CHAPTER 1
INTRODUCTION TO HARDSHIP WAIVERS AND THE MANUAL

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§ 1.1 Introduction

This manual is narrowly focused on waivers of inadmissibility that require a showing of hardship: waivers for certain crimes, fraud and misrepresentation, and unlawful presence. It is designed to be your general, "go to" waivers book for these common waiver applications involving hardship and a companion for general hardship waivers practice for Forms I-601 and I-601A waiver applications.

As such, this manual will discuss what the applicable hardship standard entails, what factors have been successfully used to meet the hardship standard, ideas for creative hardship strategies, and how to prepare a winning hardship waiver case. It also has separate chapters for each of the grounds of inadmissibility that may be waived by showing hardship, in addition to separate chapters devoted to the different waiver applications and processes: Form I-601, the general application for a waiver of inadmissibility for the grounds discussed in this manual, and Form I-601A, the provisional unlawful presence waiver used in only limited contexts to waive unlawful presence.[1]

This manual is not simply a discussion of legal requirements and procedures. Because the input and work of the client is so essential to the success of a hardship waiver case, the manual, and in particular **Chapter 6**, is filled with many ideas about how to work best with clients so that they may be active and informed participants in their own waiver cases. Applicants, their families, and friends can help legal workers by doing much of the work while applying for the hardship waivers discussed in this manual. Working with applicants is not just more efficient for a legal worker. The client's active and informed participation helps to build a stronger case. Additionally, working collaboratively with clients will likely better prepare them to cope with the stress of the waiver application, answer questions more accurately in court or in an agency

[1] Other specialized waiver applications and processes, such as Form I-192 for nonimmigrants; Form I-212, which can be used to waive some grounds of inadmissibility but does not involve a hardship showing; and Form I-602 for asylees, are not discussed in this manual. For information on Form I-192 in the context of U nonimmigrant applications, see ILRC, *The U Visa: Obtaining Status for Immigrant Survivors of Crime* (ILRC 2023). For information on Form I-212, see ILRC, *Inadmissibility and Deportability* (ILRC 2021). For information on Form I-602, see ILRC, *Essentials of Asylum Law* (ILRC 2023).

interview if need be, and have a higher possibility of success if they know the legal requirements and what to expect.

Although we have thoroughly researched the legal and procedural requirements presented in this manual, we recommend that the reader use this manual as an addition to, and not as a substitute for, their own research and knowledge. Immigration law changes constantly and can be complex. Further research may be necessary on issues not discussed in this manual or on new developments in the law or practice.

What this manual will *not* discuss: Hardship is a concept that comes up in many different areas of immigration law beyond the extreme hardship needed for the inadmissibility waivers discussed in this manual, and with varying degrees of hardship required, such as the "exceptional and extremely unusual" hardship standard for cancellation of removal for non-permanent residents, or the "extreme hardship involving unusual and severe harm" standard for applicants for T nonimmigrant status. Similarly, the Immigration and Nationality Act provides for waivers in a wide variety of contexts—special waivers of grounds of inadmissibility available for specific forms of relief, such as relaxed or modified waiver requirements for asylees, U nonimmigrants, or VAWA self-petitioners applying for those respective forms of relief; and beyond solely waivers of removal grounds, such as the waiver of the requirement to jointly petition to lift conditions on residency for those who immigrated through a marriage that was not yet two years old, or naturalization disability waivers when an applicant is unable to take the English or civics tests due to a disability or impairment. Other inadmissibility waivers that do not involve a hardship showing,[2] or other applications and forms of relief beyond inadmissibility waivers that have their own unique hardship standard are not discussed in this manual, although for any instance where a showing of hardship is required, the discussions in **Chapters 2 and 6** of this manual may still be helpful.

§ 1.2 Who Needs a Waiver of Inadmissibility

In general, the hardship waivers discussed in this manual, like other waivers of inadmissibility, are available to those who are facing the grounds of inadmissibility either at time of entry into the United States or in an application process within the United States. **Chapters 3 through 6** discuss when an individual may specifically need a waiver for fraud or misrepresentation, or for certain crimes, or for unlawful presence; in other words, when these specific grounds of inadmissibility are triggered and for how long they continue to apply, necessitating a waiver. Here, however, we will briefly discuss who is subject to the grounds of inadmissibility writ large (i.e., who needs to worry about inadmissibility). We will start first below by defining what is an "admission" in immigration law since only those who are seeking admission are subject to the grounds of inadmissibility.

A. "Admission" in immigration law

The terms "admission" and "admitted" are defined in INA § 101(a)(13)(A) as "the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration

[2] For more information on waivers of grounds of removability, including those that do not involve hardship, see ILRC, *Inadmissibility and Deportability* (ILRC 2021).

officer." Those who have been admitted are subject to the grounds of deportability; those who have not been admitted are considered "applicants for admission" and are subject to the grounds of inadmissibility. People who are deemed to be subject to the grounds of inadmissibility bear the burden of proving that they are "clearly and beyond doubt entitled to be admitted and not inadmissible under INA § 212"[3] or, "by clear and convincing evidence, that [they are] lawfully present in the U.S. pursuant to a prior admission."[4] The grounds of inadmissibility, found at INA § 212(a), and the grounds of deportability, found at INA § 237(a), are similar, but they are not identical.

B. Who is subject to the grounds of inadmissibility?

The waivers discussed in this manual are available to waive certain grounds of inadmissibility. The grounds of inadmissibility will apply to someone seeking admission at a U.S. border or to someone within the United States who entered the United States without having been admitted at the border. The following people are subject to the grounds of inadmissibility:

- People that are undocumented and entered without inspection;
- Applicants for admission at the border, such as nonimmigrant visa holders, those eligible for a visa waiver, and immigrant visa holders arriving for the first time in the United States;[5]
- Applicants for adjustment of status;
- Parolees:[6] see INA § 101(a)(13)(B);
- Crewmen: see INA § 101(a)(13)(B); and
- Certain lawful permanent residents, including conditional residents, who fall within INA § 101(a)(13)(C). See below.

The following people, on the other hand, are subject to the grounds of deportability and they will only require the waivers discussed in this manual if they somehow become subject to the grounds of inadmissibility, such as certain lawful permanent residents who travel (see **Subsection C**):

- Nonimmigrant visa holders within the United States following a lawful admission;
- People admitted as visa waiver entrants;
- Visa holder and visa waiver overstays in the United States;

[3] INA § 240(c)(2).
[4] *Id*.
[5] A person with an immigrant visa from a U.S. consulate abroad does not become a lawful permanent resident until and unless they are admitted at a U.S. border while the immigrant visa is valid, and within six months of the date the visa was granted. *See* 22 CFR §§ 42.64.(b)–42.72.
[6] DHS has the power to "parole in" persons who are outside the United States or at the border and are charged with being inadmissible. A person who is paroled can physically enter the United States, but legally their situation is the same as if they were still waiting at the border, applying for admission (and therefore subject to the grounds of inadmissibility).

- Refugees;[7] and
- Lawful permanent residents, including conditional residents, except those who fall within INA § 101(a)(13)(C) (see **Subsection C**).

We have outlined above who is subject to the grounds of inadmissibility, and **Subsection C** below goes into further detail regarding the situations where the grounds of inadmissibility apply to lawful permanent residents, who are otherwise subject to the grounds of deportability. The grounds of deportability are applicable only to individuals who have been "lawfully admitted" to the United States, such as lawful permanent residents and nonimmigrant visa holders. **Chapter 3** discusses how the hardship waiver for some of the criminal grounds of inadmissibility under INA § 212(h) applies to lawful permanent residents when they are subject to the grounds of inadmissibility. Otherwise, a more thorough discussion of the grounds of inadmissibility and deportability is beyond the scope of this manual. For a more in-depth discussion of the grounds of inadmissibility and deportability, please see *Inadmissibility & Deportability* (ILRC 2021).

C. Special rules for lawful permanent residents under § 101(a)(13)(C)

When lawful permanent residents (LPRs) travel abroad and then come home to the United States, they generally will *not* be considered "seeking admission" at the border and will not be subject to the grounds of inadmissibility. There are six exceptions to this rule. Under INA § 101(a)(13)(C), an LPR returning from a trip outside the United States is seeking admission if any one of the following applies:

- They have abandoned or relinquished permanent resident status;
- They have been absent from the United States for a continuous period of more than 180 days;
- They have engaged in illegal activity after departing the United States;
- They have left the United States while under removal or extradition proceedings;
- They have committed an offense identified in INA § 212(a)(2) (grounds of inadmissibility relating to crimes), unless the person was granted § 212(h) relief or § 240A(a) cancellation of removal to forgive the offense; or
- They are attempting to enter or have entered without inspection.

LPRs who come within any of these six exceptions will be in the same position as other noncitizens seeking admission and will be considered "arriving." In order to be admitted, they must prove that they do not come within a ground of inadmissibility. There is a limited exception for LPRs who were convicted of an offense described in INA § 101(a)(13)(C)(v) before April 1, 1997.[8]

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[7] See *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012), holding that refugees are subject to the grounds of deportability because they have been admitted to the United States.

[8] See *Vartelas v. Holder*, 566 U.S. 257 (2012), in which the U.S. Supreme Court held that INA § 101(a)(13)(C)(v) did not apply to LPRs with convictions that pre-dated April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546. These LPRs are covered under pre-IIRIRA law, in which they are not considered to be

> **Example:** Marc is a permanent resident. In 2022 he travels to France for two weeks to attend a conference and then returns to the United States. He has tuberculosis, which is a health ground of inadmissibility. As a returning permanent resident, Marc is deemed not to be "seeking admission" at the U.S. border. Therefore, although DHS knows that he is inadmissible for tuberculosis, it cannot charge him with being inadmissible and place him in removal proceedings as a person "seeking admission" because his tuberculosis is not one of those things that turn him into an "applicant for admission." Marc should lawfully re-enter the United States without a problem.

Legally, Marc has not made a new admission. His tuberculosis is *not* one of the circumstances that would cause the government to treat him as arriving. But if Marc instead had stayed outside the United States for 190 days, for example, then he *would* be treated as someone seeking admission, for having been absent for more than 180 days under INA § 101(a)(13)(C)(ii). Consequently, in this situation he could be placed in removal proceedings and charged with being inadmissible for tuberculosis. As a defense, he could have it treated and cured, or he could apply for a waiver (note this type of waiver, for a health-related ground of inadmissibility, is beyond the scope of this manual).

> **Example:** What if ten years after his admission into the United States to become an LPR, Marc was convicted of a felony crime involving moral turpitude and sentenced to 90 days in jail, and then he traveled to France for two weeks? In that case, when he returns he will be considered to be "seeking admission" according to INA § 101(a)(13)(C)(v), for having committed an offense identified in the crimes-related grounds of inadmissibility and then traveling abroad. Such a conviction does not make him deportable but it does make him inadmissible, and since he traveled outside the United States after this conviction he falls under one of the exceptions at INA § 101(a)(13)(C) in which a returning LPR can be subject to the grounds of inadmissibility, thus DHS can bring him into removal proceedings and charge him with being *inadmissible*. As a defense, he could apply for a waiver of inadmissibility under INA § 212(h). For more information on this waiver, see **Chapter 3.**

Because there are these limited circumstances in which an LPR returning from a trip abroad would be considered to be seeking an admission, it is possible that an LPR will be facing grounds of inadmissibility and need a waiver. For instance, an LPR with a recent crime that triggers inadmissibility (and not a ground of deportability) would not face problems while within the United States, but if that same person traveled, they would be found inadmissible upon return (such as with Marc in the second example above). In this situation, the INA § 212(h) waiver of inadmissibility for certain crimes may be used by an LPR who is otherwise subject to the grounds of deportability. See **Chapter 3**.[9]

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making a new admission upon return to the United States as long as the departure was "brief, casual, and innocent."

[9] Note while outside the scope of this manual, an LPR in this situation might also be eligible for LPR cancellation of removal under INA § 240A(a). *See* ILRC, *Removal Defense: Defending Immigrants in Immigration Court* (ILRC 2024).

§ 1.3 How Waivers Work and Waivers Versus Exceptions

A. Asking for "forgiveness"

When the law bars a person from obtaining an immigration benefit or a form of relief, Congress has outlined some circumstances where the person may seek a waiver of the applicable bar from U.S. Citizenship and Immigration Services (USCIS)[10] or from an immigration judge. To obtain a waiver is to obtain "forgiveness" of the issue that is barring the person from relief. The government is saying: "Even though we could deny you, there is a path for you to show that you deserve to be admitted anyway, and we can decide to let you immigrate." Therefore, discretion plays an important role in the process of obtaining a waiver, and successfully obtaining a waiver requires skilled advocacy and the presentation of persuasive evidence.

> **Example:** Muata is barred from immigrating to the United States through his U.S. citizen wife because he is inadmissible for misrepresentation under INA § 212(a)(6)(C)(i). INA § 212(i) states that the Attorney General (that means USCIS, or an immigration judge if the applicant is in removal proceedings) in their discretion may waive the misrepresentation ground of inadmissibility if the immigrant can show that a qualifying relative (see **§ 1.4**) would suffer extreme hardship if the waiver is denied. Muata has a qualifying relative because he is the spouse of a U.S. citizen. To be granted, he must show his wife will suffer extreme hardship if the waiver is denied. If USCIS grants the waiver, he can immigrate (proceed with an application for LPR status based on his marriage).
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> **Example:** Ira has a U.S. citizen wife and six U.S. citizen children. He is inadmissible because he has a conviction for sale of drugs. There is no waiver for this ground of inadmissibility. Ira cannot immigrate through his family.

B. Waivers versus exceptions

There are some cases where a waiver may not be necessary at all. For example, sometimes there is an "exemption" or "exception" to the ground of inadmissibility for certain people. It is very important to recognize the difference between proving your client qualifies for an "exception," which is mandatory, and proving eligibility for a "waiver," which is discretionary. If someone falls within an exemption or exception, it applies automatically and there is no need to submit a waiver application—the ground simply does not apply to them. In contrast, with a waiver, the ground applies to them, but they can ask to overcome it through a favorable exercise of discretion.

> **Example:** Sonia is applying for LPR status through her husband. She has one petty theft conviction, for which she was sentenced to two days in jail and six months of probation. This may be a crime of moral turpitude. There is an inadmissibility ground for crimes of moral turpitude under INA § 212(a)(2)(A)(i)(I). However, Sonia is *not inadmissible* because her offense, even if it is a crime of moral turpitude, falls within the "petty offense

[10] USCIS adjudicates all waiver applications for those who are pursuing an immigrant visa through consular processing with Department of State, in addition to those applying for adjustment of status with USCIS.

exception" to this ground of inadmissibility found in INA § 212(a)(2)(A)(ii)(II). Sonia does *not* need a waiver in order to immigrate.

Example: Rosario has a conviction for possession of less than an ounce of marijuana. She is inadmissible under INA § 212(a)(2)(A)(i)(II) for having violated a law relating to controlled substances. Rosario will need a waiver under INA § 212(h) before she can immigrate.[11]

§ 1.4 Qualifying Relatives

The hardship waivers discussed in this manual require the applicant to have certain U.S. citizen or LPR relatives. These relatives are referred to as "qualifying relatives" because all these types of waivers require that the applicant show that the "qualifying relative" would experience hardship if the waiver were denied. One exception to this is the waiver for misrepresentation under INA § 212(i), which permits VAWA self-petitioners applying for the waiver to prove *hardship to themselves*.[12] Otherwise, a U.S. citizen or LPR relative is necessary in order for the applicant to qualify for all the waivers discussed in this manual, including the 212(i) waiver for all other applicants who are not VAWA self-petitioners. See **Chapter 2** for more information on who can be a qualifying relative for the hardship waivers discussed in this manual.

§ 1.5 Hardship Is a Discretionary Determination

Showing that a client has met the requisite hardship standard is difficult not only because "hardship" is not defined, but also because the hardship determination is a discretionary one. This means that the adjudicator has a lot of freedom when deciding whether a particular situation constitutes hardship. Moreover, discretionary decisions are unreviewable by federal courts, meaning that the hardship determinations by the immigration court, USCIS, and Board of Immigration Appeals (BIA) cannot be appealed to the federal appellate courts.[13]

Because the hardship determination ultimately hinges on the individual opinion of the adjudicator when looking at the specific factors of a particular case, it is hard for practitioners to feel confident when analyzing a client's case. Indeed, a level of caution is important. Representatives should be very careful when discussing hardship with their clients and make sure to emphasize that no matter how strong the case may appear, at the end of the day, the adjudicator will decide whether the factors in the case are sufficient. There is no bright line rule, and no particular outcome can be guaranteed.

§ 1.6 Distinguishing Hardship from Equities

Some forms of immigration relief require the adjudicator to balance positive equities against negative equities when deciding whether to grant a person relief, while other forms of

[11] Note that simple possession of 30 grams or less of marijuana is the only type of controlled substance offense that can be waived under the inadmissibility grounds, and the only controlled substance offense for which there is an exception under the deportability grounds. For more information on this waiver, see Chapter 3.
[12] For more information on this waiver, see Chapter 4.
[13] 8 U.S.C. § 1252(a)(2)(B)(i).

immigration relief require the applicant to demonstrate hardship. It is important to understand the distinction between hardship and equities and not to confuse the two. Demonstrating hardship is a specific statutory requirement for certain forms of relief, including the hardship waivers discussed in this manual, which involves an evaluation of how certain family members would suffer if the applicant were forced to leave the United States. Equities are aspects of a person's life, such as the length of time living in the United States, employment records, criminal history, community involvement, and other positive or negative factors that the adjudicator can consider when making a discretionary determination.

Showing that a person has many positive equities will not satisfy a hardship requirement, and showing hardship may not be sufficient to outweigh negative equities. For instance, the courts have found that LPR cancellation requires a balancing of positive equities against negative equities. A representative preparing a client for a case like this that hinges on a positive balance of equities should not focus only on hardship per se, although that might be a part of the argument, but should instead emphasize any ties the person has to the United States and positive characteristics the person may have. Likewise, in a case requiring hardship like the waivers discussed in this manual, showing that the person is deserving and has substantial family ties in the United States will not meet the hardship standard. Nonetheless, that the applicant warrants a favorable exercise of discretion *is* another requirement for the hardship waivers discussed in this manual, although the bulk of the waiver case will likely focus on the hardship showing rather than the applicant's equities.

There is nevertheless a great deal of overlap between the factors and evidence a client would use to show hardship and to show positive equities. For instance, the fact that a waiver applicant is a vital member of their community, volunteering at their child's school or in their local church, might be offered as evidence that the *applicant* deserves a favorable exercise of discretion—that their waiver application should be approved—even though it does not relate directly to whether their *qualifying relative* would suffer extreme hardship if the waiver were denied (the focus of the hardship waiver application).

> **Example:** Graciela is a native of Mexico applying for a waiver for unlawful presence. She has an elderly LPR mother, Ana, who is her qualifying relative for the waiver. Ana has breast cancer and requires almost daily care from Graciela. Ana lives with Graciela. Graciela supports herself and her mother through her job, where she has worked for almost 11 years. She has always paid taxes. Graciela also volunteers at her local church and is very active in her community. If Graciela were denied the waiver and had to leave the United States, her mother would have to either remain in the United States on her own, even though she is wholly dependent on Graciela, or relocate abroad with Graciela. It is unlikely that Graciela would be able to earn as much in Mexico, and the hospital near her hometown does not have the type of equipment that Ana is treated with in the United States.
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> A creative advocate will present Graciela's situation as one in which her LPR mother will clearly suffer economic and medical *hardship* if Graciela must leave the United States, but will also highlight Graciela's steady employment, payment of taxes, involvement in her church and community, and careful monitoring of her mother's fragile health condition as positive *equities* that are relevant to the adjudicator's discretionary decision.

While this manual's focus is on showing hardship for waivers of certain grounds of inadmissibility, we will endeavor to highlight opportunities when hardship factors might perform "double-duty" as positive equities, and we encourage you always to keep discretion in mind as you work with your client to develop their case.

§ 1.7 Contents of This Manual

This manual is divided into eight chapters, as follows:

CHAPTER 1 briefly covers when a waiver of inadmissibility is required and how it works, as well as some key overarching concepts like waivers versus exceptions, qualifying relatives, hardship as a discretionary determination, and distinguishing hardship from equities.

CHAPTER 2 provides an overview of the legal standard "extreme hardship," and the factors to consider in building a case based on hardship. The chapter draws on caselaw, regulations, and USCIS guidance, as well as looking at common hardship factors and what those factors may entail, with practice pointers and case examples.

CHAPTER 3 covers the **INA § 212(h) waiver** for inadmissibility for **certain crimes** under INA §§ 212(a)(2)(A)(i)(I), (II), (B), (D), and (E): crimes of moral turpitude, certain crimes involving controlled substances, multiple criminal convictions, prostitution and commercialized vice, and criminal activity after which immunity from prosecution was asserted.

CHAPTER 4 covers the **INA § 212(i) waiver** for inadmissibility under INA § 212(a)(6)(C)(i) for **fraud or misrepresentation**.

CHAPTER 5 covers the **unlawful presence waiver** for inadmissibility under INA § 212(a)(9)(B), the three- and ten-year bars.

CHAPTER 6 provides information and practical advice for working with clients to strengthen their waiver cases, including tips on how to draft a declaration, gather supporting documentation as evidence of hardship, and present the overall waiver case for submission.

CHAPTER 7 describes preparing and filing the **Form I-601**, Application for Waiver of Grounds of Inadmissibility.

CHAPTER 8 covers the application process and filing procedure for **Form I-601A,** Application for Provisional Unlawful Presence Waiver.

Finally, the **Appendix** at the end of this manual provides several sample waiver applications along with documents that may be helpful in the preparation of hardship cases, including document checklists and sample supporting letters.