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Law Offices of James D. Eiss
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Why Should I Maintain My Nonimmigrant Status While My Adjustment of Status Application is Pending?

Over 100 of our clients filed employment-based Adjustment of Status applications between June and August of 2007. Those who file for adjustment of status have the option of applying for employment and travel authorization while their adjustment of status applications are pending. However, those who are in a “dual intent” status such as H-1B or L-1, have the option of maintaining their nonimmigrant status while their adjustment of status applications are pending.

An applicant for adjustment of status is considered to be in a period of stay authorized by the Attorney General, meaning that they do not accrue any unlawful presence toward the three and ten year bars. However, unless the applicant is maintaining some kind of nonimmigrant status, he is technically out of status while the adjustment is pending. See our article explaining the difference between being out of status and unlawfully present, at http://www.usvisahelp.com/art_chgstatus.html; and our article on the three and ten year bars at http://www.usvisahelp.com/art_thebras.html). In general, people who are out of status but have adjustment applications pending are a low enforcement priority for Immigration Customs & Enforcement (ICE). However, people in this situation are technically deportable as aliens present in the United States in violation of law. Therefore, those who are in H-1B and/or L-1 status are best served by maintaining status as long as possible. Those in other statuses, such as R-1 Religious Workers or TN, will most likely not be approved for an extension of stay after their I-485 is filed, because their statuses do not permit dual intent. While those in L-1 status may eventually run out of time (there is a 5 or 7 year maximum period of stay), the American Competitiveness in the Twenty First Century Act permits H-1B extensions indefinitely in many situations where adjustment of status adjudication is delayed.

Maintaining nonimmigrant status also provides the adjustment applicant a status to fall back on in the event his I-485 application is denied. Without an underlying nonimmigrant status, those whose adjustments are denied begin to accrue unlawful presence on the date of denial and must leave the United States immediately. However, those who were in H-4 or L-2 dependent status and went out of status due to employment, and whose parent or spouse maintained H-1B or L-1 nonimmigrant status as the principal, may be able to leave the U.S. and reenter on dependent visas after I-485 denial. (Note this would not apply to an L-2 spouse, for whom employment is not a violation of status).

Other practical reasons for maintaining nonimmigrant status while an adjustment is pending include the fact that local USCIS offices no longer issue interim EAD cards when the service centers fail to issue the card within 90 days. While EAD issuance times are within 90 days currently, there is no guarantee this will continue. Having H-1B or L-1 status in place will help to ensure continuity of employment, without the employee needing to take off from work if there is a gap between the expiration of one EAD card and the issuance of a new one. Also, those traveling on Advance Parole are required to go through secondary inspection when traveling, which can cause delays. Those traveling on visas, on the other hand, are not required to go through secondary inspection as a matter of course.

There are several factors to be taken into account when determining whether an individual should maintain his or her nonimmigrant status after filing an Adjustment of Status application. However, in general it is our firm's opinion that it is best to maintain nonimmigrant status whenever possible.

Grounds of Inadmissibility and Deportability in the Employment-Based Immigration Context

The Immigration and Nationality Act (hereinafter "INA") lists grounds of inadmissibility and deportability which govern who can be excluded from or removed from the United States. Some immigration attorneys specialize in representing foreign nationals in removal proceedings before Immigration Judges. The Law Offices of James D. Eiss has no such specialty; rather, our practice is limited to the filing of employment-based immigration petitions and applications, although we do some family-based immigration work. Nevertheless, every immigration attorney needs to have an understanding of the grounds of inadmissibility and deportability because they can potentially impact every application or petition filed with the Immigration Service.

What follows is a general overview of the grounds for which someone can be removed from, or barred admission from, the U.S., with particular focus on the issues that we see most frequently in our practice. Our goal in writing this article is to steer foreign nationals away from behavior that would make them inadmissible to or removable from the United States, and also to encourage our clients to disclose fully any issues that impact on their admissibility to the U.S. so that we can deal with those issues in a straightforward manner. Attempting to conceal potential problem issues from government agencies only compounds the problems someone will face in entering the U.S. There are many cases in which someone can legally enter the U.S. despite a checkered immigration or legal history, but it cannot be done by concealing those issues.

As always, this article is not intended to substitute for legal counsel related to any individual case. Neither is it a complete list of all of the grounds of inadmissibility and deportability. Those can be found in INA §§ 212(a) and 237(a) at www.uscis.gov. There may be statutory exceptions or waivers available for some grounds of inadmissibility which are outside the scope of this article. Issues regarding inadmissibility and

deportability are incredibly complex. This article should be used more as a guide in helping you to discuss potential issues with your immigration attorney.

What's the Difference Between Inadmissibility & Deportability?

Inadmissibility

Section 212(a) of the INA lists grounds of inadmissibility. These grounds apply to anyone seeking admission to the U.S. either as a permanent resident or as a nonimmigrant. (Although returning permanent residents are not considered to be seeking admission in most cases). Admission means the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer;” and involves physical entry to the U.S. at a port of entry (INA 101(a)(13)). Adjustment of status to that of a lawful permanent resident has also been held to be an “admission;” and therefore an adjustment applicant must be found to be admissible to the U.S. at the time of adjustment of status. An applicant for admission to the U.S., either at the port of entry or when filing an adjustment of status application, bears the burden of proving by a preponderance of the evidence (i.e. more than 50% likelihood) that he is admissible to the United States.

Deportability

Section 237 of the INA lists the grounds of deportability. The INA still uses the word “Deportability” to define the grounds on which someone can be removed from the United States, although the name of the proceedings are no longer “deportation proceedings” but “removal proceedings.” If a foreign national is deportable, it means he can be placed in removal proceedings by Immigration Customs and Enforcement (“ICE”). The case will be brought against him by a government attorney employed by ICE, and an Immigration Judge will determine, in an Immigration Court, whether or not the foreign national can be removed from the United States. In the context of a removal proceeding, the government bears the burden of proving, by clear and convincing evidence (i.e. highly probable, reasonably certain) that the foreign national is removable from the United States.

The Grounds of Inadmissibility (INA 212(a))

- Health-Related Grounds

As part of the permanent residency application process, applicants are required to be examined by a Civil Surgeon designated by USCIS to perform such examinations, to determine whether the foreign national is inadmissible for health-related reasons. However, most of the health-related grounds of inadmissibility also apply to applicants for admission in a nonimmigrant status. The grounds of inadmissibility include having a communicable disease of public health significance (e.g. Tuberculosis, Hepatitis B, AIDS or HIV+ status, etc.); and failure to provide evidence of vaccinations for specific vaccine preventable diseases (applies only to immigrants, not nonimmigrants). Another health-related ground of inadmissibility is having “a physical or mental disorder and behavior

associated with the disorder that may pose, or has posed, a threat to the property, safety or welfare of the alien or others;” or being a drug abuser or addict.

In the employment-based immigration practice, we do not see very many individuals who are inadmissible for health related grounds. However, in 2004, the Department of Homeland Security released a memo advising immigration officers who adjudicate adjustment of status applications to have aliens re-examined by the Civil Surgeon for possible inadmissibility as someone with a mental disorder and associated harmful behavior if they have:

One or more for arrest/conviction for alcohol-related driving (DUI/DWI) while the driver's license was suspended, revoked or restricted at the time of the arrest due to a previous alcohol-related driving incident(s).

One or more arrest/conviction for alcohol-related driving where personal injury or death resulted from the incident(s).

One or more conviction for alcohol-related driving where the conviction was a felony in the jurisdiction in which it occurred or where a sentence of incarceration was actually imposed.

Two or more arrests/convictions for alcohol-related driving within the preceding two years.

Three or more arrests/convictions for alcohol-related driving where one arrest or conviction was within the preceding two years.

William R. Yates, Associate Director of Operations, Memorandum, “Requesting Medical Re-examination” (Jan. 16, 2004), Posted on AILA InfoNet at Doc. No. 04022362 (Jan. 23, 2004). If the applicant’s history of alcohol use had not been discussed at the first medical examination, then upon reexamination, the Civil Surgeon will discuss the issue with the applicant to determine if he is inadmissible to the U.S. as someone with a mental disorder and associated harmful behavior. The Civil Surgeon is the only one authorized to make this determination. This memo is particularly significant because criminal convictions for alcohol related driving offenses are generally not found to make a person inadmissible to the U.S. on criminal grounds; however, there could be a medical basis for making the person inadmissible, if the driving offenses point to an underlying alcohol problem.

- Criminal and Related Grounds

Crimes Involving Moral Turpitude (CIMT)

There are several criminal-related grounds of inadmissibility, the first being conviction for, or admission to having committed, a crime involving moral turpitude (“CIMT”) or an attempt or conspiracy to commit such a crime. It has been determined that “Moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public

conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." Matter of Danesh Interim Decision 3068 (BIA 1988). See also, Matter of Flores, 17 I&N Dec. 225 (BIA 1980). It is decided on a case by case basis, and prior court decisions must be reviewed to determine which crimes are and which crimes are not CIMTs. There may be new types of convictions on which courts have not yet ruled regarding moral turpitude.

It is not the particulars of the offense committed that determine whether a crime is morally turpitudinous for immigration purposes, but the specific statute under which the conviction occurred. See Matter of Short, 10 I&N Dec. 136, 137 (BIA 1989); Matter of Lopez-Meza, Interim Decision 3423 (BIA 1999). The statutes under which any offense is committed must therefore define a CIMT in order for that offense to make a person inadmissible, although there are certain exceptions which allow a USCIS or a court to look behind the record of conviction to determine admissibility. Generally, to be considered a CIMT, the statute under which the foreign national was convicted must require a culpable mental state, or an intention to do wrong, rather than just proscribing a specific act. Almost any crime involving an element of fraud or theft is considered a CIMT.

The courts have specifically held that conviction for simple DUI is not a CIMT, because DUI statutes do not require a culpable mental state, *unless* the person was driving while his license was revoked. However, as stated above, the person may be found inadmissible on health related grounds if he has an underlying alcohol abuse problem.

There is a huge exception to the CIMT ground of inadmissibility which is commonly referred to as the "petty offense exception." The petty offense exception states that persons (1) who have committed one crime (2) for which the maximum penalty possible is not more than one year and (3) if the alien was convicted, he was not sentenced to more than 6 months in prison. Note that the petty offense exception requires that the foreign national have committed one *crime*, not just one CIMT. So someone who has been convicted of one CIMT and admits, with or without having been convicted, to commission of any other crime, the petty offense exception does not apply.

Another exception to the CIMT ground of inadmissibility occurs where the foreign national (1) committed only one crime; (2) the crime was committed when the foreign national was under age 18; and (3) the crime was committed (and the foreign national released from confinement or prison) more than 5 years from the date of application for a visa or other documentation and the date of application for admission to the U.S. In addition to this statutory exception for minors, most convictions of minors are not considered to be criminal convictions and therefore do not create any grounds of inadmissibility.

Determination of whether a crime is a CIMT can be an involved legal analysis.¹ It is best to hire an immigration attorney to handle a case where there is a potential CIMT.

Violation of Law “Related to” a Controlled Substance

An alien is inadmissible if he admits to having violated, or has been convicted of violating any law or regulation “relating to a controlled substance.” The term “relating to” has been construed broadly to include convictions for possession of drug paraphernalia.

Multiple Criminal Convictions

A foreign national convicted of two or more offenses, regardless of whether the offenses involved moral turpitude, for which the alien was actually sentenced to confinement of 5 or more years in aggregate, is inadmissible.

Other Criminal Grounds

Other criminal grounds include being an illicit trafficker in controlled substance(s) or in some cases being the spouse, son or daughter of such a person; coming to the U.S. to engage in prostitution or having engaged in prostitution within 10 years of application for a visa or admission or adjustment of status; procuring or attempting to procure prostitutes; trafficking in persons; money laundering, etc. A complete list is available at INA 212(a), which can be found at <http://tinyurl.com/2vo84l>.

- Public Charge

Anyone likely to become a public charge is inadmissible to the U.S. A public charge is someone who collects means tested public benefits such as Medicaid. This ground of inadmissibility comes up most often in the family-based immigration context, where the sponsoring family member is required to execute an Affidavit of Support demonstrating his ability to provide for the sponsored immigrant. However, it can also come up in the employment-based immigration context. For example, an affidavit of support is required in an immigrant visa petition where the immigrant’s U.S. citizen or permanent resident relative either filed the petition or holds a significant ownership interest in the company that filed the petition on the immigrant’s behalf. In addition, employment-based nonimmigrants can be found inadmissible on public charge grounds if the petitioner cannot show that it has the ability to pay the proffered wage, or if the wage offered is so low that it cannot reasonably support the nonimmigrant. This can be an issue for R-1 Religious Workers whose pay is often low. The size of the immigrant’s family is taken into account when determining whether the wage will be sufficient.

- Labor Certification

¹ Norton Tooby and Jennifer Foster have written an excellent book on this subject entitled Crimes of Moral Turpitude, which is available through Tooby’s web site at <http://criminalandimmigrationlaw.com>.

Employment-based immigrants are inadmissible unless the Department of Labor approves a labor certification on their behalf. There are certain classes of immigrants for which labor certification is not required, such as Multinational Managers and those who receive a National Interest Waiver due to their exceptional ability in the arts and/or sciences. The process of labor certification is governed by the Department of Labor.

- Physicians & Health Care Workers

The Act specifically prohibits admission of Physicians to the U.S. if they seek to enter primarily to perform physician services, unless they have passed Parts I and II of the National Board of Medical Examiners Examination or the equivalent and are competent in oral and written English. Health care workers other than physicians are inadmissible unless they have a certificate from CGFNS or similar credentialing organization and are competent in oral and written English.

- Illegal Entrants & Immigration Violators

Any foreign national present in the U.S. without having been admitted or paroled is inadmissible, as is anyone who fails or refuses to attend Removal Proceedings without reasonable cause and again seeks admission within 6 years of a subsequent departure or removal. Stowaways and alien smugglers are also inadmissible to the U.S.

Someone who enters the U.S. without inspection is also considered to be “unlawfully present.” Unlawful presence is a separate ground of inadmissibility discussed below.

- Misrepresentation

Anyone who commits fraud or misrepresents a material fact for the purpose of obtaining a visa, admission to the U.S., or other immigration benefit is inadmissible to the United States. If someone misrepresents a nonmaterial fact, it does not make him inadmissible. A non-material fact is one which has no bearing on one’s eligibility for the benefit sought. For example, if someone checks the box on the N-400 form saying he has maroon eyes when his eyes are really blue, that fact is not material to his eligibility for U.S. citizenship. However, if the misrepresentation cuts off a line of inquiry that could have led to discovery some material fact, it can be considered material. See, *Kungys v. United States*, 485 U.S. 759, 770 (1988).

If someone makes a material misrepresentation but then timely retracts it, it will not make him inadmissible. For example, if a foreign national claims to be a U.S. Citizen at the port of entry but then, before the officer admits him he admits he is not really a U.S. citizen and then tells the truth, he has timely retracted the misrepresentation and it will not be used to bar his admission to the U.S. if he is otherwise admissible. Whether the retraction is “timely” is decided on a case by case basis.

Note that fraud or material misrepresentation only makes an alien inadmissible if the fraud is committed in the context of an application for an immigration benefit. An alien

is not inadmissible on this ground for fraud on, for example, a federal income tax form, although he may be inadmissible for that fraud on other grounds, such as for committing a CIMT.

Anyone who falsely claims citizenship for *any* purpose, including but not limited to an immigration benefit, is also inadmissible. This often occurs where a non-citizen registers to vote in an election. Many DMVs hand out voter registration forms to applicants for driver's license renewal, and nonimmigrants or permanent residents who receive the forms often fill them out, not realizing that they are ineligible to do so due to their non-citizen status.

- Failure to Meet Documentation Requirements

Perhaps the most frequent reason for denial of admission or a visa is INA § 212(a)(7), failure to present the documents required to prove eligibility for admission. An applicant for admission or a visa always bears the burden of proving eligibility and refusal of admission under this section is a statement that the applicant has not met that burden. It could be based on failure to present a valid passport or visa, or it could be for failure to provide other documents. For example, Canadian citizens are visa-exempt and can apply for admission to the U.S. in B-1, B-2, TN, and L-1 status directly at the port of entry under NAFTA. They can also apply for R-1 admission directly at the port of entry. Canadians who fail to prove eligibility for admission in any of those statuses would be denied admission under INA § 212(a)(7).

It should be noted that consulates often cite INA § 214(b) as the reason for denial of a nonimmigrant visa. Section 214(b) is not a ground of inadmissibility, but a section of the Act creating the presumption that everyone who seeks admission to the U.S. does so as an immigrant unless they can prove eligibility for a specific nonimmigrant category. Intending nonimmigrants who fail to prove eligibility for a nonimmigrant visa are therefore presumed immigrants who lack the documentation required to enter the U.S. as an immigrant. It is not entirely accurate for the consulate to state that 214(b) is the ground for refusal; it is actually § 212(a)(7) that makes someone inadmissible if they can't prove eligibility. INA § 214(b) is also cited where the visa applicant cannot establish to the satisfaction of the consular officer that he has a residence abroad that he has no intention of abandoning.

- Unlawful Presence

Unlawful presence accrues any time after someone's I-94 expires; after they have been found to be out of status by USCIS or an Immigration Judge; or upon entering the U.S. without being admitted or paroled. Anyone who accrues more than 180 days but fewer than 365 days of unlawful presence and thereafter departs the U.S. is subject to a 3-year

bar to readmission. Anyone who accrues more than 365 days of unlawful presence and then departs the U.S. is subject to a 10 year bar to readmission².

The foregoing is not a complete list of the grounds of inadmissibility.

The Grounds of Deportability (INA 237(a))

- Inadmissible at Time of Entry

Aliens who were inadmissible at the time of entry or of adjustment of status are deportable. Often someone deportable on this ground is also deportable for having committed fraud, since in order to be admitted when inadmissible, many people commit fraud.

- Present in Violation of Law

This broad ground of deportability can arise in several circumstances including after revocation of a visa, after expiration or violation of status, or unlawful entry, and may overlap other grounds of deportability. An alien who files an application for adjustment of status and whose nonimmigrant status expires is technically out of status and present in the U.S. in violation of law, although DHS, in prosecutorial discretion, does not ordinarily place such aliens in Removal Proceedings and allows them to adjust status to that of a lawful permanent resident.

- Violated Nonimmigrant Status

Employment-based nonimmigrant status is, in almost every case, job- and employer-specific. Engaging in any additional or different employment from that for which a visa and admission were granted is considered a violation of nonimmigrant status, as is failure to work in the specified job. In addition, a little known section of the regulations found at 8 C.F.R. 214.1(g) provides that,

A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may be imposed (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status.

In addition, when an alien is incarcerated for a period of time that renders him unable to engage in the nonimmigrant employment for which he was admitted to the U.S., he may be found to have violated his nonimmigrant status.

- Marriage Fraud

² For a more thorough discussion of unlawful presence, see our article, "The Three and Ten Year Bars Revisited: When It Helps to Be Put Into Removal Proceedings," available at http://www.usvisahelp.com/art_thebras.html.

Marriage fraud is primarily an issue in family-based immigrant petitions; however, it does come up in the employment-based immigration context. In addition to making an alien deportable under INA § 237(a)(1)(G), a prior finding of marriage fraud can prevent an alien from ever obtaining an immigrant visa under INA § 204(c) prevents the approval of *any* immigrant petition, whether family- or employment-based.

- Criminal Offenses

Foreign nationals are deportable for commission of CIMTs within five years of admission (regardless of date of conviction). There is no petty offense exception. Conviction for two or more criminal convictions of CIMTs, at any time after admission, where the crimes did not arise out of a single scheme of criminal misconduct, makes a foreign national deportable.

Anyone convicted of violation of a law related to a controlled substance is deportable, with the notable exception that conviction for possession for one's own use of thirty grams or less of marijuana does not make a foreign national deportable. This exception does not exist in the drug-related conviction ground of inadmissibility.

Conviction of an "aggravated felony" at any time after admission makes an alien deportable. An aggravated felony for immigration purposes is not necessarily a felony conviction for criminal law purposes, but any of a laundry list of criminal offenses listed in INA § 101(a)(43). Some offenses, such as murder, rape, and sexual abuse of a minor, make an alien deportable no matter what, while others, such as crimes of violence, only make the foreign national deportable if the term of imprisonment is for a certain duration (e.g. for crimes of violence, it is one year). Conviction of an aggravated felony also lengthens the amount of time, after deportation, for which the foreign national must wait before applying for readmission to the U.S. Ordinarily, one must wait five years after deportation. Aggravated felons must wait 20 years. See INA 212(a)(9)(A)(i).

- Failure to Register

INA § 265 requires every nonimmigrant and lawful permanent resident to file Form AR-11 notifying the government of their new address within 10 days of every move. Failure to do so makes the foreign national deportable unless he can prove that the failure was reasonably excusable or was not willful. "Reasonably excusable" is not defined. This requirement has always been a part of the Act, but was never enforced until after September 11, 2001.

- Public Charge

Anyone who becomes a public charge within 5 years of entry is deportable unless they can show that the causes of their becoming a public charge arose after entry.

Why Are the Grounds of Inadmissibility Different From the Grounds of Deportability?

The grounds of inadmissibility and deportability bear several similarities but also differ in important ways. This is because the inadmissibility grounds consider the foreign national to be outside the U.S. seeking to come in (even though this is not always true since the inadmissibility grounds also apply in the adjustment of status context); whereas the deportability grounds consider the alien to be physically present in the U.S. and subject to removal. Thus certain grounds of deportability, such as being present in the U.S. in violation of law, don't logically apply in the inadmissibility context, where the person is presumed to be outside the U.S.

Because the grounds differ, it is possible to be inadmissible and not deportable. For example, INA § 237(a)(2)(B) states that if someone is convicted of possession of 30 grams or less of marijuana for personal use, they are not deportable even though they remain inadmissible under INA § 212(a)(2)(A) as someone convicted of a drug-related offense. If someone is inadmissible, he cannot physically enter the U.S. at a port of entry without a waiver, and may not adjust status without a waiver (which is available in limited circumstances). However, if a nonimmigrant waiver is granted so that the person can enter the U.S., he is not then deportable but may not adjust status unless an immigrant waiver, which is more difficult to obtain, is also granted.

It is also possible, and more common, to be deportable but not inadmissible. For example, someone who goes out of status while their adjustment of status applications are pending is deportable as someone present in the U.S. in violation of law, but there is no corresponding ground of inadmissibility and the person therefore remains eligible for adjustment of status. Another example is that someone who is convicted of a crime involving moral turpitude is deportable, but if the petty offense exception applies, he remains admissible and can travel in and out of the U.S. and qualifies for adjustment of status. In Matter of Rainford, 20 I&N Dec. 598 (BIA 1992), the Board of Immigration Appeals held that when an alien is deportable but not inadmissible, adjustment of status can be approved, and that once the foreign national is admitted to permanent residence, he is not deportable for the act occurring prior to his becoming a permanent resident. However, the foreign national may again make himself deportable by commission of subsequent criminal acts, or other acts that render him deportable. Only U.S. citizens are safe from removal.

Conclusion

The Act creates a minefield of potential grounds for becoming removable from, or inadmissible to the U.S., and it is only through careful legal analysis and full disclosure of all facts related to an individual's case that it can be determined whether any such grounds apply.

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