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Sneaky Inadmissibility Issues At The U.S. Consular Office: Alien Smuggling, Drug and Alcohol Abuse, Gang Affiliations, and Public Charge

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By Nicolas Chavez, Rosemary Vega

Approved visa petition? Check. Approved provisional waiver? Check. No benefit-stripping crimes, illegal reentries or deportations? Wonderful. You might think: What could possibly go wrong for my client at the visa interview? Though clearing these hurdles can bring forth feelings of achievement and excitement, any resulting sense of security would be misplaced. One reason for developing a false sense of security is that the provisional waiver is usually approved, and that forms an expectation that an immigrant visa will seamlessly be granted abroad. But, the provisional waiver only waives unlawful presence. It does not cover other grounds of inadmissibility, including the inconspicuous grounds that are increasingly being applied at the consulates, such as those relating to tattoos, smuggling, health or medical grounds, or public charge. These not-so-obvious issues usually arise at the panel physician examination or consular interview abroad, and they are sometimes difficult to catch before the applicant leaves the United States. Once at the consular interview, the applicant could face visa refusal based upon these emerging grounds, most of which have limited or no remedies. Thus, it is important that counsel look for and identify these potential issues before sending clients abroad when they might not be able to return.

Alien Smuggling

One grounds of inadmissibility that has become a problem for many immigrant visa applicants in the last few years, is the alien smuggling ground, which is found in INA § 212(a)(6)(E).

Section 212(a)(6)(E) of the INA Illegal entrants and immigration violators

(i) in general any alien who at anytime knowingly has encouraged, induced, assisted, abetted, or aided any alien to enter or to try to enter the United States in violation of law is inadmissible

(ii) special rule in the case of family reunification- Clause (i) shall not apply in the case of an alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law

(iii) waiver authorized- For provision authorizing waiver of clause (i), see subsection (d)(11).

The statute provides a very broad definition of what constitutes alien smuggling. Encouraging, inducing, assisting, abetting, or aiding anyone to enter the U.S. unlawfully at any time, encompasses paying for a smuggler, physically helping a person cross into the United States, or even transporting a person once in the United States. *See Soriano v. Gonzales*, 484 F. 3d 318 (5th cir 2007).

In *Soriano*, Mr. Soriano picked up three people who had entered the U.S. without inspection earlier that day, and he was stopped while transporting them. Based on these facts, the court held that Mr. Soriano's actions constituted alien smuggling under § 212(a)(6)(E).

Consistent with *Soriano*, the Foreign Affairs Manual (FAM), discusses actions giving rise to smuggling grounds of inadmissibility. Some examples are offering a job to an individual, if accepting the job requires the individual to enter illegally; physically bringing someone across the border or paying for their passage with a smuggler; or even making a false, material statement on another person's visa application. *See* 9 FAM 302.9-7(B)(4).

For purposes of its smuggling provision, the FAM defines "any alien" as "[a]ll aliens, including lawful permanent residents seeking reentry into the United States." are potentially subject to this provision. *See* 9 FAM 302.9-7(B)(1). Waivers of inadmissibility are available for immigrant visa applicants who sought to assist only an individual who is a spouse, child or parent at the time of the assistance. *Id*.[1]

A few years ago, at a tour of the U.S. Consular Office in Cd. Juarez, Mexico, some of the consular officers who conduct immigrant visa interviews discussed some of the issues they saw the most, and the alien smuggling ground of inadmissibility was one of them.

The most common alien smuggling scenario arises when an undocumented person has entered the U.S. without inspection and then, many years later, began the immigrant visa process, usually through a family-based petition by a U.S. citizen or lawful permanent resident relative. Then, at the consular interview, the officer asks about the applicant's child(ren) and how they entered the U.S. If the applicant entered the U.S. with a child, or even if the child entered the U.S. after the applicant, the consular officer will normally decide that the alien smuggling ground has been triggered.

At the consular interview, the consular officer usually asks about the child(ren) and how they entered the United States. Unfortunately, many applicants have filed and received approval for an I-601A provisional waiver prior to the interview. Because the provisional waiver only waives unlawful presence, the applicant will have to file a separate waiver (Form I-601) while waiting outside of the U.S.

It is mind boggling that a mother would be considered an alien smuggler merely because she and her child entered the U.S. together, or that the child entered afterward, with or without parental knowledge or involvement.

In a previous era, actions taken on behalf of close family members were excluded from the alien smuggling definition where family affection, instead of financial gain, was the sole motive. *See* 9 FAM 302.9-7(B)(5). For many years, people were able to consular process under this interpretation, which recognized that the reason for bringing one's child or close relative into the U.S. was for family reunification. Today, however, the interpretation has evolved to encompass those who, regardless of motive, enter with--or even prior to--their child(ren) or other close relatives.

[1] The waiver of this ground of inadmissibility is discretionary and based on humanitarian principles, including family unity. A showing of extreme hardship is not required for waiver approval. *See* INA § 212(d)(11).

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