



INADMISSIBILITY AFTER APPLYING FOR U NONIMMIGRANT STATUS

By ILRC Attorneys

I. Introduction

Under INA § 212(d)(14), U nonimmigrant petitioners may apply for a waiver of any inadmissibility ground except those in INA § 212(a)(3)(E) [participants in Nazi persecutions, genocide, torture, or extrajudicial killing]. The inadmissibility waiver for potential U nonimmigrants is very generous and does not apply in most other immigration applications.¹ However, sometimes inadmissibility issues arise for U nonimmigrants or U nonimmigration status petitioners at times other than the U petitioning process.

This practice advisory covers what to do when inadmissibility factors are discovered or triggered outside the U petitioning process such as after applying for or receiving U nonimmigrant status, adjusting status through INA § 245(m), adjusting status under a different petition, or traveling outside the country.

II. Inadmissibility Discovered or Triggered After Applying for or Receiving U Nonimmigrant Status

A. Inadmissibility grounds triggered before filing Form I-918 petition but discovered after filing

It is possible that prior to the approval of your client's Form I-918 Petition for U Nonimmigrant Status ("Form I-918"), you may discover an inadmissibility ground that was not disclosed on Form I-918 when you filed it nor listed among the grounds sought to be waived on Form I-192 Application for Advance Permission to Enter as a Nonimmigrant ("Form I-192" or "waiver"). For example, this could occur if you receive your client's FBI record after you filed Form I-918, and it shows a controlled substances conviction that your client did not disclose to you before filing the U nonimmigrant status petition. If a ground was not properly disclosed and waived, it could cause many issues for your client, such as barring their re-entry if they travel abroad (unless they apply for and receive an amended waiver), revocation of U nonimmigrant status, denial of adjustment (unless it is disclosed and addressed), or denial of naturalization. Thus, it is best to

¹ For more information about addressing inadmissibility grounds at the U nonimmigrant status applications, please see the ILRC practice advisory on this topic at <https://www.ilrc.org/u-visa-t-visa-vawa> or the ILRC's manual, *The U Visa Manual: Obtaining Status for Immigrant Victims of Crime* (<http://www.ilrc.org/>).

be prompt and proactive about any newly discovered grounds. In such a case, you should submit a supplemental filing that includes:

- A cover letter,
- A written statement detailing the additional inadmissibility grounds and asking that the relevant ground be added to the pending I-192,
- A new declaration from your client explaining the omission or the new inadmissibility ground, and
- A copy of the receipt for the principal applicant's Form I-918.²

Make sure to highlight the receipt number (starting with the letters "EAC") to increase the chances that the supplemental filing makes it into the file and help ensure that all the applicable grounds of inadmissibility will ultimately be considered and waived for your client. Remember that USCIS will have access to multiple background databases and will likely learn about any additional inadmissibility issues (like the controlled substances conviction example), so it is best to amend Form I-192 as soon as possible to avoid any delay, alleged misrepresentation, and/or denial. This supplemental filing should be filed with the hotline address where the case is pending (Vermont Service Center at hotlinefollowupI918I914.VSC@uscis.dhs.gov or Nebraska Service Center at nsc.I-918inquiries@uscis.dhs.gov).

In addition to requesting a waiver of the additional ground, you should document the applicant's continued eligibility for a waiver with sufficient positive factors to outweigh any newly disclosed negative factor. Consider explaining why and how incorrect information was provided in the initial filing. If the applicant was intentionally misrepresenting a material fact to obtain U nonimmigrant status, the written statement should request a waiver of INA § 212(a)(6)(C) [misrepresentation]. If it was arguably just a mistake or miscommunication (perhaps your client thought that their charge was dropped or "erased," or had mental health issues affecting their memory), consider explaining the circumstances and requesting a waiver of that ground only if USCIS deems it applicable. For example, you could write: "Although Ms. Kung did not intend to withhold information about her old marijuana conviction in her earlier application, if you deem her inadmissible for misrepresentation, please waive INA § 212(a)(6)(C)."

PRACTICE TIP: What if a Form I-192 approval does not include inadmissibility grounds that were listed in the waiver application? USCIS has said that it conducts a comprehensive review of Form I-192 to determine which inadmissibility grounds apply in a particular case. If a specific inadmissibility ground is not listed on the approval notice, it could be the reviewing officer determined it was not applicable. If you disagree and want to ensure that the ground is indeed waived to avoid future issues at adjustment, naturalization, or travel, you can send an inquiry to the hotline follow-up address. The email addresses are: hotlinefollowupI918I914.VSC@uscis.dhs.gov, and nsc.I-918inquiries@uscis.dhs.gov.

² September 2022 Stakeholder Call with USCIS on VAWA, U, T (Dec. 13, 2022), <https://www.ilrc.org/resources/stakeholder-call-uscis-va-wa-u-t>.

B. Inadmissibility grounds triggered 1) after filing but before adjudication of Forms I-918 and I-192 or 2) after being granted deferred action, but before being granted U nonimmigrant status

If your client triggers a new inadmissibility ground 1) after filing but before adjudication of Forms I-918 and I-192, or 2) after being granted deferred action, but before being granted U nonimmigrant status, you will also need to file a request to amend the pending Form I-192 to add the newly triggered ground.

Example: Attorney Leonel had to file his client Emiliano’s Forms I-918 and I-192 very quickly even though Emiliano’s criminal case had not yet been resolved because the law enforcement certification was about to reach its six-month expiration. While Forms I-918 and I-192 were pending, Luis was ultimately convicted of a second shoplifting arrest, which triggered a new ground of inadmissibility. Attorney Leonel must alert the hotline and request to add this new ground to Emiliano’s pending Form I-192. He can do this by sending in a supplemental packet including a cover letter, declaration, the certified summary conviction disposition from the court, and evidence of any mitigating factors or additional positive equities.

C. Inadmissibility grounds discovered or triggered after approval of U nonimmigrant status

If your client triggers a new inadmissibility ground after approval of U nonimmigrant status, wait until they apply to adjust status to address the new factor—but only if they have no plans to travel. With the adjustment of status application, they should be completely forthcoming about the violation, and argue that a positive exercise of discretion is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. They should submit with their adjustment of status application documentation of positive factors in support of that discretionary determination.

If your client triggers a new ground after approval of U status and they hope to travel, they will need to file a new Form I-192 with USCIS immediately so that the ground can be waived before they apply for a U visa at the consulate abroad. If they travel and do not receive a new waiver granted for the additional inadmissibility ground, they will likely be denied a visa or denied reentry, or they may be considered later by USCIS not to have entered in lawful U status (which could affect their adjustment and/or naturalization eligibility).

If your client was approved for U nonimmigrant status and afterwards realized that they mistakenly omitted certain inadmissibility factors/sections (i.e., old grounds triggered before approval of U status) at the time of filing the U nonimmigration petition, then the latest practice, as of this update, is to address this at the time of the adjustment filing. At the time of adjustment, you should ask that the previous Form I-192 be “amended” to include the additional ground, explain why the ground was omitted, and provide mitigating circumstances and positive factors—but not file a new Form I-192.

PRACTICE TIP: A granted Form I-192 does not necessarily waive the inadmissibility grounds for other purposes. Form I-192 can waive inadmissibility grounds for purposes of the U nonimmigrant status application; however, that does not necessarily mean that your client's inadmissibility issues are completely erased for the future.

III. Inadmissibility Issues at Adjustment through INA § 245(m)

The only ground of inadmissibility applicable to U nonimmigrants applying for adjustment of status under INA § 245(m) is INA § 212(a)(3)(E) (for Nazi persecutions, genocide, torture, or extrajudicial killings). Other than in connection to the INA § 212(a)(3)(E) grounds, U adjustment applicants are not required to establish that they are admissible, and the other inadmissibility grounds under INA § 212 do not apply directly to U nonimmigrant adjustment applicants. An applicant who triggered the inadmissibility ground at INA § 212(a)(3)(E) cannot adjust status because the ground is not waivable. If the adjustment applicant has triggered another ground of inadmissibility after being granted U nonimmigrant status, they are not barred from adjusting under INA § 245(m) and will not need to file a waiver application form such as Form I-192 or Form I-601.

This does not mean that you can simply ignore the other grounds of inadmissibility altogether. U nonimmigrants are still subject to the grounds of inadmissibility upon return to the United States if they travel outside the United States while in U nonimmigrant status. Additionally, USCIS will consider inadmissibility issues as negative factors in a discretionary determination at adjustment. Form I-601 waiver application, needed for adjustment for many other types of immigration status, is not required in the U adjustment context, but the documentation you would submit in support of that form may be necessary to avoid a denial as a matter of discretion.

Although the health-related grounds of inadmissibility are not specified in INA § 245(m), USCIS requires applicants to submit a Report of Medical Examination and Vaccination Record, as is usually required with general adjustment applications under INA § 245.

Although most of the grounds of inadmissibility do not apply to U nonimmigrants who adjust status under INA § 245(m), USCIS may revisit some of them (e.g., criminal offenses or convictions) and consider them in its discretionary adjudication of the adjustment application. In fact, practitioners note that some U adjustment applicants have been denied as a matter of discretion for issues that were waived at the U nonimmigrant stage. Furthermore, practitioners report that some U adjustment applicants have been denied as a matter of discretion even for issues that did not necessarily trigger a ground of inadmissibility, such as a lengthy pattern of arrests or minor convictions. Therefore, your client should be prepared to provide evidence of equities, rehabilitation, and/or other counterbalancing factors at the time of adjustment—even if these grounds were previously waived at the U nonimmigrant status stage or do not necessarily trigger a ground of inadmissibility. You may also be asked to submit evidence of the arrest/police report for any criminal offenses, along with proof of the outcome of the case, any sentence, and proof of completion of any sentence, although that does not necessarily mean every one of those documents must be submitted.

Example: Gloria applied for and was granted U nonimmigrant status despite a prior criminal record of offenses and convictions related to her prior drug abuse. She was able to have those inadmissibility grounds waived when she applied for U nonimmigrant status. Now she has applied for adjustment of status as a U nonimmigrant and was surprised to receive an RFE about the criminal convictions she had previously waived with Form I-192.

At this point in time, USCIS is reviewing some past crimes as part of its adjudication of adjustment as a discretionary benefit. Until recently, past crimes were generally not a problem unless there had been another incident since the I-918 was approved. Now, however, it may be prudent to submit, or re-submit, any updated criminal court dispositions and sentencing documentation, evidence of compliance with probation, and proof of current positive equities with an adjustment application. Gloria should also present evidence that she has stayed out of trouble since her prior convictions and has continued her path to rehabilitation. She should also document the contributions she has made to society, including being a good mother to her children or a good member of her community, and having a job or volunteering.

Adjustment of status is always a discretionary benefit, and the burden is on applicants to show that they merit a favorable exercise of discretion.³ Normally, applicants without adverse factors are not required to submit documentation specifically to support a favorable exercise of discretion. A short statement in the applicant's declaration regarding family ties, hardship, and length of residence in the United States may be sufficient to merit a favorable exercise of administrative discretion in some cases.⁴ However, if there are adverse factors present, they must be offset with mitigating factors and positive equities, and, if serious enough, may require a showing that denial of the adjustment would result in exceptional and extremely unusual hardship.⁵ Even that might be insufficient where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse of a minor, drug trafficking or multiple drug-related crimes, or where there are security- or terrorism-related concerns.⁶ Those applications may only be approved where "the most compelling positive factors" are present.⁷ Practitioners have reported a substantial increase starting in 2018 in denials of adjustment applications where the applicant has been convicted of crimes since they were granted U status. In some cases, U adjustment applicants have been denied due to criminal arrests and convictions that occurred even before they applied for U nonimmigrant status, and for which they received waivers of inadmissibility. Because USCIS has been denying these cases as a matter of discretion more frequently over the last several years, U adjustment applicants with criminal histories, particularly recent arrests and convictions, should prepare thorough documentation of any mitigating factors, rehabilitation, positive equities, etc., and be prepared to appeal a denial if necessary.

Many applicants with criminal histories are still being approved, but applying for adjustment in these cases requires more time and documentation than in the past. It is necessary to be

³ 8 CFR § 245.24(d)(11).

⁴ See Evidence Relating to Admissibility and Discretion, 73 Fed. Reg. 75,549 (Dec. 12, 2008).

⁵ 8 CFR § 245.24(d)(11).

⁶ *Id.*

⁷ See Evidence Relating to Admissibility and Discretion, 73 Fed. Reg. 75,549 (Dec. 12, 2008).

upfront with your clients and weigh their criminal histories against any positive equities when advising your client about the chances of approval or denial of their application. Practitioners representing U nonimmigrants with adverse factors should be especially careful to:

1. Screen U applicants thoroughly for any back-up relief in case they are denied and placed in proceedings;
2. Consider post-conviction relief to vacate prior convictions;
3. Build a thorough record of mitigating factors, rehabilitation, any link between the negative factors and the crime suffered, and any positive equities; and
4. Request administrative review by appealing a denial or filing a motion to reopen and/or reconsider where appropriate.

Although it is not formally required that an applicant resubmit documentation used to support the initial inadmissibility waiver application, it is still advisable that applicants update any such evidence.

It is important to note that although criminal and other issues may result in a negative discretionary determination for U adjustment applicants, the risks and benefits of applying must be thoroughly discussed with the U nonimmigrant. The benefits of becoming a lawful permanent resident include additional security and stability for that individual, including being able to travel outside of the United States more easily and for potentially longer amounts of time, accruing time towards eligibility to naturalize and become a U.S. citizen, the ability to sponsor family members abroad, access to more benefits in the United States, potentially more protection from deportation, and more. In addition, since U nonimmigrant status terminates automatically after four years, a failure to apply for adjustment for lawful permanent residence will leave the individual without any status at all. As a result, there is likely no downside at this time to filing a well-documented adjustment application, unless it would result in disclosure of serious adverse factors leading to a likelihood that the applicant would be detained and/or placed in removal proceedings. At this time, U adjustment applicants are not generally placed in removal proceedings if their applications are denied, although this could change with a future administration.

IV. Deportability Issues Before Adjustment

U applicants who commit crimes or trigger inadmissibility grounds after their grant of U nonimmigrant status but before they adjust status may find themselves in trouble with immigration. For example, ICE has been very inconsistent in how it handles U nonimmigrants who have been convicted in criminal courts and/or otherwise received an ICE hold. Nevertheless, it is clear from the regulations that removal proceedings may be instituted against a U nonimmigrant for conduct committed after U approval or admission; for conduct or conditions not disclosed to USCIS prior to the granting of U nonimmigrant status; for misrepresentations of material facts on Form I-918 or Form I-918A and supporting documentation; or after revocation of U nonimmigrant status.⁸ U nonimmigrants risk losing their status in any of these situations.

⁸ 8 CFR § 214.14(l).

V. Deportability Issues After Adjustment

Offenses that were disclosed at or prior to a U nonimmigrant's adjustment of status cannot later be used to remove the person even if those offenses were independent grounds of deportability.

Example: Kaspar received a firearms conviction in 2002. He disclosed it on his U visa application. Although his conviction is a deportable offense, it did not trigger any ground of inadmissibility, so he did not need to request a waiver for it specifically. It was considered as a discretionary matter in his waiver request for separate immigration violations. He then adjusted status in 2006. He now wants to naturalize but is worried that he is deportable for the same conduct—his old firearms conviction. The BIA has held that adjustment of status wipes out the possibility of removal for a preexisting offense that was an independent ground of deportability.⁹ Based on this case, Kaspar should not be deportable for his firearms conviction. Even if he committed the firearms offense after he was granted U nonimmigrant status and before he adjusted, he should not now be deportable based on this conduct if he was properly adjusted.

VI. Inadmissibility Issues' Impact on Good Moral Character Determinations

It is currently unclear whether inadmissibility grounds that have been waived with Form I-192, or disclosed during adjustment, will still affect someone's good moral character determination for naturalization. Advocates should cautiously assume that conduct or convictions could remain good moral character issues, even if they were waived.

Example: Jonah had a conviction for a crime in 2005 that is considered both an inadmissible controlled substances offense as well as an aggravated felony under INA § 101(a)(43). He was able to have the ground of inadmissibility waived with a Form I-192 waiver at the time of his U nonimmigrant status petition and was also able to adjust status as a U nonimmigrant. He is not deportable based on this aggravated felony because he properly adjusted and because the aggravated felony deportability ground is for aggravated felonies committed after admission.¹⁰ However, because aggravated felonies for convictions on or after November 29, 1990, create a permanent good moral character bar to naturalization, Jonah will probably not be able to naturalize.

VII. Inadmissibility Issues' Impact on Travel

U nonimmigrants will always be assessed for grounds of inadmissibility if they depart the country and are seeking admission based on issuance of a U visa at the consulate abroad or reentry to the United States at a port of entry. If any new grounds have been triggered (e.g., unlawful presence), the U nonimmigrant must be prepared to have these grounds waived.

Travel involves more risks and preparation if the applicant has (or will upon departure) trigger an additional ground of inadmissibility since their original I-192 waiver was approved,

⁹ *Matter of Rainford*, 20 I&N Dec. 598, 602 (BIA 1992).

¹⁰ INA § 237(a)(2)(A)(iii).

especially if the newly triggered ground is also a negative discretionary factor such as a new criminal conviction.

Example: Rebekah made a false claim to U.S. citizenship when she used her U.S. citizen cousin's passport to enter the United States. However, her application for U nonimmigrant status was approved when she successfully requested a specific waiver of the false claim to U.S. citizenship inadmissibility ground on Form I-192. After Rebekah's U nonimmigrant status was approved, she was arrested and convicted for possessing marijuana. She is worried that this conviction will trigger an inadmissibility ground under INA § 212(a)(2) for a conviction of a controlled substances offense. She did not have to ask for this ground of inadmissibility to be waived earlier since the arrest and conviction occurred after her approval for U nonimmigrant status. Now she wants to return to Israel to visit her mother.

Although Rebekah's conviction will not bar her from adjusting status because the only inadmissibility ground that applies to adjusting U nonimmigrants is INA § 212(a)(3)(E), if she leaves the United States, she will have to show she is admissible when she seeks a U visa to return. At that time, the grounds of inadmissibility will apply, and she can be denied a U visa by the U.S. consulate. The safest strategy for Rebekah is not to travel outside of the United States at all. If she does have to travel, she will need to submit an I-192 waiver to USCIS for any inadmissibility grounds that were not previously waived. Because the waiver adjudication process takes many months, she can ask USCIS to expedite the I-192 processing.

Furthermore, although the inadmissibility ground under INA § 212(a)(2) does not apply to U nonimmigrants seeking to adjust status, the criminal conviction will be used against her in USCIS's discretionary determination of her case. She should therefore be prepared to try to overcome this by providing the same kind of supporting evidence one would submit with a waiver application (although she does not need to file or pay for Form I-601 itself), and she should be warned that her adjustment application could be denied.

VIII. Non-U Adjustment

Finally, grounds of inadmissibility that are waived for U nonimmigrants are not waived for adjustment under another statutory section.

Example: Juan Pablo made a false claim to U.S. citizenship for which he was able to receive a waiver when he applied for U nonimmigrant status. He is also married to a U.S. citizen, Desiree, and would like to adjust status through her I-130 family-based petition so he can get his green card now rather than wait the three years he must be in U nonimmigrant status to adjust as a U nonimmigrant. But Juan Pablo will not be able to adjust through Desiree's petition for him. To adjust under her petition, he would adjust under INA § 245(a) instead of under INA § 245(m) for U nonimmigrants. There is no waiver for inadmissibility for a false claim of citizenship under § 245(a), and the I-192 waiver does not apply. He will have to wait and adjust under INA § 245(m).



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