Presented:
2011 Conference on Immigration and Nationality Law – IM11

October 20-21, 2011
Austin, TX

Extreme Lawyering: Filing Waivers at Home and at Consulate Abroad

George Rodriguez and Martin Valko

George Rodriguez
Saenz-Rodriguez & Associates, P.C.
Dallas, TX

gr@sralawonline.com
214-637-5700

Martin Valko
Chavez & Valko, L.L.P.
Dallas, TX

mvalko@keyvisa.com
214-251-8011

Extreme Lawyering:
Filing Waivers at Home and at Consulates Abroad

By George Rodriguez and Martin Valko*

As immigration practitioners, we come across underlying issues that potentially bar the admission of our clients into the United States. Often, our clients have engaged in certain activities that render them inadmissible, such as remaining in the country beyond their authorized period of stay, committing fraud or having misrepresented themselves, having been convicted of certain crimes, or having been previously ordered deported or removed. Furthermore, issues of inadmissibility can also arise based on health-related grounds. Their inadmissibility, therefore, must be carefully analyzed based on the facts of each case and, most importantly, practitioners should never concede a presumption by an adjudicator or consular officer that a waiver is necessary.

This article will address the most common grounds of inadmissibility and their corresponding waivers. These waivers are filed with a USCIS office in the United States or at a U.S. consulate abroad.[1] This article will also offer practical pointers on how to prepare a strong application for a waiver of inadmissibility, covering the most commonly requested types of waiver. We know that extreme hardship is "not a definable term of fixed and inflexible content or meaning," and that it "necessarily depends upon the facts and circumstances peculiar to each case."[2] Therefore, many times the art in our craft is in telling our client's story. As lawyers, our job is to define "extreme hardship" as it relates to our client. At the end of this paper we list some pointers and ideas based on our experiences and used in our respective practices. However, we can easily summarize the secret to a successful waiver – it is based on how well you know your client and how well you tell their story.

It is also important to note, that even though an applicant may have met all the requirements for a particular waiver, the applicant must still demonstrate that he or she merits a

---

* **George Rodriguez** (george@sralawonline.com) the co-founder of Saenz-Rodriguez & Associates, P.C. He has a B.A. from the University of Notre Dame and earned his J.D. from Southern Methodist University. He is on several educational advisory boards and enjoys mentoring students interested in the practice of law. George has been a member of the National Hispanic Institute since 1984 and volunteers as an educational director for their youth leadership programs. Licensed by the Texas Supreme Court, he has been admitted to the Northern Federal District Court and the Federal 5th Circuit Court of Appeals. He is a member of AILA and is the Dallas AILA ICE liaison. He has been recognized as a Rising Star by Texas Monthly in 2004, 2005, and 2008.
* **Martin Valko** (mvalko@keyvisa.com) is a partner at Chavez & Valko, LLP in its Dallas office. His practice focuses exclusively on representing both individual and corporate clients in all types of U.S. immigration matters. Martin received his Juris Doctor degree from Oklahoma City University School of Law and a Master of Laws degree from Southern Methodist University Dedman School of Law. He serves as a legal advisor on U.S. immigration laws to the Mexican Consulate in Dallas and the Slovak Embassy to the U.S. Martin represents the Slovak Republic as its Honorary Consul of to Texas.

[1] The article does not cover waivers of inadmissibility filed with the Immigration Court.
[2] *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964).

favorable exercise of discretion. We bear the burden of proving that the positive factors (which include extreme hardship) are not outweighed by the adverse factors.[3] Keep in mind that the adverse factors that will be considered will not be limited to the ground of inadmissibility you are attempting to waive. Negative factors include past immigration violations, criminal history (including those which do not serve as the basis for the ground of inadmissibility), and length of time in the U.S. without legal immigration status.

Finally, and perhaps most importantly, prior to moving forward with an application for admission or any of the waivers addressed below, make sure that your client is not subject to INA §212(a)(9)(C)(i).[4]

Inadmissible Due to Unlawful Presence
INA §212(a)(9)(B)(i)(I) and (II)

The statutory amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to section 212(a)(9)(B) of the Immigration and Nationality Act (INA) added the three- and ten-year bars of inadmissibility for aliens who departed the United States after being unlawfully present beyond 180 days or one year, respectively.[5] Aliens who accrued unlawful presence after April 1, 1997, the date the changes went into effect, must first obtain a waiver of inadmissibility when seeking immigrant visas at a U.S. Consulate abroad or applying for adjustment of status before the USCIS. Because the federal regulations for the changes made to the INA have yet to be promulgated, the USCIS has followed numerous memoranda and policies governing unlawful presence.[6] Note that section 212(a)(9)(B) also provides exceptions for minors and other specified applicants who are not affected by the unlawful presence bars.[7]

Section 212(a)(9)(B) of the INA provides, in pertinent part, that any alien (other than an alien lawfully admitted for permanent residence), who:

> (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States

---

[3] *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957); *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

[4] This section eliminates the possibility of a waiver for those who are subject to §212(a)(9)(B)(i) due to multiple immigration violations including those previously removed under Sections 235(b)(1) or 240 or any other provision of law. Simply stated, those who triggered unlawful presence or have been removed and illegally reenter the U.S. are barred for 10 years without a waiver.

[5] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208; September 30, 1996).

[6] USCIS Interoffice Memorandum titled Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I), with revision to the Adjudicator's Field Manual (AFM) from Donald Neufeld, Acting Associate Director of Domestic Directorate, Lori Scialabba, Associate Director of Refugee, Asylum and International Operations Directorate, and Pearl Chang, Acting Chief of Office of Policy and Strategy, dated May 6, 2009, found at:
http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

[7] INA §212(a)(9)(B)(iii) lists exceptions to the inadmissibility bars as they apply to (I) Minors, (II) Asylees, (III) Family Unity, (IV) Battered Women and Children, and (V) Victims of a Severe Form of Trafficking in Persons.

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Extreme Lawyering: Filing Waivers at Home and at Consulates Abroad

Also available as part of the eCourse
Immigration and Nationality: The Permanent Resident Timeline Tightrope; Filing Waivers at Home and at Consulates Abroad; plus Exploring Advanced Citizenship Issues

First appeared as part of the conference materials for the
35th Annual Immigration and Nationality Law session
"Extreme Lawyering: Filing Waivers at Home and at Consulates Abroad"