Frequently Asked Questions: Common U Visa Inadmissibility Issues

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Which inadmissibility grounds apply to U nonimmigrant petitioners and how can these grounds be waived?

All U nonimmigrant status petitioners, including derivative family members, are generally subject to the grounds of inadmissibility found in section 212(a) of the Immigration and Nationality Act (INA).

A generous discretionary waiver is available specifically to U nonimmigrant applicants under INA § 212(d)(14), which waives all inadmissibility grounds except those found under INA § 212(a)(3)(E) (those grounds related to participation with Nazi persecution, genocide, torture, or extrajudicial killings), which are unwaivable. The standard for this waiver is "in the national or public interest." This waiver is sought by filing Form I-192, Application for Advance Permission to Enter as a Nonimmigrant.

While USCIS generally adjudicates waivers using the standard set forth at INA § 212(d)(14), when U nonimmigrant applicants are not eligible for such a waiver, they may apply for the general discretionary waiver available to all nonimmigrant applicants, including U petitioners and derivatives, pursuant to INA § 212(d)(3)(A). While the statute does not specify a standard for this waiver, the Board of Immigration Appeals (BIA) set out a balancing test for it in *Matter of Hranka*,16 I&N Dec. 491 (BIA 1998). The factors considered include the following: 1) the risk of harm to society if the applicant is admitted; 2) the seriousness of the applicant's prior immigration or criminal law violations; and 3) the nature of the applicant's reasons for entering the United States. This waiver most typically comes up in removal proceedings, or where U.S. Citizenship and Immigration Services (USCIS) requires the applicant to meet this general waiver due to serious, but not violent, violations. Therefore, these factors may need to be addressed by practitioners, especially when criminal grounds are involved.

As to both waivers, the regulations provide for a heightened waiver standard for "violent or dangerous crimes" and for the waivable security grounds at INA § 212(a)(3). Per 8 CFR § 212.17(b)(2), USCIS will only exercise discretion in "extraordinary circumstances."

Are U nonimmigrants exempt from any inadmissibility grounds at INA § 212(a)?

U applicants are specifically exempt from the public charge ground of inadmissibility under INA § 212(a)(4).

Are there any inadmissibility grounds under 212(a) that do not require a waiver for U-nonimmigrant status purposes?

A U nonimmigrant petitioner is not required to waive inadmissibility under INA § 212(a)(7)(A), which applies to immigrants and is not applicable to nonimmigrants. A U nonimmigrant petitioner is also not

required to waive inadmissibility under INA § 212(a)(7)(B)(i)(II), as this ground applies only at the border and not to those seeking nonimmigrant status.

Note that INA § 212(a)(7)(B)(i)(I), however, does apply to U nonimmigrant petitioners, who must hold a current passport at the time of application for U nonimmigrant status. If they do not, or if they will not be able to renew their expiring passports while the Form I-918 is pending, they must request a waiver of this ground.[1]

If the only ground of inadmissibility that an applicant has triggered is that relating to entry without inspection, must the applicant seek a waiver for that ground?

Yes. Inadmissibility under INA § 212(a)(6)(A)(i) (entering without inspection and admission or parole) applies if the U applicant entered without inspection, and it must be waived, even when it is the only ground that has been triggered.

Does overstaying a B1/B2 visitor visa require an inadmissibility waiver?

No. No grounds need to be waived when a U nonimmigrant applicant overstays a visitor visa unless a misrepresentation was made either to procure that visa or enter the United States using that visa.

Must a U nonimmigrant applicant request an inadmissibility waiver for working in the United States without authorization?

No. U nonimmigrant status petitioners are subject to inadmissibility grounds found at § INA 212(a). Working without employment authorization is not one of these grounds and, therefore, does not need to be waived. Note that INA § 245(c)(2) and (8) bars eligibility for adjustment of status under 245(a) for working without authorization. However, someone applying for adjustment of status based on U nonimmigrant status is applying pursuant to INA § 245(m) and is not subject to those bars.

Note, however, that practitioners must screen carefully on the issue of unauthorized employment to determine what type of documents, if any, were submitted to the employer as part of the I-9 employment eligibility verification process. If the U petitioner submitted a false U.S. birth certificate, U.S. passport, or other documents indicating they were a U.S. citizen, they would be inadmissible under INA § 212(a)(6)(C)(ii). The petitioner in that case would then have to request a waiver of that ground.

Do U nonimmigrant applicants have to waive the unlawful presence grounds of inadmissibility if they have never left the United States since accruing unlawful presence?

No. Inadmissibility grounds pursuant to INA § 212(a)(9)(B)(i)(I) and (II) (the three- and ten-year unlawful presence bars) must be waived only when the applicant has accrued over 180 days or 365 days or more of unlawful presence and then departs the United States. The bars are not activated, or triggered, until the applicant departs the United States. Therefore, if a U nonimmigrant applicant has entered the United States only once, but has never departed, no matter how much unlawful presence they have accrued, they have not triggered the unlawful presence bars.

[1] Waiving the passport inadmissibility ground at INA 212(a)(7)(B)(i)(I) for applicants residing abroad is possible, but under most circumstances, the U Visa holder will not be able to actually enter the United States without a valid passport; therefore, this is not generally recommended.

What if the U nonimmigrant applicant entered the United States without inspection, stayed over 180 days but fewer than 360 without any lawful status, departed the United States and then returned again without inspection, all before April 1, 1997? Is the applicant subject to any unlawful presence bar?

No, this applicant faces no inadmissibility grounds for these actions, as the unlawful presence bars were not in effect until April 1, 1997. Therefore, for purposes of the bars at INA § 212(a)(9)(B), any time spent in the U.S. prior to April 1, 1997, is not a factor in determining whether unlawful presence inadmissibility exists. Unlawful presence can only accrue after April 1, 1997.

Note, however, that if this applicant had entered the U.S. without inspection, stayed over 365 days without any lawful status, departed the U.S. and then returned illegally, all *after* April 1, 1997, the applicant would be subject to the permanent bar found at INA § 212(a)(9)(c)(i)(I).

Does a U nonimmigrant applicant who has been convicted of a crime involving moral turpitude (CIMT) but who qualifies for the petty offense exception have to waive that conviction?

No, if the U nonimmigrant applicant is eligible for the petty offense exception under INA § 212(a)(2)(A)(II), no inadmissibility ground has been triggered.

The petty offense exception applies to noncitizens who have only one CIMT conviction, for which the maximum possible sentence that may be imposed does not exceed one year, and for which the noncitizen was sentenced to a term of imprisonment of six months or less. When all these requirements are met, the noncitizen is not inadmissible for commission or conviction of a CIMT.

PUTTING IT ALL TOGETHER

Selene first entered the United States without inspection in June 1994. She lived in the United States for a year and a half before returning to her home country in December 1995. In 2005, she applied for a B-1/B-2 visa but failed to disclose her prior entry. The visa was granted, and Selene entered the United States in April of 2005. Once she was in the United States, she paid a "coyote" to smuggle her daughter across the border. Selene was also convicted of a CIMT in 2011. It is her only conviction, and she was sentenced only to probation. The CIMT of which she was convicted has a maximum possible sentence of six months in jail. Selene was the victim of domestic violence last year and cooperated with police and prosecutors in the investigation and prosecution of her abuser. Which inadmissibility grounds does Selene need to identify on her Form I-192?

Selene must ask for the following inadmissibility grounds to be waived on her Form I-192:

- INA § 212(a)(6)(A)(i) - for entering without inspection in 1994;
- INA § 212(a)(6)(C)(i) - for willful misrepresentation for not disclosing her priority entry without inspection when applying for a visitor's visa; and
- INA § 212(a)(6)(E) - for smuggling her daughter into the United States.

Note that Selene does not have to waive any grounds of inadmissibility for her last entry as she last entered lawfully with her B1/B2 visa. Note also that she does not have to waive any grounds of inadmissibility under INA § 212(a)(9)(B)(i)(II) for triggering the ten-year bar or under INA § 212(a)(9)(C)(i)(I) for triggering the permanent bar, as the unlawful presence bars did not go into effect

until Apr. 1, 1997, two years after Selene departed the United States. Even if this activity had occurred after Apr. 1, 1997, Selene still would not have triggered the permanent bar since she subsequently entered the United States legally by way of a B-1/B-2 visa.[2]

In addition, Selene does not have to ask that any grounds of inadmissibility related to conviction of a CIMT at INA § 212 (a)(2)(A)(i)(I) be waived as she qualifies for the petty offense exception.

COMMON INADMISSIBILITY GROUNDS FOR U NONIMMIGRANT STATUS PETITIONERS

CIMT	INA § 212(a)(2)(A)(i)(I)
Entering Without Inspection	INA § 212(a)(6)(A)(i)
Failure to Attend Removal Proceedings	INA § 212(a)(6)(B)
Fraud/Misrepresentation	INA § 212(a)(6)(C)(i)
False Claim to U.S. Citizenship	INA § 212(a)(6)(C)(ii)
Smuggling	INA § 212(a)(6)(E)
Failure to Maintain Current Passport	INA § 212(a)(7)(B)(i)(I)
Prior Removal Order	INA § 212(a)(9)(A)
Expedited Removal	INA § 212(a)(9)(A)(i)
Ten-Year Bar	INA § 212(a)(9)(B)(i)(II)
Permanent Bar	INA § 212(a)(9)(C)(i)

[2] Note that in this event, Selene would still have triggered the ten-year bar, making her ineligible for the B1/B2 visa.