Employment-Based Adjustment How to Address Tricky Admissibility Issues

Beatriz Trillos Ballerini, Esq.
Trillos-Ballerini Law Firm, PC
Houston, Texas

Danuta "Danka" Villarreal, Esq.
Law Office of Danuta Villarreal, PLLC
Bellaire, Texas

Scope of Presentation

- **Spot Inadmissibility issues early**
- **Deal with inadmissibility issues in EB AOS**
- **Common Grounds of Inadmissibility in EB AOS context**
  - **Crimes**
  - **Status Violations**
  - **Fraud/Willful Misrepresentation, False Claims**
- **Waivers and Strategies for Inadmissibility issues**
- **Ethical considerations & Best Practices**

How to handle Dual Representation in Employment-Based AOS

- **DR = Lawyer represents two or more co-clients in a single matter**
- **Lawyer-client relationship with both parties unless rep. by own Lawyer**
- **Common in immigration in FB & EB cases**
- **Does not matter who pays fee, initiated contact or if the lawyer attempts to seek a disclaimer of representation from Pet. or BNF**

Dual Representation: Best Practices

- **Make it Clear !**
- **Writing: Transparency Minimizes Risk of Conflict**
  - **Explain nature of Dual Representation**
  - **How conflicts will be handled**
  - **Lawyer must disclose confidential info to both**
  - **Equally Loyal to both clients**

Dual Representation: Conflict Arises

- **When does it arise?**
  - **ER layoff of EE pre-140 approval or post I-140**
  - ***USCIS Guidance Coming: USCIS to Provide Notice of Revocation of I-140***
  - **EE desire to "port" under AC21**
- **When Conflict of Interest Arises in Dual Representation**
  - **Cannot side with either party or ignore conflict**
  - **MUST try to resolve**
  - **If not, MUST withdraw**

Criminal Issues : EB AOS

- **Does my client have a criminal record?**
- **Was my client convicted? When was the client convicted for that offense? What was the punishment?**
- **How does the criminal history affect my client's admissibility?**
- **Does my client have a pending criminal matter?**

Does my client have a criminal record?

- **FBI Background Check**
  - Instructions: https://www.fbi.gov/about-us/cjis/identity-history-summary-checks
  - Application information form, two fingerprint cards, and a cashier's check or money order for $18.00 made payable to "Treasury of the United States"
  - Current processing time 3 to 15 weeks
- **Certified Copies of Court Records from Pertinent Jurisdiction**
  - Record of conviction from appropriate District Clerk's office
  - Certificate of records search or certificate of disposition, charging documents, judgment and sentence, order of dismissal

Conviction: Immigration Purposes and Foreign Convictions

- **Conviction for Immigration Purposes: INA § 101(a)(48).**
  - Deferred adjudication is a conviction for immigration purposes: requires a pleading of guilty or no contest (first prong), and the BIA has held that imposition of court costs is sufficient to constitute punishment (second prong). *See Matter of Cabrera,* 24 I. & N. Dec. 459 (BIA 2008).
  - Pretrial Diversion may not be a conviction.
  - Juvenile delinquency is not a conviction. *Matter of Devison*, 22 I. & N. Dec. 1362 (BIA 2000).
  - Foreign Convictions:
    - No effect if conducted in absentia. 22 C.F.R. § 40.21(a)(4).
    - Conduct must be deemed criminal by U.S. standards. *See Matter of McNaughton*, 16 I. & N. Dec. 569 (BIA 1978).

What affects my client's admissibility?

IT DOES NOT AFFECT ADMISSIBILITY	IT DOES AFFECT ADMISSIBILITY
Not a crime which triggers inadmissibility.	CIMT: INA § 212(a)(2)(A)(i)(I).
Falls under the petty offense exception: INA § 212(a)(2)(A)(ii).	Controlled substance offenses: INA § 212(a)(2)(A)(i)(II).
Falls under the youthful offender exception: INA § 212 (a)(2)(A)(ii)(I).	Multiple criminal convictions: INA § 212(a)(2)(B).
	Prostitution: INA § 212 (a)(2)(D).

How does the criminal history affect my client's admissibility?

212(h) waiver for: CIMTs (except murder and torture); multiple criminal convictions; prostitution; and a single offense of simple possession of marijuana of 30 grams or less.

15-year statute of limitations INA § 212(h)(A): for all offenses (except prostitution), must show: (1) activities occurred more than 15 years before application for admission or adjustment; (2) the admission would not be contrary to the national welfare, safety or security of the United States; (3) the person has been rehabilitated; and (4) the applicant meets all other terms, conditions, and procedures as established by regulation

Extreme Hardship Waiver INA § 212(h)(1)(B): a person may obtain a waiver if s/he is the spouse, parent, son or daughter of a USC or LPR who would suffer extreme hardship if the person is denied admission

How does the criminal history affect my client's admissibility?

- **Even if the client has not been convicted, the charges were dismissed, or s/he merely mentions the commission of a crime, the criminal issue should still be analyzed to determine any criminal inadmissibility ground.**
  - **Person who *admits* commission of CIMTs and/or drug offenses is also inadmissible.**
  - **Three-part test for the acceptance of an admission: (1) the admitted conduct must constitute the essential elements of the crime; (2) the applicant must have been provided with a definition and the essential elements of the offense prior to admission; and (3) the admission must be voluntary. *Matter of K,* 7 I. & N. Dec. 594 (BIA 1957). The applicant must also admit all facts constituting the crime. *Matter of E-N-,* 7 I. & N. Dec. 153 (BIA 1956).**

Does my client have a pending criminal matter?

- **Maintain NIV status until the criminal case is finalized. File for AOS, or consular process the IV, when the case is final and any inadmissibility issues have been resolved.**
- **If the client commits an offense after the application for AOS has been filed, the criminal matter will have to be resolved prior to any adjustment interview.**
- **Work closely with criminal counsel to avoid any inadmissibility grounds and to finalize the matter in a timely manner, or consider withdrawal of the application.**

Fraud & Misrepresentation

- **An alien is inadmissible "who by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or any other benefit under this Act." *See* INA § 212(a)(6)(C)(i); 8 USC §1182(a)(6)(C)(i);**

- **A misrepresentation is material if it tends to shut off a line of inquiry that would result in a finding of inadmissibility. *See* Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961)**

Fraud & Misrepresentation

- **When does it arise in EB AOS?**
  - **Inaccurate statements regarding employment history**
  - **Omissions of fact, info on visas, etc.**
  - **Visa applications, failure to disclose visa denials**
  - **Consulate interviews or info at secondary inspection**
  - **Practice Pointer: Be thorough in your initial consultation with client.**
- **Waiver: INA § 212(i)**
  - **Req's QR USC or LPR spouse or parent suffer EH**
- ***See USCIS Memo AILA Doc. 09040236***

False Claims to USC
When does it arise in EB AOS ?

- **AOS Interviews: Field officers conduct fraud unit investigations based on info on G-325 finding of FC to USC on I-9 applications**
- **245i Applicants adjust based on old L/C applications**
- **No waiver available: Strict Liability Violation (except prior to Sept. 30, 1996)**
- **Ethical Consideration During Representation : Ask your client!**

DERIVATIVES OF EMPLOYMENT-BASED PETITIONS

- **If biological age or CSPA adjusted age is under 21 on the date the visa number is available, then the child remains a derivative, but must "seek to acquire" LPR status within one year of visa number availability. INA § 203(h).**

DERIVATIVES OF EMPLOYMENT-BASED PETITIONS

- ***Period of time I-140 pending*: Receipt date until Appv'l date**
- ***Date visa # available*: 1st of the month Visa Bulletin indicating PD is current, or date of approval of I-140 if the visa is already available**
- ***CSPA age:* Child's biological age – period I-140 pending**
- ***Seek to acquire:* Filing for AOS, IV, or BNF. of a timely filed I-824. (See AILA InfoNet No. 03020550)**

HYPO CSPA #1

- **EXAMPLE: Juan filed a first preference petition under EB(1)(3) category on June 5, 2015, and it was approved on February 3, 2016. The preference category was current at the time of approval. Juan's daughter, Maria, turned 20 in December 2015. As long as Maria "seeks to acquire" permanent resident status within one year of the approval date, she will remain a derivative for CSPA purposes, even if she turns 21 in the process.**

HYPO CSPA #2

- **EXAMPLE: Juan filed a first preference petition under EB(1)(3) category on June 5, 2015, and it was approved on February 3, 2016. The preference category was current at the time of approval. Juan's daughter, Maria, turned 21 on December 3, 2015. The petition was pending 243 days (7 months and 29 days). On the date visa number is available (date of approval of I-140), Maria is 21 years and 2 months, but her CSPA age (biological age minus period of time I-140 was pending) is 20 years, 6 months and 1 day. She remains a derivative as long as she "seeks to acquire" LPR status before February 2017.**

Maintenance of Status: Violations & Strategies

Generally:

Under INA §245(c)(7), a person may not adjust who is seeking employment based residency if s/he is not in lawful NIV status. A person who was employed without authorization or has violated the terms of his or her NIV may not adjust under 245(a). ***INA §245(c)(8).***

Maintenance of Status: Violations & Strategies

- **Exceptions:**
  - **8 CFR 245.1(d)(2) - Failure to maintain status due to technical reasons or through no fault of his own, or**
  - **Grant of E/S or COS which was not approved until after stay expired, or**
  - **Reinstatement of F-1 status on basis of circum's beyond student's control**

Maintenance of Status
The Magic Tool: INA § 245(k)

- **Section 245(k) of the INA provides a waiver for the following ineligibility grounds:**
  - **Failure to maintain, continuous lawful status;**
  - **Engaged in unauthorized employment; or**
  - **Otherwise violated the terms and conditions of the alien's admission.**

- **Limitation: Since the date of the foreign national's <u>lawful admission</u>, he or she has not engaged in the enumerated ineligibility activities for an <u>aggregate period</u> <u>exceeding</u> <u>180 days</u>.**

Maintenance of Status
The Magic Tool: INA § 245(k)

- **The 180-day clock:**
  - **<u>Starts</u> on the 1st day the foreign national's status expires, is revoked, or is violated following the person's most recent admission; and**
  - **<u>Ends</u> on the date the foreign national files for adjustment of status.**
- **Who does it apply to? Beneficiaries of EB petitions & their derivatives appv'd under EB1, EB2, EB3 and EB4**

Maintenance of Status
The Magic Tool: INA § 245(k)

- **Practice Pointer:**
- **Discuss with the Pet & Benef to maintain the underlying nonimmigrant status *after* the AOS applications if filed in 245k scenario. If AOS is filed & NIV status expired, if AOS is denied time spent pending AOS will count toward 180 day period if new AOS is filed. Keep NIV status.**
- **Memo: *Neufeld, Acting Assoc. Director, Domestic Operations, USCIS, Applicability of Section 245(k) to Certain Employment-Based Adjustment of Status*, AILA InfoNet at Doc. No. 08073061**

Public Charge Ground of Inadmissibility

- **Ground of inadmissibility if "in the opinion of the consular officer at the time of the application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, [s/he] is likely at any time to become a public charge." INA § 212(a)(4)(A).**
- **Public charge is demonstrated by:**
  - **Receipt of public cash assistance for income maintenance (e.g. SSI, TANF, cash assistance);**
  - **Institutionalization for long-term care at government expense (e.g. nursing home or mental health institution). *USCIS Fact Sheet*, "Public Charge" (Oct. 20, 2009), AILA Doc.09102970.**

Public Charge=No Waiver

- **Overcome the finding by presenting evidence that the inadmissibility no longer applies. The U.S. CIS requires proof that the principal applicant has the capacity to support himself or herself and any derivative applicants at the 125% of the federal poverty guidelines. INA § 213A(f)(4)(B)(i).**

- **Practice Pointer: In cases where an applicant has received "problematic" benefits in the past, or presents special issues such as a chronic illness or disability, prepare additional evidence to overcome any potential finding of inadmissibility on public charge grounds.**

QUESTIONS ?