UNDERSTANDING I-212S FOR INADMISSIBILITY RELATED TO PRIOR REMOVAL ORDERS AND THE PERMANENT BAR

By Aruna Sury and Ariel Brown

I. Introduction

In order to qualify for permanent resident status in the United States and most temporary (nonimmigrant) visas, applicants must prove that they are "admissible" under section 212 of the Immigration and Nationality Act (INA). Among the grounds of inadmissibility are bars to admission after a removal order has been executed; and after a person has re-entered unlawfully after accruing over one year of unlawful presence or after a prior order of removal. See INA §§ 212(a)(9)(A), (C).

This practice advisory explains when and how the inadmissibility grounds under INA § 212(a)(9)(A) and § 212(a)(9)(C) can be overcome by filing Form I-212, "Application for Permission to Reapply for Admission into the United States After Deportation or Removal," sometimes referred to as a "waiver" or "consent to reapply." The I-212 is not technically a "waiver" of inadmissibility, as an approved I-212 provides for an "exception" to these grounds of inadmissibility rather than a "waiver."[1] Nonetheless, as a practical matter an I-212 has the effect of allowing a person to qualify for admission despite being inadmissible, much like a waiver.

This advisory will cover the purpose of an I-212 consent to reapply, how to determine if your client needs one, and how to prepare the application packet. It will also discuss certain special circumstances, such as how a grant of Temporary Protected Status (TPS) or advance parole may affect the need for an I-212, or when a "conditional" I-212 may be filed for someone who will be seeking a provisional waiver and consular processing.

This advisory assumes a basic knowledge of the process of family-based immigration, the grounds of inadmissibility, and how to assess whether a client is eligible for immigration relief. Guidance on these topics can be accessed through various other ILRC publications and resources.[2]

II. What is the Purpose of an I-212?

An I-212 can serve two general purposes:[3]

(1) **Address inadmissibility related to a removal order:** An I-212 can overcome inadmissibility under INA § 212(a)(9)(A), which is triggered for a certain number of years when a person is either physically removed from the United States pursuant to a removal order or otherwise departs while a removal order is

outstanding, thereby executing the order. If granted, the I-212 allows that person to seek admission to the United States even though they have not waited the required period of time after a removal.

(2) **Address inadmissibility related to the permanent bar:** Once a person has been outside the United States for at least 10 years, an I-212 can overcome the "permanent bar" under INA § 212(a)(9)(C), which is triggered when a person enters or tries to enter the U.S. without inspection after being unlawfully present for over one year or after a removal order. Unlike 212(a)(9)(A) inadmissibility, an I-212 is *always* needed for inadmissibility under 212(a)(9)(C), and filing the application does not allow the noncitizen to skip the required ten years outside the country.

In sum, an approved I-212 allows an applicant for admission to overcome inadmissibility under 212(a)(9)(A) or 212(a)(9)(C). An I-212 to address inadmissibility under 212(a)(9)(A) allows someone to avoid the time bars; an I-212 to address inadmissibility under 212(a)(9)(C) allows someone to overcome the permanent bar, meaning they will still have to wait the ten years outside the country, but can eventually come back if the I-212 is approved instead of being permanently barred. Failure to foresee the need for an I-212 could result in the denial of your client's application, or, at a minimum, significantly delay the process.[4] Consequently, it is very important to determine at the outset whether your client needs and qualifies for an I-212.

III. Determining if Your Client Needs an I-212

As mentioned above, an I-212 can allow someone to overcome the inadmissibility grounds under INA §§ 212(a)(9)(A) and 212(a)(9)(C). Therefore, the first step is to determine if your client falls under one of these grounds (see Section A below). If they do, the next step is to determine whether the I-212 is the correct form to use in your client's situation and whether any special circumstances apply to them (discussed in Sections B and C below). Note an I-212 generally contemplates that the applicant is *outside the United States*, although in Section C we address some limited situations in which someone presently within the United States might be able to request an I-212, either preemptively (via a "conditional" I-212) or after-the-fact (via a *nunc pro tunc* I-212).

WARNING: An I-212 *only* addresses the inadmissibility provisions of INA §§ 212(a)(9)(A) and (C). It does not address any other inadmissibility provisions that may also apply to your client. Before you decide to file an application for admission, you must thoroughly screen for other inadmissibility provisions that may apply and whether your client qualifies for a waiver or exemption of those provisions. For example, a related ground of inadmissibility for individuals who have a prior order that was entered *in absentia* is INA § 212(a)(6)(B), which imposes a five-year bar from the date an individual with an *in absentia* removal order departs the country. If your client has a prior *in absentia* order, and does not have grounds to reopen their proceedings (see Section C), they will be subject to inadmissibility under INA § 212(a)(6)(B). An I-212 will not cure inadmissibility under INA § 212(a)(6)(B), which can only be overcome during the five years that it applies by proving that there was "reasonable cause" for their failure to appear.

A. Step One: Determine if Your Client is Subject to INA § 212(a)(9)(A) or (C)

1. INA § 212(a)(9)(A): Departed the United States after a removal order was entered (whether physically removed by DHS or left on their own after removal order), AND the application for admission is being filed:[5]

- Before 5 years have elapsed, if they were ordered removed as an arriving alien or through expedited removal;
- Before 10 years have elapsed, if they were ordered removed other than as an arriving alien, which includes several scenarios, most commonly non-arriving aliens ordered removed by an immigration judge;
- Before 20 years have elapsed if they were removed more than once, regardless of whether it was as an arriving alien or not; or
- At any time, if they have ever been convicted of an aggravated felony, even if the conviction was not the reason for the removal.

Note that 212(a)(9)(A) requires a *departure* after a removal order, and *only lasts for a period of time* after such departure. This is in contrast to 212(a)(9)(C), discussed in the next section, which turns on an attempted or actual *re-entry*, rather than a departure, and *lasts permanently* (hence the name "permanent bar"). In both situations an approved I-212 consent to reapply allows someone to overcome the time bar associated with the inadmissibility ground, which otherwise would be applicable for five, ten, twenty years, or forever.

Does everyone who has a prior removal order need an I-212 for 212(a)(9)(A) inadmissibility? No. Section 212(a)(9)(A)(iii) provides for an avenue for legal admission to the United States *if they have waited out the applicable time bar* — five, ten, or twenty years — as described in 212(a)(9)(A)(i) and (ii). This means that an individual who has already waited the required period of time is no longer inadmissible under this ground and *does not need to file an I-212*.[6] For example, someone who was expeditiously removed five or more years ago, or someone who was deported after having been ordered removed by an immigration judge ten or more years ago, would not need an I-212 to overcome 212(a)(9)(A) inadmissibility, as the ground no longer applies to them.

> **Example:** Charlie entered the United States many years ago and overstayed his visa. In 2016, he was placed in removal proceedings and that same year he was deported to England pursuant to a removal order. Charlie's son, a U.S. citizen, has recently turned 21 and wants to know if he can help his father come back to the United States through a family petition. Charlie is inadmissible under INA 212(a)(9)(A) because it has not been 10 years since his deportation. Therefore, he must first obtain an I-212 approval before he can be admitted as a permanent resident, unless he's willing to wait until 2026 (at which point he will no longer need consent to reapply in order to seek admission).

Example: Meghna was ordered removed by an immigration judge after overstaying her nonimmigrant visa. She appealed the decision to the Board of Immigration Appeals (BIA), which denied her appeal in June 2000. Meghna did not pursue a federal appeal and her removal order became final. She did not leave the country pursuant to the removal order, however, and the immigration authorities did not deport her. In 2007, Meghna left for India to visit her sick mother and decided to remain there to take care of her mother. In 2018, Meghna married a U.S. citizen after meeting him in India. The I-130 petition he filed for her has been approved. At this point Meghna does not need an I-212 because she has spent more than the required 10 years abroad after departing the U.S. following her removal order.

Example: Ruth entered the U.S. without inspection in 2001. In 2003, she was ordered removed by an immigration judge and she was deported pursuant to that order. In 2004, Ruth attempted to re-enter the United States but was apprehended and deported at the border pursuant to an expedited removal order. Because Ruth has departed twice pursuant to removal orders, she is inadmissible until she lives outside the United States for 20 years. If she wishes to legally immigrate before that, Ruth will need an approved I-212.[7]

What if someone with a removal order never left the United States? In all the examples above, the individual who was ordered removed eventually left the United States where they then remained, outside the country. But what if someone was ordered removed and never actually left? In this situation, they are not subject to 212(a)(9)(A), which requires a *departure* after a removal order. However, while not inadmissible under 212(a)(9)(A), such an individual is in danger of enforcement action to execute the order, if ICE learns of their whereabouts and the removal order. Certain individuals with a prior removal order, who have not departed and are presently protected from removal, for instance because they have TPS, may be able to pursue adjustment of status if they are otherwise eligible. Additionally, those with a prior removal order who have not yet left the United States, but will be leaving to consular process, may be able to seek a "conditional" I-212 in anticipation of triggering 212(a)(9)(A) when they leave to attend their consular interview (see Section C, below). Otherwise, unless such an individual is able to reopen their removal case, they will be in danger of having the removal order executed, without an opportunity to seek admission through adjustment of status or other relief as long as that removal order is outstanding.

What if someone with a removal order left, but came back soon thereafter—can the 212(a)(9)(A) time bar include time spent inside the United States? Although the statute does not specify where the time must be spent for the 212(a)(9)(A) inadmissibility bars, USCIS relies upon the regulations that specify the time must be spent outside the United States.[8] The BIA has held to the contrary in a few unpublished decisions, focusing on the differing statutory language in 212(a)(9)(A) as opposed to 212(a)(9)(C).[9] However, it may be best to conservatively assume that unless a client subject to a time bar under 212(a)(9)(A) for having departed after a removal order has spent the complete requisite period of time outside the United States, the ground of inadmissibility still applies and they still need an I-212 if they are seeking admission.[10]

Example: Aracely was ordered removed in 2002 and subsequently departed that same year. In 2006, she was admitted back into the country with a visitor visa even though she was technically inadmissible under 212(a)(9)(A). She now has an approved I-130 through her U.S. citizen spouse and wants to apply for adjustment, thinking that now that more than ten years have passed since her removal order, 212(a)(9)(A) should no longer apply to her. However,

> USCIS will likely take the position that she is still inadmissible under 212(a)(9)(A) because she did not spend the ten years outside the United States or seek consent to reapply before coming back in 2006.[11]

As the example with Aracely above illustrates, however, only a very small class of individuals will have departed after a removal order but be presently in the United States pursuant to a lawful re-entry, thereby in a position to contemplate whether time inside the United States can count towards the 212(a)(9)(A) time bar, without also having to worry about the permanent bar at 212(a)(9)(C) (which would be triggered by an unlawful re-entry after a removal, see next section).

2. INA § 212(a)(9)(C): Re-entered or attempted to re-enter the United States illegally after being unlawfully present for over one year or after an order of removal.

To determine if your client is subject to the "permanent bar" under § 212(a)(9)(C), you must first determine your client's prior immigration history, including the number and approximate dates of entries into the United States (as well as failed attempts to enter), periods of unlawful presence, and whether they have a removal order. Your client is subject to the permanent bar if:

- They left the U.S. after accruing more than a year of unlawful presence[12] and then tried to re-enter without inspection, whether successful or not;

OR

- They departed the U.S. with an outstanding removal order (either voluntarily or not) and subsequently tried to re-enter without inspection, whether successful or not.

This ground of inadmissibility is referred to as the "permanent bar," because if your client falls within one of these two categories they are permanently inadmissible *unless granted consent to reapply, which can only be sought after they have spent at least 10 years abroad*.[13] Unlike 212(a)(9)(A) discussed above, the passage of time alone does not eliminate the need to file an I-212 in this context. The ten years is counted from their *last departure* from the United States, not necessarily the departure pursuant to the removal order. For instance, if a noncitizen returned to the United States after a removal order and then departed again, the ten-year period for 212(a)(9)(C) starts from the second and last time they left, not the first departure following the removal order. Someone who is inadmissible under 212(a)(9)(C) submits the I-212 from outside the United States, with proof they have remained outside the country for least ten years. If they are presently in the United States after trigging the permanent bar, they cannot file an I-212 until they leave, have spent at least ten years outside the country, and seek the I-212 prior to their return. Further, someone in this situation is also in danger of reinstatement of removal (see warning below).

Can the 10 years required before a person can seek consent to reapply for 212(a)(9)(C) be spent inside the United States? No. Unlike with 212(a)(9)(A), the statute is clear that for 212(a)(9)(C), the time must be spent *outside* the United States. Additionally, someone who is subject to the permanent bar for re-entering without inspection after a prior removal is also in danger of reinstatement of removal.

Example: You have determined that your client, Angela, is eligible to adjust based on an I-130 filed by her U.S. citizen wife. Angela is grandfathered under 245(i) based on an I-130 filed by her brother in 1996. As you get ready to submit the adjustment application, you obtain Angela's immigration file and discover that Angela traveled to Mexico 12 years ago. When trying to re-enter, she was processed for expedited removal. Angela has now told you that she re-entered the U.S. without inspection the following day. Angela is inadmissible under 212(a)(9)(C) (both because she re-entered after accruing over one year of unlawful presence and because she re-entered unlawfully after being deported pursuant to a removal order). She cannot adjust with an I-212 at this time because she has not spent 10 years outside the U.S. since her departure 12 years ago. She is also in danger of reinstatement, so she may not want to submit an I-130 through her wife, because providing her address on the application form may enable ICE to locate her and reinstate the order.

Example: Doug overstayed his visa by three weeks before being placed in removal proceedings. Within a few months, he was granted voluntary departure by an immigration judge. Doug complied with the order and left the U.S. voluntarily within 60 days. The following week, Doug re-entered the United States illegally. Doug is not subject to 212(a)(9)(C) because he did not depart after accruing one year of unlawful presence. Nor did he leave pursuant to a removal order. Because he left the country pursuant to voluntary departure, Doug did not trigger the permanent bar despite having re-entered illegally. (He also is not inadmissible under 212(a)(9)(A), because he does not have a removal order and he departed pursuant to voluntary departure within the required timeframe so the voluntary departure order did not convert to a removal order. If he later seeks admission, however, he may have other inadmissibility issues.[14])

Note: Special Waiver of Permanent Bar Available for VAWA Self-Petitioners: VAWA self-petitioners who are subject to the permanent bar need not spend 10 years abroad before qualifying for a special waiver provision in the statute at 212(a)(9)(C)(iii), exclusively for VAWA self-petitioners. A waiver of the permanent bar is available for VAWA self-petitioners if they can show a connection between the abuse and the event that triggered the permanent bar, i.e., their deportation, departure, reentry, or attempted reentry.[15] As explained in Section B below, they use a Form I-601, instead of Form I-212, in order to overcome inadmissibility under § 212(a)(9)(C). Unlike with the consent to reapply, VAWA self-petitioners seeking a waiver of 212(a)(9)(C) do not need to spend ten years outside the country before trying to overcome 212(a)(9)(C) inadmissibility.

WARNING: Risk of Reinstatement for Individuals Who Returned to the U.S. without Inspection after a Prior Removal Order. Under INA § 241(a)(5), any individual who has re-entered unlawfully after an executed or self-executed removal order can be removed without the right to a removal hearing. This summary process, known as "reinstatement of removal," can apply even to VAWA self-petitioners who have not yet obtained deferred action. If a VAWA self-petition is denied and the petitioner is subject to reinstatement of removal due to a prior removal and illegal re-entry, she may be deported without the chance to apply for other relief, such as VAWA cancellation of removal before an immigration judge. This is an important consideration before filing a VAWA self-petition for individuals who plan on relying on the VAWA exception to 212(a)(9)(C)'s time-abroad requirement.

Practice Tip: As the examples above highlight, it is crucial to have an accurate account of your client's immigration history, including entries, departures, and contact with the immigration system. To achieve this, advocates will need to use effective client interviewing techniques, Freedom of Information Act (FOIA) requests, and a thorough review of other available evidence, such as corroborating witnesses. For guidance on how to obtain the necessary information, you can review ILRC's advisories on interviewing clients about entries and exits,[16] and how and where to make FOIA requests.[17]

COMPARING I-212 FOR PRIOR REMOVAL VS. PERMANENT BAR:

Prior removal	Permanent bar
INA § 212(a)(9)(A) Waiver: § 212(a)(9)(A)(iii)	INA § 212(a)(9)(C) Waiver: § 212(a)(9)(C)(ii)
Cannot come back for 5/10/20 years	Cannot ever come back without I-212
To come back sooner, use I-212	To come back, use I-212 after 10 years
After 5/10/20 years, no I-212 needed	After 10 years, still need I-212 to come back
In some cases, no I-212 necessary; I-212 allows coming back sooner than 5/10/20 years	ALWAYS need I-212; I-212 allows coming back only AFTER 10 years abroad

B. Step Two: Ensure That Your Client Does Not Fall Under One of the Special Circumstances in Which a Different Form is Needed.

To overcome the inadmissibility provisions under INA §§ 212(a)(9)(A) or (C), an I-212 is generally the required form. But in certain circumstances, an I-212 is not the correct form to address 212(a)(9)(A) or (C) inadmissibility. If your client falls under one of the following categories of applicants, a different form should be used to address inadmissibility under INA §§ 212(a)(9)(A) or (C).

a. **Applicants for a U visa or T visa must use Form I-192 instead of Form I-212.** The I-192 must be filed along with the U or T visa petition.[18]

b. **Applicants for other nonimmigrant visas who are inadmissible under INA § 212(a)(9)(C)(i)(I) (permanent bar based on unlawful presence) *may* file Form I-192 instead of Form I-212.**[19] This waiver is temporary and only for the purpose of the nonimmigrant visa. It does not eliminate the permanent bar for future immigration purposes, such as applications for permanent residency.

c. **Applicants for adjustment of status who fall within the following classes must file Form I-601 instead of Form I-212:**

- If the application is being filed by a self-petitioner under VAWA (Violence Against Women Act), the applicant is inadmissible under INA § 212(a)(9)(C), and they can establish a "connection" between the battery or extreme cruelty and the self-petitioner's removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States.

- If the application is being filed under NACARA (Nicaraguan Adjustment and Central American Relief Act).

- If the application is being filed under HRIFA (Haitian Refugee Immigration Fairness Act of 1998).

- Adjustment applicants who are currently in T nonimmigrant status.

d. **Applicants for adjustment of status who are filing under the legalization programs of INA §§ 245A or 210 must use Form I-690 instead of Form I-212.**

C. Other Special Circumstances Involving I-212s

1. Applicants granted TPS and/or who travel with advance parole

Effect of TPS on §§ 212(a)(9)(A) and (C): Temporary Protected Status (TPS) is a form of temporary immigration relief available to people from specific countries designated by the Department of Homeland Security ("DHS"). For TPS recipients living in the Sixth and Ninth Circuits, a grant of TPS is considered an "admission" for purposes of qualifying for adjustment of status under INA § 245(a).[20] Some practitioners have considered whether the reasoning in these decisions could be used to argue that once a person is granted TPS, they are "admitted," and therefore do not trigger INA §§ 212(a)(9)(A) or (C) if they subsequently depart (and attempt to re-enter unlawfully for purposes of (C)). Unfortunately, this argument would be difficult to make in light of the BIA's view that TPS' scope is a "limited one, the purpose of which is to permit certain aliens . . . to remain in the United States with work authorization, but only for the period of time that TPS is effective."[21] So while TPS can be an "admission" for adjustment of status purposes, as explicitly authorized by the statute,[22] there is no such provision stating that a person with TPS does not trigger a "departure" for purposes of INA §§ 212(a)(9)(A) and (C) if they subsequently leave the United States after being granted TPS.

***Departure with Advance Parole*:** In *Matter of Arrabally and Yerrabelly*,[23] the BIA held that a person who leaves the United States temporarily pursuant to advance parole under INA § 212(d)(5)(A) does not make a "departure" from the United States within the meaning of § 212(a)(9)(B)(i)(II).[24] Practitioners have considered whether this same argument can apply to §§ 212(a)(9)(A) and (C) – that is, a departure on advance parole should not count as a "departure," even if the person has an outstanding removal order at the time they depart. Unfortunately, this argument is unlikely to be successful as suggested by several unpublished USCIS decisions that have found 212(a)(9)(A) and (C) to apply despite a departure with advance parole.[25] As of this writing, we are unaware of any practitioners who have been successful with this argument.[26]

WARNING: On June 28, 2018, USCIS issued a policy memorandum expanding its practice of issuing a Notice to Appear (NTA) upon denying certain immigration applications.[27] Among other issues precipitating referral under this new memo, USCIS has stated that it will issue an NTA if it denies an application, petition, or other request for benefits and the applicant is not lawfully present. It is imperative that advocates thoroughly screen their clients for any red flags and inform them of the risks of applying under the policy announced in this NTA memo.[28] It would be highly risky to file an I-485 adjustment application if the client may be subject to §§ 212(a)(9)(A) or (C), unless you are certain that they are eligible to file an I-212.

2. When the "departure" after a removal order has not yet occurred

A person who has an outstanding order of removal (in other words, they were ordered removed but never left the United States) may become eligible for an immigrant visa for which they must leave the country in order to process through a U.S. consulate abroad. If they have not yet departed the United States after the order of removal, they have not yet triggered 212(a)(9)(A) inadmissibility, *but they will be triggering this ground when they leave to consular process*. There may be several options to consider in this scenario, including consular processing with an I-212. You would want to consider whether it is prudent to depart for consular processing, since the departure would effectively execute the removal order and trigger INA § 212(a)(9)(A) (and often § 212(a)(9)(B) unlawful presence inadmissibility as well). In these situations, a conditional I-212 approval (see below) can be used to provide more insurance of the client's safe return. In some situations, another way to address a removal order that is still outstanding is a motion to reopen (MTR) which, if granted, would vacate the removal order and potentially eliminate the need for an I-212 altogether.

a. Conditional I-212: As with I-601A "provisional" waivers that are available for individuals who will trigger § 212(a)(9)(B) upon departure but have not yet triggered this ground of inadmissibility, a "conditional" I-212 can be sought *before* an individual's departure from the United States that would trigger 212(a)(9)(A) inadmissibility.[29]. The I-212 in this situation is conditioned upon the applicant's departure, even though they are still in the United States when they request it. If both an I-601A and I-212 are needed, an I-212 must be granted before USCIS will consider an I-601A.[30] Much like the I-601A, once an individual obtains an I-212 approval, they can present it to the consular officer abroad as proof that advance permission to reapply for admission has been granted. Similarly, as with the provisional unlawful presence waiver, a conditional I-212 should not be denied for possible other grounds of inadmissibility, a finding reserved for the consular official (and if the consular officer determines other grounds of inadmissibility apply, the applicant may have an opportunity to file an I-601 waiver).[31] Note a conditional I-212 is only available for 212(a)(9)(A) inadmissibility.

b. Motion to reopen: Any time a client has an outstanding removal order that has not been executed, advocates should consider whether there are grounds for a motion to reopen, whether it is likely to be successful, and what risks filing an MTR would pose for the client. The scope of this practice advisory does not extend to a full explanation of the MTR filing and strategizing process. For a more detailed explanation of MTRs, see the MTR chapter in ILRC's publication, *Removal Defense: Defending Immigrants in Immigration Court* (Jan. 2020).[32]

The purpose of an MTR is to seek a fresh determination based on newly discovered facts or a change in circumstances, since the time of the last action on the case in Immigration Court or the Board of Immigration Appeals.[33] An MTR is appropriate where material and previously unavailable evidence arises *after* the final order of removal entered by the IJ or BIA. Once reopened, the proceedings need not be limited in scope to the

reasons stated in the MTR. For example, if an individual becomes adjustment-eligible after the reopening of proceedings that were based on a prior due process violation, the person can pursue adjustment of status during the reopened proceedings in immigration court. As a strategy matter, the following factors should be considered when deciding whether to file an MTR for a client who has a final order of removal.

1. How strong is the MTR and what are the chances of success? To be timely, an MTR must be filed within 90 days of the date of entry of a final administrative order of removal; it must be the first motion to reopen filed by the respondent; and it must state material and previously unavailable facts, supported by affidavits and other evidentiary material, including new applications for relief, if applicable.[34] Even when these requirements are met, the decision whether to grant an MTR is discretionary.

2. If the time and numerical limitations cannot be met, would the MTR fall under an exception such that it would have a strong chance of being granted? Some exceptions are MTRs based on eligibility for asylum or withholding of removal based on changed country conditions,[35] MTRs of *in absentia* removal orders that are based on a lack of notice of the proceedings or "exceptional circumstances,"[36] MTRs based on eligibility for VAWA-based adjustment or cancellation of removal,[37] joint MTRs,[38] and *sua sponte* MTRs.[39] Or could the principle of equitable tolling render the MTR timely? The more complicated the arguments are for reopening, the more of a risk an MTR would pose for a client with a final order of removal. Seeking reopening could bring the client to the attention of ICE, which would put the client at risk of imminent detention and removal.

3. Ultimately, what would be the advantage of an MTR? It is generally preferable for clients to obtain immigration relief without having to leave the United States. But if an MTR is unlikely to result in any immigration relief, the client risks being left in a position no different than their current position. Nonetheless, keep in mind that if a client is able to obtain voluntary departure after reopening their proceedings, it could eliminate the need for an I-212 if they comply with the order. Generally, however, the risks of filing an MTR to obtain voluntary departure outweigh the risks involved in obtaining a conditional I-212 before departure.

4. If the client departs after being granted a conditional I-212 (and I-601A, if applicable), is their application for an immigrant visa straightforward, or are there complications such as other inadmissibility grounds that would be triggered by their departure? For example, would they be departing within five years of an *in absentia* order that would make them inadmissible under INA 212(a)(6)(B) – a ground which would not be resolved with a waiver or consent to reapply? Would it be risky, given the facts, to let the consular officer decide during the interview whether the applicant has established an exception to an inadmissibility ground?

Practice Tip: MTRs, particularly late-filed ones, almost always pose an enforcement risk for clients since they necessarily require informing ICE of a person's presence in the United States after an unexecuted removal order. On the other hand, advising a client to depart also inherently carries with it a risk that additional inadmissibility bars could be triggered by their departure in addition to the bars under INA §§ 212(a)(9)(A) and (B). The bottom line is that advising a client with a removal order whether to pursue an MTR or depart and execute an outstanding removal order should involve a full consideration of the pros and cons of each option.

Example: Janet is married to a U.S. citizen and has an approved I-130. You determine that Janet is not eligible for adjustment of status because she entered the U.S. without inspection. You also determine that she is not eligible to adjust under 245(i). Janet may be able to consular process instead, but you realize that because she has accrued over a year of unlawful presence, she would trigger the 10-year bar under INA § 212(a)(9)(B) if she departs the U.S. for her consular interview. You determine that she has a strong case for an I-601A provisional waiver, which would waive the unlawful presence bar. While preparing Janet's application, you submit USCIS, ICE, CBP, OBIM, and EOIR FOIA requests through which you discover that Janet has an *in absentia* removal order which became final 8 years ago. Janet tells you that she had no idea she was in removal proceedings or that she had missed a hearing. You realize that if Janet leaves for her consular interview as planned, she will additionally trigger INA § 212(a)(9)(A). So now, you must decide whether to file a motion to reopen the removal proceedings on grounds that Janet did not receive notice of the proceedings, or advise Janet to obtain a conditional I-212 approval before leaving the country. How you advise Janet will depend on: (1) what relief options Janet would have once removal proceedings are reopened; (2) how strong her I-212 application and chances of successfully consular processing would be; and (3) whether Janet would trigger any other, particularly non-waivable, inadmissibility grounds by departing. Your assessment may change if Janet were to be apprehended and detained by ICE before you have had a chance to obtain the conditional I-212 and I-601A approvals for Janet.

Example: Jack comes to your office and tells you that he has a removal order against him from over 15 years ago, after he lost his case for cancellation of removal in immigration court. Jack initially entered the United States without inspection and has never left the country, even after his removal order. Now, his adult daughter wants to petition for him. You inform Jack that he must consular process and that he will need an I-601 to waive unlawful presence, and also an I-212 since he has not spent 10 years outside the country after the removal order was entered (assuming the State Department will take the same position as USICS, that the time bar for 212(a)(9)(A) cannot be spent inside the United States). You additionally inform him of the advantages of obtaining an I-601A provisional waiver before he departs. After thoroughly assessing the facts of Jack's case, you determine that Jack has no basis to file an MTR and that even if he were to get the proceedings reopened, he would have absolutely no grounds to apply for relief. Here, the decision is much easier – as long as Jack knows the inherent risk in pursuing a conditional I-212 followed by an I-601A in advance of his departure, consular processing would be the best way for Jack to achieve legal immigration status.

3. When someone subject to 212(a)(9)(A) returns to the U.S. without first seeking an I-212

Generally an I-212 must be filed from outside the United States, prior to the applicant's return—an approved I-212 gives the applicant permission to return, which would otherwise not be allowed due to the inadmissibility ground.[40] Anyone inadmissible under the permanent bar at 212(a)(9)(C) cannot get around filing the I-212 from outside the United States, because in order to file an I-212 in this situation, they must include proof they have remained outside the country for a minimum of ten years. But with 212(a)(9)(A), someone may return to the United States before having spent the required time outside the country and without seeking an I-212 first,

and later be in the position of formally seeking admission through an application for adjustment of status, for example. In this situation, they may be able to file a belated, *nunc pro tunc* ("now for then") I-212. USCIS will grant a *nunc pro tunc* I-212 where an applicant who should have filed an I-212 was inadvertently admitted without one and 212(a)(9)(A) is the applicant's only ground of inadmissibility.[41] The approval of a *nunc pro tunc* I-212 dates back to the date when the person should have sought the I-212.[42]

IV. Filing the I-212

A. What to Prove

There is no legal prerequisite such as a qualifying family member or hardship showing to be eligible for an I-212 consent to reapply. The process is entirely discretionary—weighing the favorable factors against the unfavorable—and adjudicators will consider "all pertinent circumstances relating to the applicant."[43] These include:

(1) The basis and recency of deportation

(2) Length of residence in the U.S.

(3) Moral character of the applicant

(4) Criminal history and evidence of rehabilitation

(5) Family responsibilities of applicant

(6) Inadmissibility to the U.S. under other sections of law[44]

(7) Hardship involved to the applicant and others

(8) The need for the applicant's services in the U.S. (the I-212 instructions state that one factor it will consider is "likelihood of becoming public charge," which is also a ground of inadmissibility).

B. Preparing the I-212 Packet

The I-212 packet should include:

1. **A completed Form I-212**,[45] with the legal basis for the application clearly marked. *Always check the form website to confirm you are using the correct version of the form.*

2. **A copy of the relevant deportation, exclusion, or removal order and proof of departure**, if applicable.

3. **A detailed affidavit by the applicant** setting out the facts that give rise to the application, i.e., accrual of more than one year unlawful presence, attempted unlawful entry after removal, etc., and highlighting positive equities.

4. **Proof of relationship to U.S. citizen or LPR family members**, i.e. marriage/birth certificates, as well as proof that they are citizens or LPRs, although having a qualifying relative is not a requirement for an I-212.

5. **Proof of residence abroad**, if minimum time abroad is required. Evidence showing presence in the country can include school or work records, medical records, tax records, phone and other utility bills, receipts of purchases, lease or home purchase documents as well as rent or mortgage payments, and any other documentation that would tend to show the person was physically present outside of the

U.S. for the required time abroad. Ideally, at least one or two documents from each month or every few months should be submitted if available. For periods of time in which no documents are available, witness statements can help fill the gap.

6. **Criminal records**, if applicable. If there are convictions, certified copies of the abstracts of judgment should be submitted. Any plea agreements, sentencing orders, charging documents, police reports or other documents such as probation reports can also be submitted if they help buttress the applicant's positive equities.

7. **Extensive evidence of positive equities**, including but not limited to the factors listed above. Such evidence should include a combination of witness declarations, primary evidence of family and community ties such as photos and employment records, and the client's own declaration, as mentioned above. If there would be hardship to family members or particularly sympathetic facts, such as unusual effects of family separation, health problems, or poor country conditions, that should be included as well.

8. **Payment of filing fee.** As of this writing, the filing fee for an I-212 is $930.[46] *Always check the USCIS website for the latest filing fee information before you file to ensure you have the correct amount.*

C. Where to File

There are very specific instructions on where to file an I-212 depending on your client's situation. I-212s can be filed with USCIS, a U.S. Consulate, the Immigration Court, or CBP, depending on the circumstances. Please review the instructions carefully on the USCIS website;[47] below is a summary of some of the most common filing scenarios.

Consular Processing Applicants:

- **For immigrant visa applicants outside the United States who do not need an I-601**, the I-212 must be filed with the USCIS field office having jurisdiction over the place where removal proceedings were held. 8 CFR § 212.2(d). If your client is inadmissible under the permanent bar solely based on unlawful presence (so no removal order), the I-212 should be filed with the USCIS field office with jurisdiction over the applicant's intended place of residence in the United States.

- **For immigrant visa applicants outside the United States who also need an I-601 waiver**, the I-212 should be filed concurrently along with the I-601 with the USCIS Phoenix Lockbox.

- **Applicants for most nonimmigrant visas** should submit Form I-212 to the U.S Consulate with jurisdiction over their nonimmigrant visa application. The consular officer will forward a recommendation to the CBP Admissibility Review for a decision.

Adjustment of Status Applicants:

- **Applicants adjusting status with USCIS** file Form I-212 with the USCIS office having jurisdiction over the adjustment application, which is the same office to adjudicate the I-212 application.

- **Applicants adjusting status in Immigration Court** file Form I-212 directly with the court.[48]

Applicants who do not fall into one of the above categories, or who fall into a special category (such as a K visa applicant or an applicant under VAWA), should refer to the form instructions on the USCIS website.[49]

End Notes

[1] See USCIS Policy Manual, Vol. 9, Ch. 2-C, available at: https://www.uscis.gov/policy-manual/volume-9-part-a-chapter-2.

[2] Available at: https://www.ilrc.org/areas-of-expertise and https://www.ilrc.org/store.

[3] 8 C.F.R. § 212.2. Note an I-212 is only necessary for a person who is inadmissible under 212(a)(9)(A) or 212(a)(9)(C) and who is an applicant for admission. An applicant for admission can be inside or outside the United States and is someone seeking to enter or remain in the country with authorization, either permanently or temporarily. It does not include applicants seeking to be paroled. See INA § 101(a)(13).

[4] As of September 11, 2018, USCIS adjudicators can deny an application or petition without first issuing an RFE/NOID. See USCIS Policy Memorandum: Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b) (Jul. 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

[5] INA § 212(a)(9)(A) went into effect on April 1, 1997 with passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The provision applies to all removal orders (except of arriving aliens), as well as old exclusion and deportation orders entered pre-IIRIRA. The provision barring individuals removed as arriving aliens or pursuant to an expedited removal order (§ 212(a)(9)(A)(i)) was newly-created by IIRIRA. Therefore, the five-year inadmissibility bar applies only to such removal orders entered on or after April 1, 1997.

[6] Note 212(a)(9)(A) does not specify where the time must be spent, but the regulations at 8 C.F.R. § 212.2(a) state that the time must be spent outside the United States.

[7] The 20-year bar does not come up very often due to the reinstatement of removal provision under INA § 241(a)(5), which provides for removal without a hearing where a person re-enters after the execution of a prior removal order. But the bar can come up occasionally in practice if DHS places a person in removal proceedings or issues an expedited removal order instead of reinstating removal. This could happen either inadvertently or due to an exercise of prosecutorial discretion.

[8] *See* 8 C.F.R. § 212.2(a).

[9] *See, e.g., In re Jose Armando Cruz*, 2014 WL 1652413 (Apr. 9, 2014); (case name redacted) (July 11, 2014), available at https://www.aila.org/ as AILA Doc. No. 14072147.

[10] See mention of nunc pro tunc I-212s in conjunction with an adjustment application at Part III.C.3 below.

[11] She also may be inadmissible under other, waivable grounds such as for unlawful presence and misrepresentation for failing to disclose the prior removal order in her visitor visa application, but such issues are outside the scope of this advisory.

[12] The accrual of unlawful presence for purposes of § 212(a)(9)(C) is counted in the aggregate and only starts on or after April 1, 1997. That is, the total amount of unlawful presence is determined by adding together all periods of time during which a person was unlawfully present, on or after the effective date of April 1, 1997. Unlike § 212(a)(9)(B), unlawful presence for purposes of (a)(9)(C) accrues even if the person was a minor. The exceptions provided under 212(a)(9)(B) for minors, asylum applicants, victims of abuse or trafficking, and Family Unity beneficiaries do not apply in the context of 212(a)(9)(C).

[13] *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Unlike 212(a)(9)(A), subsection (C) specifically refers to the ten-year period during which an applicant can become eligible for an I-212, as counting from the date of their "last departure" from the United States. But practitioners should be aware that there is no clear BIA precedent recognizing this difference in statutory language. As previously discussed, some practitioners have reported that USCIS officers have taken the position that the 5, 10, and 20-year time bars imposed by subsection (A) also require the time to be spent abroad in order to show that no I-212 is needed. Unpublished BIA decisions, however, reflect that the BIA has generally taken the opposite position and recognized that while (a)(9)(C) requires the ten years to be spent abroad before an applicant can file an I-212, (a)(9)(A) does not require the respective time periods to be spent abroad before being exempted from needing to file an I-212. See footnote 9.

[14] For instance, if he later departs the United States to pursue an immigrant visa through consular processing, he will likely trigger unlawful presence inadmissibility. For now, however, his only inadmissibility issue appears to be that he is currently present without admission or parole, INA § 212(a)(6)(A).

[15] INA § 212(a)(9)(C)(iii).

[16] ILRC, PRACTICE ADVISORY: *HOW TO INTERVIEW CLIENTS ABOUT THEIR ENTRIES AND ATTEMPTED ENTRIES TO THE UNITED STATES (AND UNDERSTAND THEIR ANSWERS)* (DEC. 18, 2018), AVAILABLE AT: HTTPS://WWW.ILRC.ORG/HOW-INTERVIEW-CLIENTS-ABOUT-THEIR-ENTRIES-AND-ATTEMPTED-ENTRIES-UNITED-STATES-AND-UNDERSTAND-THEIR.

[17] ILRC, *PRACTICE ADVISORY: A STEP-BY-STEP GUIDE TO COMPLETING FOIA REQUESTS WITH DHS* (NOV. 17, 2017), AVAILABLE AT: HTTPS://WWW.ILRC.ORG/STEP-STEP-GUIDE-COMPLETING-FOIA-REQUESTS-DHS.

[18] 8 CFR § 245.24.

[19] INA § 212(d)(3)(A).

[20] See *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017). INA § 245(a) requires adjustment applicants to prove that they were inspected and admitted or paroled.

[21] *Matter of Sosa Ventura*, 25 I&N Dec. 391, 393 (BIA 2010).

[22] INA § 244(f)(4).

[23] 25 I&N Dec. 771 (BIA 2012).

[24] INA § 212(a)(9)(B)(i)(II) renders inadmissible, any person who "has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of . . . departure or removal from the United States."

[25] See also INA § 101(g) ("For the purposes of this chapter any alien ordered deported or removed (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported or removed in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.").

[26] Note that upon return to the United States on advance parole, applicants who are adjustment-eligible may have an argument that they are an "arriving alien," therefore vesting jurisdiction on USCIS to adjudicate their application. See 8 CFR § 245.2(a)(1); *Matter of Yauri*, 25 I&N Dec. 103, 106-107 (BIA 2009). So while departing on advance parole may give rise to inadmissibility under § 212(a)(9)(A), once the person is paroled, they may become eligible to adjust status with USCIS if the application is filed in conjunction with an I-212. In practice, advocates have had mixed results in convincing USCIS to take jurisdiction over such applications. A few practitioners have reported that some immigration judges are taking jurisdiction of adjustment applications even where the most recent entry by the applicant was with advance parole.

[27] *USCIS Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTA) in Cases involving Inadmissible and Deportable Aliens* (Jun. 2018), available at: https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf.

[28] For a more detailed explanation of the memo see *ILRC Practice Advisory: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear* (Dec. 2018), available at: https://www.ilrc.org/updated-guidance-referral-cases-and-issuance-notices-appear-tips-and-strategies-working-clients.

[29] 8 C.F.R. § 212.2(j). See 81 FR 50244 (July 29, 2016). The final rule allows individuals with a final order of removal, deportation, or exclusion to be eligible for a provisional waiver if they have already applied for, and been granted, an I-212 consent to reapply.

[30] 8 C.F.R. § 212.7(e)(4)(iv).

[31] *See, e.g.* unpublished BIA decision *Matter of Y-M-C-* (May 25, 2018), available as AILA Doc. No. 1518339.

[32] Available for purchase at: https://www.ilrc.org/defending-immigrants-in-immigration-court.

[33] INA § 240(c)(7); 8 C.F.R. § 1003.2(c).

[34] *Id.*

[35] INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii), § 1003.23(b)(4)(i).

[36] INA § 240(b)(5)(C); INA § 240(e)(1); 8 C.F.R. § 1003.2(c)(3), § 1003.23(b)(4)(ii), (iii)(A).

[37] INA § 240(c)(7)(C)(iv).

[38] 8 C.F.R. § 1003.2(c)(3)(iii); § 1003.23(b)(4)(iv).

[39] 8 C.F.R. § 1003.23(b)(1); § 1003.2(a).

[40] Very technically, an approved I-212 gives someone permission to initiate the process of returning; they must otherwise have a pathway to immigrate and the I-212 is the necessary precursor to pursuing that path.

[41] *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976); *Matter of Garcia Linares*, 21 I&N Dec. 254 (BIA 1996); *see also* AFM at Ch. 43.1(c).

[42] AFM at Ch. 43.1(c).

[43] *Matter of Tin*, 14 I&N Dec. 371 (RC 1973); *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). The Seventh and Ninth Circuits have found that it would be reasonable to give less weight to equities gained after entry of the removal order. *See Garcia–Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991); *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980).

[44] The Adjudicator's Field Manual (AFM) at Ch. 42.3 notes that if the I-212 applicant would be inadmissible under any other grounds of inadmissibility and they are not also submitting an I-601 waiver for the other ground(s), then the I-212 should be denied because "no purpose would be served" by granting consent to reapply where other inadmissibility issues would still prevent the noncitizen from immigrating. Further, if the noncitizen submits both an I-601 and an I-212, the AFM directs the adjudicating officer to review the I-601 first and only proceed to the I-212 if the I-601 waiver is granted. Otherwise, the I-212 should be denied "since its approval would serve no purpose." This only applies to applicants who are filing the I-212 and I-601 with an application for adjustment of status. Note that the regulations apply the opposite rule in situations where a conditional I-212 is filed with an I-601A provisional waiver – requiring that the conditional I-212 be adjudicated first. 8 C.F.R. § 212.7(e)(4)(iv).

[45] Available at https://www.uscis.gov/i-212. This page indicates which form edition dates are accepted.

[46] No fee waiver is available for the I-212, unless the applicant is a VAWA self-petitioner or battered spouse of an A, G, E-3, or H nonimmigrant.

[47] See https://www.uscis.gov/forms/direct-filing-addresses-form-i-212-application-permission-reapply-admission-united-states-after-deportation-or-removal.

[48] 8 CFR § 212.2(e). Some practitioners have reported that a few ICE attorneys in various parts of the country have taken the position that immigration judges do not have jurisdiction of I-212s. Practitioners who face this argument by ICE should point to the USCIS Adjudicator's Field Manual, Chapter 43.1, which requires officers to transfer pending I-212s to the immigration court if an applicant is placed in proceedings. See: https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-19162/0-0-0-19167.html. EOIR regulations contain the same requirement. 8 CFR § 1212.2(e).

[49] See

https://www.uscis.gov/forms/direct-filing-addresses-form-i-212-application-permission-reapply-admission-united-states-after-deportation-or-removal.

San Francisco
1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

Washington D.C.
1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin
6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio
500 6th Street
Suite 204
San Antonio, TX 78215
t: 210.760.7368

ilrc@ilrc.org www.ilrc.org

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.