



PREPARING CLIENTS FOR IMMIGRANT VISA INTERVIEWS AT U.S. CONSULATES

How to prepare consular processing clients for questions at the immigrant visa interview about alien smuggling, receipt of public benefits, drug use, tattoos, and other issues

By Ariel Brown

I. Introduction¹

Counseling clients who will appear at U.S. consulates abroad for their immigrant visa interviews can be nerve-racking as an attorney because you cannot accompany your client to the interview the way that you can with an adjustment of status interview in the United States. Nonetheless, your role as their legal representative is to guide them through the process to obtain permanent residency, and to do your best to ensure everything goes smoothly. This goes beyond simply helping your clients to complete the proper forms and pay the required fees. It is critical that you adequately prepare your clients for all the questions that may come up at the consular interview, as their responses may determine whether their immigrant visa is granted or denied, and you will not be there to intervene—even if it is a simple misunderstanding or clear misapprehension of the law.

The purpose of this advisory is to go through some common issues that may come up at the immigrant visa interview and medical exam, and to provide suggestions for how to prepare your clients who are consular processing. This advisory is primarily focused on preparing clients who are currently in the United States and will be departing to consular process, as those who are outside the country and have never set foot in the United States have less to worry about (for instance, no unlawful presence or alien smuggling issues). Further, the stakes are also often diminished for those who have never lived in the United States before, because if their immigrant visas are denied they will not suddenly find themselves exiled from the place they call home. On the other hand, you must still screen clients who have never before traveled to the United States to determine whether they have ever previously applied for a visa and been denied. Many of the issues highlighted in this advisory will be pertinent to discuss with your consular processing clients, whether or not they have ever been to the United States before.

This advisory will discuss the following key issues you should make sure to cover with your consular processing clients:

- **Alien smuggling:** questions about whether they helped others to come into the United States, including children and other family members;
- **Public charge:** questions about receipt of public benefits, the affidavit of support, and plans to support themselves in the United States;
- **Unlawful presence:** questions about their immigration entry and exit history, especially for those with approved provisional waivers;
- **Drugs, DUIs, domestic violence, and tattoos:** questions at the medical exam about drugs, especially now that marijuana use has been legalized in some states; and alcohol use, especially with a history of DUIs; domestic violence; and questions about tattoos, related to possible gang affiliation.

II. Alien Smuggling

Alien smuggling is a ground of inadmissibility at INA § 212(a)(6)(E), which can lead to denial of an immigrant visa.² Although many may only think of alien smuggling as the business of “coyotes” charging money to bring people into the United States undetected, someone who brought their child with them when they crossed into the United States without inspection is also considered to have engaged in “alien smuggling.” Additionally, alien smuggling includes arranging travel or sending money with the express purpose to bring another person to the United States unlawfully, even if they did not accompany the person on their trip to the United States or physically bring them across the border.³ In some cases, “alien smuggling” has been broadly construed to include helping a stranger who is crossing into the United States at the same time as you, even if you had no plan to help the person, did not know them, your help was minimal, and you received no payment for your assistance.

There are some constraints, however, to this fairly expansive interpretation of alien smuggling. Most importantly, alien smuggling must include an affirmative and knowing act.⁴ Thus, if someone was not aware the person they were helping to come to the United States was not entitled to enter the United States,⁵ or they knew that someone was trying to come into the United States illegally but they did not make any affirmative act to help that person,⁶ then the courts have clarified such facts do not amount to alien smuggling. In addition, before 1990 only smuggling noncitizens *in exchange for money* triggered this ground of inadmissibility. For this reason, it will be important to explore with your client *when* possible alien smuggling may have occurred in order to determine whether the ground of inadmissibility applies to them. If it does not apply, because the smuggling occurred before 1990 and they did not receive any money in exchange for bringing the noncitizen to the United States, you will want to make sure that your client knows this and can explain this to the immigration officer. Lastly, there is a Family Unity exemption to the alien smuggling inadmissibility ground, meaning the ground does not even apply to them, if they are an “eligible immigrant” for the Family Unity program and they only smuggled a spouse, parent, or child of any age *before May 5, 1988*, among other requirements.⁷

Therefore, it is very important to explain to your clients what “alien smuggling” means, especially for clients who have children in the United States either without immigration status or with DACA (Deferred Action for Childhood Arrivals), and to pin down the details of when any possible alien smuggling occurred and what exactly happened.⁸ You must inform your client that they may be asked questions about how their children initially came to the United States and whether they played any role or knew about their child’s entry. If your client did not help anyone to come into the United States but nevertheless has an undocumented child in the United States and cannot clearly articulate that they had nothing to do with, and no knowledge of, how their child was brought here, they are in danger of being found inadmissible for alien smuggling. Sometimes consular officials may just assume that the children were smuggled by the client, if the client has undocumented children in the United States, so it is extremely important to prepare your client to credibly explain their lack of knowledge and involvement with their children’s entry to the United States. You may want to prepare documentation for your client to provide to a consular officer establishing that they did not smuggle their children into the United States, if that is the case, to try to pre-empt such a conclusion.

Clients who have smuggled into the United States their spouse, parent, or child of any age,⁹ and no one else, may request a waiver of this ground of inadmissibility. In order to be granted an inadmissibility waiver for smuggling a spouse, parent, son or daughter, the applicant must demonstrate that a favorable exercise of discretion is warranted in their case for humanitarian purposes, to assure family unity, or is otherwise in the public interest.¹⁰ While waiting for the waiver to be approved, they must remain outside the United States. Unlike the provisional unlawful presence waiver, this waiver cannot be sought prior to departure from the United States for the immigrant visa interview. The client must first attend their immigrant visa interview and be denied, before they can file the application for the smuggling waiver. If the waiver is ultimately denied, your client cannot legally return to the United States. And if consular officials determine that your client smuggled anyone else, such as a grandparent, niece, fiancé, family friend, or other person, there is no waiver available. If a consular official determines at the immigrant visa interview that your client smuggled anyone besides their

spouse, parent, or child, your client will be stuck outside the United States permanently, with no legal avenue to return, unless eligible for another immigration benefit for which the smuggling ground is otherwise waivable or inapplicable.

For clients who have an approved I-601A provisional unlawful presence waiver, an alien smuggling determination by a consular officer has additional ramifications. In addition to having to seek a waiver, if available, for alien smuggling inadmissibility, a finding of alien smuggling at the consular interview will result in revocation of the approved provisional waiver. This means the client must now seek a new waiver for unlawful presence, in addition to a waiver of alien smuggling inadmissibility (which, as discussed above, is only available in limited cases).

For more information on alien smuggling, including details on the legal definition and interpretation of “alien smuggling,” and waivers and exemptions to this ground of inadmissibility, see ILRC, *Alien Smuggling: What It Is and How It Can Affect Your Clients*, (July 18, 2017).¹¹

How to Prepare Clients for Questions at the Consular Interview About Alien Smuggling

- Explain what “alien smuggling” means in easily understandable terms.
- Compare what your client tells you about any possible alien smuggling with the legal definition, and determine if their conduct meets this definition.
- Even if they do not think they have engaged in alien smuggling, if they have children in the United States who are or were previously undocumented (or have DACA), ask them how their children got here. If their children previously attended an interview with USCIS to adjust status or with DOS to consular process, it may be necessary to request the notes from the interview through the FOIA process to know what they said about how they arrived in the United States.
- If it sounds like there may be facts to suggest or support a finding of alien smuggling in your client’s case, you will want to screen whether a waiver is available to them or an exemption applies.
- Even if a waiver is available, you will want to alert them to the possibility of an alien smuggling inadmissibility finding and what that will mean for them—i.e. extended time outside the United States, revocation of any I-601A provisional waiver, etc.
- If no waiver or exemption applies, and there are facts that might suggest alien smuggling, you may want to advise against consular processing. At a minimum, you should explain the risks to your client.
- If you determine that a clear exception or exemption applies, you should consider preparing a brief legal argument for your client to present to the consular officer in the event that alien smuggling comes up at the immigrant visa interview.¹² In this case, you should coach your client about how to figure out when to present such documentation so they feel confident resorting to this if the need arises.

III. Public Charge

The Foreign Affairs Manual (FAM), governing consular processing cases, was updated in January 2018. Most notably, the public charge guidance in the FAM was revised to de-emphasize the sufficiency of the I-864, Affidavit of Support.¹³ Previously, a properly completed affidavit of support that met the financial requirements was generally enough to prove that an immigrant visa applicant was not likely to become a public charge under INA § 212(a)(4). Now, applicants may be found inadmissible under 212(a)(4) even with a qualifying affidavit of support. Further, they may be found inadmissible or subject to additional questions if their joint sponsor is not related to them,¹⁴ and overall face heightened scrutiny and questioning regarding receipt of public benefits, health, work history, etc. as now a qualifying I-864 is just one factor among many as part of the “totality of circumstances” test. The “totality of circumstances” test includes consideration of an applicant’s age, health, family status, assets, other financial resources, financial status, education, work experience, skills, and “any other reasonable factors considered relevant by an officer.”¹⁵ In addition to the January 2018 update to

the FAM, on September 22, 2018 the Department of Homeland Security posted a proposed rule that, if finalized, would further change the regulations with regard to public charge inadmissibility.¹⁶ For now, however, this proposed rule has no effect, and may still undergo changes before it is finalized.¹⁷

As with any other inadmissibility grounds determined to apply to an applicant with an approved provisional waiver, a finding of public charge inadmissibility will result in revocation of the provisional waiver. An applicant who had an approved provisional waiver and later is found to be inadmissible under another ground, besides INA § 212(a)(9)(B) unlawful presence, will have their provisional waiver revoked when their immigrant visa is denied. The applicant will then be required to submit a new unlawful presence waiver, this time on Form I-601, and remain outside the United States unless and until the unlawful presence waiver is granted, in addition to overcoming the finding of public charge inadmissibility. In the public charge context, this is especially problematic for two reasons. One, an immigrant visa applicant with an affidavit of support that meets the financial requirements may have no indication or expectation prior to the interview that their visa may be rejected on public charge grounds. Two, unlike other inadmissibility grounds that require a waiver in order to overcome the ground, the applicant may be able to overcome public charge inadmissibility simply by providing additional documentation. Advocates are working with the State Department to try to come up with a better way to handle possible public charge inadmissibility, without immediately denying the visa on public charge grounds, but at the time of this writing consular officials are continuing to revoke provisional waivers if they think public charge inadmissibility may be at issue.

For a more in-depth discussion on public charge inadmissibility and consular processing, see ILRC, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*, (July 2, 2018).¹⁸

How to Prepare Clients for Questions at the Consular Interview Relating to Public Charge

- Look critically, and objectively, at your client's facts—
 - Is your client especially old or young?
 - Do they have any serious health conditions or disabilities that may require costly care?
 - Are they employed?
 - Have they or any of their family members received or are currently receiving public benefits?
- Examine the affidavit of support—
 - Does it barely meet the financial requirements?
 - Are there many household members listed whom the sponsor must also support?
 - Has the sponsor filed an affidavit of support for other immigrants for whom they are still obligated to support?¹⁹
 - Have they or any of their family members received or are currently receiving public benefits?
 - If a joint sponsor, what is the relationship between the sponsor and the immigrant?
 - Will the joint sponsor be motivated to provide financial assistance, if needed?
- If you notice any potentially problematic facts based on responses to the above questions, make sure to include documentation to help offset or minimize these negative facts, because the consular officer must consider the full totality of circumstances. This may include proof of private health insurance, multiple years of tax returns reflecting stable income, extensive employment history, and/or substantial savings in bank accounts or net value of assets.
- If the case includes a joint sponsor who is not related to the immigrant visa applicant, you should prepare a brief statement signed by the joint sponsor explaining their relationship to the immigrant and their commitment to support the immigrant.
- If you determine that your client may be found inadmissible under 212(a)(4), and they have an approved provisional waiver, you may want to advise them to wait until the State Department hopefully changes course and at least adopts 221(g) visa refusals as an alternative in some cases,²⁰ thereby preserving a provisional waiver grant. Otherwise, they

must be aware that if they are found inadmissible under public charge grounds at their consular interview, even if they are subsequently able to overcome the public charge ground with additional proof of financial support, they will still have to stay outside the United States while they re-request a waiver for unlawful presence. This means a trip that was originally expected to last two weeks at most will now be a year or longer, while waiting for adjudication of the I-601, outside the country and away from family.

IV. Unlawful Presence and Provisional Waivers

All clients should be prepared to provide a succinct summary of their immigration history, including all entries and exits to the United States, at their consular interview.²¹ Provisional waiver clients, in particular, must be able to clearly communicate that they have not departed the United States after having accumulated one year (or longer) of unlawful presence,²² until leaving to attend this consular interview. Otherwise, their answer may call into question the validity of their I-601A waiver, which only waives inadmissibility under INA § 212(a)(9)(B) for individuals who were unlawfully present and then departed the United States. Even though you have screened your client, determined them eligible for the I-601A waiver, filed the I-601A, and received an I-601A approval, it may be that your client's perception of their attempted entries and exits to the United States lacks understanding of the legal significance of attempted entries, voluntary returns, and other border apprehensions. For example, your client who had never previously been in the United States may have been apprehended multiple times at the border while attempting to enter the United States and been given voluntary return each time, before successfully entering without inspection on their fourth attempt. Your client may think that this means they had four entries to the United States, so you need to make sure that they understand the legal significance of the attempted entries and one successful entry, so they do not answer the question incorrectly when asked by the consular official.²³

How to Prepare Clients for Questions at the Consular Interview About Unlawful Presence

- For clients with an approved I-601A, discuss their immigration history with them so that they understand which entries were legally significant and why they were eligible for the I-601A waiver.
- For clients with an approved I-601A, practice asking them:
 - When did they first come to the United States; and
 - When was their last entry to the United States.
 - Make sure their answer to both questions above (first entry and last entry) is the same, and that they know the date, as reported on all their immigration forms including the DS-260 and the I-601A.
 - Explain they should also disclose any “attempted” entries and what happened. Send along the OBIM documents that help corroborate their explanation.
- For clients with a more complicated entry and exit history to the United States, consider preparing a concise bullet-point list summarizing their complete entry and exit history that they can provide to the consular officer at their immigrant visa interview if necessary. This will help avoid overwhelming your client with lots of information they may feel they need to memorize, and make the experience less stressful for the client. It will also avoid answers that appear less than truthful, if it seems to the consular officer that they are reciting from a script. Go over the information with them a few times, suggest they look over their copy of the DS-260 the day before their interview, then tell them to leave it at that and not obsess over the answers further.

V. Medical Exam: Drugs, DUIs, Domestic Violence, and Tattoos

You must also prepare your client for questions at the medical exam by the panel physician, which is usually completed a few days before the consular interview. Sometimes there will be just one designated medical office, or a list of two or three clinics from which the applicant may choose. They must go to one of the authorized clinics. The main purpose of the medical exam is to determine whether the immigrant visa applicant has any health-related inadmissibility issues, such as Class A or Class B medical conditions. In addition, the physicians will note any tattoos on the applicant's body

(as part of the medical exam, the applicant must fully disrobe, so the client cannot assume that tattoos that are usually hidden by clothing will not be observed) and ask about drug and alcohol use.

A. Drugs, DUIs, and Domestic Violence

You should advise your client that if they admit to drug use within the past year, they will likely be found inadmissible for being a drug abuser under INA § 212(a)(1)(A)(iv), or for admitting to a controlled substance offense under INA § 212(a)(2)(A)(i)(II), and their visa will then be denied. This is a growing issue for clients who assume that marijuana use is not a problem anymore because recreational or medicinal use is legal in the state where they live. In addition to current and prior drug use, the panel physicians usually ask applicants about current and prior alcohol use and abuse, as well as domestic violence, the latter usually if the applicant has suffered an arrest or conviction for domestic violence. Domestic violence and alcoholism can lead to a conclusion of inadmissibility under INA § 212(a)(1)(A)(iii), for a mental or physical disorder and related behavior which may pose a danger to themselves and others.

Panel physicians often refer applicants with a history of drug use, including drug, alcohol (driving under the influence), or domestic violence-related arrests or convictions to a psychological examination for further questioning. Immigrant visa applicants have reported that some of these psychologists question applicants in a very coercive manner, so your clients need to be prepared for this type of questioning to ensure they are not intimidated or pressured into admitting something that is not true and may detrimentally affect their case.

If an immigrant visa applicant is found inadmissible under INA § 212(a)(1)(A)(iv), there is no waiver for this ground of inadmissibility. They must wait for one year of “remission” since last use before they can be cleared by the civil surgeon. In practice, sometimes the panel physician will make a finding of “drug abuse” even if the applicant admits only to abusing drugs on a couple of occasions. The panel physician retains discretion to require a longer period, and may suggest or require that the applicant undergo random drug testing, take drug abuse classes, etc., in order to meet the criteria for “remission.” When the remission period is over, the applicant must undergo a new medical exam before an immigrant visa can be issued. If you believe your client may be found to be a “current” drug abuser or would admit to having used anytime within the past year, you should advise them to wait to consular process until more than one year has passed since last use, so they are not stuck outside the country for the one year.

In order to be found inadmissible under INA § 212(a)(2)(A)(i)(II) for admitting to a controlled substance offense, the immigrant visa applicant must be walked through and admit to all the elements of the crime.²⁴ The best way to make sure this ground of inadmissibility does not apply to your client is to properly screen before they depart for the consular interview, and make sure they understand the consequences of admitting to a controlled substance offense.

A person should not be found inadmissible under INA § 212(a)(1)(A)(iii) for a record of drunk driving arrests or convictions unless a panel physician has found: (1) a diagnosis or mental disorder (alcohol abuse) and (2) current harmful behavior or a history of harmful behavior related to the disorder that is likely to recur in the future, such as drunk driving or domestic violence.²⁵ If an immigrant visa applicant is found inadmissible under this ground of inadmissibility, there is a waiver available under INA § 212(g).

How to Prepare Clients for Questions at the Consular Medical Exam About Drugs, Alcohol, and Related Issues

- Make sure that clients understand the consequences of disclosing any controlled substance use, including marijuana in states where recreational or medicinal use has been legalized.²⁶
- You should also explain that unlike an ordinary medical examination with their personal doctor, whose primary interest is your client’s health and well-being, the panel physician performing the consular processing medical exam works for the government. Therefore, the panel physician is screening for immigration inadmissibility, not general

health and wellness, and unlike ordinary physician-patient interactions, the information disclosed to a panel physician is not confidential.

- Prepare any clients with a history of substance use or abuse to be able to address their history of substance use, including the date of last use, how they remember that date, the amount and frequency of use, and any treatment such as participation in Alcoholics Anonymous or Narcotics Anonymous counseling. It is important for the client take ownership of past behavior while impressing the fact that they are not a “current” user. It may be useful to send these clients with a small packet evidencing rehabilitation and good moral character.

B. Tattoos

Consulates frequently view certain tattoos as a proxy for gang affiliation, especially at certain consulates such as Ciudad Juarez, Mexico (CDJ), or with certain immigrant visa applicants, primarily young men. If a consular officer believes that a tattoo shows gang affiliation, they may deny the immigrant visa under INA § 212(a)(3)(A)(ii), for reason to believe the immigrant visa applicant seeks to enter the United States to engage in unlawful activity. While tattoos alone are not supposed to be indicative of gang affiliation, most consulates view certain tattoos as strong indicators of possible ties to gangs. However, they should also consider the immigrant visa applicant’s testimony and criminal history, or lack thereof. Gang affiliation is considered a factual determination, so it is nearly impossible to overturn a gang determination at a consular interview. Recent reports indicate consulates have started using black lights to detect tattoos that have been altered or professionally removed, so removing or reworking tattoos may not eliminate the issue.

If your client has any tattoos, they must be prepared to discuss and explain the tattoo, and if any tattoos seem particularly problematic, you may want to advise against consular processing from the very beginning of the visa petition process. Even if the client has a clear explanation of the significance of a tattoo and it does not immediately trigger warning signs, clients should be made aware that the consular officer might issue a 221(g) administrative processing visa refusal to investigate the tattoo further. In this situation even if the consulate ultimately determines there is no real issue with the tattoo, this administrative processing will delay issuance of the visa and can pose serious hardships to applicants who must remain outside the United States while they wait.

How to Prepare Clients for Questions at the Consular Medical Exam About Tattoos

- When you first begin to evaluate consular processing with your client, ask them about any tattoos, including tattoos that may not be visible under clothing—do not assume because you do not see any tattoos that your client does not have any.
- Ask about the meaning of any tattoos.
- Do your own research, too—if they have tattoos that are obscured by clothing, ask them to provide a picture of the tattoo and compare with images online of tattoos that have been identified as “gang tattoos.”
- Assess the location, content, and quality of the tattoo.
- Assess your client’s criminal record. If your client has no criminal record and does not think they are in any gang database, including classification or entry in a database from a school incident or juvenile delinquency, then they may be at less risk of being accused of gang affiliation, notwithstanding the tattoo. If they have a criminal record, it may be more risky.
- If the tattoo seems like it may be problematic, you may want to advise against consular processing. U.S. consulates, especially CDJ, are more fixated on tattoos than physicians who complete immigration medical exams in the United States as part of the adjustment of status process. If in the future your client may have a way to adjust, that may be a safer route to pursue.

- If the client has a potentially problematic tattoo, is aware of the risk, and wants to proceed with consular processing, then you should try to collect documentation for them to take with them, explaining that the tattoo is not a gang tattoo, even if similar to some actual gang tattoos. Such documentation might include:
 - Proof of the image's origin, for example a drawing or design that was the inspiration for the tattoo;
 - Other explanation of the tattoo's significance;
 - A letter from law enforcement, confirming that your client has not been involved in any gang-related criminal activity and is not in any gang databases;
 - A tattoo expert's professional analysis of your client's tattoo(s), including whether they are similar to known gang tattoos.

VI. Other Tips for Preparing Consular Processing Clients

As part of preparing your client for consular processing, we also suggest that you go through all the logistical details involved with the immigrant visa interview, medical exam, and any biometrics appointment abroad so that your client knows what to expect. Explain to them the different options available in each country for passport delivery upon approval so they can plan accordingly. Providing maps of the consulate complex for common consular posts, like CDJ, or suggestions of places to stay near the consulate if other clients have given you recommendations, may also be helpful. Finally, you should warn your clients about unscrupulous individuals who prey on immigrants near U.S. consulates, offering services to “fix” or speed up their paperwork.

Help your clients think through their travel plans—will other family members such as a spouse accompany them and if so are their travel documents in order as well, have they notified their employer of the trip, especially as they cannot project an exact return date, have they notified their bank so they can use their ATM/credit card, checked whether their cellphone plan will allow them to call the United States while they are abroad, will they go visit relatives in their home country after the immigrant visa interview while they wait for a decision.

A few other points to cover with your clients:

Do not open the immigrant visa packet! Make sure to warn your clients that the immigrant visa and related documents will be provided to them in a sealed envelope that they must not open. Explain the difference between opening the package sent to them to retrieve their passport and the smaller, sealed immigrant visa packet within the larger package. The CBP officer at the port of entry or customs official at the airport will open the envelope when the client is being processed upon their return to the United States.

Payment of the Immigrant Visa Fee. Discuss when and how to pay the immigrant visa fee. Inform them that despite what consular officials may say, this fee does not have to be paid before they are safely back in the United States, it simply must be paid in order to ultimately receive their green card. It is helpful to explain this payment cannot be made before the immigrant visa appointment, because at the time of payment they must provide specific information only provided in the visa once it is issued. Sometimes the process to pay this fee is confusing and they may wish to wait until you can assist them once they are in the United States.

CBP makes the final decision. Warn clients that they must remain eligible for the immigrant visa, once granted, *until they are admitted by CBP at the U.S. border or airport*. For example, a family-based first or second preference beneficiary son or daughter or a derivative child should be warned that marriage between the time of their consular interview and their entry into the United States invalidates their visa, and if the Department of Homeland Security eventually realizes this has occurred, they will be placed in removal proceedings.

Must enter U.S. within six months of immigrant visa issuance. While many clients will come back to the United States as soon as their immigrant visa is issued, others may want to continue visiting family abroad, so make sure they understand the timeframe for traveling to the United States with their approved immigrant visa. All those issued immigrant visas must enter the United States within six months of when the immigrant visa is issued in order to “claim” their permanent resident status. The principal applicant must enter the United States before or at the same time as any derivative applicants.

End Notes

¹ For questions or more information regarding this advisory, please contact Ariel Brown at abrown@ilrc.org. Special thanks to Veronica Garcia, San Joaquin Valley Law Fellow at the ILRC; Tami Castillo, Of Counsel at Considine, Sorenson & Trujillo; and Ann Block, ILRC Contract Attorney; for their contributions to this advisory.

² Alien smuggling is also a ground of deportability, a bar to showing good moral character, and in some instances an aggravated felony. For purposes of consular processing, however, the ground of inadmissibility is the only issue with which we are concerned. For more on the other issues alien smuggling can pose, see ILRC, *Alien Smuggling: What It Is and How It Can Affect Your Clients* (July 18, 2017), available at <https://www.ilrc.org/alien-smuggling-what-it-and-how-it-can-affect-immigrants>.

³ See, e.g., *Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011) (sending financial assistance directly to child at hotel on the border constitutes alien smuggling, where parents knew funds would be used for child to cross border illegally); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005) (knowingly participating in a prearranged plan to bring people to the border and then meeting them on the U.S. side to transport them within the United States is alien smuggling).

⁴ Belief that someone was entitled to enter the United States legally, while mistaken, may be a defense to “alien smuggling” inadmissibility. 9 FAM 302.9-7(B)(3).

⁵ *Tapucu v. Gonzales*, 399 F.3d 736 (6th Cir. 2005) (no alien smuggling where LPR was sharing driving responsibilities with three friends, one of whom was an illegal immigrant, and LPR believed the illegal immigrant could travel legally back and forth across the border because they were in process applying for green card); 9 FAM 302.9-7(B)(3) (“belief that the alien was entitled to enter legally, although mistaken, would be a defense to inadmissibility for a suspected ‘smuggler.’”).

⁶ *Altamirano v. Gonzales*, 427 F.3d 586 (9th Cir. 2005).

⁷ They must 1) be an “eligible immigrant” for Family Unity, which includes the spouse or child of a legalized alien (“child” is defined as less than 21 years of age as of one of two specific dates in 1988); 2) have been physically present in the United States on May 5, 1988; 3) be immigrating as a second preference beneficiary, or immediate relative, or as someone who is applying for Family Unity; and 4) have, before May 5, 1988, smuggled only a spouse, parent, son or daughter. See INA § 212(a)(6)(E)(ii).

⁸ You may even want to prepare clients for these questions if they have children in the United States who previously adjusted status or consular processed; in other words, any children in the United States who were not born in the United States, even if they now have immigration status.

⁹ The wording in the INA is “son or daughter,” which means that it does not matter the child’s age at the time they were smuggled; this inadmissibility waiver applies to smuggling one’s child, of any age.

¹⁰ See INA § 212(d)(11).

¹¹ Available at <https://www.ilrc.org/alien-smuggling-what-it-and-how-it-can-affect-immigrants>.

¹² This assumes that the legal representative already determined that a legal exception or exemption applies, and checked “no” on the immigrant visa application in response to the question about whether the applicant had engaged in alien smuggling. In other words, you have already argued and stated “no” to alien smuggling, but want to make sure the client’s responses at the consular interview are consistent.

¹³ 9 FAM 302.8-2(B)(3)(b)(1)(a); 9 FAM 302.8-2(B)(2)(a)(3), “Value of the Affidavit of Support.”

¹⁴ This is because the State Department views whether a joint sponsor is related to the applicant as an indicator of the likelihood that the joint sponsor would voluntarily meet their financial obligations to the applicant. See 9 FAM 302.8-2(B)(3)(b)(1)(b). Note, however, that the joint sponsor does not have to be related to the immigrant visa applicant. 9 FAM 302.8-2(C)(7)(a).

¹⁵ See 9 FAM 302.8-2(B)(2).

¹⁶ For further updates on the proposed rule, please refer to the ILRC’s website on public charge, <https://www.ilrc.org/public-charge>. Other helpful websites with information on the proposed changes to public charge are CLINIC Legal, at <https://cliniclegal.org/>, and Protecting Immigrant Families, at <https://protectingimmigrantfamilies.org/>.

¹⁷ For more information, see the ILRC’s website on public charge, <https://www.ilrc.org/public-charge>, in addition to CLINIC Legal, <https://cliniclegal.org/>, and Protecting Immigrant Families, <https://protectingimmigrantfamilies.org/>.

¹⁸ Available at <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.

¹⁹ The affidavit of support obligation ends when the immigrant for whom the affidavit of support was filed becomes a U.S. citizen, accumulates or can be credited with 40 qualifying quarters of work in the United States, or passes away. INA § 213A(a)(3). Divorce does not terminate a sponsor’s obligation to their ex-spouse. In addition, the affidavit of support obligation ends if the sponsored immigrant ceases to be a permanent resident and leaves the United States, or obtains a new permanent resident grant in removal proceedings as relief from removal (e.g. by re-adjusting in immigration court or being granted cancellation of removal). INA § 213A(a)(3).

²⁰ In the public charge context, the FAM distinguishes between 221(g) and 212(a)(4) visa refusal grounds on the basis that 221(g) pertains to “documentary problems” while 212(a)(4) reflects more substantive problems with the affidavit of support, that cannot be fixed simply with the submission of new or additional documents. See 9 FAM 302.8-2(B)(5)(1) & (2).

²¹ It is advisable to obtain FOIAs from ICE, CBP, and OBIM for every client who has had more than one entry to the United States, but this should be done well in advance of final meetings to prepare your client before they attend their consular interview, the focus of this practice advisory.

²² Only applies after April 1, 1997.

²³ Note this is different if the individual had already accumulated an aggregate period of more than a year of unlawful presence in the United States, departed, *and then* attempted to re-renter—in this case even *attempted* entries trigger inadmissibility under INA § 212(a)(9)(C), the “permanent bar,” and the individual would be ineligible to even apply for a waiver until they remained outside the United States for at least ten years.

²⁴ See Matter of K, 7 I&N Dec. 594 (BIA 1957).

²⁵ 9 FAM 40.11 N8.3.

²⁶ For more information on marijuana legalization and immigrants, especially “self defense” tips for clients such as making sure that they do not carry any marijuana cards, stickers, etc. or have any images or text on their phones or social media relating to marijuana, see ILRC, *Immigration Risks of Legalized Marijuana* (Jan. 2018), available at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana>.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the fundamental rights of immigrant families and communities.