

# WAIVERS— NON-IMMIGRANT VISA APPLICANTS

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## **WAIVERS OF GROUNDS OF INADMISSIBILITY FOR NON— IMMIGRANT VISA APPLICANTS**

**The Immigration and Nationality Act (INA)** establishes conditions that must be met before an applicant may be issued a particular nonimmigrant visa. If an applicant is ineligible for a visa, the INA also contains provisions that allow certain ineligible applicants to apply for waivers of their ineligibility. The visa category that you are applying for will determine whether a waiver of ineligibility is available.

This brochure will explore some of the ineligibility grounds for nonimmigrant visas and the available waiver. It will also briefly explain the process to obtain said waiver. It is not, however, a substitute for legal advice. Be sure to consult with an attorney experienced in immigration matters to determine the correct course of action on your case.

### **General Waiver for Nonimmigrant Visas: What is a 212(d)(3) waiver?**

INA § 212(d)(3) provides for the waiver of most inadmissibility grounds that may make you ineligible for a nonimmigrant visa, including, but not limited to:

- Criminal offenses
- Fraud
- Unlawful presence in the U.S.

The granting of this waiver is discretionary and unlike other waivers, eligibility is not conditioned upon having a qualifying family relationship, the passage of a specific amount of time, a humanitarian or compelling purpose, or any other special statutory threshold requirement. Instead, the consular officer or adjudicator will conduct a balancing test of the following factors in deciding whether to recommend a waiver:

1. The risk of harm to society if the applicant is admitted;

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2. The seriousness of the applicant's prior criminal or immigration law violation(s), if any;
  3. The nature of applicant's reason for seeking entry;
  4. Whether there is a single, isolated incident or a pattern of misconduct; and
  5. Evidence of reformation or rehabilitation.

Keep in mind that this waiver should only be used if your intent is to enter the U.S. temporarily and you will return to your country of origin on or before your authorized period of stay expires. Thus, you must be prepared to demonstrate that you have strong ties to your home country that will compel you to leave the U.S. at the end of your temporary stay.

### **What is the process to apply for a 212(d)(3) waiver?**

There are two ways to apply for a 212(d)(3) waiver: at a consular post or at a port of entry. Regardless of how you apply, the ultimate adjudication of these waivers is by the U.S. Customs and Border Protection (CBP) Admissibility Review Office (ARO).

- **Waivers filed at consular posts:** Consular officers have the discretionary function of recommending waivers for nonimmigrant visa ineligibilities to CBP for approval. No specific form is required for submission of a waiver application at the embassy or consulate. Typically, the foreign national will apply for a nonimmigrant visa through the normal visa application process. He or she will then be permitted to submit the waiver request at the visa interview, usually in the form of a legal memorandum or brief. The consular officer will:
  1. Review the application, and
  2. Electronically forward the application and supporting documents to the ARO with a recommendation.

If the ARO approves the waiver application, the consular post will issue the visa, which will contain an annotation that it has been issued pursuant to INA § 212(d)(3). As a matter of practice, a visa will not be issued for a period longer than that for which the waiver has been granted. Generally, waivers are valid for an initial one year period but may subsequently be issued for a longer period up to five years.

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- **Waivers filed at a port of entry:** If you are an applicant from a country where a visa is not required (Canadian citizens) or you are a nonimmigrant with appropriate documents who subsequently becomes inadmissible, you may be eligible to apply directly with CBP or at a CBP preclearance office. You must file Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, in advance of the date you intend to travel to the United States. Form I-192 has a filing fee of \$930.00 and must be filed electronically or at CBP designated port of entry or at a preclearance location.

**NOTE:** If you are planning to seek admission under the Visa Waiver Program (VWP) you should not file this application. Foreign nationals from VWP countries who are inadmissible are not eligible for VWP admission. You must apply instead for a nonimmigrant visa at a U.S. Embassy or U.S. Consulate for authorization to travel.

### **What inadmissibility grounds *are not* waivable by 212(d)(3)(A)?**

The only grounds of inadmissibility that cannot be waived for nonimmigrants include:

- aliens seeking to engage in acts of espionage or sabotage;
- an alien seeking entry to engage in unlawful activity;
- aliens whose entry would have adverse foreign policy consequences for the U.S.;  
and
- aliens who participated in Nazi persecutions or genocide.