Overview

The grounds of inadmissibility specified in §212(a) of the Immigration and Nationality Act (INA) affect those seeking admission to the United States, those present in the United States without having been inspected and admitted, and those seeking adjustment of status or certain other benefits under the INA. The 10 inadmissibility categories are:

- health-related grounds
- criminal-related grounds
- national security grounds
- public charge
- labor protection grounds
- fraud or other immigration violations
- documentation requirements
- grounds relating to military service in the United States
- prior removals or unlawful presence in the United States
- miscellaneous grounds

The grounds of inadmissibility overlap with many, but not all, of the grounds of deportation found in INA §237. Although the grounds of inadmissibility, especially criminal and security grounds, often coincide with grounds of deportation, there are several grounds of inadmissibility that are unique. Prostitutes,¹ uncertified health care workers,² practicing polygamists,³ and others are inadmissible but not deportable from the United States. Similarly, there are unique grounds of deportation not found in the grounds of inadmissibility. For example, those convicted of an aggravated felony⁴ or certain firearm offenses⁵ are deportable but not inadmissible. However, those convicted of an aggravated felony,⁶ while not inadmissible, are entitled to fewer procedural protections and benefits than inadmissible individuals. Under INA

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¹ INA §212(a)(2)(D).
² INA §212(a)(5)(C).
³ INA §212(a)(10)(A).
⁵ INA §237(a)(2)(C).
⁶ INA §101(a)(43).
§212(a)(9)(A)(i), for example, individuals removed from the United States based on a conviction for an aggravated felony are permanently inadmissible.

Each inadmissibility category is comprised of several grounds. This chapter will focus on the most common grounds of inadmissibility, particularly those affecting persons immigrating through family-based petitions.

Health-Related Grounds

There are four health-related grounds of inadmissibility. The first excludes aliens who have “a communicable disease of public health significance.” The second excludes aliens who are seeking admission as permanent residents and who were not vaccinated against certain diseases. The third relates to physical or mental disorders with associated behavior that poses a threat to the property, safety, or welfare of the alien or others. The fourth ground excludes drug abusers and addicts.7

Communicable Diseases

The first health-related ground makes inadmissible any aliens who are determined to have “a communicable disease of public health significance,”8 as determined by the secretary of the Department of Health and Human Services. The Public Health Service (PHS) currently considers the following diseases to be communicable and of public health significance: active tuberculosis, infectious leprosy, and five venereal diseases (chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, and the infectious stage of syphilis).9 Several of these diseases may be treated, whereupon the individual may be admissible to the United States. Note that HIV infection is no longer one of the listed diseases, and therefore no longer leads to inadmissibility.10

Lack of Vaccination

Intending immigrants must present evidence that they were vaccinated against the following: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B, hepatitis A, hepatitis B, rotavirus, meningococcal, varicella, pneumococcal, and any other vaccinations recommended by the Advisory Commission for Immunization Practices (ACIP).11 Whenever the ACIP recommends new vaccinations for the general U.S. population, the Centers for Disease Control and Prevention (CDC) will determine which vaccinations are required for individuals immigrating to

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7 INA §212(a)(1).
8 INA §212(a)(1)(A)(i).
9 42 CFR §34.2.
10 74 FR 56547 (Nov. 2, 2009)
11 INA §212(a)(1)(A)(ii).
the United States. The human papillomavirus and zoster vaccines, though recommended by the ACIP for the general U.S. population, are no longer required for intending immigrants.

**Physical or Mental Disorders**

Aliens are inadmissible under the physical or mental disorder inadmissibility ground if they have or had a condition that has an associated behavior that poses a threat to the property, safety, or welfare of themselves or others. If the alien no longer has the condition, it does not constitute an inadmissibility ground unless the behavior is likely to recur or the condition is likely to lead to other harmful behavior.

The current PHS interim regulations do not identify specific diseases that would make an alien inadmissible under the physical or mental disorder inadmissibility ground. The CDC Technical Instructions for both civil surgeons and panel physicians list the major diagnostic categories of mental disorders. The CDC Technical Instructions also list mental disorders for which harmful behavior is an element of the diagnosis. Diagnosing the applicant for any of these conditions automatically establishes his or her inadmissibility, unless the condition is in remission. Note, however, that some of the disorders listed (such as mood disorders) do not always have associated harmful behavior; a doctor would have to make a specific finding of associated harmful behavior for an alien to be inadmissible for some of these disorders. Alcohol dependence and abuse are included as disorders for which harmful behavior is a necessary part of the diagnosis.

If the doctor examining an alien uncovers a history of physical or mental disorder and an associated history of harmful behavior, the condition will be considered in remission—and, therefore, not likely to recur—if no pattern of the behavioral element has manifested in the previous twelve months. Panel physicians are instructed to use their clinical judgment to determine if twelve months is an acceptable period of time for the individual applicant to demonstrate full remission. This judgment is to be made based on an assessment of the history of associated harmful behavior and its likelihood of recurrence.

Consular officers are required to refer visa applicants to a doctor if they have either a single alcohol related arrest or conviction within the last five years; two or more alcohol related arrests or convictions within the last ten years; or if there is any

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14 INA §212(a)(1)(A)(iii)(II).

15 This list is reproduced as appendix 6A.

16 Appendix 6B reproduces the table that lists these conditions and their associated harmful behaviors.

17 *Foreign Affairs Manual* (FAM) 40.11 N11.1
other evidence to suggest an alcohol problem.\textsuperscript{18} The doctor will determine whether the applicant suffers from alcohol abuse or dependence.

\textit{Drug Abusers or Addicts}

Aliens who are determined to be “drug abusers” or “addicts” are inadmissible.\textsuperscript{19} The PHS regulations contain very broad definitions of the terms “drug abuse” and “drug addiction.” The regulations define drug abuse as the “non-medical use of a substance listed in section 202 of the Controlled Substances Act ... which has not necessarily resulted in physical or psychological dependence.”\textsuperscript{20} Section 202 of the Controlled Substances Act\textsuperscript{21} lists hundreds of controlled drugs arranged into five “schedules,” which determine the degree of a criminal offense involving a particular drug. For example, marijuana is included on the list in schedule I, the most severely penalized category.

The PHS regulations define drug addiction as a nonmedical use of a controlled substance “which has resulted in physical or psychological dependence.”\textsuperscript{22} Both drug abuse and drug addiction make one inadmissible, and there is no waiver for either category.

On June 1, 2010, the CDC issued Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance Related Disorders. These instructions appear to heighten the standard required to show substance abuse or addiction. In order to make a substance (either alcohol or drug) related diagnosis, the panel physician must document the pattern or use of the substance and behavioral, physical and psychological effects associated with the use or cessation of use of that substance. Substance dependence is characterized by compulsive long term use of the substance. Substance abuse is characterized by a pattern of recurrent substance use despite adverse consequences or impairment.\textsuperscript{23}

As is the case for general mental disorders, sustained, full remission of substance related disorders is a period of twelve months during which no substance use has occurred. Panel physicians are instructed to use their discretion to determine whether twelve months is an acceptable period of time for an individual applicant to demonstrate full remission. Full remission can be shown through evidence such as completion of a drug treatment program.\textsuperscript{24} Therefore, people who stopped using drugs more

\textsuperscript{18} \textit{Foreign Affairs Manual} (FAM) 40.11 N11.2
\textsuperscript{19} INA §212(a)(1)(A)(iv).
\textsuperscript{20} 42 CFR §34.2(g).
\textsuperscript{21} 21 USC §812.
\textsuperscript{22} 42 CFR §34.2(g).
\textsuperscript{23} CDC, Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance Related Disorders (June 1, 2010).
\textsuperscript{24} \textit{Foreign Affairs Manual} (FAM) 40.11 N11.1.
than twelve months before their medical examination may be able to show that they are not inadmissible.

Chronic alcoholism per se is not included as an inadmissibility ground, nor is it subsumed under the definitions of drug user or drug abuser.25 PHS has equated “drugs” with “controlled substances” as defined in section 202 of the Controlled Substances Act, and this definition specifically excludes alcoholic beverages and tobacco from its coverage. However, the CDC Technical Instructions instruct physicians to look for alcohol abuse as part of the evaluation for mental and physical disorders with associated harmful behavior. The instructions list alcoholism as a disorder in which harmful behavior is a necessary element of the diagnostic criteria. In other words, a diagnosis of alcoholism necessarily includes a determination of associated harmful behavior and, therefore, in the absence of evidence of remission, necessarily leads to a Class A medical notification of excludability. Note that there are waivers available for aliens who are inadmissible under the physical or mental disorders bar, unlike the drug abuse or addiction bar.

**Waivers**

U.S. Citizenship and Immigration Services (USCIS) may waive the “communicable diseases” inadmissibility ground for aliens who are spouses, unmarried sons or daughters, unmarried lawfully adopted children, or parents of U.S. citizens, permanent resident aliens, or aliens who have been issued immigrant visas.26 The “vaccination” ground may be waived for immigrants (1) who subsequently are vaccinated; (2) who obtain a certificate from a civil surgeon or medical officer showing that such vaccination would not be medically appropriate; or (3) for whom USCIS waives the requirement because of the alien’s religious beliefs or moral convictions.27

USCIS does not require those who are subsequently vaccinated, or for whom vaccinations are not medically appropriate, to submit a waiver application and fee. A waiver application and fee is required only for an immigrant seeking a waiver of the vaccination requirements based on religious or moral beliefs. The “physical or mental disorder” inadmissibility ground may be waived for any alien; no family relationship is required.28 INA §212(g) waivers29 are not available for the “drug abuser or addict” inadmissibility ground.

25 9 FAM 40.11 N11.2.
26 INA §212(g)(1).
27 INA §212(g)(2).
28 INA §212(g)(3).
29 For more information on waivers of this ground of inadmissibility, see chapter 7.
Criminal Grounds

Aliens are inadmissible for having committed or engaged in the following:

- controlled substance violations
- crimes involving moral turpitude
- multiple crimes
- controlled substance trafficking
- prostitution and commercialized vice
- assertion of diplomatic immunity from prosecution for serious crimes
- being responsible for or carrying out particularly severe violations of religious freedom during the past 24 months while serving as a foreign government official, or being the spouse or child of such a person\(^{30}\)

A limited waiver is available for some of these “criminal” inadmissibility grounds, and some forms of post-conviction relief also may cure inadmissibility.\(^{31}\)

Several of the criminal grounds of inadmissibility require that to be inadmissible, the alien must have been convicted. The term “conviction” is defined in the statute.\(^{32}\) A person is considered to have been convicted if a court has adjudicated him or her guilty or has entered a formal judgment of guilt against him or her.\(^{33}\) In addition, even if the court has withheld such an adjudication, a person is considered to have been convicted for immigration purposes if: (1) the person was found guilty or entered a plea of guilty or nolo contendere, and (2) the judge ordered some form of punishment or restraint on the person’s liberty.\(^{34}\) The imposition of administrative costs alone may constitute punishment under the statute.\(^{35}\)

Certain “pre-plea” or “diversionary” programs, which exist in many states and counties, are not convictions under state law but will be considered convictions based on the INA definition. The exact descriptions differ, but, generally, the accused agrees to participate in some sort of program or community service, without any admission or determination of guilt. If the program is successfully completed, the proceedings are dismissed. If the program is not successfully completed, the case is returned to court for a determination of guilt. You must be careful in these cases to make sure that the client has not pled guilty and has not admitted sufficient facts to establish guilt.

\(^{30}\) INA §212(a)(2).
\(^{31}\) INA §212(h).
\(^{32}\) INA §101(a)(48)(A).
\(^{33}\) INA §101(a)(48)(A)(ii).
\(^{34}\) INA §101(a)(48)(A)(i).
Convictions that do not require proof of guilt beyond a reasonable doubt or otherwise comport with standard criminal proceedings may also not be convictions for immigration purposes.\textsuperscript{36} A nolle prosequi, or “nol pros” by the prosecutor, which means that the person was arrested and charged but that the prosecutor dismissed the charges before a determination, is also not a conviction for immigration purposes.

The authority to change or set aside a conviction belongs to the court in which the conviction occurred or to courts reviewing that conviction.\textsuperscript{37} USCIS and the immigration court do not have that authority.

Prior to the 1996 amendments to the INA,\textsuperscript{38} expungements and other means of vacating or ameliorating criminal convictions by criminal and reviewing courts were accepted as removals of convictions for immigration purposes. This rule was changed, however, with the Board of Immigration Appeals’ (BIA) decision in \textit{Matter of Roldan}.\textsuperscript{39} In that case, Roldan’s drug possession conviction had been expunged under a state counterpart of the Federal First Offender Act\textsuperscript{40} [for first-time convictions for simple possession of drugs]. The BIA held that, following the 1996 addition of a definition of “conviction” in the INA, any state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute, such as the one under which Roldan’s conviction was expunged, will be given no effect for immigration purposes.

This does not mean, however, that persons with criminal convictions should not attempt to have the convictions vacated, set aside, or otherwise ameliorated, if there is a basis under federal or state law for making such a request. It is important to remember that the sort of expungement or vacating of conviction dealt with in \textit{Matter of Roldan} occurred by operation of law, without regard to whether there were flaws in the underlying criminal procedure. In contrast, a vacating or setting aside of a conviction because of constitutional or other legal errors in the criminal proceeding, such as inaccurate translation or a failure to advise the accused of his or her rights, can serve to remove the conviction for immigration purposes.\textsuperscript{41} The U.S. Court of Appeals for the Ninth Circuit reversed the BIA’s decision in \textit{Roldan}, in \textit{Lujan-Armendariz v. INS}.\textsuperscript{42} The Ninth Circuit held that the new definition of “conviction” did not repeal the Federal First Offender Act\textsuperscript{43} or the rule that no alien may be de-

\textsuperscript{36} \textit{Matter of Eslamizar}, 23 I&N Dec. 684 (BIA 2004).
\textsuperscript{37} \textit{Rosendiz v. Kovensky}, 416 F.3d 952 (9th Cir. 2005).
\textsuperscript{39} 22 I&N Dec. 512 (BIA 1999), vacated by \textit{Lujan-Almendariz v. INS}, 222 F.3d 728 (9th Cir. 2000).
\textsuperscript{40} 18 USC §3607.
\textsuperscript{41} \textit{Matter of Pickering}, 23 I&N Dec. 621 (BIA 2003).
\textsuperscript{42} 222 F.3d 728 (9th Cir. 2000).
\textsuperscript{43} 18 USC §3607(a).
ported based on an offense that could have been tried under the Act, but is instead prosecuted under state law, where the findings are expunged pursuant to a state rehabilitative statute. The 9th Circuit subsequently reversed itself, however, and overturned *Lujan-Armendariz* prospectively in *Nunez-Reyes v. Holder*. Because the decision is not retroactive, *Lujan-Armendariz* still controls in the 9th Circuit for convictions which occurred prior to July 17, 2011.

*Lujan-Armendariz* dealt specifically with expungements of first-time drug possession cases under the Federal First Offender Act or state law. The BIA’s decision in *Roldan* is broader, however, and appears to apply to the expungement, vacating, or setting aside under a state rehabilitative statute of a conviction for any crime. Several circuit courts of appeals have upheld the BIA’s *Roldan* decision.

Some grounds of inadmissibility and deportability apply only to convictions for which there was a certain term of imprisonment. The INA contains a definition of “term of imprisonment” for this purpose. Under this definition, a term of imprisonment includes the period of incarceration or confinement ordered by the court, regardless of any suspension of the imposition or execution of the sentence. Note that for offenses that have immigration consequences because of the length of the sentence imposed, a reduction of the sentence may serve to remove or lessen the immigration consequences of a conviction.

A conviction should not be considered final until the direct appeal has been either waived or exhausted. Some federal circuit courts of appeals, however, have reasoned that Congress eliminated the finality requirement when it added a definition of “conviction” to the INA. When a case is under collateral attack—e.g., if a writ of coram nobis or a habeas corpus motion has been filed—the conviction is still final until the motion is decided. If the collateral attack is decided in the immigrant’s favor, the disposition may cure the inadmissibility ground.

Unless Congress intended the inadmissibility ground to apply only to convictions in the United States, a conviction by a court in a foreign country may bring about the

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44 *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).
45 Id.
46 See *Ramos v. Gonzales*, 414 F.3d 800 (7th Cir. 2005); *Elkins v. Comfort*, 393 F.3d 1159 (10th Cir. 2004); *Resendiz-Alcaraz v. Att’y Gen.*, 383 F.3d 1262 (11th Cir. 2004); *Madiz v. Ashcroft*, 383 F.3d 321 (5th Cir. 2004); *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003); *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003).
47 INA §101(a)(48)(B).
50 *Puello v. BCIS*, 511 F.3d 324 (2nd Cir. 2007); *Abiodun v. Gonzales*, 461 F.3d 1210 (10th Cir. 2006); *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001); *Planes v. Holder*, 652 F.3d 991, (9th Cir. 2011)
same immigration consequences as a conviction inside the United States.\textsuperscript{51} To cause inadmissibility, the foreign conviction must be for conduct that also would be considered criminal in the United States.

The general rule is that findings of delinquency by a juvenile court are not convictions for immigration purposes.\textsuperscript{52} However, if the minor is convicted by a court as if he or she were an adult, the conviction will bring immigration consequences.\textsuperscript{53} Within the United States, such a conviction may occur if a state court forgoes the option of treating the minor as a juvenile.

Two of the criminal inadmissibility grounds apply to an alien who admits either having committed a crime or having committed the essential elements of a crime, even though he or she was never convicted for that crime. For an admission to be valid, the consular officer or USCIS officer must establish all of the following:

\begin{itemize}
  \item The act is considered criminal under the law in force where the act was alleged to have been committed
  \item The alien was advised in a clear manner of the essential elements of the alleged crime
  \item The alien has clearly admitted conduct constituting the essential elements of the crime
  \item The admission was made in a free and voluntary manner.\textsuperscript{54}
\end{itemize}

Guilty pleas are considered admissions for immigration purposes.\textsuperscript{55} However, the admission cannot have a greater effect than the criminal proceeding. Thus, if after the guilty plea the accused is not convicted, USCIS cannot use the plea as an admission for purposes of inadmissibility.\textsuperscript{56}

\textit{Crimes of Moral Turpitude}

Aliens are inadmissible if they are convicted of a crime of moral turpitude or if they admit having committed a crime of moral turpitude.\textsuperscript{57}

\textit{What Is a Crime of Moral Turpitude?}

No clearly delineated definition exists within the law for “crime of moral turpitude,” though the term “moral turpitude” has been held to involve acts demonstrating “baseness, vileness, and depravity” on the part of the perpetrator.\textsuperscript{58}

\begin{footnotesize}
\begin{enumerate}
  \item \textit{Lennon v. INS}, 527 F.2d 187 (2d Cir. 1975).
  \item 22 CFR §40.21(a)(2)(ii).
  \item \textit{Matter of K}, 7 I&N Dec. 594 (BIA 1957).
  \item \textit{Id.}
  \item INA §212(a)(2)(A).
  \item \textit{Matter of Franklin}, 20 I&N Dec. 867 (BIA 1994), \textit{aff’d}, 72 F.3d 571 (8th Cir. 1995).
\end{enumerate}
\end{footnotesize}
In evaluating whether a particular crime involves moral turpitude, USCIS does not look at the underlying conduct of the applicant, but at the language in the criminal statute. If the statute is broad or multisectional (a “divisible statute,” in the parlance of the law), the courts will look at the record of conviction—i.e., the “charge (indictment), plea, verdict, and sentence”—to determine whether the crime for which the person was convicted involved moral turpitude. A 2008 decision by the Attorney General, however, allows for the consideration of evidence outside of the record of conviction where the statute is divisible and the record of conviction is inconclusive on the issue of moral turpitude.

Although you always must analyze the specific statute involved in your client’s case, there are some basic concepts to apply to the analysis of whether a crime involves moral turpitude. Crimes that have fraud as an element are considered to involve moral turpitude. Crimes of violence involving intent, such as murder, voluntary manslaughter, or rape, also involve moral turpitude. On the other hand, involuntary manslaughter is not a crime of moral turpitude unless the statute requires reckless conduct involving the conscious disregard of a substantial and unjustifiable risk.

Whereas simple assault does not involve moral turpitude, if injury to a spouse or child is an element of the offense, it may involve moral turpitude. Some sexual crimes, such as prostitution, are considered crimes of moral turpitude, as are some crimes against property, such as theft and robbery.

A conviction of simple driving under the influence (DUI) or driving while intoxicated (DWI) ordinarily does not involve moral turpitude. Aggravated DUIS, however, may be crimes involving moral turpitude.

70 Id.
Exceptions

The law contains two categories of exceptions for certain aliens who have been convicted of crimes of moral turpitude or who have made valid admissions regarding such crimes. Of the two exceptions to this inadmissibility ground, the first involves crimes that were committed when the alien was under the age of 18, and the second involves “petty offenses.”\textsuperscript{71} Aliens who have committed more than one crime of moral turpitude, however, cannot claim either of the exemptions.

The law provides that if the crime was committed while the alien was under age 18 and the alien both committed the crime and was released from prison more than five years before he or she applied for a visa, for other documentation, or for admission to the United States, then the alien is not inadmissible.\textsuperscript{72} This provision is different from the rule that findings of juvenile delinquency are not considered convictions for purposes of immigration law. If the alien had his or her acts adjudicated under juvenile proceedings, or if the foreign proceedings are interpreted as falling within the federal juvenile type of proceedings, then this provision does not apply.\textsuperscript{73}

In such a case, the alien would not have been convicted of any crime and would not be inadmissible. On the other hand, if the minor was convicted as if he or she were an adult, or, in the case of foreign convictions, if the minor’s conviction does not fall within the type of proceedings that federal law considers necessarily as juvenile proceedings, then this exception comes into play.

The second exception, known as the “petty offense” exception, has two parts. First, the applicant qualifies for this exception only if the crime of moral turpitude under which he or she was convicted, or to which he or she admitted, had a maximum possible penalty of one year of imprisonment.\textsuperscript{74} Second, in order not to be inadmissible for such a conviction, an alien must establish that he or she was sentenced to a term of imprisonment of no more than six months, regardless of how much time the convicted alien actually served.\textsuperscript{75}

Multiple Criminal Convictions

To be inadmissible under the multiple criminal convictions provision, (1) an alien must have been convicted of two or more crimes (other than purely political offenses), and (2) the aggregate sentences to confinement must have been five years or more.\textsuperscript{76} Under this ground, it is irrelevant whether the convictions occurred in a sin-

\begin{itemize}
  \item \textsuperscript{71} INA §§212(a)(2)(A)(ii)(I), (II).
  \item \textsuperscript{72} INA §212(a)(2)(A)(ii)(I).
  \item \textsuperscript{73} 22 CFR §40.21(a)(2).
  \item \textsuperscript{74} INA §212(a)(2)(A)(iii)(II).
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} INA §212(a)(2)(B).
\end{itemize}
gle trial, whether the offenses arose from a single scheme of misconduct, or whether they involved moral turpitude.

**Controlled Substance Violations**

Of the two grounds of inadmissibility relating to drug crimes, one is for people who have been convicted or admit commission of drug-related crimes; the other makes inadmissible aliens believed to be drug traffickers. For persons subject to grounds of deportability, the law also classifies drug trafficking crimes as “aggravated felonies,” which further drastically restricts possible remedies for people convicted of these crimes.

The provision relating to conviction of a drug-related crime makes inadmissible any alien convicted of, or who makes a valid admission of having committed, certain crimes or the essential elements of those crimes. This inadmissibility ground applies to a violation of, or conspiracy to violate, “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act).” This ground covers virtually every type of drug. Furthermore, the use of the words “any law or regulation ... relating to a controlled substance” has been interpreted as being broad enough to encompass convictions for being under the influence of drugs, or facilitating the unlawful sale of cocaine.

**Traffickers in Controlled Substances**

No conviction—or even valid admission—is necessary to exclude people believed to be drug traffickers. This ground applies to “[a]ny alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance.” It also applies to persons who knowingly assist, and to abettors, conspirators, and those who collude with others. Spouses and children who knowingly obtained financial or other benefit from the illicit activity within the previous five years are also inadmissible.

An “illicit trafficker” is “a knowing and conscious participant or conduit in an attempt to smuggle” a controlled substance. This broad definition applies not only to persons who smuggle or attempt to smuggle drugs into the United States, but also to

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77 INA §212(a)(2)(A)(i)(II).
78 INA §212(a)(2)(C).
79 INA §212(a)(2)(A)(i)(II).
82 INA §212(a)(2)(C).
83 INA §212(a)(2)(C)(ii).
people who serve as conduits for the drug trade within the United States. A person can be an illicit trafficker even if he or she has committed only one transgression.

This ground of inadmissibility can follow a person into lawful permanent residence. A person is removable under INA §237(a)(1)(A) for having been inadmissible at the time of entry or adjustment of status pursuant to INA §212(a)(2)(C) as an illicit trafficker in controlled substances where an immigration official knows or has reason to believe that the alien was a trafficker in controlled substances at the time of admission.

Prostitution and Commercialized Vice

Unlike the other grounds included under INA §212(a)(2), prostitution and commercialized vice are not technically “criminal” inadmissibility grounds. They apply even to persons who come from countries where prostitution is legal and presumably also to those who are coming to states of the United States where prostitution is legal. This ground’s three subsections make inadmissible the following:

- people who are coming to the United States to engage in prostitution or who have engaged in prostitution within 10 years of the date of application for a visa, adjustment of status, or entry into the United States
- people who are procurers of prostitutes, or who attempt to procure, or who receive the proceeds of prostitution, or people who have done any of these activities within 10 years of applying for a visa, adjustment of status, or entry into the United States
- people who are coming to the United States to engage in unlawful commercialized vice, whether or not it is related to prostitution

The phrase “engage in prostitution” requires that the person must have been engaged in this type of conduct over a period of time. Similarly, the statute does not cover acts of solicitation of prostitution on one’s own behalf. Having been convicted of a single act of prostitution does not make the person inadmissible under this ground. However, those falling into any of these three subsections are inadmissible even if there is no conviction for an offense involving prostitution.

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87 22 CFR §40.24(c).
88 INA §212(a)(2)(D).
**Foreign Government Officials Who Have Engaged in Particularly Severe Violations of Religious Freedom**

Aliens who were responsible for or carried out particularly severe violations of religious freedom during the preceding 24 months while serving as a foreign government official, and the spouse and children of such persons, are inadmissible.\(^{91}\)

Particularly severe violations of religious freedom are defined in section 3 of the International Religious Freedom Act of 1998\(^{92}\) to include arbitrary prohibitions on, restrictions of, or punishment for assembling for peaceful religious activities, speaking freely about one’s religious beliefs, changing one’s religious beliefs and affiliation, possession and distribution of religious literature, raising one’s children in the religious teachings and practices of one’s choice, or any of the following acts if committed on account of an individual’s religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.

**Significant Traffickers in Persons**

Under section 111(b) of the Trafficking Victims Protection Act of 2000,\(^{93}\) a report to Congress identifying publicly foreign persons to be sanctioned under the Act will be prepared by the president. Any alien who is listed in that report, or whom the consular officer or the attorney general knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, is inadmissible.\(^{94}\) Spouses, sons, and daughters (except unmarried children under 21) of traffickers who have knowingly obtained any financial or other benefit from the trafficker’s illicit activity are also inadmissible.\(^{95}\)

The term “severe forms of trafficking in persons” is defined as either (1) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform the commercial sex act is under 18 years of age, or (2) the recruitment, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subject to involuntary servitude, peonage, debt bondage, or slavery.\(^{96}\)

**Resources for Evaluating Immigration Consequences of Crimes**

Practitioners should consult *Immigration Consequences of Criminal Activity (AILA 3rd Ed. (2008))* by Mary E. Kramer.

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\(^{91}\) INA §212(a)(2)(G).

\(^{92}\) Pub. L. No. 105-292, §3(11), 112 Stat. 2787, 2791.


\(^{94}\) INA §212(a)(2)(H)(i).

\(^{95}\) INA §§212(a)(2)(H)(ii), (iii).

\(^{96}\) Pub. L. No. 106-386, §103(8), 114 Stat. 1464, 1470.
Also, there are many online resources that may help you evaluate the immigration consequences of particular criminal activity. These websites include:

- National Immigration Project of the National Lawyers Guild:
  - www.nationalimmigrationproject.org
- Law Offices of Norton Tooby
  - www.criminalandimmigrationlaw.com
- Immigrant Defense Project, New York State Defender’s Association
  - www.nysda.org/idp/index.htm
- National Defending Immigrants Partnership, through the National Legal Aid and Defender Association
  - www.nlada.org/Defender/Defender_Immigrants

National Security Grounds

Aliens inadmissible under the political/national security grounds are divided into five categories:

- persons seeking to enter the United States to engage in prejudicial and unlawful activities, including espionage, sabotage, “any unlawful activity,” or the violation or evasion of “any law prohibiting the export from the United States of goods, technology or sensitive information”\(^97\)
- persons “engaging in” “terrorist activities”\(^98\)
- persons whose admission into the United States would bring about serious foreign policy consequences\(^99\)
- members of the Communist or any totalitarian party\(^100\)
- participants in Nazi persecution or genocide.\(^101\)

Under the foreign-policy inadmissibility ground, aliens can be found inadmissible for purely ideological reasons. That is, the U.S. secretary of state may exclude an alien “because of the alien’s past, current, or expected beliefs, statements, or associations” if the person’s admission would “compromise a compelling U.S. foreign policy interest.” Mere membership in a Communist party is also a bar to entry, but only for aliens seeking lawful permanent residence.\(^102\)

\(^97\) INA §212(a)(3)(A).
\(^98\) INA §212(a)(3)(B).
\(^99\) INA §212(a)(3)(C).
\(^100\) INA §212(a)(3)(D).
\(^101\) INA §212(a)(3)(E).
\(^102\) INA §212(a)(3)(D)(i).
Espionage, Sabotage, Export Control Violations, and Other Unlawful Activities

Any alien is inadmissible if a consular officer or the U.S. attorney general has reason to believe that the person will (1) engage in espionage or sabotage; (2) attempt to violate or evade export control laws; (3) engage in activities with a view to overthrowing the U.S. government by unlawful means; or (4) engage in any other unlawful activity. For such a person to be barred from admission it is sufficient for the consular officer or USCIS to have reasonable grounds to believe that the person intends to engage in the proscribed activities. The applicant is inadmissible even if he or she intends to engage only incidentally in the described activities.

The provision barring entry to those who seek to “violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information” was intended by Congress to forbid the entry not only of those whom the consular officer has reason to believe seek to violate the export control laws, but also of those who have the intention to evade those laws. Thus, the ground covers activity not expressly forbidden by the export control laws. However, the legislative history indicates that this provision should be applied only to those cases in which such evasion would harm the national security.

Terrorist Activity

This ground of inadmissibility, which was greatly expanded by the USA PATRIOT Act of 2001 and the REAL ID Act of 2005, has three essential, interrelated prongs: “engaging in” “terrorist activity,” and belonging to or working on behalf of a “terrorist organization.” INA §212(a)(3)(B) makes inadmissible any alien who has “engaged in a terrorist activity;” whom a consular officer or the Department of Homeland Security (DHS) knows or reasonably believes is engaging in or will after entry engage in “terrorist activity;” who has incited “terrorist activity” with an intent to cause death or serious bodily harm; who is a representative or member of a “terrorist organization”; endorses or espouses terrorist activity; who has received military-type training from a terrorist organization; or who is the spouse or child of such an alien if the activity occurred within the last five years.

“Terrorist activity” includes hijacking and sabotaging conveyances; kidnapping someone and threatening her or him with death or injury in order to compel actions from a third party as a condition of release; violent attacks on internationally protected persons; assassination; use of biological, chemical, or nuclear weapons; use of

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103 INA §212(a)(3)(A).
104 INA §212(a)(3)(A)(i)(II).
explosives, firearms, or other weapons to endanger people or substantially damage property; or a threat or conspiracy to do any of the foregoing.\(^{108}\)

“Engaging” in terrorist activity under the statute encompasses more than directly performing any of the acts above. It also includes preparing and planning a terrorist activity; gathering information for potential targets of terrorist activity; soliciting funds either for terrorist activity or terrorist organizations; soliciting individuals to engage in terrorist activity or to join a terrorist organization; giving “material support” (including a safe house, transportation, communications, funds (in any amount), false documents, weapons, explosives, or training) for the commission of a terrorist activity or to a terrorist organization.\(^{109}\) Note that officers, official representatives, and spokesmen of the Palestine Liberation Organization (PLO) are considered under the statute to be “engaged in terrorist activity.”\(^{110}\)

The INA sets out three different tiers of “terrorist organizations.” The groups in the first two tiers are specifically designated by the Department of State (DOS) as terrorist organizations.\(^{111}\) Groups in the third tier are not specifically named anywhere; the third tier comprises any “group[s] of two or more individuals, whether organized or not,” which engage in, or have subgroups that engage in, terrorist activities.\(^{112}\) Anyone who is a representative of a terrorist organization from any of the three tiers is inadmissible. Members of Tier I and II organizations are inadmissible, while a member of a Tier III organization is inadmissible unless he or she can show that he or she did not know, and reasonably should not have known, that the organization was a terrorist organization.\(^{113}\)

The statute as originally passed contained few specific exemptions from these bars. There is an exception to inadmissibility for the spouse or child of an alien who had engaged in terrorist activity within the last five years. To be eligible for this exception, the spouse or child must show that he or she reasonably should not have known about the activity that made his or her parent or spouse inadmissible under this section; or whom the consular officer or DHS officer has reason to believe has renounced this activity.\(^{114}\) There is also an exception for individuals who provided “material support” to terrorists or terrorist organizations if they can show, by clear

\(^{110}\) INA §212(a)(3)(B)(i).
\(^{113}\) INA §212(a)(3)(B)(i)(VI).
\(^{114}\) INA §212(a)(3)(B)(ii).
and convincing evidence, that they did not know that the organization in question was a terrorist organization.\footnote{INA §212(a)(3)(B)(iv)(VI)(dd).}

Legislation passed at the end of 2007 gave DHS and DOS explicit authority to exempt many more individuals from some of the terrorism-related bars to admission.\footnote{Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, §6, div. J, sec. 691, 121 Stat. 1844, 2364–66.} These exemptions are often referred to as “waivers,” although technically speaking they are not waivers, and one does not use a waiver application to request these exemptions. The following persons may be exempted from the terrorism-related bars: members and representatives of Tier III groups; people who knowingly and voluntarily engaged in terrorist activity as long as it was not on behalf of a Tier I or Tier II group; people who engaged in terrorist activity on behalf of a Tier I or Tier II group, but did not do so knowingly or willingly; and spouses and children of people inadmissible under INA §212(a)(3)(B) who are not covered by the exception at INA §212(a)(3)(B)(i)(IX).\footnote{INA §212(d)(3)(B)(i).} To date, DHS has not exercised the full scope of its exemption authority.

**Potential for Serious Adverse Consequences for Foreign Policy**

Another ground bars the entry of an alien if the secretary of state has reasonable ground to believe that the alien’s entry or proposed activities would have serious adverse foreign policy consequences.\footnote{INA §212(a)(3)(C).}

**Beliefs, Statements, and Associations Exception**

Beliefs, statements, or associations that would be lawful within the United States do not make aliens inadmissible on the foreign policy ground. However, the secretary of state may override this exception if she or he “personally determines that the alien’s admission would compromise a compelling United States foreign policy interest.”\footnote{INA §212(a)(3)(C)(iii).} The law provides that if the secretary of state makes such a determination, he or she must notify the chairs of the Judiciary and Foreign Affairs Committees of the House of Representatives and of the Judiciary and Foreign Relations Committees of the Senate regarding the alien’s identity and the reasons for the determination.\footnote{INA §212(a)(3)(C)(iv).}

**Exception for Foreign Politicians**

Another exception to the adverse foreign policy effect inadmissibility ground specifically protects foreign politicians. No official of a foreign government or purported government, and no candidate in a foreign election during the period immediately preceding the election, may be excluded on the basis of beliefs, statements, or associ-
ations, if such beliefs, statements, or associations would be lawful in the United States. The secretary of state has no authority to override this exception. 121

Membership in the Communist or a Totalitarian Party

The INA bars the admission of members or former members of the Communist party or of any totalitarian party. 122 Speech-related conduct such as “advocating or teaching totalitarian doctrine, or writing, publishing, distributing, printing, or possessing totalitarian materials” no longer constitutes a ground of inadmissibility. And aliens are no longer inadmissible, as they once were, for being members of organizations proscribed by the Subversive Activities Control Act of 1950.

Meaning of Membership in a Totalitarian or Communist Party

Giving, loaning, or promising support or money for any purpose to any organization is presumed, according to the INA, to constitute “affiliation” with the organization. 123 The term “totalitarian party” refers to an organization that advocates the establishment in the United States of a one-party system and that forcibly suppresses opposition.

The Foreign Affairs Manual says that “intellectual interest in, sympathy for, or favoring the ideologies of the Communist or other totalitarian party does not constitute affiliation ... unless accompanied by some positive and voluntary action which provides support, money, or another thing of value.” 124 DOS regulations also provide that voluntary service in the armed forces of a Communist country is not by itself considered voluntary membership or affiliation with the Communist party. 125 Voluntary service in a political capacity, on the other hand, is considered affiliation with or membership in the party. 126

Membership must be a “meaningful association” to be the basis of inadmissibility. In 1957, the U.S. Supreme Court held that membership is not present when the motivating impulse to the affiliation was devoid of political implications. 127 In that case, the alien had joined the Communist party of the United States in the 1930s because he considered it the only way to fight for food and shelter, and he seemed unaware of such Communist aims as the overthrow of the state. In a 1963 decision, the U.S. Supreme Court stated that membership is not meaningful if it is temporary and if the person does not know of the party’s international relationships, but believes it to be a group solely trying to remedy unsatisfactory social or economic conditions, carry out trade union objectives, eliminate racial discrimination, combat unemployment, or

121 INA §212(a)(3)(C)(ii).
122 INA §212(a)(3)(D).
123 22 CFR §40.34(a).
124 9 FAM 40.34 N1.
125 22 CFR §40.34(b).
126 22 CFR §40.34(c).
alleviate distress and poverty.\textsuperscript{128} The BIA has held that membership is absent if the alien joined an affiliate of the Communist party when the alien had no knowledge of the affiliate’s relationship with the Communist party.\textsuperscript{129}

Consular officers seeking to determine whether an alien’s membership in a Communist or totalitarian party was meaningful may (and in some cases must) request an advisory opinion from DOS’s Visa Office.

\textit{Membership in the Communist Party and Foreign Policy Considerations}

Historically, courts have held that the executive power should not circumvent limitations on its power to exclude aliens who are members of the Communist party by resorting to the foreign policy inadmissibility ground. To exclude a Communist party member under this ground, the government was required to have a foreign policy reason independent from the alien’s organizational membership.

\textit{Involuntary Membership Exception}

The law exempts from the Communist party membership ground of inadmissibility aliens whose membership in or affiliation with the Communist party (1) is or was involuntary; (2) was solely when the person was under 16 years of age; (3) arose solely by operation of law; or (4) was for the purpose of obtaining employment, food rations, or other essentials of living.\textsuperscript{130}

\textit{Past Membership Limitations}

Former membership in a Communist or totalitarian party will not bar the former member’s entry into the United States if the consular officer determines that (1) such membership or affiliation terminated two years before the date the former member applied for a visa (or five years before in the case of a member of a totalitarian party that still controls the government of the foreign state at the time of application for the visa); and (2) the alien is not a threat to the security of the United States.\textsuperscript{131}

\textit{Participant in Genocide or Nazi Persecution}

The INA bars admission of individuals who, as members of the Nazi government or its allies, participated in the persecution of others on account of race, religion, national origin, or political opinion.\textsuperscript{132} Another inadmissibility ground excludes aliens who have engaged in genocidal conduct as defined by the International Convention on the Prevention and Punishment of Genocide.\textsuperscript{133} The convention defines genocide as the commission of any of a number of specified acts with intent to destroy, in

\begin{itemize}
\item \textsuperscript{128} \textit{Gastelum-Quinones v. Kennedy}, 374 U.S. 469 (1963).
\item \textsuperscript{129} \textit{Matter of Rusin}, 20 I&N Dec. 128 (BIA 1989).
\item \textsuperscript{130} INA §212(a)(3)(D)(ii).
\item \textsuperscript{131} INA §212(a)(3)(D)(iii).
\item \textsuperscript{132} INA §212(a)(3)(E)(i).
\item \textsuperscript{133} INA §212(a)(3)(E)(ii).
\end{itemize}
whole or in part, a national, ethnic, racial, or religious group as such. The acts specified are:

- killing members of the group
- causing serious bodily or mental harm to the members of the group
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction
- imposing measures intended to prevent births within the group
- forcibly transferring children of the group to another group

**Waivers**

INA §212(a)(3) specifically provides for only one type of waiver applicable to persons inadmissible because of membership in Communist or totalitarian parties. Only parents, spouses, sons, or daughters of U.S. citizens or lawful permanent residents (LPRs), and brothers or sisters of U.S. citizens are eligible for this waiver. USCIS is authorized to grant these waivers for humanitarian purposes, to assure family unity, or when it is in the public interest, provided the alien is not a threat to the security of the United States.

**Public Charge**

**Public Charge Standard**

The public charge inadmissibility ground bars entry to any alien who, “in the opinion of the consular officer at the time of application for a visa, or in the opinion of the attorney general at the time of application for admission or adjustment of status,” is likely to become a public charge. This ground of inadmissibility is not applicable to refugees seeking adjustment, asylees seeking adjustment, special immigrant juveniles, and others. In addition, aliens applying for permanent residence as immediate relatives of U.S. citizens or under the family-based preferences are inadmissible unless they have obtained an affidavit of support executed by the petitioner. The affidavit of support requirements are covered in chapter 8.

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134 18 USC §1091(a).
135 Id.
137 INA §212(a)(4).
138 INA §209(c).
139 8 CFR §209.2(a)(1)(v).
140 8 CFR §245.2(e)(2)(vi)(3).
141 8 CFR §§245.13(c), 245.15(e)(1), 245.12(c), 245.20(c).
The 1996 law incurred amendments to the ground of inadmissibility for individuals likely to become a public charge. The revised ground requires that consular officers, and the attorney general in the case of adjustment applications, consider several factors, including the alien’s age, health, family status, assets, resources, financial status, education, and skills. Basically, this amendment codifies the standard that USCIS previously developed to implement this exclusion ground.

Historically, USCIS and DOS have applied somewhat different standards in determining who is likely to become a public charge. DOS’s standard relies heavily on the U.S. Department of Health and Human Services’ annual poverty income guidelines. “An immigrant visa applicant relying solely on personal income to [counter public charge inadmissibility], who does not demonstrate an annual income above the income poverty guidelines ... and who is without other adequate financial resources, shall be presumed ineligible” for admission.

Immigrant visa applicants, therefore, should not rely solely on past earnings to prove they are not likely to become public charges, but should submit additional evidence that they are not inadmissible—e.g., that they have been offered permanent employment in the United States. Letters submitted to prove prearranged employment must be notarized, written on letterhead stationery of the employing business, and must include all of the following:

- a definite offer of employment
- a description of the job and the skills required
- the rate of compensation
- the location, type, and duration of the employment
- whether the employment will be immediately available upon the applicant’s arrival in the United States

If the employer does not have letterhead stationery, he or she should submit a letter in the form of a contract or an affidavit attesting the offer. If the offer is being made by an individual rather than a business, the employer must provide evidence of financial means to carry out the offer.

Other evidence that an applicant may submit includes evidence that the applicant has, or will have, personal funds or property at his or her disposal in the United States. In making a determination of the likelihood that the alien will become a public charge, the consular officer will also consider such factors as the alien’s age, health, vocation, and conditions in the United States that would reasonably tend to show that the burden of supporting the alien is likely to be cast on the public.

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142 IRAIRA, supra note 38.
143 INA §212(a)(4)(B).
144 22 CFR §40.41(f).
145 22 CFR §40.41(e).
USCIS applies a “totality of the circumstances” test, which looks at all the circumstances present at the time the alien applies for an immigrant visa or for admission to the United States.\textsuperscript{146} This ground of inadmissibility is prospective in nature, and the adjudication must be based on whether the applicant is likely to become a public charge in the future. The mere possibility that the alien may become a public charge is not sufficient to find him or her inadmissible. Some specific circumstance—such as mental or physical disability, advanced age, or some other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public—must be present. A healthy person in the prime of life ordinarily cannot be considered likely to become a public charge, especially if the alien has friends or relatives in the United States who have indicated their ability and willingness to provide help in case of emergency.

USCIS places its main emphasis not on existing economic factors but rather on “the alien’s physical and mental condition as it affects ability to earn a living . . . .”\textsuperscript{147} The negative side of this approach is that the frail and the elderly are likely to be excluded from the United States under USCIS’s standard. On the other hand, even though low earnings and past receipt of public assistance are factors USCIS considers, they do not automatically make a person likely to become a public charge.

In a move intended to calm fears that receipt of public benefits would make the alien’s family members inadmissible as public charges, USCIS issued a notice that both defines public charge and clarifies the effect of past use of certain public benefits. The notice went into effect on May 26, 1999, and is applied by both USCIS and consular officials. Under the official interpretation, public charge is defined as “likely to become . . . primarily dependent on the government for subsistence, as demonstrated by either . . . the receipt of public cash assistance for income maintenance, or . . . [i]nstitutionalization for long-term cash at government expense.”\textsuperscript{148} Therefore, likely receipt or even dependence on noncash assistance programs will not subject one to public charge inadmissibility.

The proposed rule specifies that “cash assistance for income maintenance” includes Supplemental Security Income (SSI), cash assistance from the Temporary Assistance for Needy Families (TANF) program, and state or local cash assistance programs for income maintenance, often called “general assistance.”\textsuperscript{149} In addition, public assistance, including Medicaid, that is used for supporting aliens who reside in an institution for long-term care also will be considered as part of the public charge analysis. Past or current receipt of these forms of public cash assistance could make the visa applicant a public charge, if, after weighing all the statutory factors, USCIS or consular agent believes the applicant is likely to become dependent on them in the future.

\textsuperscript{146} Matter of A–, 19 I&N Dec. 867 (Comm. 1988).
\textsuperscript{148} 64 Fed. Reg. 28689 (May 26, 1999).
\textsuperscript{149} Id.
However, short-term institutionalization for rehabilitation is not subject to public charge consideration, nor are benefits that are not considered “cash assistance for income maintenance.” These would include the following: Medicaid, Children’s Health Insurance Program (CHIP), food stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), immunizations, prenatal care, testing and treatment of communicable diseases, emergency medical assistance, emergency disaster relief, nutrition programs, housing assistance, energy assistance, child care services, foster care and adoption assistance, transportation vouchers, educational assistance, job training programs, and noncash benefits funded under the TANF program. Although some of these programs may provide cash benefits, their purpose is not for income maintenance but rather to avoid the need for ongoing cash assistance for income maintenance.

**Bonds**

Aliens seeking immigrant status who are inadmissible on economic grounds may be admitted to the United States at the attorney general’s discretion by posting a “public charge bond” or paying a cash deposit of at least $1,000.

**Labor Protection Grounds**

The law singles out two groups—U.S. workers and U.S. physicians and health care workers—as deserving of special protection from possible erosion of living standards due to foreign competition. The inadmissibility ground that provides general protection to U.S. workers, INA §212(a)(5)(A), prohibits the entry of those coming to the United States to perform skilled or unskilled labor without having first obtained a “labor certification.” A labor certification is a process involving the state employment agency and the Department of Labor (DOL) whereby the employer demonstrates to the satisfaction of both the state and federal departments of labor that there are no available or qualified U.S. workers to do the job. DOL must “certify” that there are no U.S. workers able, willing, qualified, and available to accept the job at the prevailing wage for that occupation in the geographic area, and that the employment of the immigrant will not adversely affect the wages and working conditions of similarly employed U.S. workers. Labor certification decisions by DOL may be appealed to the Board of Alien Labor Certification Appeals.

The protection extended to U.S. physicians and health care workers under INA §212(a)(5)(B) prevents graduates of foreign medical schools and health care workers

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150 *Id.*

151 22 CFR §40.41(d).

152 INA §212(a)(5)(A)(i).

153 20 CFR §656.1.
who have not received a certificate from the Commission on Graduates of Foreign Nursing Schools, or an equivalent credential, from entering the United States.\textsuperscript{154}

Labor protection grounds apply only to aliens seeking admission under the second and third employment-based preference categories. They do not apply to aliens seeking permanent residence through family-based immigrant categories or under other nonemployment-based immigrant categories.\textsuperscript{155}

\textbf{Previous Immigration Violations}

INA §212(a)(6) covers certain immigration-related misconduct. These grounds of inadmissibility apply to numerous categories of aliens, including:

- aliens present in the United States without being lawfully admitted or paroled
- aliens who fail to attend removal proceedings
- aliens who engage in fraud or misrepresentation
- aliens who falsely claim U.S. citizenship
- stowaways
- smugglers
- aliens who have been found to have committed civil document fraud
- foreign students who study at public institutions

\textbf{Aliens Present Without Permission or Parole}

This ground of inadmissibility applies to aliens who are present in the United States without being admitted or paroled, or who arrive at a place other than a designated port of entry.\textsuperscript{156}

This ground does not apply to aliens who leave the United States for consular processing, as they will not then be present in the United States. This ground also does not bar aliens who entered the United States without inspection from adjusting status to permanent residence under the special provisions of INA §245(i).\textsuperscript{157}

There is an exception to this ground of inadmissibility for aliens who qualify for immigrant status under the INA’s provisions for battered spouses and children.\textsuperscript{158} For aliens who first arrive in the United States after April 1, 1997, there are further restrictions on this exception. They must show that the spouse or child was battered or subjected to extreme cruelty by a spouse or parent, or a member of the spouse or par-

\begin{footnotes}
\footnotetext[154]{INA §§212(a)(5)(B), (C).}
\footnotetext[155]{INA §212(a)(5).}
\footnotetext[156]{INA §212(a)(6)(A).}
\footnotetext[157]{AFM § 40.6.2(a)(4)(i)}
\footnotetext[158]{INA §212(a)(6)(A)(ii).}
\end{footnotes}
ent’s family in the household, and that there was a substantial connection between
the battery or cruelty and the alien’s unlawful entry to the United States. 159

Failure to Attend Removal Proceedings

Another bar to admissibility applies to aliens who without reasonable cause fail to
attend their removal proceedings. 160 They are inadmissible for a period of five years
following their subsequent departure or removal from the United States. This ground
applies only to aliens who failed to attend removal proceedings; it does not apply to
aliens who failed to attend deportation or exclusion proceedings. In other words, the
ground applies only to aliens who fail to attend proceedings that were initiated on or
after April 1, 1997, and who were served with the Form I-862, Notice to Appear. 161
Moreover, this ground applies only to aliens who departed the United States after
failing to attend a removal hearing. Those who did not leave the United States and
are seeking to adjust status would need to reopen the removal proceedings.

It should also be noted that aliens who fail to attend removal proceedings after re-
ceiving notice may be ordered removed in absentia. 162 Moreover, in situations in which
an alien: (1) has received oral notice of the time and place of proceedings and the con-
sequences of failing to appear; (2) fails to appear for less than “exceptional circu-
tances”; and (3) an in absentia order results, the alien is ineligible to apply for ten years
for cancellation of removal, voluntary departure, adjustment of status, change of status,
or registry. 163 This ten-year period could be satisfied through residence in the United
States or abroad.

Fraud or Willful Misrepresentation

An alien is inadmissible if he or she commits willful misrepresentation or fraud in
attempting to obtain, or in obtaining, a visa, other documentation, admission into the
United States, or other benefit. 164 “Other documentation” refers to documents re-
quired at the time of the alien’s admission to the United States, such as re-entry per-
mits, border crossing cards, U.S. Coast Guard identity cards, or U.S. passports. “Oth-
er benefit” is understood to include, among other things, adjustment of status
applications, all visa petitions, requests for extension of stay, change of nonimmi-
grant classification, requests for employment authorization, and voluntary departure
requests. 165 All such misrepresentations that are material create a permanent bar to
admission. The BIA has held that “fraud” and “misrepresentation” are the same, ex-

160 INA §212(a)(6)(B).
161 AFM § 40.6.2(b)(2)(iv).
162 INA §240(b)(5)(A).
163 INA §240(b)(7).
164 INA §212(a)(6)(C)(i).
165 AFM § 40.6.2(c)(2)(A)(v)
cept that in cases of “willful misrepresentation” it is unnecessary to prove that the “person to whom the misrepresentation was made was motivated to action because of the misrepresentation.”

Under this ground, only misrepresentations to U.S. officials (generally a consular officer or a USCIS officer) are the basis of inadmissibility. Therefore, buying documents from a private individual does not make an alien inadmissible under the ground of procuring a document by fraud or misrepresentation, nor does using false documents to procure an entry into the United States make an alien inadmissible, unless they are presented to a U.S. official. However, aliens are inadmissible if they are subject to a final order under the civil document fraud provisions of INA §274C. Presenting false documents to an airline or transportation company constitutes a violation of §274C.

The visa fraud inadmissibility ground does not apply if the statements made by the alien were not untrue at the time they were uttered. Thus, the alien’s activities after entering the United States do not necessarily indicate that the alien misrepresented his or her intentions at the time of applying for a visa or for admission. For example, if an alien applies for adjustment of status to permanent residence after entering the United States with a tourist visa, this does not mean necessarily that the alien misrepresented his or her intentions at the time he or she obtained the visa. A person may have valid reasons for changing his or her plans after admission.

When aliens actively seek unauthorized employment or otherwise violate the terms of a nonimmigrant visa within 30 days of the date their visa is issued or they are admitted to the United States, DOS places the burden on the alien to rebut a presumption that the initial admission was based on a misrepresentation. If the conduct occurred more than 30 but less than 60 days after the person’s admission to the United States, no presumption applies, but a consular officer still may conclude that the alien misrepresented his or her original intent. USCIS officers may look at the 30/60 day rule for guidance in determining whether or not an applicant obtained admission through misrepresentation. The 30/60 day rule is not conclusive as to misrepresentation, however.

For the misrepresentation to be willful, intent to deceive is not necessary. It is sufficient that the false statement be made in a deliberate and voluntary manner or that the applicant has knowledge of the falsity of the documentation he or she is employing.

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168 INA §212(a)(6)(F)(i).
169 INA §274C(a)(6).
170 DOS Cable, 91 State 187392 (June 7, 1991), reprinted in 68 Interpreter Releases 1569 (Nov. 4, 1991); 9 FAM 40.63 N4.7.
171 AFM § 40.6.2(c)(1)(B)(viii).
A timely retraction of a misrepresentation can prevent it from being considered a basis for inadmissibility. In general, a retraction should be made at the first opportunity.

Only misrepresentations of material facts may make a person inadmissible. In this context, a misrepresentation can be fairly characterized as material: (1) if the alien was inadmissible on the true facts, or (2) if the misrepresentation tended to shut off a line of inquiry that was relevant to the alien’s eligibility and that line of inquiry might have resulted in a proper determination that the alien not be admitted.

When the true facts would not have made the alien inadmissible, but it has been established that the misrepresentation tended to cut off a relevant line of inquiry, the alien has the burden of persuasion and production to show that the inquiry would not have resulted in a proper determination that he or she was inadmissible. This burden is higher than just showing that the alien is eligible for a visa, because passage of time may have deprived the government of the possibility of making an adequate investigation. Consequently, when available facts indicate the existence of a substantial question as to the alien’s eligibility for admission to the United States, a holding that the alien’s misrepresentation was material may be warranted. On the contrary, if the record does not contain indications of inadmissibility, the misrepresentation will not be considered material. This holds even when applicants misrepresented their identity, if nothing in the record suggests that by disclosing their true name and identity they would have revealed an inadmissibility ground.

Misrepresentations on behalf of others do not make an applicant inadmissible under this section. They may, however, lead to inadmissibility due to alien smuggling under INA § 212(a)(6)(E).

Fraud or willful misrepresentation in securing entry into the United States may defeat the ability to adjust status under INA §245(a).

**False Claim of U.S. Citizenship**

Any alien who, on or after September 30, 1996, falsely represents himself or herself to be a citizen of the United States for any purpose or benefit under the INA or any other federal or state law is inadmissible. This could include false claims of citizenship to a USCIS agent for purposes of gaining admission to the United States, as well as false claims of citizenship to a state employee for purposes of obtaining a driver’s license or public benefit, or voting.

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173 *Falaja v. Gonzales*, 418 F.3d 889 (8th Cir. 2005).
175 AFM § 40.6.2(c)(1)(B)(vii).
178 AFM § 40.6.2(c)(1)(B)(v).
179 INA §212(a)(6)(C)(ii).
Three circuit courts of appeal have determined that an individual who marks the box “citizen or national of the United States” on a Form I-9 for the purpose of obtaining employment as a U.S. citizen is inadmissible for having made a false claim to U.S. citizenship. Another circuit court, however, recently found that falsely claiming to have been born in the United States in the course of an arrest by local police did not constitute a false claim under this section. The court reasoned that even if the respondent had lied to the local police about his immigration status and falsely claimed birth in Puerto Rico, he would only have done so to minimize the risk that the police would report him to DHS. This, the court found, is not a legal benefit, certainly not the kind of “purpose or benefit” under state or federal law that must be sought to trigger inadmissibility under section 212(a)(6)(C)(ii).

An exception for certain persons was included in section 201(b)(2) of the Child Citizenship Act of 2000. Under that exception, the inadmissibility ground does not apply if each natural or adoptive parent of the alien is or was a U.S. citizen, by birth or naturalization, the alien permanently resided in the United States prior to reaching age 16, and the alien reasonably believed at the time of making the representation that he or she was a citizen. The exception applies to representations made on or after September 30, 1996.

Timely retraction of a false claim to U.S. citizenship may be used as a defense to this section. As with timely retractions of general fraud and misrepresentation, the retraction must be both voluntary and without delay in order to be effective.

Stowaways

Stowaways are persons who obtain transportation without the consent of the owner or person in command of the vessel or aircraft on which they are traveling. A passenger who travels with a valid ticket is not a stowaway. Stowaways are inadmissible and there is no specific waiver available for this ground of inadmissibility.

Smugglers and Encouragers of Unlawful Entry

Immigrants and nonimmigrants are inadmissible to the United States if they have at any time knowingly encouraged, induced, assisted, abetted, or aided any other

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180 Rodriguez v. Mukasey, 519 F.3d 773 (8th Cir. 2008); Kechkar v. Gonzales, 500 F.3d 1080 (10th Cir. 2007); Crocock v. Holder (2nd Cir. 2012). See also Theodros v. Gonzales, 490 F.3d 396 (5th Cir. 2007) (false claim to U.S. citizenship in order to gain private sector employment).


183 INA §212(a)(6)(C)(ii)(II).


185 AFM § 40.6.2(c)(2)(C)(viii).

186 INA §101(a)(49).

187 INA §212(a)(6)(D).
alien to enter the United States illegally. There is no requirement that the smuggling have been for gain. One federal circuit court has found that mere presence in a vehicle with knowledge that an undocumented person was hiding in the vehicle does not constitute alien smuggling without there being an affirmative act to aid or abet the smuggling. The mistaken belief that the smuggled alien was legally entitled to enter the U.S. may be used as a defense to this ground. Individuals who qualified for Family Unity and who are applying for either Family Unity or an immigrant visa under the immediate-relative or the second-preference family visa provisions of the INA are not subject to this ground.

Congress created a waiver to ameliorate the smuggling inadmissibility ground’s possibly harsh results. However, only two groups of aliens can take advantage of this waiver: (1) LPRs who are returning from a visit abroad, and (2) aliens seeking permanent residence as immediate relatives of U.S. citizens or under the family visa provisions. Even for these individuals, the waiver is available only if the alien they encouraged or assisted to enter illegally was, at the time of the smuggling, their “spouse, parent, son or daughter (and no other individual).” The attorney general is authorized to grant these waivers for humanitarian purposes, to assure family unity, and when it is in the public interest. It should also be noted that any conviction for smuggling is now an “aggravated felony,” unless the smuggling was done only to assist a spouse, parent, son, or daughter.

Final Civil Document Fraud Order

Any alien who is subject to a final order for violation of INA §274C, which authorizes civil penalties for making or using false documents, or using documents issued to other persons, for purposes of satisfying any requirement imposed by the INA, is inadmissible.

Many of these activities also are prohibited under a criminal statute and may be punished criminally. However, to impose civil penalties under INA §274C, an administrative law judge (ALJ) only needs to determine by a preponderance of evidence that the violations have been committed. There is no administrative appeal from an order by an ALJ under this section, and the order becomes final unless the

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188 INA §212(a)(6)(E).
189 AFM 40.6.2(e)(3)(iii).
190 Altamirano v. Gonzales, 427 F.3d 586 (9th Cir. 2005).
191 AFM 40.6.2(e)(2)(i).
193 INA §212(a)(6)(E)(ii).
194 INA §212(d)(11).
196 INA §101(a)(43)(N).
197 INA §212(a)(6)(F).
attorney general vacates or modifies it within 30 days of the decision. Once the order becomes final, the affected person has 45 days to file a petition for review of the order with a court of appeals.

However, the document fraud procedures the government establishes to implement INA §274C must comport with due process. The government was enjoined from implementing confusing and misleading document fraud procedures that violated immigrants’ due process rights.\textsuperscript{198}

There is a waiver for this ground of inadmissibility.\textsuperscript{199} The waiver is available only to the following: (1) LPRs who temporarily left the country voluntarily and are otherwise admissible, and (2) aliens seeking admission or adjustment based on immediate-relative or family-preference petitions who have not previously been fined under §274C and whose offense was committed “solely to assist, aid, or support the alien’s spouse or child (and not another individual).”\textsuperscript{200}

### Documentary Requirements

Immigrants are prohibited from being admitted to the United States unless they are “in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document,” as well as a passport or other suitable travel document, or document of identity or nationality, as required by regulation.\textsuperscript{201} Immigrants also are inadmissible if their visas were not issued according to the INA’s numerical selection system governing allocation of visas according to family-based preferences.\textsuperscript{202} These two grounds do not apply if the applicant for admission otherwise is admissible under a specific provision of the INA.\textsuperscript{203}

The INA’s documentary requirements are subject to many waivers and exemptions. Immigrants who are inadmissible for failure to comply with the INA’s documentary requirements may be admitted to the United States if they can prove that their inadmissibility was not known to them or they could not have reasonably discovered it before arriving in the United States.\textsuperscript{204} The alien applies for this waiver at the port of entry on Form I-193 (Application for Waiver of Passport or Visa). If USCIS denies the waiver, the alien may renew the request before an immigration judge in removal proceedings. If USCIS fails to act on the waiver application before the hearing, the immigration judge may adjudicate the application without waiting for USCIS’s decision.

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\textsuperscript{198} Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998).
\textsuperscript{199} INA §212(a)(6)(F)(ii).
\textsuperscript{200} INA §212(d)(12).
\textsuperscript{201} INA §212(a)(7)(A)(i)(I).
\textsuperscript{202} INA §212(a)(7)(A)(i)(II).
\textsuperscript{203} INA §212(a)(7).
\textsuperscript{204} INA §212(k); Matter of Aurelio, 19 I&N Dec. 458 (BIA 1987).
Ineligible for Citizenship

Aliens are inadmissible if they are “ineligible to citizenship” or are draft evaders. 205 By “ineligible to citizenship,” the INA refers only to aliens who are permanently barred from becoming U.S. citizens because of laws relating to military service. 206 In order for this ground of inadmissibility to apply, the primary purpose of the departure or remaining abroad must be to avoid military service. 207 These aliens also are barred from entry into the United States, even as nonimmigrants. 208

An alien may be barred permanently from citizenship if he or she has deserted the U.S. Armed Forces or if he or she has been excused from having to serve because he or she is an alien. Though somewhat redundant of the inadmissibility ground that bars admission of deserters and draft evaders, INA §314 specifically makes ineligible for citizenship any aliens who have been convicted by a martial court or by a court of pertinent jurisdiction. INA §315, on the other hand, relates to persons who applied for exemption or discharge from military training or service based on alienage. Since World War I, Congress has enacted various statutes exempting certain aliens within the United States from military service with the condition that those taking advantage of the exemption would be ineligible for citizenship.

For an alien to be permanently barred from citizenship under §315, all the following elements must be present:

- The alien must apply for exemption or discharge.
- The exemption or discharge must be from training or service in the U.S. Armed Forces or the U.S. National Security Training Corps.
- The basis for the request for exemption or discharge must be the fact that the applicant is an alien.
- The applicant must have been relieved or discharged from such training or service based on alienage.

This inadmissibility ground is applicable only if the person sought and obtained a permanent exemption. Subsequent voluntary availability for service does not remove the bar to citizenship. Aliens automatically exempted from service are not subject to these provisions.

Though at present there is no draft, young men are required to be registered for the draft. Because the Military Selective Service Act 209 automatically exempts nonimmigrants from U.S. military service, nonimmigrants will not be required to exchange the right to become U.S. citizens for exemption from military service if a draft is in-

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205 INA §212(a)(8).
207 9 FAM 40.82 N1.2.
208 22 CFR §40.82(b).
209 50 USC App. §451 et seq.
stituted. Aliens who take advantage of treaties mutually exempting nationals of their country and of the United States from service in the other’s military will not become ineligible for citizenship if, before exercising their treaty rights, they have served in the armed forces of their country of nationality.

Aliens are inadmissible if they left the United States during time of proclaimed national emergency or war to escape military service. Aliens who deserted after induction or who remained outside the United States to evade military service also are inadmissible.210

Nonimmigrants are exempt from this ground. However, aliens who were LPRs at the time of the evasion or desertion are barred from even temporary visits to the United States. The general rule is that an alien not subject to the draft at the time of departure is not inadmissible upon return. But aliens who depart the country to avoid future military service are inadmissible. In these cases, though, exclusion is required only when the primary motive for departing or remaining outside the United States was to avoid military conscription.

There are no specific waivers for military-related inadmissibility grounds. However, a deserter who has been unconditionally pardoned by the president of the United States is relieved from the penalties imposed by law, including ineligibility for citizenship. When President Jimmy Carter granted a blanket pardon to Vietnam-era draft evaders and deserters, he declared that draft evaders “shall be permitted as any other alien to enter the United States.”211 DOS interprets the wording of this pardon as being conditional. It regards the pardon as being effective against the draft evader inadmissibility ground, but not in removing the inadmissibility ground based on “ineligibility to citizenship” because of a conviction by court martial for evasion or desertion.

Prior Removal Orders or Periods of Unlawful Presence

INA §212(a)(9) includes grounds of inadmissibility for aliens who have committed specified immigration violations. It applies to the following five categories of persons:

- aliens previously excluded
- aliens previously deported
- aliens who were unlawfully present in the United States for specified periods of time and now seek admission
- aliens who enter or attempt to enter the United States after having previously been unlawfully present in the United States for one year
- aliens who enter or attempt to enter the United States after having been previously ordered removed

210 Espinoza-Castro v. INS, 242 F.3d 1181 (9th Cir. 2001).
Having Previously Been Removed

Aliens who have been ordered removed under expedited removal, or ordered removed after proceedings initiated upon the alien’s arrival in the United States (in other words, the equivalent of exclusion proceedings under pre-1996 law), are inadmissible for a period of five years after the date of their removal.212 Other aliens who have been ordered removed, deported, or excluded are inadmissible for 10 years.213 They are inadmissible for 20 years after a second removal, and forever if they have been convicted of an aggravated felony.214

These inadmissibility bars do not apply if the attorney general has consented to the alien’s reapplying for admission.215 The inadmissibility periods set in the current statutory provisions went into effect on April 1, 1997, and apply retroactively, in that aliens, for example, who were subject to the prior five-year bar based on a deportation must now wait 10 years.216 However, a 1998 DOS memo indicated that legacy Immigration and Naturalization Service (INS) would extend “sympathetic consideration” on a case-by-case basis to requests for re-entry if the alien served the required period of time outside the United States pursuant to the prior law.217

Not every person who has been apprehended by USCIS will be subject to this inadmissibility ground. An alien who (1) was granted voluntary departure—either administratively by USCIS or in deportation proceedings by an immigration judge—and (2) left the United States on his or her own within the period specified in the voluntary departure order is not subject to this inadmissibility ground. However, aliens who leave the United States at their own expense after an immigration judge has entered a deportation or removal order against them are considered to have self-deported or self-removed and are thus also subject to this ground.

Unlawful Presence Bars

Aliens “Unlawfully Present” Who Depart the United States

Another ground of inadmissibility applies to aliens who are “unlawfully present” in the United States for certain periods of time, leave the country, and then seek admission.218 These provisions are prospective, and time spent in the United States “unlawfully” prior to April 1, 1997, does not count towards this bar. Aliens who are unlawfully present in the United States for a period of more than 180 days (but less than

212 INA §212(a)(9)(A)(i).
213 22 CFR §40.91(b).
214 INA §212(a)(9)(A)(ii).
217 Id.
218 INA §212(a)(9)(B).
Aliens who are unlawfully present in the United States for one year or more after April 1, 1997, and who depart and then seek admission, are inadmissible for a period of 10 years from the date they departed.220

The three-year bar provisions apply only to aliens who voluntarily depart the United States before the commencement of removal proceedings.221 If removal proceedings have commenced, the alien may not be subject to the three-year bar, but may be subject to the 10-year bar. This means that aliens who leave the United States under voluntary departure granted by an immigration judge will not be subject to the three-year bar and will be subject to the 10-year bar only if they accumulated a year or more of unlawful presence in the United States prior to departure.222 Further, by the terms of the statute, the 10-year bar may be triggered by a departure or removal that is not voluntary.

Under this ground, periods of “unlawful presence” in the United States are not counted in the aggregate, but rather each period is counted separately. Thus, this bar does not apply to an alien with multiple periods of “unlawful presence” if no single period exceeded 180 days.223

**Leaving the U.S. with Advance Parole Does Not Trigger the Three or Ten Year Bars**

Prior to April 2012, aliens who had applied for and being granted an advance parole document, and then left the U.S. after having accrued more than 180 days of "unlawful presence" were generally paroled back into the U.S. but then at the time of adjustment found inadmissible under INA §212(a)(9)(B). This changed on April 17, 2012, when the BIA published a decision, **Matter of Arrabally and Yerrabelly**, which held that leaving the U.S. temporarily pursuant to a grant of advance parole does not constitute a "departure" for purposes of §212(a)(9)(B).224 The case dealt with an adjustment of status applicant who obtained advance parole pursuant to his adjustment application, but it arguably covers others who obtain advance parole, such as aliens with Temporary Protected Status.

**Definition of “Lawfully Present” and “Unlawfully Present”**

There are no regulations interpreting the meaning of unlawful presence. The statute lists certain categories of individuals who are not subject to accruing unlawful pres-

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220 INA §212(a)(9)(B)(i)(II).
221 INA §212(a)(9)(B)(ii).
222 Note that AFM § 40.9.2(a)(4)(C) wrongly states that the 10-year bar is triggered by more than one year of unlawful presence rather than a year or more as written in the statute.
223 AFM § 40.9.2(a)(4)(A)
ence, and all other guidance on this topic comes from a new section in the Adjudicator’s Field Manual, Section 40.9. The statute says that “unlawfully present” means that the alien is present after overstaying an authorized period of stay, or without being admitted or paroled. For an alien who enters with a nonimmigrant visa but who subsequently violates the terms of the visa – such as by working without authorization – unlawful presence begins only after a determination by USCIS or an immigration judge that the alien violated status.

As noted in the AFM, unlawful presence and unlawful status are related but distinct concepts. In many instances, an individual may be present in the U.S. without lawful status but is nevertheless protected from accruing unlawful presence based on statutory or policy-based exceptions, as summarized below.

The statute recognizes six categories of individuals who do not accrue unlawful presence. They are:

- aliens under 18 years of age
- applicants for asylum during the pendency of the application, provided the alien did not work without employment authorization
- aliens who have been granted Family Unity during the authorized period
- battered spouses and children, provided there is a substantial connection between the abuse and the unlawful presence
- victims of a severe form of trafficking in persons if the trafficking was at least one central reason for the unlawful presence
- nonimmigrants who have made a timely, nonfrivolous application for an extension of stay or change of status, during the 120-day period after filing the application.

Section 40.9 of the Adjudicator’s Field Manual lists additional classes of aliens whom USCIS regards as being present in the United States pursuant to a period of authorized stay:

- persons with properly filed applications for adjustment of status under INA §§245(a) or 245(i), including persons who in removal proceedings renew ad-

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225 INA §212(a)(9)(B)(iii).
226 INA §212(a)(9)(B)(ii).
227 AFM § 40.9.2(b)(1)(E)(i)
228 AFM § 40.9.2(a)(2)
229 INA §§212(a)(9)(B)(ii), (iv).
230 This period may extend to include all the time such an application is pending, beyond the 120-day period stated in the statute. INS Memorandum, supra note 227; see also Adjudicator’s Field Manual, ch. 30.1(d).
justment applications that were denied by USCIS, but not including persons
who first apply for adjustment when in removal proceedings231

- persons admitted to the United States as refugees under INA §207 or granted
  asylum under INA §208 232
- persons granted withholding of removal under INA § 241(b)(3)233
- persons granted withholding or deferral of removal under the Convention
  Against Torture234
- persons with legalization and special agricultural worker applications for lawful
  temporary residence pending through an administrative appeal235
- persons granted deferred enforced departure236
- applicants for adjustment of status under the Nicaraguan Adjustment and Central
  American Relief Act and the Haitian Refugee and Immigrant Fairness Act237
- Cuban/Haitian entrants as defined under Pub. L. No. 99-603, §202(b)238
- persons granted voluntary departure, during the period allowed239
- persons granted suspension of deportation or cancellation of removal240
- persons granted deferred action status 241
- persons under a current grant of temporary protected status (TPS), including
  applicants for TPS, provided the application was granted 242
- conditional residents who timely file a petition to remove the conditions on residence,
  or whose late filing is accepted by USCIS or an immigration judge243
- Parolees, during the allowed parole period244
- Persons granted a Stay of Removal, during the authorized stay period. 245

231 AFM § 40.9.2(b)(3)(A)
232 AFM § 40.9.2(b)(1)(F)(i) and (ii). This group includes derivative asylees and refugees, from the date a bona fide I-730 Asylee/Refugee Relative Petition is filed with USCIS.
233 AFM § 40.9.2(b)(3)(K)
234 AFM § 40.9.2(b)(3)(L)
235 AFM § 40.9.2(b)(3)(E)
236 AFM § 40.9.2(b)(3)(M)
237 AFM § 40.9.2(b)(3)(A)
238 Id.
239 AFM § 40.9.2(b)(3)(H)
240 AFM § 40.9.2(b)(1)(D)
241 AFM § 40.9.2(b)(3)(J)
242 AFM § 40.9.2(b)(1)(F)(iii)
243 AFM § 40.9.2(b)(1)(C)
244 AFM § 40.9.2(b)(1)(G)
Aliens not considered to be in a period of authorized stay under this ground include:

- persons under an order of supervision (pending removal)\(^{246}\)
- persons with pending applications for cancellation of removal\(^{247}\)
- persons with pending applications for withholding of removal\(^{248}\)
- asylum applicants who have worked without employment authorization\(^{249}\)
- aliens present pursuant to pending federal court litigation.\(^{250}\)

**Period of Inadmissibility**

The USCIS clarified that the unlawful presence inadmissibility period begins to run with the initial departure from the United States that triggers the bar and “continues to run even if the alien subsequently returns to the United States pursuant to a grant of parole under Section 212(d)(5) of the Act.”\(^{251}\) This means that if an alien triggered a three-year bar period of inadmissibility by leaving the United States, subsequently returning under a grant of parole, the alien would no longer be inadmissible three years after the departure date, even if the alien had been in the United States during the inadmissibility period. The DOS Visa Office concurs with this analysis. The Administrative Appeals Office has issued at least three unreported decisions with the same analysis of this issue.

**Waiver of Inadmissibility**

The three- and ten-year bars may be waived by the attorney general in the case of an immigrant who is the spouse, son, or daughter of a U.S. citizen or LPR who will experience extreme hardship if his or her family member is refused admission to the United States.\(^{252}\) Note that an immigrant is not eligible for a waiver based on showing extreme hardship to a U.S citizen or LPR child.

Note that INA § 245(i) does not waive inadmissibility under § 212(a)(9)(B)(i)(II). An alien subject to the ten-year bar may not use § 245(i) to waive the bar, but must seek a waiver under § 212(a)(9)(B)(v).\(^{253}\)

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\(^{245}\) AFM § 40.9.2(b)(3)(I)

\(^{246}\) AFM § 40.9.2(b)(6)

\(^{247}\) See AFM § 40.9.2(b)(1)(D)

\(^{248}\) See AFM § 40.9.2(b)(3)(K) and (L)

\(^{249}\) See AFM § 40.9.2(b)(2)

\(^{250}\) See AFM § 40.9.2(b)(5)(B)


\(^{252}\) INA §212(a)(9)(B)(v).

Re-entering the United States Without Authorization

A more severe ground of inadmissibility applies to an alien “who has been unlawfully present in the United States for an aggregate period of one year or more,” and who then enters or attempts to re-enter the United States without being admitted.254 Because this provision applies only to unlawful presence accruing after April 1, 1997, it applies to persons who enter or attempt to enter illegally on or after April 1, 1998. The same definition of the term unlawful presence applies here.255 However, the one-year period of unlawful presence requires only an “aggregate period” of one year or more. This means that an alien may trigger inadmissibility under this section with repeated periods of unlawful presence that may each have been too short to trigger the three-year unlawful presence bar, but cumulatively add up to a year or more. While an alien may seek relief from this ground of inadmissibility after remaining outside the United States for 10 years, the bar has no set expiration date, unlike the three– and ten-year unlawful presence bars. For this reason the bar is termed “permanent.”

A similar ground of inadmissibility applies to an alien who has been ordered removed under any provision of law and who then enters or attempts to re-enter the United States without being admitted on or after April 1, 1997.256 This covers persons who were ordered removed, deported, or excluded at any time. Such aliens are permanently inadmissible, although they may seek permission to reapply for admission to the United States 10 years after their last departure.

In the one policy guidance memorandum addressing this issue, legacy INS stated that the statutory exceptions to unlawful presence listed in INA §212(a)(9)(B) do NOT apply to the inadmissibility under (a)(9)(C).257 This means, for example, that a minor who does not accrue unlawful presence for purposes of the three– and ten-bars prior to age 18 is nevertheless subject to the permanent bar if he or she enters the United States without admission after accruing a year or more of unlawful presence.

Per the BIA’s decision in Matter of Torres-Garcia,258 approval of an I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal cannot cure inadmissibility under the permanent bar until the person has remained outside the United States for 10 years after the date of last departure. Consequently, such an alien is ineligible to adjust status. Following the BIA’s deci-

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254 INA §212(a)(9)(C)(i).
256 INA §212(a)(9)(C)(i)(II).
257 INS Memorandum (Mar. 31, 1997), supra note 255.
258 23 I&N Dec. 866 (BIA 2006).
sion, USCIS issued policy guidance conforming to this analysis. As a result of the Torres-Garcia decision, the Ninth Circuit overruled a prior circuit decision that had allowed for adjustment eligibility under INA §245(i) for persons subject to inadmissibility under INA §212(a)(9)(C)(i)(II).

In addition, the BIA has ruled that a person subject to the permanent bar for entering the United States without admission after accruing unlawful presence in the aggregate of one year or more is not eligible to adjust status under INA §245(i). The two circuit courts of appeals that had previously ruled otherwise on this issue have since revisited this conclusion in light of the BIA’s decision and both the 9th and 10th Circuits now follow the BIA’s decision.

Under the statute, only VAWA self-petitioners are eligible to seek a waiver of permanent bar inadmissibility immediately. The statute provides that a waiver is available when a self-petitioner can establish a connection between his or her removal, departure from the United States, re-entry, or attempted re-entry and the battery or extreme cruelty to which he or she was subjected. To date, there is no USCIS guidance on this point to interpret the statutory language.

Miscellaneous Grounds

The “miscellaneous” inadmissibility grounds concern “unlawful voters,” practicing polygamists, guardians required to accompany an inadmissible person, former citizens who renounced their citizenship in order to avoid taxation, and international child abductors. Unlawful voters are individuals who voted in a U.S. election in violation of federal, state, or local law. However, such individuals will not be considered inadmissible if their natural parents are or were citizens of the United States.


260 Duran Gonzalez v. DHS, 508 F.3d 1227 (9th Cir. 2007), overruling Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004).


262 Garfias-Rodriguez v. Holder, 649 F.3d 942 (9th Cir. 2011) (rehearing en banc granted on issue of retroactivity, March 1, 2012) overruling Acosta v. Gonzalez, 439 F. 3d 550 (9th Cir. 2006); Padilla-Caldera v. Holder, 637 F.3d 1140 (10th Cir. 2011), overruling Padilla-Caldera v. Ashcroft, 453 F.3d 1237 (10th Cir. 2005).

263 INA §212(a)(9)(C)(iii).

264 INA §212(a)(10).

265 INA §212(a)(10)(D).

266 22 CFR §40.104.
The inadmissibility ground including practicing polygamists applies only to persons coming to the United States to practice polygamy. Until 1990, the law barred persons who are polygamists, practice polygamy, or advocate the practice of polygamy. Since 1990, only those practicing polygamy are inadmissible under the statute.

An international child abductor is a person who detains, retains, or withholds a U.S. citizen child outside the United States from the person granted custody of such child. Persons who are abductors or who assist, support, or provide safe haven to abductors, including the spouse, child, parent, sibling, or agent of the abductor, are inadmissible.

Former citizens of the United States who renounced citizenship to avoid taxation are inadmissible. This provision is applicable to persons who renounced U.S. citizenship for taxation purposes after September 30, 1996.

A guardian required to accompany an inadmissible person is also inadmissible. A medical officer may certify that the person being accompanied is helpless from sickness, mental or physical disability, or infancy, and that the guardianship is required to assist the disabled person.

Reinstatement of Removal

Reinstatement of removal under INA §241(a)(5) is not a ground of inadmissibility but is frequently an additional consequence faced by an individual who is potentially inadmissible under INA §§212(a)(9)(A) and (C)(ii). Aliens subject to this removal provision may be removed from the United States through the “reinstatement” of the prior order of removal and are not eligible for and may not apply for any relief. As implemented by regulation, the term “prior removal orders” includes all prior expulsion orders, including orders of deportation and exclusion.

Legacy INS also implemented reinstatement as a summary proceeding with no right to a hearing before an immigration judge. The proceedings begin with issuance of a notice of intent to reinstate the prior removal, deportation, or exclusion order, on Form I-871. The individual may check a box on the form indicating that he or she wishes to contest the determination. If this box is checked, the individual may make a written or oral statement before the U.S. Immigration and Customs Enforcement (ICE) or other

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267 INA §212(a)(10)(A).
269 INA §212(a)(10)(C)(i).
270 INA §212(a)(10)(C)(ii).
271 INA §212(a)(10)(E).
272 22 CFR §40.105.
273 INA §212(a)(10)(B).
274 8 FAM 40.102.
275 8 CFR §241.8(a).
immigration agent adjudicating the reinstatement. The agent is authorized to consider only three issues: (1) whether the individual is the subject of a prior removal or deportation order; (2) whether the individual is in fact the person who was previously removed; and (3) whether the alien unlawfully reentered the United States.276

There are limited exceptions allowing an alien subject to reinstatement to apply for relief. An alien subject to reinstatement who fears return to the country of designated in the removal order may seek withholding of removal and relief under the Convention Against Torture.277 In addition, reinstatement of removal does not apply to persons eligible for relief under the Haitian Refugee and Immigrant Fairness Act (HRIFA) and the Nicaraguan Adjustment and Central American Relief Act (NACARA)278, and legalization under the Legal Immigration and Family Equity Act (LIFE Act).279

Retroactive Application

The U.S. Supreme Court has ruled that reinstatement of removal may be applied to a person who illegally re-entered the United States before the statute’s effective date.280 Four circuit courts of appeals, however, recognized exceptions to the retroactive application of reinstatement when the individual had applied for discretionary relief281 or took affirmative steps to legalize his or her status prior to April 1, 1997.282 The issue of whether reinstatement may be applied retroactively in these situations was expressly not decided in the Supreme Court’s decision.283

Appeals to Federal Court

Reinstatement orders are appealable to federal circuit courts of appeal, and erroneous underlying removal orders may be reviewable in habeas corpus proceedings before federal district courts.284

Courts that have considered the issue have found that a reinstatement order is appealable through a petition for review to the U.S. court of appeals having jurisdiction over the place where the reinstatement order was entered.285

276 Id.
277 8 CFR §241.9(e); 8 CFR §208.31.
278 8 CFR §241.9(d).
279 8 CFR §245.18(c).
281 Arevalo v. Ashcroft, 344 F.3d 1 (1st Cir. 2003); Faiz-Mohammed v. Ashcroft, 395 F.3d 799 (7th Cir. 2005); Sarmiento-Cisneros v. Ashcroft, 381 F.3d 1277 (11th Cir. 2004).
282 Valdez-Sanchez v. Gonzales, 485 F.3d 1084 (10th Cir. 2007).
283 Fernandez-Vargas, supra note 280.
284 INA §242(a)(2)(D).
285 Lattab v. Ashcroft, 2004 WL 2059762 (1st Cir. 2004); Avila-Macias v. Ashcroft, 328 F.3d 108 (3d Cir. 2003); Velasquez-Gabriel v. Crocetti, 263 F.3d 102, 105 (4th Cir. 2001); Ojeda-Terrazas v. Ash-
In order to obtain judicial review through a petition for review to the circuit court of appeals, the petition for review must be filed within 30 days of the date the reinstatement order was issued. This deadline is jurisdictional and cannot be extended, so it is crucial to file the petition for review within the deadline. As a practical matter, practitioners should be ready to file the petition for review immediately upon issuance of the reinstatement order and to request a stay of removal.

Even though review of an order of reinstatement may be available, the extent of the review in the circuit court of appeals is generally limited. This is because the circuit court reviews only the order before it, which is the order of reinstatement. Thus, a number of federal appellate courts have determined that the petition for review allows review of only the three issues considered by ICE.

Although the circuit court of appeals may not have jurisdiction to review the underlying removal order, a federal district court may have that jurisdiction, through a petition for habeas corpus. For example, in *Arreola-Arreola v. Ashcroft*, cited above, the respondent was found deportable as an aggravated felon after he was convicted of driving under the influence. When USCIS reinstated the respondent’s earlier removal order, the respondent filed a petition for review with the Ninth Circuit, arguing that the underlying removal order was invalid based on the Ninth Circuit’s subsequent decision that DUI was not an aggravated felony. The Ninth Circuit found that it did not have jurisdiction on petition for review to review the underlying removal order, but, in order to ensure that Arreola-Arreola obtained proper review of the underlying removal order, it transferred the matter, under 28 USC §1631, back to the district court, which did have jurisdiction to review the underlying removal order in habeas corpus.

**What Practitioners Can Do Now**

The most important preventive action a practitioner can take is to determine whether the client is subject to reinstatement before filing for adjustment of status. File a Freedom of Information Act (FOIA) request in all cases in which your client has been in immigration proceedings or has had prior contact with the immigration authorities. In addition, ask the client to describe in detail his or her experiences with the immigration authorities.

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286 INA §242(b)(1).
287 *Morales-Izquierdo v. Gonzales*, 477 F.3d 691 (9th Cir. 2007).
In examining the response to the FOIA request, also be aware of who is not subject to reinstatement. First, reinstatement applies only to persons who actually have left the United States under an order of removal, deportation, or exclusion. If a client has such an order, but has never left the United States, he or she may be arrested and removed, but will not be subject to reinstatement. Thus, the prohibition on applying for any relief under the INA does not attach, and it may be possible to reopen the proceedings to apply for relief. Second, reinstatement applies only to persons who have re-entered the United States unlawfully. Remember that an order of voluntary departure converts automatically into an order of deportation if the individual does not leave the country by the voluntary departure date.

If ICE has instituted reinstatement proceedings, the respondent should check the box indicating that he or she wishes to contest the determination. Practitioners should make all possible legal and factual arguments in opposition to reinstatement. These arguments should be made in writing, so as to preserve the record. If ICE orders reinstatement and there are grounds for review, the respondent or counsel should file a petition for review in the federal circuit court immediately, because of the 30-day jurisdictional deadline, and also should file an application for stay of removal with the court.

Practitioners also should investigate the validity of the underlying removal order and, if there are grounds for showing that it was erroneous, consider seeking review in federal district court through a petition for habeas corpus.