivocal and unqualified (*Howes v. Tozer*, 3 F2d 849)."

If these guidelines were not followed then it is advisable to argue that the client has made no admission. This is an issue that is cropping up again and again in the Philippines, discussed *infra*. Also note, an admission is not effective if the client was tried for the crime and no conviction was made or the charges were dismissed by the court.

Padilla v. Kentucky

The Supreme Courts decision in *Padilla v. Kentucky* 130 S. Ct. 1473 (2010) has made it possible for many criminal convictions to be overturned. In that case the Court recognized that criminal defense attorneys must advise their clients when a criminal conviction "may" result in immigration consequences, and where deportation will clearly result, they must tell their clients that a conviction "will" trigger deportation. This is a procedural error that many cases suffer from. It could be a way to reopen and dismiss your client's case. However, state courts are creating new legal precedent on this issue every day, including finding that the rule is not retroactive, and a thorough investigation of current law is necessary.

The Vacating of *Silva-Trevino*

On April 10, 2015 the Attorney General vacated *Matter of Silva-Trevino* in *Matter of Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015). This is the odious case in which Attorney General Eric Holder expanded the acceptable evidence allowable for review when courts or government agencies are attempting to decide if a crime is a CIMT - he

expanded it just about anything and everything. While it is wonderful news that the very case this expanded approach began with has been vacated, it does not actually mean that the *Silva-Trevino* 'third-step' modified categorical analysis is dead…as the government is still attempting to use it in 'violent or dangerous' crime analyses, but more on that later.

The US Supreme Court has issued recent rulings that directly impact the ability to apply the modified categorical analysis. In *Descamps v. U.S.*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) the Court defines more clearly what constitutes a divisible statute and therefore requires a modified categorical approach. The issue in *Descamps* was whether the defendant's prior conviction under the California law for burglary met the 'generic' definition of burglary for sentencing purposes under the Armed Career Criminal Act (ACCA). The Supreme Court found the California law did not match the 'generic' definition but also that it was not a divisible statute. It then clarified that the modified categorical approach is not for overbroad statutes containing alternative means of committing a crime, but for a "divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps* at 2283. The Court gave an example of such alternative offenses: "'Breaking and Entering at Night'" in any of four alternative places: a "building, ship, vessel, or vehicle.'" Id. at 2284 (quoting *Nijhawan v. Holder*, 557 U.S. 29 (2009)). In such a case one would have to look beyond the statute to the record do discover what element had the person been convicted for, breaking into a building, ship, vessel, or vehicle.

The California law is not divisible in this context because what was at question was not an alternative element. Instead the statute was broader than the 'generic' crime of burglary, which does require unlawful entry, because California's law does not require unlawful entry. Put another way, simply because under the California law one can be found guilty of either entering lawfully or unlawfully does not mean that the statute is divisible into A) the crime of theft with unlawful entry (generic); or B) the crime of theft without unlawful entry (non-generic) - the entry itself is simply not written as an element of the crime.

End result: if a law is not divisible, then you MUST apply the categorical approach.

Then the Court ruled on *Moncrieffe v. Holder*, No. 11-702, 569 U.S. ___, 2013 U.S. LEXIS 3313, 2013 WL 1729220 (April 23, 2013) and seemed to write to remind us practitioners what 'categorical approach' means. The Court reminded us that when applying the categorical approach the decider must look to the <u>minimum</u> conduct encompassed by the statutes: "Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense."

End result: if you apply the categorical approach then non-CIMT crimes might also be covered by the statute, and therefore the crime cannot be viewed as a CIMT.

Most attorneys are using these two cases together to bring us back from the days of *Silva-Trevino*, to argue that most statutes are not divisible and that the decider can no longer look to any and every piece of evidence but instead must simply assume the minimum act criminalized under the statute. I have already had the opportunity to make these arguments but none of those cases is yet resolved. One of them even involved the same California law involved in *Descamps*. I am hopeful that these cases will be properly decided as not involving a CIMT.

'Violent or Dangerous Crime'

Both *Deschamps* and *Moncrieffe* should also aid in arguments against a finding a crime was a 'violent or dangerous crime'. After *Silva-Trevino* USCIS and the AAO began stating that the smallest battery is a violent or dangerous crime. With the advent of the Supreme Court decisions in these two cases one should explore the possibility that the adjudicator is disallowed the use of extrinsic evidence like police reports to decide if a crime was violent or dangerous. I also have begun to argue that the term 'violent or dangerous' without definition makes 8 CFR § 212.7(d) void for vagueness.

Drug Offenses

A person found to have a violation or conspiracy to violate a controlled substance law or regulation of any country is inadmissible. This is a very harsh part of the law and the only exception is if the violation was possession of 30 grams or less of marijuana. If the client has only been found to have possessed less than 30 grams of marijuana then an I-601 waiver is available. As well, if the case was expunged under the Federal First Offender Act or similar statute in the Ninth Circuit then at present one should argue there is no conviction (this rule is currently in flux so research is required in any case after the publishing of this article).

Practice Pointers

Be aware many clients do not understand when a criminal act has even occurred. I ask, "Have you ever talked to a police officer?" "Have you ever gotten a ticket for driving without a license?" "Have you gotten any tickets for anything?" One client had told me he had tickets and only when pressed was it discovered that where he lived in Utah handed out criminal citations as tickets and that he had eleven misdemeanors. We were able to demonstrate that these were issued in great numbers in that area and that the stories behind the citations were not that of a career criminal, but usually just unfortunate decisions (unlawful discharge of a firearm within city limits turned out to be shooting a BB gun at a target in the backyard). He is now reunited with his family.

Prior domestic violence cases can cripple a case. It is important to explore the background of the prior case, however. A statement from the victim or their relatives can be very enlightening. I once showed a client had been found guilty of domestic battery for taking a phone from his estranged wife's hand and that her then boyfriend was the one

who called the police, just to deny my client the right to have his children for a scheduled visit. Again, this is a time when a statement from the Applicant is in order.

Lastly, do not assume because there was a complete dismissal or not guilty finding on the case it will be ignored. I address almost all criminal charges except driving without a license. You do not want to lose because the adjudicator simply decides they don't like your client because he or she seems like a bad person. Adjudicators have broad discretion and they use it, you want to place your client in the best light possible.

Prior Asylum or Other Immigration Proceedings

Prior immigration proceedings normally must be addressed, an exception to this is normally a simple apprehension followed by voluntary departure. Asylum cases that failed need to be explained. If a client was found "not credible" that may appear to an adjudicator that the client is not truthful. I explain what credibility means in the context of asylum and then try to address these findings, preferably with information to show that the asylum claim had merit. Did another relative win on the same claim with a different IJ? Did someone else's testimony differ? Why? Perhaps you just need to point out that there were really very small discrepancies in testimony, perhaps you can get a statement from the source of discrepant testimony about why they spoke or wrote what they did at the time. Were they ashamed? Were they being asked to describe sexual attacks they could not bear to discuss at the time? Did they simply misunderstand the question? I almost always want a statement from someone with a prior asylum or withholding case.

Removal in Absentia and Aggravated Felonies

Theoretically under the law a person can show they did not appear for removal proceedings by demonstrating "reasonable cause". My experience is that this can rarely be shown. The fact a person did not speak English or had an ill relative does not meet the adjudicator's definition of "reasonable cause".

There is news in this area, as many attorneys are now having success in reopening and dismissing these removals for Provisional Waivers. This is often done Jointly with the Attorney from Homeland Security. My advice for those in the U.S. is to not leave unless this has been accomplished or unless they are ready to remain outside the U.S. for five years, or for those already out to wait until five years is past to file.

A waiver can also theoretically overcome aggravated felonies, as the enumerated relief barred by statute do not include waivers of inadmissibility, but my experience is that they do not succeed.

I would never advise a person who has a crime that can be construed to be an aggravated felony to leave the U.S. However, if they are already out of the U.S. some steps can be taken. First, thoroughly research the client's crime and the current case law. Sometimes you can be surprised at what *is not* construed as an aggravated felony. (*See* The Vacating of *Silva-Trevino supra*). If you really cannot find a valid argument a crime does not or should not be construed as an aggravated felony then explore if post-conviction relief is

available based on procedural or substantive bases. Note that at this time case law has established that post-conviction relief based solely on rehabilitation of immigration hardships does not eliminate the conviction for immigration purposes. Be aware as well that though for a time many attorneys were having success with reopening and dismissing crimes based on the Supreme Courts decision in *Padilla v. Kentucky* more and more State courts are limiting the ability to gain this relief as well.

INA 212 (a)(9)(C) Inadmissibility

Those well versed in inadmissibility often refer to this as 9C inadmissibility. It is when someone was in the U.S. illegally for over one year after April 1, 1997 then leaves the U.S. and returns or tries to return without inspection OR is deported (at any time) and then returns or tries to return without inspection after April 1, 1997. Courts have found that the one year of unlawful presence can accrue at any time as long as the entry or attempted entry is after the enactment of IIRIRA.

Like criminal issues, clients sometimes do not think a certain interaction on the border matters; you have to ask questions again and again. Tell them if they do don't disclose this to you they could find themselves stuck outside the U.S. for ten years without possibility of a waiver.

I usually ask: "How many times did you try to enter the U.S.?" and "You only tried to enter one time and never saw immigration, right?" and "So you never met an immigration officer or someone from the government coming in or after?" If they answer in the positive they still may be eligible, but a FOIA will need to be done with each agency that may have information, CBP, FBI, and USCIS to see if there is any record of the interaction. It may have been a "catch and release" wherein the immigrant was printed but no expedited removal took place. I also inform a client beginning the process voluntarily that I cannot promise that a complete absence of a record ensures there is no removal on file. FOIA checks are fallible and I have had people contact me from CDJ after filing *pro se* who discovered that though there was no record of the spouse's interaction at the border in the FOIA the consular officer had it designated as a removal.

This makes it impossible to file an I-601 waiver until the person has spent 10 years outside of the U.S. - it is imperative you know if it is a possible issue.

False Claim of U.S. Citizenship

If made after September 30, 1996 any false claim of U.S. citizenship for any state or federal benefit makes a person permanently inadmissible. Those made before are only considered misrepresentation and then only if made in connection with an immigration benefit. While once waiveable misrepresentation under INA 212 (a)(6)(i), under INA 212(a)(6)(ii) there is no waiver for such claims. Worse still, "any state or federal benefit" includes state health benefits, housing benefits, or food stamps when one says they are a citizen. Some claims can be argued, however. Checking the "citizen or national" box on Form I-9 has been successfully argued to be too unclear to be a "claim" of citizenship. Timely retractions can also affect such a finding.

Some other defenses are that it was not a claim at all or that it was not willing. There are also some exceptions to the law. A false claim made through voting can sometimes be defended in citizenship situations and in the waiver context there is the statutorily exception that if a person can show:

- Each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen by birth or naturalization;
- The alien permanently resided in the U.S. prior to attaining the age of 16; and
- The alien reasonably believed at the time of making such representation that he was a citizen;

They are excused from such a false claim.

Approach false claims with incredible care. Any client needs to be duly warned of the seriousness of this finding. Further, CDJ has held that immigrants who state they were "just waved through" the border must have made a false USC claim. They have also held the position that this section of the law is one of strict liability, and no age or intent will shield an immigrant from this bar. They have even imputed the act as done by a parent or other relative for a child, such as a mother handing over a U.S. passport for a toddler. This ignores any intent element and the very INA's language and the Foreign Affairs Manual (FAM) recognition that misrepresentations must be willful. I encourage attorneys with such cases to continue to argue this statute was not meant to be implemented this way and to contact the client's elected representatives to inform them this is happening.

NEW CHANGE: On September 26, 2013 the Department of State issued new 9 FAM 40.63 notes wherein minors might be forgiven for false claims of US Citizenship. It states:

> "*A separate affirmative defense is that the individual was (a) under the age of 18 at the time of the false citizenship claim; and (b) at that time lacked the capacity (i.e., the maturity and the judgment) to understand and appreciate the nature and consequences of a false claim to citizenship. The individual must establish this claim by the appropriate standard of proof (for applicants for admission or adjustment, "clearly and beyond doubt.")*

However a recent Q&A with AILA Ciudad Juarez Post representatives stated they still had not changed their policies on this issue. This is clearly an evolving situation and one must (as always) do research to see what the position of the government is.

<u>Gang Membership</u>

Many consulates are prone to assuming all and every tattoo on a man is a gang tattoo. Gang membership is a bar as long as the person is considered a member. The government is citing INA 212(a)(3)(A)(ii) (any alien the consular officer even suspects is coming to the U.S. engage solely, principally, or incidentally in any unlawful activity) as the basis of this inadmissibility. The consulates and the Visa Office have proven unbending on findings of gang membership or arguments a person is an ex-member. The situation is so illogical and arbitrary it is ripe for federal legal action.

Prostitution

Engaging in prostitution or procuring a prostitute within the lat ten years makes one inadmissible, even if it was legal where the prostitution took place. Note, in Matter of *Gonzalez-Zoquiapan* 24 I&N Dec. 549 (BIA 2008) the BIA established that "procuring" under the INA in this context does not mean solicitation of a prostitute for one's own use, but trafficking in prostitutes. Why the legal acts of a prostitute are punishable but the illegal acts of a person soliciting are not is yet one more interesting example of the immigration law's incongruity.

Do also note, isolated acts do not establish a person is a prostitute. The BIA has stated that to "engage in" prostitution there must e a regular pattern of prostitution and that even two convictions do not necessarily establish a person is a prostitute.

As with other criminal inadmissibilities, the waiver is available based on extreme hardship to a qualifying relative or rehabilitation. I normally argue both in a waiver.

Drug and Alcohol Abuse

Until 2010 the USCIS relied on the position of the CDC that a person could be found to be a drug addict if they had used drugs regularly in the past three years or demonstrated alcohol abuse in the last year. Effective June 1, 2010, the CDC updated the Technical Instructions to reflect changes to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM). The FAM recognizes that a person is not to be found inadmissible if in remission. The DSM now states a person is generally considered in remission after only one year of no use of controlled substances or associated harmful behavior. If your client has been in remission for a year then generally they should not be found inadmissible.

Inadmissibilities Requiring Advisory Opinions

Some bases of inadmissibility require that the consulate request an advisory opinion from the Visa Office (VO). These include INA 212(a)(6)(E) (alien smuggling), INA §212(a)(10)(C) (international child abduction), INA §212(a)(10)(D) (unlawful voting), when the consulate decides not to recommend a non-immigrant waiver but the applicant still wants to pursue it, and others. The FAM is full of other scenarios where the consulate is required to contact the VO and this can be used to your advantage. The VO an be contacted and legal arguments can be made and evidence supplied (in case the consulate does not forward it). Currently they are reached by the email LegalNet@state.gov.

A Special Note on the U.S. Embassy in the Philippines

For a time the U.S. Embassy in the Philippines had a campaign against prior drug users. It is clear from the language and formation of the INA that a person can have been a drug user and still be admissible to the U.S. This is demonstrated by the fact that one can have been found inadmissible as an addict then the inadmissibility is removed after just one year of remission. Yet the U.S. Embassy in the Philippines has at times found people

permanently inadmissible for prior drug use – by finding people guilty of breaking the Philippine drug law and therefore a INA 212 (a)(2)(A)(i)(II): a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance.

For the U.S. Manila Embassy to continue to treat any drug user as permanently inadmissible this way flies in the face of both the INA and the Philippine law itself. The Philippine law was changed in 2002 and now the offence of using drugs requires the person test positive for drugs under the Philippine Republic Act No 9165 Section 15. Therefore a person cannot admit to an essential element of this law after the fact - since that essential element is a positive test. Further changes in that law were that now it is quite possible to be a drug user and not incur criminal charges at all. A person can be determined to be an addict and therefore relegated to treatment and not criminal prosecution under Philippine Republic Act No 9165 Section 54 and 55.

Usage of drugs is not *per se* the possession of drugs, nor a drug offense that triggers criminal liability. Otherwise there would be no admission available to ANY person who was EVER found to have used drugs. Yet the INA specifically allows for past drug users, in fact past drug addicts, to show rehabilitation by the inclusion of the language under INA 212(a)(1)(A)(iv), wherein one "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible." This allows for the Secretary of Health and Human Services to determine a person is no longer an addict, and they have done so through the promulgation of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM); *also see* 9 FAM 40.11 N11.

If this occurs with your client please contact the VO and client's congresspeople to inform them that the U.S. Philippine Consulate has been acting in this incorrect manner, that they are abusing their power in a capricious and arbitrary manner, and that the State Department and Congress should step in and address the manner in which this Embassy addresses past drug use.

<u>Petitioner or Qualifying Relative's Birth Certificate</u>

This has been an issue from time to time and for a while CDJ was pursuing it in earnest: is the petitioner's or qualifying relative's birth certificate fraudulent? There were investigations discovering that midwives, primarily in Texas, were selling fraudulent U.S. birth certificates to immigrants. The fraud unit at CDJ was holding interviews to determine if suspect birth certificates were purchased. To refute this one must procure all possible evidence to demonstrate a mother was living in the U.S. before the questioned birth. This can include old pay stubs; taxes, even under false social security numbers, and request a report from the IRS or SSA if possible; proof of prior children born in the U.S., living or dead; government identification issued before the birth; photos of the mother pregnant in clearly U.S. settings that appear to be from that time period, affidavits; any and everything you can find.

This appears to be happening less, thank goodness. The consulate will deny the attorney access to the interview, but I encourage you to demand the ability to attend, as we have that right under 5 USC 555. This is such a serious matter it should not be addressed in this manner. It is an affront to Constitutional rights of due process and I also encourage those targeted to entreat their legislators to stop this process if it occurs and demand such questions of citizenship be transferred to the Federal Court.

DENIALS

Consular or Service Error vs. a Valid Denial

We all make mistakes, including consular officers and adjudicators. These can include incorrect findings of inadmissibility, incorrect interpretations of crimes, or even simple confusion of cases. Read every denial carefully, is it really addressing your client's case? If it is, is the decision maker citing the law/regulations correctly? It is very common for errors to be made on infractions that occurred before IIRIRA came into effect. For example a removal followed before re-entry without inspection before April 1, 1997 does not incur a lifetime bar, but many adjudicators and consular officers forget this. Always research the denial; you may be happy to discover your client was not even inadmissible in the first place.

For visa denials at the consulate based on error do not hesitate to file a timely Motion to Reconsider (MTR) or pursue an Advisory Opinion from the Visa Office. Common consular errors can often be cleared up by asking the Consular Officer to review the case; this requires no fee or I-290B Form, just an email or phone call. If the officer is unknown or continues to disagree contact the head of the Consular Visa Unit to review the case. If that fails then approach the Visa Office, which will not interfere in a consular decision based upon discretion but will generally act on questions of law. Again, they are reached by the email LegalNet@state.gov, but there is a preferred format of making inquiries which can be found through AILA (American Immigration Lawyers Association).

Practice Pointer: Where to physically file the I-290B

Service errors in a denial of a waiver do require a timely filed I-290B, but they are worth it if there was a clear error of fact or law. Where to file MTRs has changed and again – do NOT rely on the instructions given in a denial on where to file, instead research at USCIS.gov. One Direct Filing Address not addressed is where to file when disagreeing with the AAO, this is currently the Chicago Lockbox for in-country I-601s as it is seen as 'A decision made by a USCIS domestic or overseas Field Office'. For an AAO decision stemming from a Immigrant Visa Consular Case I-601 that would be the Phoenix Lockbox, as it would be seen as 'Any other decision made by a USCIS Service Center.'

REFILING VS. APPEAL

If there is an error of law or fact a Motion to Reconsider is in order. If there was no such error then you can decide to appeal or in the alternative, refile. A Motion to Reconsider needs to be filed with the entity that made the decision. An Appeal goes to the Administrative Appeals Office (AAO). Either requires an I-290B form and the requisite fee.

If the waiver is denied based only on a decision that the evidence did not support a finding of extreme hardship then it may be best to simply file another waiver. Theoretically one can supplement the original waiver packet in an appeal, but you should submit the new information with the I-290B and there may not be time to amass it. The fee for the appeal is also slightly higher. To file a second waiver contact the consulate and see if you must schedule another visa interview. If the waiver was based upon a fiancé petition be sure to check with the consulate and inquire if they are willing to use the old petition as a basis for the interview. The I-129F petition is valid for 4 months from the date of approval by USCIS, but the Consular Officer can extend its validity at her or his discretion.

CONSULAR REVIEWABILITY

In general consulates enjoy a position of power that is above judicial review, however this is not an entirely absolute. This Doctrine of Consular Absolutism generally means that factual decisions of COs are not subject to appeal. In a showing of reason and logic some Federal Circuit Courts of Appeal are recognizing that COs must not act abusively. In *Bustamante v. Mukasey* the 9th Circuit Court of appeals stated that,
"[A] U.S citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision. As long as the reason given is facially legitimate and bona fide the decision will not be disturbed…" It is therefore a possibility to argue decisions on a very limited basis in the Federal Courts.

MANDAMUS

Sometimes a case just will not move. When an agency is not making a decision on a case it can be brought in front of the Federal Court to force a decision. This is happening with quite a few of my cases in India, where a waiver is approved but the visa is now in apparent permanent administrative review. When these delays require it you can file the mandamus in the Federal District Court where the Petitioner lives. There are a lot of great practice aids that walk you through the requirements for a mandamus, but I will say, none of them seem to tell you *where* to file your summonses. You will need to send one to the Attorney General through the US Attorney Federal District Court you filed the compliant at - do this care of the civil process clerk. You also need to send one to the AG at her/his Washington address: U.S. Department of Justice, 950 Pennsylvania Ave., NW Washington, DC 20530-001. For those in the Department of State, they need to receive the summons as addressed to The Executive Office, Office of the Legal Adviser, room 5519, United States Department of State, 2201 C Street, NW., Washington, DC 20520-6310. Other offices may also need to be served if being brought in as defendants.

PAROLE IN PLACE

This program finally got its own Memo (attached as Appendix C). USCIS has been implementing PIP to allow immediate relatives of military personnel to adjust status within the U.S., even if they entered without inspection. The program is called Parole in Place (PIP) and essentially the local USCIS office will parole the immigrant at their office, then accept the application to adjust status (together with the Petition for Alien Relative if it has yet to be filed). Each office is handling PIP differently. Contact the

District Director's office and ask what their procedure is. Also be aware, PIP does not excuse or forgive other bases for inadmissibility other than prior unlawful presence.

EXPEDITE REQUESTS

Most petition processing can be expedited for good cause. These include military deployment of the petitioner, very serious medical conditions (cancer, liver failure, imminent death), and humanitarian reasons (natural disaster, war). For I-130s or I-129Fs make the expedite request on the cover page very conspicuous. Deployment only requires proof of impending deployment. If the expedite is based on medical reasons you must have a medical professional write a statement explaining the situation and explicitly asking for an expedite, otherwise the request will be ignored. For humanitarian reasons try to find all official evidence that explains the need. Be aware, certain emergencies create such a need for expedited cases that the entire caseload slows. The earthquake of 2010 in Haiti is a good example; cases were "expedited" in such a volume that the queue slowed down.

To expedite with the NVC include a conspicuous cover letter but also contact them via NVCAttorney@state.gov and bring the situation to their attention. If they feel an expedite is warranted they will also contact the consulate on your behalf to try to facilitate expedited submission and transfer to USCIS.

To expedite the waiver (yes, you need to ask even if all the other steps were expedited) request on the cover letter but also contact the Service Center where your receipt was issued. They often ignore the cover letter and must be asked a second time via email and/or mail. I personally send a request through both channels.

At times all of these efforts still does not ensure quick review. Client's need to understand that there are different agencies – and different offices within the agencies – involved and they do not all communicate or agree. I often have to enlist a congressperson to help push for expedited review. In 2012 I had a case that involved a petitioner with recurring, life threatening infections. She would enter the hospital and I would be terrified she would die. Her I-130 was part of the thousands that were somehow misdirected from the Chicago lockbox and did not arrive at the Texas Service Center for months. Once it arrived it was approved in a week, but then got lost again on its way from Texas to the NVC! Her Representative was key in helping us find and track the case. He also was key in communication with Santo Domingo, as they would not provide me with an email address to discuss the case with them. The I-601 was approved and the visa in my client's hand in three days, but I felt lucky the client survived long enough to see her husband home after this "expedited" case.

ETHICAL QUESTIONS

<u>Online Postings</u>

While it is important for informed attorneys to help out how and when they can, it is also important that counsel is not offered in situations that affront professional rules of

conduct. The rule of thumb in online postings is never apply a person's facts to the law, just describe the law and encourage a person to seek legal advice. Also stipulate that you are only stating the law.

Candor Toward the Tribunal

The American Bar association Rule 3.3 (b) states: "(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This rule has been promulgated in all states in some form. It places an affirmative duty to disclose information adverse to out clients to the consulate or USCIS.

The forms utilized in the I-601 process require the disclosure of all and any inadmissibility grounds. If a client has told you about information the government does not know, past crimes for instance, you must disclose it. You do not have to do the government's work for them, but you cannot hide what are established rules and laws or omit information that is clearly subject to disclosure.

Sending Your Client Overseas

While the Provisional Waiver program has lessened the need for applicants to leave the U.S. to apply for an I-601 some clients still have misrepresentations or CIMTs that require it (two shoplifting cases, for example). Some attorneys feel it is a clear violation of ethics to send clients outside of the U.S. for an affirmative filing of a waiver. In looking at the huge number of people taking this on pro se, often complaining because they could not find an attorney they trusted to represent them, I think it unethical to consider it. My position is that I must give an honest evaluation of a case and advise accordingly. If I think a client has a strong case I tell them, but always with the caveat that we could lose. I always state that the client needs to be prepared for years of separation. Many clients tell me, "we just can't take this anymore, we will do what we have to, we understand the risks and we just can't take life like this."

ONLINE RESOUCRES

Any attorney practicing in this area should become aquatinted with the online information being shared by pro se clients. Communities such as immigrate2US.net, visajourney.com, and now multiple pages on Facebook share information. These all have a wealth of information. Applicants often provide information to legal and procedural changes before even AILA does.

This community is reaching more and more potential clients and an attorney will appear behind on information at best and ignorant of the process at worst if they fail to explore the ongoing updates on these forums.

Further, these websites encourage more and more immigrants to take the plunge of affirmatively filing for a waiver. There is a real need for informed, ethical attorneys to represent them and it breaks my heart every time someone consults with an attorney (or non-attorney) then posts to these sites that they were led down the wrong path, often

being told they could simply adjust status in the U.S., and now face deportation. Worse still when they are trapped outside the U.S. with no option for a waiver.

ADVOCACY

Finally, I come from a background of community organizing. As an immigration attorney you need to get involved politically. You need to encourage your clients to do the same. They should complain about all of the inconsistencies and harsh, illogical bars to admissibility. They, and you, need to call legislators and kvetch as much as possible. The process has many problems. Communication between the Department of State and USCIS is almost non-existent and often AILA liaisons or legislators need to find out where a file is. I have had files languish in one consulate for weeks before being sent to the Lima, Peru office that adjudicates them. I have had clients with an approved I-601 wait months for their visa interview because the approving office neglected to forward the case to the consulate. There was the aforementioned case where I could not discuss my client's life threatening illness with Santo Domingo. As an attorney you need to keep on top of these problems, but they should not be happening in the first place. Lobby for not just comprehensive immigration reform, but improvements to the system. CDJ, through the work by Warren Jensen and Laura Dogu in the past, and Yolanda Miranda today is a model for communication and openness and other consulates should follow its lead. However, even CDJ has room for improvement, especially in allowing counsel to be present at consular interviews.

CONCLUSION

The waiver process is constantly changing as is immigration law. Following the cables, memos, and manual changes can be daunting. The online communities can help alert you to changes, but it is imperative that we do our work and help each other serve out clients. If you have any questions or want to offer any information please contact me, or maybe I'll see you online.