

DETAILED TABLE OF CONTENTS

THE WAIVERS BOOK, 3RD ED.
Advanced Issues in Immigration Law Practice

Preface and Caveat	vii
Chapter 1: An Introduction to Waivers: From A to Z	1
A Short History of Time.....	2
“A” Is for Admission (And You Thought It Was Apple)	7
Admission	7
Visa Eligibility	8
Adjustment of Status (AOS) vs. Consular Processing Abroad	8
Grounds of Inadmissibility	9
Criminal and Related Grounds	9
Foreign Residence.....	9
Health-Related Grounds.....	9
Misrepresentation Grounds	10
Public Charge and Health Insurance Grounds	10
Security and Foreign Policy Grounds	11
Unlawful Presence	11
Three- and Ten-Year Bars.....	12
Miscellaneous Grounds.....	12
Waivers of Inadmissibility	12
Nonimmigrant Visas	12
Immigrant Visas.....	13
Health-Related Grounds.....	14
Fraudulent Misrepresentation.....	15
False Claims to U.S. Citizenship.....	15
Criminal and Related Grounds.....	16
Foreign Residence Requirement for J Visa Holders	17
Unlawful Presence	17
No Waiver Available.....	18

Removal and Cancellation of Removal ... Please Don't Let the Door Hit You on the Way Out	19
Cancellation of Removal for Lawful Permanent Residents	19
Positive Factors	20
Negative Factors	20
Cancellation of Removal for Nonlawful Permanent Residents	20
Waivers of Removal	21
Conclusion.....	21
Chapter 2: Getting the Whole Story: How to Communicate with Clients and Witnesses in Waiver Cases	23
Overview of Challenges	23
Scope of Article.....	24
Provide a Welcoming Environment	24
Let's Start the Show	25
Listen—No, Really, Listen!	25
Be Alert to Non-Verbal Communications.....	26
Do Not Be Afraid of Silence or Displays of Affection	27
What If the Client Is Not Physically Present?	27
What About Gender and Culture?	28
What If the Client Is a Child	29
Do Not Be a Sucker—How to Deal with Omissions and Untruths.....	29
The Role of the Mental Health Professional	30
Conclusion.....	32
Chapter 3: Cancellation of Removal for Lawful Permanent Residents: Suggestions for Obtaining a Favorable Exercise of Discretion	33
Statutory Requirements	35
Analysis of Key Statutory Terms	35
“Lawful Admission for Permanent Residence”	35
“Continuous Residence” and the “Stop-Time” Rule	36
“After Admission in Any Status”.....	37
Discretion	37
Application Procedure.....	38
Preparing the Application.....	39

Find Out What the Government Already Knows About the Client	39
Find Out What Nongovernmental Sources Know About the Client.....	42
Make Sure the Client Reads and Understands the Written Evidence Well Before It Is Submitted to the Immigration Court	44
Conclusion.....	44
Sample LPR Cancellation Case History.....	45
Checklist of Exhibits for LPR Cancellation Applications.....	47
Chapter 4: Cancellation of Removal for Nonlawful Permanent Residents	51
The Foreign National Must Have Been Physically Present in the United States for a Continuous Period of Not Less Than 10 Years Immediately Preceding the Date of Such Application.....	52
The Respondent Has Been a Person of Good Moral Character for 10 Years.....	55
The Respondent Has Not Been Convicted of an Offense Described Under INA §§212(a)(2), 237(a)(2), or 237(a)(3)	56
Removal Would Result in Exceptional and Extremely Unusual Hardship to the Foreign National’s U.S. Citizen or LPR Spouse, Parent, or Child.....	58
Cancellation of Removal for Abused Immigrant Women and Children	60
Instances in Which the Waiver Can or Should Be Considered	61
Strategies and Tactics	62
Stop-Time Rule.....	62
Good Moral Character	63
Conviction Described Under INA §§212(a)(2), 237(a)(2), or 237(a)(3)	63
Exceptional and Extremely Unusual Hardship	63
Procedural Strategy.....	65
Basic Procedural Matters	65
Sample Fact Pattern	66
Chapter 5: INA §212(c): The Relief That Just Won’t Go Away.....	69
When the INA Was King	69
Cancellation of Removal	71
<i>INS v. St. Cyr</i> and Impermissible Retroactive Application of the Law.....	72
The Supreme Court Rejects the Need for a Comparable Ground for INA §212(c) Eligibility	75
Conclusion.....	78

Chapter 6: Waiver for Prostitution, Crimes More Than 15 Years Old, Crimes of Moral Turpitude, and Simple Possession of Marijuana—INA §212(h).....	81
§212(h)(1)(A): Prostitution and Crimes More Than 15 Years Old.....	82
Issues Particular to INA §212(h)(1)(A).....	82
Marijuana and the INA §212(h) Waiver.....	83
Extreme Hardship and Exercise of Discretion.....	85
VAWA and the INA §212(h) Waiver.....	87
Heightened Standard for Discretion or Violent and Dangerous Crimes.....	88
<i>Nunc Pro Tunc</i> and Stand-Alone Waivers Under INA §212(h).....	91
Distinctions Between LPRs and Non-LPRs: Bars to the INA §212(h) Waiver for LPRs.....	93
Aggravated Felonies.....	94
Continuous Residence of Seven Years.....	94
What Does “Previously Admitted to the United States as an Alien Lawfully Admitted for Permanent Residence” Mean?.....	95
Examples.....	97
Conclusion.....	97
Sample Supporting Documents for §212(h) Waiver.....	99
Sample Declaration of Client.....	101
Chapter 7: Waivers of Misrepresentation or Fraud in Procuring Visa or Entry ...	107
INA §237(a)(1)(H)—Waiver Authorized for Certain Misrepresentations.....	107
Relationship to a Qualifying Family Member.....	109
“ <i>In Possession of an Immigrant Visa or ‘Equivalent Document’</i> ”.....	110
“ <i>Otherwise Admissible</i> ”.....	111
“ <i>At the Time of Such Admission</i> ”.....	111
Stretching the INA §237(a)(1)(H) Umbrella.....	112
The Quest for That Sought-After “ <i>Favorable Exercise of Discretion</i> ”.....	113
Effect of the Waiver Once Granted.....	115
Waivers of “ <i>Document Fraud</i> ” Under INA §§212(d)(12) and 237(a)(3)(C)(ii).....	116
Chapter 8: Fraud and Misrepresentation Grounds of Inadmissibility: Planning for Success	119
Challenge the Fraud.....	120
Define the Attorney-Client Relationship and Build the Client’s Trust.....	120
Gather the Facts.....	120

Prepare the Legal Argument Based on the Facts	121
Apply the Law.....	121
Any Alien Who	122
By Fraud.....	122
Or Willfully Misrepresenting a Material Fact	122
Willfully	123
Misrepresenting.....	123
Willfully Misrepresenting	123
Material Fact.....	124
Facts Considered Material.....	125
Which Might Have Resulted	126
In a Proper Refusal If the Truth Had Been Known	126
Waiver Eligibility	130
Immigrant Waiver.....	130
Preparing the Waiver Application.....	131
Documenting and Arguing the Waiver Application.....	132
Nonimmigrant Waiver Cases	133
Preparing the Waiver Application.....	134
Arguing the Waiver Application	134
Practice Tips.....	135
Conclusion.....	138
Sample Letter to Consulate Addressing Inadmissibility Issues.....	139
Chapter 9: The Unlawful Presence Waiver	145
Statutory Framework.....	146
Determining Unlawful Presence	147
Departure by Any Other Name May Not Be a Departure	148
And Neither Is the Definition of “Admission”.....	150
The Interaction of the Life Act and INA §212(a)(9)(B).....	151
I-601 vs. I-601A	152
The Waiver Application Process	153
Qualifying Relatives	153
What Is “Extreme Hardship?”.....	154
A Word About Evidence.....	160

Other Considerations.....	160
Appeal Rights...Sometimes.....	160
Chapter 10: Should I Stay or Should I Go: The Importance of Evaluating the Case.....	163
Provisional Waiver Expansion	163
USCIS Extreme Hardship Policy	164
List of Waivers of Inadmissibility and Hardship Definition.....	164
Relocation Versus Separation	165
Significant Factors	166
Death of the Qualifying Relative	167
Discretion.....	167
Is a Waiver Necessary?	168
Common Grounds of Inadmissibility That Affect the Provisional Waiver Applicant	170
Conclusion.....	172
Chapter 11: Waiver After Prior Removal or Deportation: Permission to Reapply for Admission: INA §§212(a)(9)(A)(iii) and 212(a)(9)(C)(ii)	175
Overview of INA §§212(a)(9)(A) and (9)(C)	176
Unlawful Status That Does Not Contribute to Unlawful Presence Under INA §212(a)(9)(C).....	179
The INA §212(a)(9)(C) Reentry Trigger.....	181
Standards for Relief.....	183
Discretion Under <i>Matter of Tin</i> and <i>Matter of Lee</i>	183
The Impact of a Concurrent Extreme Hardship Waiver on the Discretionary Decision Under INA §§212(a)(9)(A)(iii) and (9)(C)(ii)	184
The Impact of a Successive Extreme Hardship Waiver on the Discretionary Decision Under INA §§212(a)(9)(A)(iii).....	185
In the Interest of Family Unity, Humanitarian Concerns, and Public Interest	186
Discretion Under <i>Hranka</i>	186
How Reinstatement Complicates In-Country Relief.....	187
General Procedures.....	188
Specific Procedure, Standard for Approval, Citations, and Notes for Specific Situations	188
Applying for an Immigrant Visa at a U.S. Consulate	189
Applying for a K Visa.....	190

Canadian Visitors Not Requiring a Visa, But Needing to File an I-212	190
Nonimmigrant Visa Applicants	190
Applying for Adjustment of Status Under INA §§245(i) and 245(a)	190
Cancellation	191
Asylees and Refugees	191
Temporary Protected Status	191
Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA)	192
Special Immigrant Juvenile.....	192
T Visa.....	192
U Visa	192
S Visa.....	193
Chapter 12: General Waiver for Nonimmigrants—Working with Consulates.....	195
Overview	195
Length of Validity of the §212(d)(3) Waiver and Effects on Extensions of Stays or Changes of Status.....	200
Effect of Waiver Validity Period on Extension or Change of Status	201
Conclusion	201
Chapter 13: Illness, Inadmissibility, Waivers, and Other Health-Related Issues ...	203
Medical Examinations as a Prelude to Permanent Residence	204
Communicable Diseases of Public Health Significance.....	205
Sexually Transmitted Disease.....	208
Tuberculosis.....	209
1991 Instructions for Tuberculosis Screening.....	210
Current Instructions for Tuberculosis Screening	212
Vaccination Requirements	214
Waiver of Inadmissibility for Communicable Disease.....	216
Waiver of Inadmissibility for Vaccination Requirement	217
Quarantine and Isolation Provisions.....	218
Key Practice Points.....	221
Physical and Mental Disorders: Inadmissibility and Waivers.....	222
Overview.....	222
Mental Disorders	223

Substance Use	225
Problems and Pitfalls	229
Waivers of Inadmissibility for Mental Illness and Substance Use	230
Seeking Review of the Determination	232
Key Practice Points	232
Inadmissibility and Waivers in the Nonimmigrant Context	233
Disability, Waivers, and Other Remedies in the Naturalization Context	234
Waivers of the Requirements Relating to Literacy, History, and Government	234
Waiver of the Oath.....	236
Disability and Good Moral Character	236
Waiving the Fingerprint Requirement	237
Alternative Remedies.....	237
Key Practice Pointers	238
Chapter 14: Waivers for Smuggling Grounds of Deportability and Inadmissibility	239
Alien Smuggling	240
No Conviction Necessary to Establish Deportability or Inadmissibility	241
“Alien Smuggling” Is Not a Crime Involving Moral Turpitude	242
A Conviction for “Alien Smuggling” Is an Aggravated Felony	242
Family Reunification Exception	244
The Circumstances for Which a Waiver Is Available	245
Family Relationship Must Have Existed at the Time of Entry	246
Conclusion	246
Chapter 15: Waivers Under INA §212(k)	247
History	247
Eligibility	248
Procedure	249
Presentation and Analysis	249
Inadmissibility Not Known, and Undeterminable Through the Exercise of Reasonable Diligence.....	249
Eligibility for a Favorable Exercise of Discretion	251
Case Studies	252

Potential Issues	252
Federal Court Jurisdiction.....	252
“Otherwise Admissible”	253
Conclusion	253
Chapter 16: INA §245(k): Adjustment of Status for Beneficiaries of Certain Employment-Based Petitions.....	255
History.....	255
Scope of INA §245(k).....	256
What Violations Are Excused?.....	256
What Violations Are Not Excused?.....	257
Who May Benefit?.....	257
Application of INA §245(k).....	257
What Are the Prerequisites?.....	257
Presence in the United States Pursuant to a Lawful Admission:	
INA §245(k)(1)	257
Less Than 180 Days of Status Violations Following Admission:	
INA §245(k)(2)	258
Unauthorized Employment.....	259
Failure to Maintain Lawful Status; Violations of Terms of a Nonimmigrant Visa	260
Technical Violations.....	261
Conclusion.....	261
Chapter 17: INA §209(c) Waivers for Refugees and Asylees	263
The Basics	263
Eligible Applicants	263
Grounds of Inadmissibility	265
Application Process	265
<i>Matter of Jean</i>	267
Violent or Dangerous Crimes	268
Exceptional and Extremely Unusual Hardship	270
Waiver Preparation Tips	272
Client Interview and Analysis.....	272
Document Checklist.....	273

Hypothetical Clients	274
Conclusion	275
Sample Cover Letter in Support of Form I-602	277
Sample Addendum (Merits) in Support of Form I-602.....	281
Chapter 18: Violence Against Women Act (VAWA) Waivers and Other Related VAWA Provisions	285
Special “Hardship Factors” for VAWA Waivers	286
Waiver Procedure for VAWA Applicants	288
INA §212(g)—Waiver for the “Communicable Disease” Health-Related Ground of Inadmissibility	289
INA §212(h)—Waiver for Certain Criminal Convictions	290
Public Charge Inadmissibility VAWA Provisions	291
INA §212(i) Waiver for “Visa Fraud”	291
INA §212(a)(9)(B)(iii)(IV)—Unlawful Presence VAWA Exception and Related VAWA Provisions	291
The INA §212(a)(9)(C) “Permanent” Bar	294
INA §237(a)(1)(H)—Waiver of Deportability for Fraud and Misrepresentation at Admission	296
INA §237(a)(7)—Domestic Violence Waiver of Deportability	296
Good Moral Character Issues	297
Possible Alternatives to I-360 Self-Petitions for Victims of Domestic Violence	
“U” and “T” Petitions and Waivers.....	299
I-751 Waivers of Joint Petition Requirement	300
VAWA Cancellation.....	302
CRAA, HRIFA, and NACARA Abused Spouses and Children	304
Conclusion	305
Chapter 19: The INA §212(d)(14) Waiver for U Visas	307
In the Public or National Interest	308
Heightened Standard for Criminal and Security Grounds.....	309
INA §212(d)(3) Waiver.....	309
Cross-Application of Standards.....	311
Grounds of Inadmissibility for the U Visa Applicants	311
Criminal Grounds of Inadmissibility	312
Deciding Whether to Disclose Criminal Grounds of Inadmissibility	316

Tips for Applying for the Waiver	318
Evidence for the INA §212(d)(14) Waiver	321
Conclusion	324
Checklist for I-192 Waiver	324
Sample Exhibits in Support of I-192 Waiver	327
Sample Affidavit in Support of I-192 Application for Waiver Under INA §212(d)(14)	329
Chapter 20: Special Immigrant Juvenile Status.....	333
The Problem	333
SIJS: A Curious Hybrid.....	334
How We Got to Where We Are Today: The 1997 Amendment to SIJS Provisions and the Trafficking Victims Protection and Reauthorization Act of 2008	335
Expanded Inadmissibility Waivers	340
Basic SIJS Eligibility Requirements	341
The SIJS Process	342
Preparing an Argument for the Dependency/Predicate Order	342
Filing for a Dependency/Predicate Order	343
Supporting Documents Required for the I-360 Application	344
Fees Associated with Obtaining SIJS	345
Adjustment of Status.....	347
Working with Children.....	348
Conclusion	349
Chapter 21: Inadmissible Canadians: Nonimmigrant Waivers and Border Issues	351
Inadmissibility	351
Filing Form I-192 [Pursuant to INA §212(d)(3)(A)(ii)]	351
Filing Procedures	352
The Admissibility Review Office	353
Processing Times	354
Validity Period.....	354
INA §212(d)(3)(A)(i) Waivers—Applying at a U.S. Consulate	355
When the Canadian Citizen Is Not Inadmissible to the United States	359
Criminal Grounds of Inadmissibility—Not a “Conviction” Under the INA	359
Specific Dispositions Under Criminal Code of Canada: Summary Convictions, Absolute Discharges, Conditional Discharges, and Pardons	360

Inadmissibility/Excludability Under Legacy INS “Zero Tolerance Program”	361
Expedited Removal at Land Border POE	362
Form I-212 Waiver Application Process for Canadian Citizens.....	363
Conclusion	364
I-192 Waiver Document Checklist for CBP Filings	365
I-192 Consular Waiver Document Checklist	367
Sample Memorandum in Support of INA §212(d)(3)(A)(ii) NIV Waiver Application..	369
Chapter 22: ÷ The Travel Ban Waiver.....	373
Introduction: The Need for Travel Ban Waivers.....	373
Presidential Proclamation 9645	374
The Section 3(c) Waiver	375
Presidential Proclamation 9645 Text	375
The Three Grounds for Eligibility	377
Denying Entry Would Cause the Foreign National Undue Hardship	377
Entry Would Not Pose a Threat to National Security or Public Safety of the United States	378
Entry Would Be in the National Interest	379
Determining If a Waiver Is Necessary (Exceptions and Non-Applicability).....	379
Applicability	380
Exceptions.....	381
Obtaining a Waiver	382
Waiver Adjudication.....	382
Submitting the Waiver Application	383
Initial Case Filing with USCIS.....	383
NVC Stage.....	384
Consular Processing and Interview Stage	384
Post-Interview Stage.....	384
Administrative Processing	384
Establishing Eligibility.....	384
Undue Hardship.....	385
National Security/Public Safety	386
National Interest	387
Evidence to Submit to Support a Waiver Request.....	388

Processing Times389

Conclusion.....390

Chapter 23: ÷ Discretion in the Adjudication of Immigration Benefits Applications391

Issues to Consider in Constructing a Case Requiring a Favorable Exercise of Discretion 393

Initial Procedural Considerations393

 What Constitutes Discretion?394

 Substantive Factors Guiding Agency Discretion397

 Issues Pertaining to Review of Discretionary Decisions400

 Limitations on Judicial Review.....402

 Standards of Review404

Weaving the Procedural Aspects of the Remedy into the Request for Relief: Adjustment of Status406

Conclusion.....410