Strategies/Practice Pointers for the Successful Preparation of Form I-601, Application for Waiver of Grounds of Inadmissibility
(In a Sea of Very Choppy Adjudications)

By Wendy Castor Hess* and Danja Therecka*

INTRODUCTION

Form I-601, Application for Waiver of Grounds of Inadmissibility, is processed in two manners: at a U.S. Citizenship and Immigration Services (USCIS) office within the United States or at a U.S. Embassy/Consulate by a USCIS officer assigned to that jurisdiction.1 Those individuals who are legally in the U.S. or who are “grandfathered” in under section 245(i) of the Immigration and Nationality Act of 1952 (INA)2 are eligible to adjust status within the U.S.3 and submit a concurrent I-601 waiver at the time of the filing of their application. However, foreign nationals who do not fall

1 It is important to understand that U.S. Embassies and Consulates fall within the jurisdiction of the U.S. Department of State and are charged with the issuance of visas; they lack jurisdiction to adjudicate the accompanying I-601 waivers. Jurisdiction to adjudicate I-601 waivers lies exclusively with the USCIS, which falls under the jurisdiction of the U.S. Department of Homeland Security. For this reason, USCIS officers are assigned to overseas posts where they, inter alia, adjudicate such applications, but only after a finding by the Consular officer that an I-601 waiver is necessary. This often results in long delays, especially since, depending upon the volume of cases at each Embassy/Consulate, there may or may not be a USCIS officer stationed at that particular Embassy/Consulate. Moreover, even though the standards for I-601 adjudications are supposedly the same, the reality is that they are not. Like USCIS adjudicators within the U.S., what might be approvable to one officer may be deniable if reviewed by another. Therefore, it is critical for an attorney to review the I-601 procedures described in each Embassy’s/Consulate’s website, as well as, whenever possible, to attempt to obtain “anecdotal” information from colleagues who have recently submitted waivers at such Embassies/Consulates to see which way the proverbial winds are blowing (and also to determine if that post has any particular “quirks” that should be addressed).

2 INA §245(i), 8 U.S.C. §1255(i).

3 Those who are out of status but fall within section 245(i) of the Act are generally required to pay a penalty fee of $1,000, with a few exceptions. See 8 C.F.R. §103.7(b)(1).

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within these categories are not eligible to adjust their status within the U.S. and must apply for an Immigrant Visa via consular processing. Until very recently, there was no way of “testing the waters” of I-601 success prior to the foreign national’s departure from the U.S. However, on January 6, 2012, USCIS issued a notice of intent for “Provisional Waivers of Inadmissibility for Certain Immediate Relatives of U.S. Citizens.”

Although not yet final, the proposed rules offer the pre-adjudication of an I-601 waiver prior to the foreign national’s departure from the U.S. for a restricted class of cases, limited only to immediate relatives of U.S. citizens who are seeking waivers based upon their unlawful presence. While at first glance this proposal may not seem to be a huge benefit given its limited scope, the reality is that there are many individuals who may ultimately decide to avail themselves of the new I-601 “pre-processing” waiver procedure prior to departing from the U.S. and risking the inability to return. With an influx of increased I-601 waiver requests on the horizon, it is important for immigration practitioners to become more proficient than ever in this choppy and risky area.

To start, the preparation of I-601 waivers is not “rocket science”. Like much of immigration law, successful preparation takes time, energy and the ability to hone in on what might, at the outset, appear to be a trivial detail but what might, in the end, be the decisive factor in persuading the government that the “totality of the circumstances” merits a grant of the waiver. To assist in beginning the “voyage” towards drafting approvable I-601 waivers, the following is a list of Strategies and Practice Pointers to consider:

1. You, the attorney, did not create the ground of inadmissibility but you are being hired to try and correct the situation—not to make it worse.

We are all mindful of the great responsibility that we, as counsel, particularly in an immigration case, bear; we hold our clients’ lives in our hands. Your analysis, strategy and work product will determine where your client (and very possibly your client’s entire family) will spend the remainder of his/her life—in the U.S., or in a country that s/he may no longer really know. Yes, you did not commit the fraud/material misrepresentation that triggered the ground of inadmissibility; you did not say you were married back home when you never were. Yes, you also did not commit the crime or enter the U.S. illegally, but now this problem has, in many ways, become your own. As counsel, it is your role to analyze the facts of the case, to advise clients as to which waivers are legally available to them and theoretically approvable. It is also your job to advise the client of the chances of success. Once you have done so, in writing, it is the client’s job to make the ultimate decision—whether or not to proceed. Where the client wishes to go forward, it then becomes your job to thoroughly prepare and file the waiver.

2. Spend the time to take a full history of your client’s entries and exits into the U.S., his/her arrests, criminal history, employment history, etc.

Taking a full history of this portion of your client’s background is not done in just a few
moments—it is a painstaking process, often taking hours, weeks, months (and sometimes even years) to gather. First, at the time of scheduling an appointment with your prospective client, ask him/her to bring copies of any and all “papers”—immigration and otherwise—to his/her meeting with you. You will want to see passports, forms I-94 (when applicable), copies of any and all immigration-related documents, and copies of any arrests/police reports/bonds paid. Do not skim but rather READ these documents. Only after you have reviewed them, ask the client to tell you his/her “story”—how many entries and exits did s/he make and under what names? If applicable, ask questions such as “were you ever fingerprinted”? If applicable, ask what happened when s/he was fingerprinted, how long s/he was detained and where? Were any “papers” given to him/her and if so, by whom? Does s/he have a copy of such “papers” (most probably not)? Be firm: even if your client tells you “there is no record of my six entries into the U.S. since I was never caught so why do I need to tell them? They won’t be able to figure it out”, explain that such illegal entries do count under INA §212(a)(6)(A).

3. **Even after you have taken your client’s entire immigration, criminal and personal history, don’t believe everything you hear.**

Check the documents and ask specific questions; do not rely on your client’s memory or legal knowledge/understanding. Go by your gut and dig! Call the Executive Office for Immigration Review (EOIR) hotline (1.800.898.7180) to determine if your client has ever been placed under proceedings. However, do keep in mind that the EOIR hotline is not always correct.

4. **When in doubt, file a Freedom of Information Act (FOIA) request, for surprises are rarely good in the immigration world.**

Flowers, chocolates and gifts may be wonderful surprises, but learning, after you have already filed a waiver for your client, that there is something in his/her past that renders him/her ineligible for the very waiver that you have just filed (and that you missed it), is not one of those wonderful surprises. Note that separate FOIA forms must be filed for different immigration agencies. Also keep in mind that FOIA responses may take many months to receive and may sometimes miss information, depending on how the request is made. Sometimes you will even need to “re-FOIA” a client’s file in order to obtain an accurate record.

5. **Establish a rapport with your client(s).**

If you are going to be filing your client’s waiver, you need to know just about everything about your client and the qualifying family member(s). While it may make you and/or them uncomfortable, if you do not understand them— their life history, their fears, their loves, their strengths, and their weaknesses — you cannot properly advocate on your client’s behalf. You, their lawyer, are their voice. You, their lawyer, who speaks and writes English fluently (and hopefully persuasively), are the one who must tell their story. Never forget: you are presenting their case to another human being, someone who hurts, loves, and has not always been perfect. Personalize the case—tug at the adjudicator’s heartstrings. Make them LIKE your client. Make them WANT to grant the waiver.
6. Once you discover, after all of your digging and dissecting, that your client IS inadmissible, determine if there is a waiver for that particular ground of inadmissibility.

Do your homework! Research carefully to determine what grounds of inadmissibility are applicable, particularly under INA §212(a), and if your client has triggered any of them.

7. Mea culpa. Make sure that your client admits, at the very outset, his/her reason for inadmissibility and submit the waiver upfront.

Explain that “confession is generally good for the soul”. Don’t make USCIS dig and unearth your client’s ground of inadmissibility. If you do, your client’s credibility (and yours) is shot and it is a long, uphill (and often unsuccessful) climb to get back to square one. Think of it as a trial. Having your client admit his/her wrongdoing, on direct examination, where you can explain the circumstances and “rehabilitate” your client is so much better than attempting to “clean-up” after your client is destroyed on cross examination by the other side.

8. Know the law. If you don’t know it, figure it out.

There is an awful lot of law that falls within the realm of “immigration law” and it is nearly impossible to know everything about all areas. Still, research the case law (published and unpublished decisions alike) to determine inadmissibility and hardship waiver requirements as well as to spot trends that may be helpful if you have no choice but to file the waiver. Read the Adjudicator’s Field Manual (a window into the soul of the adjudicator!). It is also perfectly acceptable (and good practice) to reach out to colleagues and ask for their opinion, especially in jurisdictions where you do not normally practice and want to learn the “lay of the land” before appearing for an interview in which a waiver must be filed. Fortunately, the immigration bar is a collegial bar where colleagues are generally quite willing to share their knowledge. However, it is important not to abuse this resource. Before you ask a colleague for assistance, do your own research! Begin with at least a foundational knowledge base and only then ask for help. The AILA message boards are also a great resource. Again, be cautious, for not all of the information posted on message boards is accurate or applicable to your case, so do perform your own follow-up research and exercise due diligence.

9. Know the standards.

The hardship standard is common to different types of immigration relief under the INA, and the differences are generally a matter of degree of hardship. Extreme hardship waivers are used both in the context of removal defense before an Immigration Judge and in the context of inadmissibility before a USCIS

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5 The Adjudicator’s Field Manual is available on the USCIS website at http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e06e91a0/?CH=afm&vgnextchannel=fa7e539dc4bed010VgnVCMI10000000ecd190aRCRD&vgnextoid=fa7e539dc4bed010VgnVCMI10000000ecd190aRCRD. See also, “Immigrant Waivers: Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers,” (Apr. 28, 2009), published on AILA InfoNet at Doc. No. 09061772 (posted June 17, 2009) http://www.aila.org/content/fileviewer.aspx?docid=29272&linkid=204790
The most common extreme hardship waivers, frequently referred to simply as “I-601 waivers”, involve the following: (1) unlawful presence waivers under INA §212(a)(9), 8 U.S.C. §1182(a)(9)(B)(v); (2) fraud and material misrepresentation waivers under INA §212(i), 8 U.S.C. §1182(i); and (3) criminal waivers under INA §212(h), 8 U.S.C. §1182(h). In order to be eligible for an I-601 waiver, the foreign national must show “extreme hardship” to a qualifying relative, such as a Lawful Permanent Resident (LPR) or U.S. Citizen parent or spouse. Note that, although a son or daughter may not be a qualifying relative for I-601 waiver purposes (except for some criminal waivers), in reality, hardship to a child may (and oftentimes does) create the requisite hardship to a parent. Remember the old “eggshell thin skull plaintiff” from Torts class in law school? When documenting your client’s extreme hardship case, do include evidence of the hardship to the non-qualifying U.S Citizen or LPR child, particularly when special medical or psychological circumstances are present. It is essential to specifically relate the child’s hardship back to the qualifying relative’s hardship. Keep in mind the maxim “a parent is only as happy as his/her unhappiest child” and integrate that into your filing/application.

10. For every action there is a reaction, and that reaction very well may be the lodging of an otherwise avoidable “Form I-862, Notice to Appear” (NTA).

Even the most brilliant and skilled of attorneys cannot win all waivers because the equities are just not there or the ground(s) of inadmissibility triggered by the client are such that they are not sympathetic enough to overcome the negative factors. Is your client prepared to face the consequences of the denial of his/her waiver and corresponding application? Obviously if your client is already outside of the U.S., there is no risk—the worst has already happened! However, for those who are in the U.S., undiscovered by USCIS or U.S. Immigration and Customs Enforcement (ICE), you must determine (1) the likelihood that the waiver will prevail and (2) carefully explain to the client the risks involved in denial.

11. Timing is everything.

Is NOW the best time to present your client’s case or is there something that you can do to make it stronger? Don’t give in to a client’s demands to “hurry”—preparation takes time and thought. Carefully explain to your client that waivers are “applications of last resort” and they are RISKY. Carefully explain the pros and cons and, most importantly, the end result of a denied waiver—removal from the U.S. As noted above, it is critical to ask your client: is s/he prepared to take such a risk and to take it now? Is there anything that can be done to strengthen your client’s case, even if it means delaying the filing of the application? For example, would it make sense to legalize, if at all possible, other relatives of

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6 Other grounds of inadmissibility for which an I-601 waiver can be filed include health-related grounds, membership in a totalitarian party, smugglers and those under a final order for false documents. Form I-601 is also used to waive certain grounds of inadmissibility when an applicant is seeking immigration benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA), the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), the Temporary Protected Status (TPS), or Violence Against Women Act (VAWA) program.

7 INA 212(h); 8 U.S.C. §1182(h).

8 Matter of _____ (AAO Mar. 27, 2007) reported in 85 No. 4 Interpreter Releases 201-04 (Jan. 21, 2008).
your client (such as a mother, father, sibling, etc.) who have alternative ways to obtain status, and thus strengthen the argument that all or the bulk of the pivotal family members reside exclusively in the U.S. and if the client is forced to return home, no one will be there? Remember another maxim: “Act in haste, repent at leisure.”

12. What is your “back up” plan if the waiver is denied? Do you even have one?

For example, if your client has been in the U.S. for 9 years at the time that you file the waiver, wouldn’t it make sense to wait until the client is physically and continuously present in the U.S. for 10 years in order to allow for a “second bite of the apple” before the Immigration Judge—not only a renewal of the denied I-601 but also a proffer to the Immigration Judge that the client has a SECOND alternative—an Application for Cancellation of Removal? This “double equity” could potentially strengthen your client’s chance of prevailing, for Immigration Judges do not like to be reversed on appeal. With these “double equities” the Immigration Judge has two different “hooks” on which to hang his/her decision, depending on whether your client meets the standard for “extreme” hardship for an I-601 waiver, or “exceptional and extremely unusual hardship” for cancellation of removal.9 Again, timing is everything in the world of immigration law.

13. Do we even know what “extreme hardship” is?

What IS “extreme hardship”? Is it as Justice Potter Stewart stated in Jacobellis v. Ohio10 in relation to pornography: “I know it when I see it”? This is particularly important since the regulations contain no specific definition or criteria to explain what must be used to establish “hardship” in the context of I-601 waivers11. Nonetheless, the generally applied standard is that the qualifying relative must demonstrate that removal (or inadmissibility) of the foreign national would result in a degree of hardship beyond what is typically associated with a person’s removal or denial of admission12. Because hardship is evaluated on a case-by-case basis and the determination is highly discretionary, preparing an I-601 waiver requires a recipe of 50% case law and 50% creativity. Perhaps the best starting point and most commonly cited case is Matter of Cervantes13, which established 5 pivotal factors that waivers must address: (1) the presence of family ties in the United States; (2) the qualifying relative’s family ties in the country of return; (3) country conditions in the country of return; (4) the financial impact of the foreign national’s removal; and (5) significant health conditions, particularly when considered in light of healthcare limitations in the country of return. Note, too, that both USCIS and some Embassies/Consulates overseas also provide

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11 The regulations do provide a general list of factors to establish hardship for NACARA applicants at 8 C.F.R. §1240.58(b). It is helpful to review this list before gathering evidence for any type of hardship waiver.
12 Hassan v. INS, 927 F.2d 465, 468 (9th Cir.1991).
helpful checklists of relevant factors to be considered in hardship cases.\textsuperscript{14}

14. All relevant factors are important, even if not “extreme” in and of themselves.

Bear in mind that adjudicators must consider the “totality of the circumstances”,\textsuperscript{15} which allows room for presenting special or unusual conditions pertaining to your client’s case and for framing your presentation/argument accordingly. Adjudicators are required to assess each relevant factor and then evaluate the totality of the evidence presented in support of a waiver.\textsuperscript{16} Since you never know what specific factor will ultimately persuade the adjudicator to grant your client’s case, document the waiver with any and all favorable information \textit{but do connect that information!}

15. “Musts” for including in I-601 waiver applications.

As the cases which follow illustrate, the granting of a hardship waiver is multi-factorial and medical records, psychological evaluations, financial information, affidavits, all are of great importance in establishing the required hardship to the qualifying relative. Understanding that many clients are limited in their ability to gather these documents as well as in their financial ability to pay for critical psychological evaluations, consider the following:

- \textbf{Medical conditions.} If your client has a medical condition, records do exist. Ask you client to obtain these from the hospital. Keeping in mind that doctors and hospitals are very busy, are generally not paid to provide these documents, and also are not fond of lawyers (often fearing that your request for records is the precursor to a malpractice suit), provide your client with a letter and an attached release form for the medical records, explaining that the purpose of this medical record request is for an immigration application only and NOT a malpractice suit! Ask the doctor to write a letter summarizing your client’s medical condition but also be sure to attach copies of any medical records (including receipts for medical services) that your client is entitled to receive. By providing the underlying medical records, the adjudicator will be able to “spot check” and see that your client’s medical condition was not “manufactured” for immigration purposes.

- \textbf{Obtain a psychological evaluation.} There are wonderful psychologists who will evaluate your client at a reduced fee. Check with colleagues, especially at non-profit agencies, to obtain their names and contact information. If your client cannot afford more than one visit to the psychologist/psychiatrist, supplement your case with internet articles/books evidencing the extreme hardship that the family would face. For example, document that which is well known: the great advantages a child has when raised in a supportive, two-parent family.

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\textsuperscript{14} See the I-601 Adjudication Manual \textit{supra} note 5, as well as the Adjudicator’s Field Manual \textit{supra} note 5.  
\textsuperscript{15} \textit{Matter of O-J-O}, 21 I&N, Dec. 381, 383 (BIA 1996);  
\textsuperscript{16} \textit{Id.}; \textit{Reyes-Melendez v. INS}, 342 F.3d 1001 (9th Cir. 2003); \textit{Watkins v. INS}, 63 F.3d 844 (9th Cir. 1995). In \textit{Matter of Ige}, 20 I&N, Dec. 880, 882 (BIA 1994), the Board stated that “relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.”
• **Say it with pictures.** Attach a “face” to your client’s case. Include photographs of the family for a photograph is, indeed, worth a thousand words.

• **Biographic documentation.** Make sure to include all of the primary/biographic documentation set forth in the I-601 application, such as birth certificates, marriage certificates, etc, to establish the requisite relationship.

• **Tax returns.** Include copies of all tax returns for years in which your client has been in the U.S. If s/he has not filed, instruct your client to file back taxes for as many years as s/he can afford (the IRS will work out payment plans).

• **Financial records.** Include financial records to establish debt which, should your client’s waiver be denied, the qualifying family member would be unable to repay.

• **Affidavits and testimonials.** Include testimonial letters from friends, family members, members of the community, etc. to establish the good moral character of your client, his/her “good deeds” and the strength of the family relationship.

• **If your client has won any awards, include copies.** If s/he is a model student (or if his/her children are), include report cards, transcripts, diplomas, etc. Demonstrate, through documents, the contributions that your client has made and will continue to make to the U.S. if s/he is granted the I-601 waiver.

• **Be creative.** What factors persuaded you, during your initial client interview, to conclude that this was a “good” case to take? Document those factors—let the adjudicator see your client through your eyes!

**BRIEF SUMMARY OF HELPFUL CASES**

Keeping in mind that the standard is the same for all hardship based relief (although the degree of hardship may differ) the following case law is helpful (but by no means a full guide):

- **Evidence of hardship, should the qualifying relative stay behind in the United States:**

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<tr>
<th>Factors</th>
<th>Case Law</th>
<th>Examples of Evidence</th>
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<td>Significant health conditions</td>
<td><em>Mendez v. Holder</em>, 566 F.3d 316 (2d Cir. 2009); <em>Biggs v. INS</em>, 55 F.3d 1398 (9th Cir. 1995); <em>Figueroa v. Mukasey</em>, 543 F.3d 487 (9th Cir. 2008); <em>Matter of Louie</em>, 10 I&amp;N Dec. 223 (BIA)</td>
<td>Medical records, physician affidavits, medication prescriptions, as well as affidavits from qualifying</td>
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<tr>
<td>Factors</td>
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<td>Harsh/dangerous country conditions.</td>
<td><em>Blanco v. INS</em>, 68 F.3d 642 (2d Cir. 1995); <em>Ordonez v. INS</em>, 137 F.3d 1120 (9th Cir. 1998); <em>Tukhowinich v. INS</em>, 64 F. 3d 460 (9th Cir. 1995); <em>Matter of Anderson</em>, 16 I&amp;N Dec. 596 (BIA 1978).</td>
<td>State Department Reports on Human Rights Practices, news reports, expert opinions, and affidavits of family members/friends residing in country of return.</td>
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<tr>
<td>Poor healthcare and/or educational system in the country of return</td>
<td><em>Mendez v. Holder</em>, 566 F.3d 316 (2d Cir. 2009); <em>Figueroa v. Mukasey</em>, 543 F.3d 487 (9th Cir. 2008); <em>Matter of Anderson</em>, 16 I&amp;N Dec. 596 (BIA 1978).</td>
<td>World Health Organization (WHO) country reports, news reports, expert opinions, and affidavits or letters from physicians and hospitals</td>
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<td>Economic hardship/unemployment in the country of return</td>
<td><em>Urban v. INS</em>, 123 F.3d 644 (7th Cir. 1997); <em>Carrette-Michel v. INS</em>, 749 F.2d 490 (8th Cir. 1984); <em>Rodriguez-Gutierrez v. INS</em>, 59 F.3d 504 (5th Cir. 1995); <em>Matter of Anderson</em>, 16 I&amp;N Dec. 596 (BIA 1978); <em>Matter of Pilch</em>, 21 I&amp;N Dec. 627 (BIA 1996).</td>
<td>State Department Reports on Human Rights Practices, country specific unemployment reports, expert opinions, and affidavits. Also include evidence of licensure or specialized knowledge requirements abroad, as well as the qualifying relative’s employment in the U.S., specific technical skills, etc.</td>
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<tr>
<td>Family and community ties in the United States</td>
<td><em>Matter of Recinas</em>, 23 I&amp;N Dec. 467 (BIA 2000); <em>Urbina-Osejo v. INS</em>, 124 F.3d 1314 (9th Cir. 1997); <em>Salameda v. INS</em>, 70 F.3d 447 (7th Cir. 1995).</td>
<td>Affidavits of qualifying relative and other family members, community/religious leaders, coworkers, friends, etc.</td>
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**UNPUBLISHED AAO DECISIONS AND SAMPLE I-601 PRESENTATIONS**

To assist you as you structure your own I-601 waivers, attached are the following:

- **Copies of two AAO decisions.** The first is a grant of a waiver based upon an I-601 application submitted by the attorney who initially represented the foreign national in her Adjustment of Status application. The second, a denial, is
based upon an unsuccessful attempt to resurrect a waiver poorly prepared by the previous attorney. Examine each decision for “clues” about what to do and what NOT TO DO when filing an I-601 waiver.

- **Copies of four I-601 presentations by different attorneys (all won their cases!)** Again, examine each; take what you like and improve upon that which you think/know you could have done better. Note the often-forgotten but “easy” standard under 212(h) criminal waivers for marijuana possession, in which your client does not need to prove hardship to a qualifying family member when certain conditions are met.\(^\text{17}\)

- **Copy of materials prepared by Jennifer Hermansky, Esquire for the Philadelphia AILA Chapter NMDE CLE Series in 2011.** Why rewrite an already great piece of work?

**CONCLUSION**

The attached materials are only the beginning of your voyage into the very choppy seas of I-601 adjudications. Good luck!

\(^{17}\) This ground of inadmissibility under INA §212(a)(2)(A)(i)(II) is waived when the violation relates to a single offense of simple possession of 30 grams or less of marijuana, which occurred more than 15 years prior, and when your client’s admission is not contrary to the national welfare, safety and security and s/he has since been rehabilitated. INA §212(h). See also Genco Op. No. 96-3, 1996 WL 33166334 (INS).