

REFUGEE AND ASYLEE ADJUSTMENT TOOLKIT

Prepared for the
Pennsylvania Immigration Resource Center (PIRC)

By The Pennsylvania State University Dickinson School of Law's Center for Immigrants' Rights
&
The Boston University School of Law's Immigrants' Rights Clinic

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PREFACE

Goals of this Toolkit:

This “Refugee and Asylee Adjustment Toolkit” for practitioners was compiled by The Center for Immigrants’ Rights at the Pennsylvania State University Dickinson School of Law and the Boston University School of Law Immigrants’ Rights Clinic on behalf of the Pennsylvania Immigration Resource Center (PIRC). “Adjustment of Status” refers to the process whereby a non-citizen submits an application to the U.S. Citizenship and Immigration Services (USCIS) or to the Executive Office for Immigration Review (EOIR) to acquire lawful permanent resident (LPR) status, otherwise known as a “green card.” This toolkit contains information addressing adjustment before USCIS and EOIR for both asylees and refugees under INA § 209. This toolkit was designed to be a step-by-step guide for the immigration practitioner who is less familiar with refugee/asylee adjustment and to address the special issues involved in handling these types of cases.

In creating this toolkit, we contacted practitioners through listservs and individually to ask them for their advice, strategies, anecdotes, and practice tips for inclusion in the toolkit. We tailored our outreach to focus on practitioners who had specific experience in the area of adjustment of status under INA § 209. Their contributions came in the form of electronic documents, answers to a questionnaire, and phone conversations, which were all then compiled into categorized sections for the toolkit. Each practitioner who provided material for the toolkit is acknowledged in the related sections as well as on the acknowledgment page at the end of the toolkit.

The toolkit opens substantively with a How-To Guide and a checklist to provide overall guidance for an adjustment case under § 209 for both asylees and refugees. The sections that follow contain fundamental information, such as the text of § 209, the relevant agency regulations, and the applicable case law.

The remaining sections are made up of input and advice contributed by practitioners reflecting their experience in handling § 209 adjustment cases. These latter sections include strategies and practice advice, government-created forms and documents, and other useful resources. The content of some of the more extensive sections is described in detail below.

Waiver: Subsection 209(c) of the INA lays out the process for requesting a waiver of the provisions of INA § 212(a) for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest for such a waiver to be granted, or all three. This waiver process has been given its own section in the toolkit, because in the majority of cases, the waiver represents a significant portion of the entire § 209 adjustment process. This section is intended to be a comprehensive treatment of the waiver process, and includes some information also found in other sections of the toolkit.

Strategies and Practice: The strategies and practice section compiles tips and advice from practitioners nationwide regarding best practices for asylee and refugee adjustment. This section has been redacted. Please contact the editors, centerforimmigrantsr@law.psu.edu and/or ssokes@bu.edu, to obtain a copy of this section.

Acronyms and Abbreviations:

The following acronyms and abbreviations are used throughout this toolkit:

- AG – Attorney General
- Board/BIA – Board of Immigration Appeals
- CAT – United Nations Convention Against Torture
- DHS – Department of Homeland Security
- EOIR – Executive Office for Immigration Review
- ICE – U.S. Immigration and Customs Enforcement
- IJ – Immigration Judge
- INA – Immigration and Nationality Act
- LPR – Lawful Permanent Resident
- USCIS – United States Citizenship and Immigration Services

Legal Disclaimer:

This toolkit provides information about the law and is designed to help users in the adjustment process under INA § 209. Legal information is not the same as legal advice – the application of law to an individual's specific circumstances. Although we have gone to great lengths to make sure our information is accurate and useful, we recommend that you consult an immigration attorney if you want professional assurance that our information, and your interpretation of it, is being properly applied to your particular situation. Questions or corrections to this toolkit should be sent to: centerforimmigrantsr@law.psu.edu and/or sstokes@bu.edu.

INTRODUCTION

Adjustment of Status for Refugees and Asylees

In 1980, Congress enacted the first comprehensive refugee legislation in U.S. history.¹ The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (March 17, 1980), was enacted to assure greater equity in the treatment of refugees and a more systematic procedure for the admission, resettlement, and absorption of refugees.² Until this Act, refugees had been admitted on an ad hoc basis by the Attorney General's power to 'parole' persons³ into the United States.⁴

The 1980 Refugee Act established a system where the President, in consultation with Congress, would set the number of refugees to be admitted from overseas in any given year.⁵ It also established an explicit asylum provision into immigration law for the first time.⁶ By adding several new provisions and amending many others to the Immigration and Nationality Act ("INA"), H.R. 2580, Pub.L. 89-236, 79 Stat. 911,⁷ Congress wanted to make sure that the process would actually be used.⁸

Among other provisions, the 1980 Refugee Act adopted the first statutory definition of "refugee" under INA § 101(a)(42) and removed the geographical and ideological restrictions that previously existed in the law. The definition of a "refugee" is a person outside of his or her country of nationality, who is unable or unwilling to return there because of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁹

¹ Stephen H. Legomsky & Christina M. Rodriguez, *Immigration and Refugee Law and Policy* 883 (5th ed. 2009).

² See Section 101(b) of The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (March 17, 1980); Edward M. Kennedy, *International Review*, Vol. 15, No. 1/2, Refugees Today, 142 (Spring- Summer, 1981); See Adjudicator's Field Manual (AFM) ch. 23.6(a)(3)(A) for information regarding adjustment of status for individuals admitted as conditional entrants or paroled as refugees into the United States before the Refugee Act took effect on April 1, 1980, as well as those paroled as refugees between April 1, 1980 and May 18, 1980.

³ If a person is paroled for humanitarian reasons after May 18, 1980 or under the provision known as the "Lautenberg Amendment," Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, 103 Stat. 1195, 1261-63 (1989), they are not classified as 'refugees' within the meaning of the Act, and are not covered by this toolkit. See 8 C.F.R. § 245.7 for regulations governing individuals covered by the "Lautenberg Amendment".

⁴ Richard A. Boswell, *Essentials of Immigration Law*, 12 (2nd ed.).

⁵ See § 207(a)(1) and 207(b) of The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 103 (Mar. 17, 1980); B. Hing, *Detention to Deportation: Rethinking the Removal of Cambodian Refugees* 891, 928 (2005).

⁶ See § 208(a) of The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 103 (Mar. 17, 1980); Edward M. Kennedy, *International Review*, Vol. 15, No. 1/2, Refugees Today, 143 (Spring-Summer, 1981); Maurice A. Roberts, *A Journal of Opinion*, Vol. 12, No. 1/2, *The U.S. and Refugees: The Refugee Act of 1980*, 5. ("The statute does not spell out asylum procedures but requires these to be developed administratively by regulations.")

⁷ The Immigration and Nationality Act, or INA, was created in 1952. Before the INA, a variety of statutes governed immigration law but were not organized in one location. The McCarran-Walter Act of 1952, Public Law No. 82-414, collected and codified many existing provisions and reorganized the structure of immigration law. The Act has been amended many times over the years, but is still the basic body of immigration law. Available at <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/act.html>.

⁸ Legomsky & Rodriguez, *supra* at 884.

⁹ Section 101(a)(42) of the Immigration and Nationality Act; 8 U.S.C. § 1101(a)(42)(A).

Furthermore, the 1980 Refugee Act provided requirements and procedures for refugees and asylees to adjust their status to that of lawful permanent resident (“LPR”). Specifically, INA § 209 outlines the eligibility requirements under § 209(a)-(b) and waiver of inadmissibility under § 209(c).

Under INA § 209(a), Congress allows refugees to adjust their status to that of LPR one year after their arrival in the United States. If a refugee should fail to acquire permanent resident status after one year, the INA states that the refugee “shall, at the end of such period, return or be returned to the custody of the Department of Homeland Security for inspection and examination for admission to the United States ...”.¹⁰

In practice, however, many of the refugees who enter the U.S. each year do not apply for permanent residence one year after their arrival – whether due to lack of money or because of language barriers or other reasons.

INA § 209(b) allows any noncitizens granted asylum who have been physically present in the U.S. for at least one year after being granted asylum to adjust their status to that of LPR.¹¹

Importantly, INA § 209(c) provides a “waiver” for noncitizens found inadmissible, regardless of whether they are refugees or asylees, due to certain criminal convictions or for other reasons. INA § 209(c) reads as follows:

(c) The provisions of paragraphs (4), (5), and (7)(A) of section 212(a) shall not be applicable to any alien seeking adjustment of status under this section, and the Secretary of Homeland Security or the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

Under INA § 209(c), certain grounds of inadmissibility are **automatically waived** for refugees and asylees: **§ 212(a)(4)[public charge]; § 212(a)(5)[labor certification]; and § 212(a)(7)(A)[immigrant documentation requirement].**¹² In his discretion, the Secretary of Homeland Security or the Attorney General **may waive** for refugees and asylees all other grounds of inadmissibility under §212(a) **except § 212(a)(2)(C)[drug trafficking] or (3)(A), (B), (C), or (E)[security, terrorist, foreign policy and Nazi persecutor grounds]** if it is for humanitarian purposes, to assure family unity or in the public interest.¹³ In this way, the Secretary of Homeland Security or the Attorney General must balance the adverse factors evidencing the individual’s undesirability for the waiver with the social and humane considerations presented by the refugee to determine whether the granting of a waiver is in the best interest of the United States.¹⁴

¹⁰ INA § 209(a)(1) [8 U.S.C. § 1159(a)(1)].

¹¹ INA § 209(b)(2) [8 U.S.C. § 1159(b)(2)].

¹² *Id.*

¹³ *Id.* at 676; INA § 209(c), 8 U.S.C. § 1159(c).

¹⁴ *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999).

Under existing case law, a waiver for “violent or dangerous” crimes will almost never be granted absent extraordinary circumstances such as those involving national security or foreign policy consideration or where the denial would result in “exceptional and extremely unusual hardship.”¹⁵

In this respect, it would be useful for practitioners representing refugees or asylees in their adjustment cases to know that there are some cases that attempt to limit the application of this heightened standard¹⁶ and there are strategies that practitioners may employ to argue against such designation. Practitioners should consult the Case Law and Strategies and Practice sections of this toolkit.

¹⁵ *Matter of Jean*, 23 I&N Dec. 373, 381-84 (AG 2002) (denying adjustment to person convicted of manslaughter in the death of a baby and reversed the BIA where the focus was on the family’s hardship without considering the nature of the criminal offence); *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006)(rejecting an argument that the Attorney General’s standard was ultra vires.); *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006) (finding that attorney general did not exceed his authority when he articulated the heightened waiver standard in *Matter of Jean*); *But see Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006) (reversing immigration judge for denying §209(c) waiver where respondent was convicted of an aggravated felony (statutory rape) and immigration judge determined there was insufficient hardship without first determining that the crime was a violent or dangerous felony.).

¹⁶ *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004) (limiting the parameters of the Attorney General’s heightened standard to noncitizens convicted of “dangerous or violent crime”. Once a noncitizen convicted of an aggravated felony successfully demonstrates the existence of truly compelling countervailing equities, he or she “will become the beneficiary of the Attorney General’s discretion under § 209(b) and 209(c).”); *Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006) superseded by 225 Fed. Appx. 680 (9th Cir. 2007) (emphasizing that the Attorney General did not impose the heightened standard on all noncitizens with aggravated felony convictions but only on those who “engage in violent criminal acts.”)

How-To Guide: How to Apply for Adjustment of Status Under § 209¹⁷

The following is an explanation of how an attorney should file an application for adjustment of status (“AOS”) under INA §§ 209(a), (b) and the discretionary waiver under § 209(c). The subsequent procedure is split into two parts: (1) AOS under § 209(a) for refugees, and (2) AOS under § 209(b) for asylees.¹⁸ The § 209(c) waiver is briefly discussed in this section. For a more thorough discussion of the waiver, practitioners should consult the [INA § 209\(c\) Waiver](#) section of this toolkit.

I. REFUGEE ADJUSTMENT PROCESS

Under § 209(a), refugees are subject to examination and inspection by the United States Citizenship and Immigration Services (“USCIS”) for admission to the United States as a lawful permanent resident (“LPR”) after one year’s physical presence in the country. Previously, USCIS **maintained initial jurisdiction over a refugee’s application for AOS.**¹⁹ A refugee placed in removal proceedings was required to first request that USCIS adjudicate his application for adjustment of status. Today, however, the Board’s decision in *Matter of D-K-*, has changed this process in many parts of the country.²⁰ Once the application has been adjudicated, the proceedings are reopened, if the application is denied by USCIS.²¹

A. Preparation of Application

An attorney should first determine whether the refugee is eligible to adjust his status under § 209(a) by interviewing the applicant. In some cases, it may be necessary to file a Freedom of Information Act (“FOIA”) request to get access to the refugee’s file. The attorney should also obtain a copy of the refugee’s criminal records, if applicable, to make sure certain grounds of inadmissibility do not bar eligibility for the § 209(c) waiver.²² It is important to note that an aggravated felony does not, per se, bar a refugee or asylee from the § 209(c) waiver.²³ If the attorney determines that the refugee is prima facie eligible for AOS and the waiver, the attorney should obtain relevant and necessary information from the refugee and

¹⁷ Some information included in this section was contributed by the practitioners named in the [Acknowledgments](#) section of this toolkit.

¹⁸ An applicant proceeding *pro se* should follow the same steps as an attorney when applying for adjustment of status under INA §§ 209(a) or (b), but should not include Form G-28 or EOIR-28 in his application.

¹⁹ See *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999); *Matter of Garcia-Alzugaray*, 19 I&N Dec. 407 (1986); 8 C.F.R. §1209.1 (2010).

²⁰ For more information, please consult the [Recent Developments](#), [Case Law](#), and [Strategies and Practice](#) sections of this toolkit.

²¹ See 8 C.F.R. §§ 209.1(e), 1209(e) (2010) (If USCIS denies a refugee’s AOS application there is no appeal; however, the refugee has the right to renew the application in removal proceedings).

²² Certain grounds of inadmissibility are automatically waived for refugees and asylees: INA § 212(a)(4) [public charge]; § 212(a)(5) [labor certification]; § 212(a)(7)(A) [immigration documentation requirement]. However, certain grounds are not waived: INA § 212(a)(2)(C) [drug trafficking]; and § 212(a)(3)(A)-(C) and (E) [security, terrorist, foreign policy and Nazi persecutor grounds]. All other grounds of inadmissibility, including criminal grounds, may be waived under INA § 209(c). See [INA § 209\(c\) Waiver](#) section of this toolkit.

²³ For immigration purposes, the term “aggravated felony” is defined by INA § 101(a)(43). See [Statute](#) section of this toolkit.

complete both the application for AOS and waiver. In order to prepare the application, the attorney should do the following:²⁴

- 1) Complete **Form I-485, Application to Register Permanent Residence or Adjust Status**.²⁵ The form requires the applicant to supply information about himself, his presence in the United States, his native country, marital status and spouse, family members, organizational membership, and military and criminal history. Evidence of refugee status should be attached, such as a clear, readable photocopy of **Form I-94, Arrival/Departure Record**.²⁶
- 2) Complete **Form I-602**²⁷, **Application by Refugee for Waiver of Grounds of Excludability**.²⁸ Section 209(c) allows the Attorney General (“AG”) to waive certain grounds of inadmissibility “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.” These equitable standards call for a weighing of the seriousness of the applicant’s crimes against the hardship that both he and his family would suffer from his deportation.²⁹ This Form requires the applicant to disclose any grounds of inadmissibility that apply and explain the equities involved in his case.
- 3) Complete **Form G-325A, Biographical Information**.³⁰ This form requires the applicant to supply information pertaining to his residence in the last five years, last address outside the U.S. of more than one year, employment during the last five years, and last occupation.
- 4) Complete **Form I-693, Medical Examination and Vaccination Record**.³¹ This form must be signed by the applicant and the civil surgeon, with only the vaccination portion completed. Refugees seeking AOS are not required to repeat the medical examination performed under § 207.2(c) (completed at their initial admission date), unless there were medical grounds of inadmissibility applicable at the time of admission.³² Practitioners representing refugees who are detained are encouraged to contact DHS/ICE to coordinate the scheduling of the medical examination as DHS/ICE will transport the

²⁴ An attorney should note the importance of making sure that he uses the most current version of all forms (Form I-485, Form I-602, Form G-325A, Form I-693, and Form G-28). These forms are updated frequently. Please check <http://www.uscis.gov/forms> before using a form provided in the Government-Created Forms and Documents section of this toolkit.

²⁵ See 8 C.F.R. § 1209.1(b) (2010); United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 4, 2014).

²⁶ Detailed instructions for filling out this form are provided with the sample form in the Government-Created Forms and Documents section of this toolkit.

²⁷ Required in most, but not all, cases.

²⁸ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 4, 2014).

²⁹ See INA § 209(c) Waiver section of this toolkit for a more detailed description of the waiver process, *supra*.

³⁰ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 4, 2014).

³¹ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 4, 2014).

³² 8 C.F.R. §§ 1209.1(c) (2010).

refugee to his or her appointment. Practitioners should be aware that two appointments are required, on day 1 and day 3, to allow for Tuberculosis testing and reading.

In addition, Practitioners should be aware that the original Form I-693, Medical Examination and Vaccination Record, should be enclosed by the civil surgeon in a sealed envelope for delivery to the IJ directly by the practitioner. Practitioners may request that the civil surgeon share a copy of the Form and/or medical results with the practitioner at the same time for the practitioner case file.³³

- 5) Complete **Form I-643, Health and Human Services Statistical Data for Refugee/Asylee Adjusting Status**.³⁴ This form is used to provide statistical data to the Department of Health and Human Services regarding refugees or asylees who wish to adjust to immigrant status in the United States.³⁵
- 6) Complete **Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative**.³⁶ This form requires the applicant's attorney to supply information pertaining to his or her bar membership and good standing, and authority to represent the applicant. However, if the refugee is in removal proceedings before the Immigration Court, the attorney should complete **Form EOIR-28**.
- 7) Complete **Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court**.³⁷
- 8) Note that every block of each form should be filled in completely and clearly.³⁸ If a particular section does not apply to an applicant, the attorney should write "not applicable" rather than leave it blank. If there is additional information that does not fit in the allotted spaces, the attorney should attach supplemental pages.
- 9) In addition, an attorney should note that all documents filed with the Immigration Court must be in English or accompanied by a certified English translation.³⁹ An affidavit or declaration in English by a person who does not understand English must include a

³³ Practitioners should note that in jurisdictions that continue to require initial adjudication of adjustment of status applications by USCIS, the original I-693 Medical Exam should be provided, in a sealed envelope, to USCIS.

³⁴ United States Department of Justice, Executive Office for Immigration Review (follow "Form I-643" hyperlink) available at <http://www.uscis.gov/sites/default/files/files/form/i-643.pdf> (last visited Aug. 3, 2014).

³⁵ While the instructions state that an application for AOS is not complete without this form, practice varies by jurisdiction.

³⁶ United States Citizenship and Immigration Services, available at <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

³⁷ United States Department of Justice, Executive Office for Immigration Review (follow "Form EOIR-28" hyperlink) available at www.justice.gov/eoir/formslist.htm (last visited Aug. 2, 2014).

³⁸ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 42, available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%203.pdf> (last visited Aug. 2, 2014).

³⁹ 8 C.F.R. § 1003.33, (2010).

certificate or interpretation stating that the affidavit or declaration has been read to the person in a language that the person understands and he understood it before signing.⁴⁰

10) Also practitioners should remind applicants of the importance of adhering to the change of address requirements of form **AR-11, Alien's Change of Address Card**.⁴¹ This form must be used by all LPRs to report a change of address within 10 days of such change. Failure to report a change of address is punishable by fine or imprisonment and/or removal.

B. Supporting Documents⁴²

In addition to filing the six forms mentioned above, an attorney should attach supporting documents to the application on behalf of the applicant. These documents should address the three equity-based elements of INA § 209(c). An attorney should include copies of original documents rather than originals.

Supporting documents suggested by practitioners include:

- 1) family member affidavits;
- 2) lay witness declarations;
- 3) country conditions evidence, including an expert affidavit;
- 4) psychological evaluations; and
- 5) a short memorandum of law.

An attorney should attach the supporting documents to the refugee's application for AOS and waiver. The attorney should also draft a short cover letter with a brief summary of law and a table of contents of the supporting documents for organizational purposes.

Please note that the 209(c) waiver is discretionary and the attorney should prepare applications for other relief if available. The attorney should interview the applicant to ascertain whether he may be eligible for asylum, withholding of removal, and/or relief under the Convention Against Torture. Applications for these forms of relief should be filed along with the applications for AOS and the 209(c) waiver.⁴³

C. Required Biometric and Biographical Information

An attorney must complete Form G-325A to submit with an AOS application for applicants 14 years of age or older.⁴⁴ Form G-325A is available to download from the Internet through USCIS's website.⁴⁵

⁴⁰ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 41, *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf#page=43 pdf (last visited Aug. 2, 2014).

⁴¹ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

⁴² See INA § 209(c) Waiver section of the toolkit for a more thorough discussion of supporting documents.

⁴³ Anna M. Gallagher and Maria Baldini-Potermin, *Immigration Trial Handbook* § 6:115 (2010); see also Strategies and Practice section of this toolkit, *infra*.

⁴⁴ 8 C.F.R. § 1209.1(b).

When an individual who is detained applies for AOS, his biometrics and fingerprinting will be handled by the facility in which he is detained.⁴⁶ The Department of Homeland Security (hereinafter “DHS”) is responsible for obtaining biometrics and any other biographical information with respect to any individual in detention.⁴⁷ Nonetheless, practitioners should check with DHS to confirm that such processing is not delayed.

D. Vaccination Requirements⁴⁸

Refugees are not required to comply with the vaccination requirements during the initial medical exam overseas. They must, however, comply with the vaccination requirements when they apply for AOS. Immigration regulations state that refugees applying for AOS are not required to repeat the entire medical examination performed overseas, unless there were medical grounds of inadmissibility that arose at that time.⁴⁹ As a result, refugees generally need only the vaccination sign-off (not the whole medical exam) when they apply for AOS.⁵⁰ This vaccination sign-off must be obtained by a DHS-designated civil surgeon.

There are two sections of the INA dealing with waivers for the vaccination requirements.⁵¹ Section 212(g)(2) permits the AG to waive the requirements in three different circumstances: first, when the applicant has received the vaccinations but has no documentation of it; second, **when the civil surgeon certifies that it is not medically appropriate for the applicant to have the vaccination(s)**; lastly, when the applicant has religious or moral objections to the vaccination(s).⁵²

It has been the experience of one practitioner to obtain a blanket waiver of the vaccination requirements by having the civil surgeon sign-off on compliance without the need for a physical visit to the civil surgeon’s office. This practitioner sends the client’s medical records to the civil surgeon, the civil surgeon in turn fills out Form I-693 (the vaccination component only), checks off everything that applies, and marks that the client is eligible for a blanket waiver of the vaccinations because they are “Not Medically Appropriate.”⁵³

Also, section 209(c) permits the AG or Secretary of Homeland Security to waive certain provisions of the INA for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The vaccination requirement under § 212(a)(1)(A)(ii) is a

⁴⁵ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

⁴⁶ *See* 8 C.F.R. § 1003.47(d) (2010).

⁴⁷ *See Id.*

⁴⁸ *See Strategies and Practice* section of this toolkit, *infra*, for practitioner advice regarding the vaccination requirements.

⁴⁹ *See* 8 C.F.R. §§ 209.1(c), 1209.1(c) (2010); *see also* Summary discussion of 8 C.F.R. § 209.1(c) in “Regulatory Authority” section of this toolkit, *infra*.

⁵⁰ *See Id.*

⁵¹ *See Strategies and Practice* section of this toolkit, *infra*.

⁵² 8 C.F.R. § 212.7(b) (2010).

⁵³ *See Strategies and Practice* section of this toolkit, *infra*, for a thorough review of the “sign-off” waiver process.

health-related ground of inadmissibility that may be waived for the same reasons as the criminal grounds of inadmissibility – for humanitarian purposes, to assure family unity, or in the public interest.

E. Fees

There is no fee for applicants who are filing Form I-485 based on having been admitted to the United States as a refugee.⁵⁴ However, refugees are required to pay the biometrics fee of \$85.00,⁵⁵ though this fee is waived for detained applicants. All application fees are payable by check or money order and should be made payable to U.S. Department of Homeland Security. Payments should be included with the application materials.⁵⁶

If a refugee is unable to pay the biometrics filing fee, his attorney may ask the Immigration Judge for permission to file the application without fee (via a fee waiver). The Immigration Judge has the discretion to waive the fee if the applicant shows that he is unable to pay the fee.⁵⁷ If an applicant wants to request a fee waiver, his attorney should notify the Immigration Judge and submit an affidavit, or unsworn declaration made pursuant to 28 U.S.C. § 1746, substantiating the applicant's inability to pay the fee.⁵⁸ An attorney should note that if she submits an application without a required fee and the applicant's request for a fee waiver is denied, the filing will be deemed defectively filed and may be rejected or excluded from evidence.⁵⁹

F. Filing the Application

After preparing an application for AOS and the waiver, an attorney should make a minimum of three copies of the application so that she can retain at least one copy for her records.

Practitioners filing Form I-485 more than 30 days after the latest edition date shown in the lower right corner of the form should visit <http://www.uscis.gov/forms> before filing to confirm the correct filing address and version currently in use. Please check the edition date located at the lower right corner of the form. If practitioners do not have internet access, call the National Customer Service Center at 1-800-375-5283 to verify the current filing address and edition date.

Improperly filed forms will be rejected, and the fee returned with instructions to resubmit the entire filing using the current form instructions.

⁵⁴ 8 C.F.R. §§ 209.1(b)(2010).

⁵⁵ United States Citizenship and Immigration Services, *available at* www.uscis.gov/portal/site/uscis (follow "Forms" hyperlink; then follow "Check Filing Fees" hyperlink), (last visited Aug. 2, 2014).

⁵⁶ *Id.*

⁵⁷ United States Department of Justice, Executive Office for Immigration Review, Immigration Court Practice Manual, Chapter 3: Filing with the Immigration Court, 52, *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf#page=43 (last visited Aug. 2, 2014).

⁵⁸ *Id.*; 8 C.F.R. § 103.7(c)(1) (2010).

⁵⁹ *See Id.*

An attorney should consult the Instructions to Form I-485 to obtain the service center's mailing address.⁶⁰

The application package should contain, in the following order:

- Form G-28 or Form EOIR-28;
- Cover Letter, with brief summary of the law and a table of contents;
- Application Forms:
 - Form I-485;
 - Form I-602;
 - Form G-325A;
 - Form I-693 (only vaccination component);
- Attached documents as indicated on table of contents; and
- Check or money order for payment of fees.

G. Next Steps After Obtaining Permanent Residence

Following a grant, it is important for the attorney to request an "InfoPass" appointment with USCIS so that her client can pick up the green card. InfoPass is a free service that lets practitioners schedule an appointment with a USCIS Immigration Officer. Clients and attorneys can make an appointment at <http://infopass.uscis.gov>.

⁶⁰ United States Citizenship and Immigration Services, available at <http://www.uscis.gov/forms> (last visited Nov., 23, 2010).

II. ASYLEE ADJUSTMENT PROCESS

Under INA § 209(b) an asylee may adjust if he: (1) applies for adjustment; (2) has been physically present in the U.S. for at least one year after being granted asylum; (3) continues to be a refugee within the meaning of INA § 101(a)(42); (4) is not firmly resettled in another country; and (5) is admissible to the U.S. as an immigrant under the Act upon examination for adjustment (a waiver may be available to an asylees if they are not inadmissible). The grounds of inadmissibility, the waivers, and the procedures for a waiver are the same as those stated above for refugees.⁶¹

Unlike refugees, asylees are not required to apply for AOS. However, it may be in the asylee's best interest to do so. Among other reasons, should country conditions change in the applicant's home country or if the applicant no longer meets the refugee definition due to changed circumstances, the applicant may find that she no longer qualifies for asylum status with the right to remain permanently in the United States. Becoming a permanent resident could alleviate these concerns.⁶²

Pursuant to 8 C.F.R. § 1209.2(c), once an asylee has been placed in removal proceedings, the Immigration Judge and the Board of Immigration Appeals have exclusive jurisdiction to adjudicate the asylee's applications for AOS and waiver under INS § 209(b), and (c), respectively.

A. Preparation of Application

An attorney should first determine whether the asylee is eligible under § 209(b) by interviewing the applicant. The attorney should also obtain a copy of the asylee's criminal records, if applicable, to make sure certain grounds of inadmissibility do not bar eligibility for the § 209(c) waiver.⁶³ If the attorney determines that the asylee is *prima facie* eligible for AOS and the waiver, the attorney should obtain relevant and necessary information from the asylee and complete both the application for AOS and the waiver. In order to prepare the application, the attorney should do the following:⁶⁴

⁶¹ See 8 CFR § 1209.2(b).

⁶² United States Citizenship and Immigration Services, *available at* www.uscis.gov/portal/site/uscis (follow "Green Card Through Refugee or Asylee Status" hyperlink; then click on "Green Card for an Asylee"), (last visited Aug. 2, 2014).

⁶³ Certain grounds of inadmissibility are automatically waived for refugees and asylees: INA § 212(a)(4) [public charge]; § 212(a)(5) [labor certification]; § 212(a)(7)(A) [immigration documentation requirement]. However, certain grounds cannot be waived: INA § 212(a)(2)(C) [drug trafficking]; and § 212(a)(3)(A)-(C) and (E) [security, terrorist, foreign policy and Nazi persecutor grounds]. All other grounds of inadmissibility, including criminal grounds, may be waived under INA § 209(c). Please note that aggravated felonies do not bar eligibility for waiver. See INA § 209(c) Waiver section of this toolkit, *supra*.

⁶⁴ An attorney should note the importance of making sure that he uses the most current version of all forms (Form I-485, Form I-602, Form G-325A, Form I-693, and Form G-28). These forms are updated frequently and it is easy to locate and use an outdated form by mistake.

- 1) Complete **Form I-485, Application to Register Permanent Residence or Adjust Status**.⁶⁵ The form requires the applicant to supply information about himself, his presence in the United States, his native country, marital status and spouse, family members, organizational membership, and military and criminal history. Evidence of asylee status should be attached, such as a clear, readable photocopy of Form I-94, Arrival/Departure Record.
- 2) Include a copy of the birth certificate of the applicant or other identification with a translation if it is not in English; DHS Form I-94, Arrival/Departure Record; asylees may also submit a copy of their approval notice granting asylum or a copy of the immigration judge's orders showing the grant of asylum; a full certified copy of the applicant's criminal record, affidavits from the applicant and others, a brief in support of the application and waiver, and other supporting documentation.⁶⁶
- 3) Complete **Form I-602, Application by Refugee for Waiver of Grounds of Excludability**.⁶⁷ INA § 209(c) allows the Attorney General to waive certain grounds of inadmissibility "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." These equitable standards call for a weighing of the seriousness of the applicant's crimes against the hardship that his family would suffer from his or her deportation.⁶⁸
- 4) Complete **Form G-325A, Biographical Information**.⁶⁹ This form requires the applicant to supply information pertaining to his or her residence in the last five years, names and birthdates of his or her parents and spouses, last address outside the U.S. of more than one year, employment during the last five years, and last occupation.
- 5) Complete **Form I-693, Medical Examination and Vaccination Record**.⁷⁰ This form must be completed in its entirety and signed by both the applicant and civil surgeon. Generally, asylees seeking AOS under § 209(b) are required to undergo a full medical examination, and also include the vaccination assessment by a civil surgeon.⁷¹ This is because asylees, unlike refugees, are not required to undergo any medical examination as part of their asylum application.

⁶⁵ See 8 C.F.R. §§ 209.1(b)(2010); United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

⁶⁶ Since the Immigration Judge has exclusive jurisdiction in adjudicating an asylee's AOS and waiver application, the asylee should submit a legal brief in support of his case.

⁶⁷ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

⁶⁸ See INA § 209(c) Waiver section of this toolkit, *supra*.

⁶⁹ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

⁷⁰ United States Citizenship and Immigration Services, *available at* <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

⁷¹ 8 C.F.R. §§ 209.2(d), 1209(d) (2010).

Practitioners representing asylees who are detained are encouraged to contact DHS/ICE to coordinate the scheduling of the medical examination as DHS/ICE will transport the asylee to his or her appointment. Practitioners should be aware that two appointments are required, on day 1 and day 3, to allow for Tuberculosis testing and reading.

In addition, Practitioners should be aware that the original Form I-693, Medical Examination and Vaccination Record, should be enclosed by the civil surgeon in a sealed envelope for delivery to the IJ directly by the practitioner. Practitioners may request that the civil surgeon share a copy of the Form and/or medical results with the practitioner at the same time for the practitioner case file.

- 6) Complete **Form I-643, Health and Human Services Statistical Data for Refugee/Asylee Adjusting Status.**⁷² This form is used to provide statistical data to the Department of Health and Human Services regarding refugees or asylees who wish to adjust to immigrant status in the United States.
- 7) Complete **Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court.**⁷³ This form requires the applicant's attorney to supply information pertaining to his or her bar membership and good standing, and authority to represent the applicant.
- 8) Note that every block of each Form should be filled in completely and clearly.⁷⁴ If a particular section does not apply to an applicant, the attorney should write "not applicable" rather than leave it blank.⁷⁵ In addition, an attorney should note that all documents filed with the Immigration Court must be in English or accompanied by a certified English translation.⁷⁶ An affidavit or declaration in English by a person who does not understand English must include a certificate or interpretation stating that the affidavit or declaration has been read to the person in a language that the person understands and that s/he understood it before signing.⁷⁷
- 9) Also a practitioner should remind the applicant of the importance of adhering to the change of address requirements of form **AR-11, Alien's Change of Address Card.**⁷⁸

⁷² United States Citizenship and Immigration Services, available at <http://www.uscis.gov/forms> (last visited Aug. 2, 2014).

⁷³ Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (Form EOIR-28), available at <http://www.justice.gov/eoir/eoirforms/eoir28.pdf> (last visited Aug. 4, 2014).

⁷⁴ Immigration Court Practice Manual, Chapter 3.3(c)(i) (Dec. 3, 2013), available at http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf.

⁷⁵ For specific questions about what to write in each section of an I-485 application, refer to the Form I-485 Application Instructions found in the Government-Created Forms and Documents section of this toolkit, *infra* § IV. See also Instructions, Application to Register Permanent Residence or Adjust Status (Form I-485), available at <http://www.uscis.gov/sites/default/files/files/form/i-693instr.pdf>, (last visited Aug 4, 2014).

⁷⁶ 8 C.F.R. §§ 1003.33, 1003.23(b)(1) (2010).

⁷⁷ Immigration Court Practice Manual, *supra*, at Chapter 3.3(a).

⁷⁸ Alien's Change of Address Card (Form AR-11), available at <http://www.uscis.gov/sites/default/files/files/form/ar-11.pdf> (last visited Aug. 4, 2014).

This form must be used by all LPRs to report a change of address within 10 days of such change. Failure to report a change of address is punishable by fine or imprisonment and/or removal.

B. Supporting Documents⁷⁹

In addition to filing the forms mentioned above, an attorney should attach supporting documents on behalf of the applicant. These documents should correspond with the three equity-based elements of INA § 209(c).

Supporting documents suggested by practitioners include:

- 1) family member affidavits;
- 2) lay witness declarations;
- 3) country conditions evidence;
- 4) psychological evaluations;
- 5) and a short memorandum of law.

An attorney should attach the supporting documents to the asylee's application for AOS and waiver. The attorney should also draft a legal brief to submit to the immigration court and a table of contents of the supporting documents for organizational purposes. Also, an attorney should include copies of original supporting documents rather than originals.

C. Required Biometric and Biographical Information

An attorney must complete Form G-325A for Biographical information to submit with an AOS application for applicants 14 years of age or older.⁸⁰ Form G-325A is available to download from the Internet through USCIS⁸¹ and requires an applicant to supply information pertaining to his residence in the last five years, last address outside the U.S. of more than one year, employment during the last five years, and last occupation abroad.⁸²

When an individual who is detained applies for AOS, his biometrics and fingerprinting will be handled by the facility in which he is detained.⁸³ The Department of Homeland Security (hereinafter "DHS") is responsible for obtaining biometrics and any other biographical information with respect to any individual in detention.⁸⁴

D. Medical Examination and Vaccination Requirements

Asylees applying for AOS are generally required to have the entire medical exam, including the vaccination assessment, by a designated civil surgeon.⁸⁵ This is because asylees are not required to undergo any medical examination as part of their initial asylum application.

⁷⁹ See INA § 209(c) Waiver, *infra*, section of the toolkit for a more thorough discussion of supporting documents.

⁸⁰ 8 C.F.R. § 1209.1(b).

⁸¹ Biographic Information (Form G-325A), *available at* <http://www.uscis.gov/sites/default/files/files/form/g-325a.pdf> (last visited Aug. 4, 2014).

⁸² *See id.*

⁸³ *See* 8 C.F.R. § 1003.47(d)

⁸⁴ *Id.*

⁸⁵ 8 C.F.R. § 1209.2(d) (2010).

However, as mentioned above the vaccination requirements are likewise waivable for asylees.⁸⁶

E. Fees

There is an application fee of \$985 for asylees filing Form I-485.⁸⁷ Asylees are also required to pay an additional biometrics fee of \$85.00. All application fees are payable by check or money order and should be made payable to U.S. Department of Homeland Security. Payments should be included with the application materials.⁸⁸

Also it is important to note that asylees may have to incur substantial costs in obtaining the requisite medical examination, which may range from \$270 - \$1,000. This cost is not submitted to USCIS but to the civil surgeon who performs the medical examination.

If an asylee is unable to pay the filing fees, his attorney may ask the Immigration Judge for permission to file the application without the fee (fee waiver). The Immigration Judge has the discretion to waive the fee if the applicant shows that he is unable to pay the fee.⁸⁹ If an applicant wants to request a fee waiver, his attorney should notify the Immigration Judge and submit an affidavit, or unsworn declaration made pursuant to 28 U.S.C. § 1746, substantiating the applicant's inability to pay the fee.⁹⁰ An attorney should note that if she submits an application without a required fee and the applicant's request for a fee waiver is denied, the filing will be deemed defectively filed and may be rejected or excluded from evidence.⁹¹

F. Serving and Filing the Application

After preparing an asylee's AOS and waiver application, an attorney should make a minimum of three copies of the application so that she can retain at least one copy for her records. The attorney should then file the application with the immigration court and serve it on opposing counsel.

The application package should contain, in the following order:⁹²

- (1) Form EOIR-28
- (2) Cover page;
- (3) Fee receipt stapled to the application or motion for a fee waiver;
- (4) Application;
- (5) Proposed exhibits (if any) with table of contents; and
- (6) Proof of Service.

⁸⁶ See *Vaccination Requirements, supra*, for a discussion of vaccination requirements and waiver.

⁸⁷ Instructions, Application to Register Permanent Residence or Adjust Status (Form I-485), available at <http://www.uscis.gov/sites/default/files/files/form/i-693instr.pdf>, (last visited Aug 4, 2014).

⁸⁸ *Id.*

⁸⁹ Immigration Court Practice Manual, *supra*, at Chapter 3.4(d).

⁹⁰ *Id.* See also 8 C.F.R. § 103.7(c) (2010).

⁹¹ Immigration Court Practice Manual, *supra*, at Chapter 3.4(d).

⁹² *Id.* at Chapter 3.3(c)(i)(A).

G. Next Steps After Obtaining Permanent Residence

Following a grant, it is important for the attorney to request an “InfoPass” appointment with USCIS so that her client can pick up the green card. InfoPass is a free service that lets practitioners schedule an appointment with a USCIS Immigration Officer. Clients and attorneys can make an appointment at <http://infopass.uscis.gov>.

Adjustment of Status Checklist⁹³

ELIGIBILITY UNDER INA 209:

209(a) Provisions (Refugee)

- One year of physical presence in US under refugee status
- Admission has not been terminated
- Has not already acquired permanent resident status
- Admissible as an immigrant under the INA at the time of examination for adjustment⁹⁴ or if inadmissible, eligible for a waiver per INA 209(c)

209(b) Provisions (Asylee)

- One year of physical presence in US after being granted asylum
- Not firmly resettled in any foreign country⁹⁵
 - Continues to be a “refugee” within the meaning of INA § 101(a)(42)(A), or a spouse or child of such a refugee⁹⁶
- Admissible as an immigrant under the INA at the time of examination for adjustment⁹⁷ or if inadmissible, eligible for a waiver per INA 209(c)

APPLICATION PACKET

EOIR-/28 – Notice of Entry of Appearance as Attorney or Accredited Representative⁹⁸ or G-28 if filing before USCIS

Cover Letter including summary of law and table of contents⁹⁹

I-485 – Application to Register Permanent Residence or Adjust Status

⁹³ Practitioners should note that the following requirements may vary by jurisdiction and forum (i.e. USCIS vs. EOIR).

⁹⁴ Certain grounds of inadmissibility are automatically waived for refugees and asylees: INA § 212(a)(4) [public charge]; § 212(a)(5) [labor certification]; § 212(a)(7)(A) [immigration documentation requirement]. However, certain grounds are not waived: INA § 212(a)(2)(C) [drug trafficking]; and § 212(a)(3)(A)-(C) and (E) [security, terrorist, foreign policy and Nazi persecutor grounds]. All other grounds of inadmissibility, including criminal grounds, may be waived under INA § 209(c). See INA § 209(c) Waiver section of this toolkit.

⁹⁵ For discussion of what constitutes firm resettlement, see *Matter of A-A-G-*, 25 I&N Dec. 486 (BIA 2011); see also *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012).

⁹⁶ Asylees may be able to apply for adjustment of status in the same removal proceeding in which their refugee status is terminated. See *K-A-*, 23 I&N Dec. at 661.

⁹⁷ See *supra*.

⁹⁸ In some jurisdictions, the trial attorneys for the Department of Homeland Security will also require a G28 from an attorney in order to discuss the case. If this is the case, include a G28 with the packet intended for ICE counsel. As of 2014, ICE no longer requires the signature of a detained noncitizen on G28 forms.

⁹⁹ Please note a table of contents in the cover letter does not replace the need for a table of exhibits or any other requirements outlined in the Immigration Court Practice Manual. (Available at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm). Practitioners should carefully review the manual to make sure any submission complies with requirements. Note that the manual is a dynamic document, subject to periodic revision.

- Copy of I-94 – Arrival/Departure Record¹⁰⁰
- Birth Certificate or other identification (with accompanying certified English translation)¹⁰¹
- Certified copies of criminal record, if applicable
- Affidavits or declarations from family members, psychologist, clergy, teachers
- Copy of Approval Notice or IJ Order granting asylum (*for asylees only*)
- Other Supporting Documents (see How-To section for suggestions)

I-912 – Request for Fee Waiver (to waive the I-485 filing fee of \$985 and the biometrics fee of \$85, if applicable)¹⁰²

- If filing and/or biometric fees are being paid, attach a receipt from the appropriate Service Center showing proof of payment¹⁰³

I-602 – Application by Refugee for Waiver of Grounds of Excludability

G-325A – Biographical Information

I-693 – (Medical Examination and) Vaccination Record (refugees only need vaccination record) submitted in an envelope sealed by the civil surgeon completing the form. (Refugees do not need the full exam and only have to fill out the vaccination portion.)

Form I-643, Health and Human Services Statistical Data for Refugee/Asylee Adjusting Status

Certificate of Service demonstrating proper service on ICE counsel

Two 2” by 2” recent passport photos of applicant¹⁰⁴

APPLICATION FOR ASYLUM, WITHHOLDING AND CAT (IF APPLICABLE):

I-589 – Application Form (no fee)

Two 2” by 2” recent passport photos of applicant

Copy to Nebraska Service Center (if applicable)

¹⁰⁰ If applicable (i.e. asylees who entered without inspection will not have an I-94).

¹⁰¹ All translations must be accompanied by a proper certificate of translation. See Immigration Court Practice Manual, Appendix H, Chapter 3: Filing with the Immigration Court, 187,

http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf#page=187 (last visited Aug. 4, 2014).

See http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf#page=187 for an example.

¹⁰² Refugees are exempt from paying any application fees, so a fee waiver is only necessary for asylees.

¹⁰³ See the Form I-485 instructions for specific instructions. Allow proper time for processing of payment.

¹⁰⁴ May not be applicable for detained applicants depending on jurisdiction.

AFTER ADJUSTMENT IS GRANTED:

Info-Pass Appointment (if green card is not received in the mail)

<http://infopass.uscis.gov/>

AR-11 – Change of Address Form (file each time LPR moves after adjustment of status is granted)¹⁰⁵

¹⁰⁵ The AR-11 is also required for any non-detained clients in proceedings who change their address.

Recent Developments

August 2014

There have been certain recent developments in law and policy with great impact on adjustment of status for refugees and asylees. Substantive discussions of these changes have been added to the relevant sections of this toolkit, but this section provides a brief overview of those changes, as well as some suggested resources that discuss these issues in more detail.

Matter of D-K-

The most dramatic development in refugee jurisprudence was the Board's recent decision in *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012). In *Matter of D-K-*, the BIA departed from earlier precedent and held that (1) refugees are conditionally admitted when they first arrive in the United States, and (2) an Immigration Judge may adjudicate a refugee's application for adjustment of status even if USCIS has not previously denied the refugee adjustment of status due to inadmissibility. On a practical level, this should have impacts on the following types of cases:

- *Detention of unadjusted refugees:* Before *Matter of D-K-* was issued, practitioners often had to contend with complicated custody issues concerning their unadjusted refugee clients. In many parts of the country, DHS would detain unadjusted refugees even if they could not be placed in removal proceedings because USCIS had not yet adjudicated their adjustment of status application. As a result, refugees were often detained for several months awaiting a result from USCIS. Because refugees were not considered as having been admitted to the United States prior to *Matter of D-K-*, they were classified as arriving aliens, and thus deprived of a right to a bond hearing before an immigration judge.
- *Loss of the right to have adjustment applications reviewed by USCIS:* Because an Immigration Judge could only review a refugee's application for adjustment of status after USCIS had made a finding of inadmissibility, refugees were guaranteed at least two opportunities to apply for and receive permanent residence status. Now that *Matter of D-K-* allows judges to adjudicate an initial application for adjustment of status, unadjusted refugees who are placed in removal proceedings will only have one venue in which to seek adjustment of status.

The Case Law section of this toolkit has been updated with a review of *Matter of D-K-*. Interested practitioners may also wish to review: L. Murray-Tjan, "*Matter of D-K-: A Great Leap Forward in Refugee Jurisprudence?*" Vol. 89 No. 19 Interpreter Releases 921 (May 7, 2012).

Developments Concerning Mental Health Issues

Representing mentally ill clients in removal proceedings effectively and ethically is challenging even for the experienced practitioner. This toolkit contains strategies and resources for working with clients who suffer from mental illness. However, interested practitioners may wish to review *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), which is the first decision by the Board in decades to address the issue of mental competency in removal proceedings. The American Immigration Council has issued a practice advisory about *Matter of M-A-M-* which is included as

part of this toolkit.¹⁰⁶ As well, EOIR has recently provided additional guidance for mentally ill respondents in removal proceedings.¹⁰⁷ Although this guidance pertains primarily to unrepresented detainees with serious mental illness or cases in which competency is at issue, this guidance may still be helpful for represented asylees and refugees.

Developments Concerning Prosecutorial Discretion

Refugees and asylees may be good candidates for prosecutorial discretion, in which DHS agrees to not pursue removal proceedings against an individual. Prosecutorial discretion does not confer status to an individual, but can help someone avoid removal from the United States when they may have no other options. In 2011, DHS issued several memoranda affirming the exercise of prosecutorial discretion and explaining how the agency intends to implement the process of reviewing cases for potential administrative closure. These memoranda are included in the Other Resources section of this toolkit, along with practice advisories issued by the American Immigration Council on this topic.¹⁰⁸ Practitioners who work with non-citizens who represent themselves *pro se* in removal proceedings may wish to review toolkits about prosecutorial discretion prepared by the ACLU of Southern California, the National Immigration Law Center and CHIRLA.¹⁰⁹

Developments Concerning Immigration Detention

Issues Concerning Custody

INA § 236(a) governs the custody of both asylees and refugees, as do the mandatory detention provisions of INA § 236(c). Thus, practitioners may represent refugee and asylee clients who are detained while they are fighting their case. Because many refugees and asylees have suffered traumatic experiences, and/or are members of vulnerable populations, prolonged detention may be even more difficult for them than for other non-citizens. Fortunately, there have been some developments that have expanded access to custody hearings for immigrant detainees. In the Ninth Circuit, non-citizens with pending petitions for review are entitled to bond hearings regardless of whether they were previously subject to INA § 236(c). *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). Subsequently, the court has provided additional guidance on what procedures must be followed in such bond hearings in order to ensure due process, including requiring the government to prove by clear and convincing evidence that an individual's continued detention is justified. *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011).

¹⁰⁶ MELISSA CROW ET AL., AMERICAN IMMIGRATION COUNCIL *Practice Advisory, Representing Clients With Mental Competency Issues Under Matter of M-A-M-*, (Nov. 30, 2011), <http://legalactioncenter.org/sites/default/files/docs/lac/Mental-Competency-Issues.pdf>.

¹⁰⁷ See Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions, EXEC. OFFICE FOR IMMIGR. REV. NEWS, Apr. 22, 2013; see also DEP'T OF JUSTICE, Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders (Dec. 31, 2013).

¹⁰⁸ ALEXSA ALONZO, THE LEGAL ACTION CENTER, AMERICAN IMMIGRATION COUNCIL *Practice Advisory, DHS Review of Low Priority Cases for Prosecutorial Discretion*, (Updated Feb. 13, 2012), http://www.legalactioncenter.org/sites/default/files/dhs_review_of_low_priority_cases__updated_2-15-13_fin.pdf.

¹⁰⁹ *Prosecutorial Discretion Resources*, NATIONAL IMMIGRATION LAW CENTER, <http://www.nilc.org/PDresources.html> (last visited Aug. 4, 2014) (Spanish and English language packets both available at link).

The Third Circuit has also held that the Due Process Clause of the Fifth Amendment permits mandatory detention for only a “reasonable period of time,” and construed the mandatory detention statute, 8 U.S.C. § 1226(c), as authorizing mandatory detention only for a reasonable period. When detention exceeds that reasonable period, the non-citizen is entitled to an individualized hearing where the government must show that continued detention is necessary to prevent flight or danger to the community¹¹⁰. *Diop*, 656 F.3d at 223. Additionally, a recent class action victory in Massachusetts challenging the government's application of the so-called mandatory immigration detention provision, 8 U.S.C. § 1226(c), which subjects noncitizens to detention without any possibility of release during their immigration proceedings, often based on minor crimes that occurred many years ago, means that some refugees and asylees will be newly eligible for bond hearings. Specifically, those refugees and asylees who were not detained by Immigration within 48 hours of release from the relevant non-DHS custody, must now have their custody determined under INA 236(a), including the opportunity for a bond hearing in front of an IJ.¹¹¹ Another victory in Massachusetts now also means that individuals who are or will be detained within the Commonwealth of Massachusetts pursuant to 8 U.S.C. § 1226(c) for over six months and have not been afforded an individualized bond hearing, will now have the opportunity for a bond hearing in front of an IJ.¹¹² Both of these decisions could have a substantial impact on detained refugees and asylees seeking adjustment.

Attorneys outside of the First, Third and Ninth circuits may be able to use these cases as persuasive authority in challenging the prolonged detention of their clients.

Policy Developments

Prior to completing an adjustment of status application, practitioners may also wish to review the newly updated USCIS Policy Manual, specifically Chapters L & M regarding adjustment of status for refugees and asylees, respectively.¹¹³

¹¹⁰ See also *Leslie v. Att’y Gen. of the United States*, 611 F.3d 171 (3rd Cir. 2010); ACLU IMMIGRANTS’ RIGHTS PROJECT, *Practice Advisory, Prolonged Mandatory Detention and Bond Eligibility: Diop v. ICE/Homeland Security and Leslie v. Attorney General of the United States* (Updated Feb. 13, 2012), https://www.aclu.org/files/pdfs/immigrants/2012.03.29_updated_practice_advisory.pdf.

¹¹¹ *Gordon v. Napolitano*, 13-CV-30146-MAP, 2013 U.S. Dist. LEXIS 152285 (D. Mass. Oct. 23, 2013).

¹¹² *Reid v. Donelan*, 13-CV-30125-MAP, 2014 U.S. Dist. LEXIS 28840 (D. Mass. Mar. 6, 2014).

¹¹³ Policy Memo, U.S. Citizenship and Immigr. Serv., Vol. 7, Parts L & M, <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7.html> (last updated July 1, 2014).

Relevant Statutory and Regulatory Authority

The following section contains relevant statutory and regulatory authority. Practitioners may also wish to consult INA § 207(a) and (b); INA § 208(a); INA § 212(a); INA § 101(a)(42); and INA § 101(a)(43).

INA § 209

Adjustment of Status of Refugees

I. Criteria and procedures applicable for admission as immigrant; effect of adjustment

Any alien who has been admitted to the United States under section 207 [8 U.S.C. § 1157] –

whose admission has not been terminated by the Secretary of Homeland Security or the Attorney General pursuant to such regulations as the Secretary of Homeland Security or the Attorney General may prescribe,

who has been physically present in the U.S. for at least one year, and

who has not acquired permanent resident status,

shall, at the end of such year period, **return or be returned to the custody** of the Department of Homeland Security for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 235 [8 U.S.C. § 1225], 240 [8 U.S.C. § 1229a], and 241 [8 U.S.C. § 1231] (emphasis added).

Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before an immigration judge to be admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of the alien's inspection and examination shall, notwithstanding any numerical limitation specified in this Act, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

* * *

Related Case Law: *Romanishyn v. Attorney General*, 455 F.3d 175 (3rd Cir. 2006); *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008); *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006); *Gutnik v. Gonzalez*, 469 F.3d 683 (7th Cir. 2006); *Vong Xiong v. Gonzales*, 484 F.3d 530 (8th Cir. 2007); *Matter of Garcia-Alzargaray*, 19 I&N Dec. 407 (BIA 1986); *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005); *Matter of S-I-K-*, 24 I&N Dec 324 (BIA 2007).

II. Maximum number of adjustments; recordkeeping

The Secretary of Homeland Security or the Attorney General, in the Secretary's or the Attorney General's discretion and under such regulations as the Secretary or the Attorney General may prescribe, **may adjust** to the status of an alien lawfully admitted for permanent residence the status of **any alien granted asylum** who –

applies for such adjustment,

has been physically present in the United States for at least one year after being granted asylum,

continues to be a refugee within the meaning of §101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)] or a spouse or child or such a refugee,

is not firmly resettled in any foreign country, and

is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

Upon approval of an application under this subsection, the Secretary of Homeland Security or the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application. (emphasis added)

* * *

Related Case Law: *Rivas-Gomez v. Gonzales*, 411 F.3d 1072 (9th Cir. 2006); *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004).

III. Applicability of other Federal statutory requirements

The provisions of paragraphs (4), (5), and (7)(A) of section 212(a) [8 U.S.C. § 1182(a)] shall not be applicable to any alien seeking adjustment of status under this section, and the Secretary of Homeland Security or the Attorney General **may waive** any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for

humanitarian purposes,

to assure family unity, or

when it is otherwise in the public interest. (emphasis added)

* * *

Related Case Law: *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008); *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006); *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006); *Rivas-Gomez v. Gonzales*, 411 F.3d 1072 (9th Cir. 2006); *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999); *Matter of Jean*, 23 I&N Dec. 373 (BIA 2002); *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004); *Matter of S-I- K-*, 24 I&N Dec 324 (BIA 2007).

Regulatory Authority
8 C.F.R. § 1209.1
Adjustment of Status of Refugees

- 1209.1 Contents.
- 1209 (a) Eligibility.
- 1209 (b) Application.
- 1209 (c) Medical Examination.
- 1209 (d) Interview.
- 1209 (e) Decision.

The provisions of this section shall provide the sole and exclusive procedure for adjustment of status by a refugee admitted under section 207 of the Act whose application is based on his or her refugee status.

(a) Eligibility.

(1) Every alien in the United States who is classified as a refugee under part 207 of this chapter, whose status has not been terminated, is required to apply to the Service 1 year after entry in order for the Service to determine his or her admissibility under section 212 of the Act.

(2) Every alien processed by the Immigration and Naturalization Service abroad and paroled into the United States as a refugee after April 1, 1980, and before May 18, 1980, shall be considered as having entered the United States as a refugee under section 207(a) of the Act.

Related Statutory Authority: *INA § 209(a)(1) [8 U.S.C. § 1159(a)]*

Related Case Law: *Romanishyn v. Attorney General*, 455 F.3d 175 (3rd Cir. 2006); *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008); *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006); *Gutnik v. Gonzalez*, 469 F.3d 683 (7th Cir. 2006); *Vong Xiong v. Gonzales*, 484 F.3d 530 (8th Cir. 2007); *Matter of Garcia-Alzargaray*, 19 I&N Dec. 407 (BIA 1986); *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005); *Matter of S-I-K-*, 24 I&N Dec 324 (BIA 2007).

(b) Application. Upon admission to the United States, every refugee entrant shall be notified of the requirement to submit an application for permanent residence 1 year after entry. An application for the benefits of section 209(a) of the Act shall be filed on Form I-485, without fee, with the director of the appropriate Service office identified in the instructions which accompany the Form I-485. A separate application must be filed by each alien. Every applicant who is 14 years of age or older must submit a completed Form G-325A (Biographical Information) with the Form I-485 application. Following submission of the Form I-485 application, a refugee entrant who is 14 years of age or older will be required to execute a Form

FD-258 (Applicant Fingerprint Card) at such time and place as the Service will designate.

(c) Medical examination. A refugee seeking adjustment of status under section 209(a) of the Act is not required to repeat the medical examination performed under § 207.2(c), unless there were medical grounds of inadmissibility applicable at the time of admission. The refugee is, however, required to establish compliance with the vaccination requirements described under section 212(a)(1)(A)(ii) of the Act, by submitting with the adjustment of status application a vaccination supplement, completed by a designated civil surgeon in the United States.

Related Statutory and Regulatory Authority: *INA § 212(g) [8 U.S.C. § 1182(g)(2)]; 8 C.F.R. § 212.7(b).*

Cross References: *See How-To and Strategies and Practice sections of this toolkit.*

(d) Interview. The Service director having jurisdiction over the application will determine, on a case-by-case basis, whether an interview by an immigration officer is necessary to determine the applicant's admissibility for permanent resident status under this part.

(e) Decision. The director will notify the applicant in writing of the decision of his or her application for admission to permanent residence. If the applicant is determined to be inadmissible or no longer a refugee, the director will deny the application and notify the applicant of the reasons for the denial. The director will, in the same denial notice, inform the applicant of his or her right to renew the request for permanent residence in removal proceedings under section 240 of the Act. **There is no appeal of the denial of an application by the director, but such denial will be without prejudice to the alien's right to renew the application in removal proceedings under part 240 of this chapter.** If the applicant is found to be admissible for permanent residence under section 209(a) of the Act, the director will approve the application and admit the applicant for lawful permanent residence as of the date of the alien's arrival in the United States. An alien admitted for lawful permanent residence will be issued Form I-551, Alien Registration Receipt Card.

Regulatory Authority
8 C.F.R. § 1209.2
Adjustment of Status of Alien Granted Asylum

- 1209.2 Contents.
- 1209.2 (a) Eligibility.
- 1209.2 (b) Inadmissible Alien.
- 1209.2 (c) Application.
- 1209.2 (d) Medical Examination.
- 1209.2 (e) Interview.
- 1209.2 (f) Decision.

The provisions of this section shall be the sole and exclusive procedure for adjustment of status by an asylee admitted under section 208 of the Act whose application is based on his or her asylee status.

(a) Eligibility. (1) Except as provided in paragraph (a)(2) or (a)(3) of this section, the status of any alien who has been granted asylum in the United States may be adjusted by USCIS to that of an alien lawfully admitted for permanent residence, provided the alien:

- (i) Applies for such adjustment;
- (ii) Has been physically present in the United States for at least one year after having been granted asylum;
- (iii) Continues to be a refugee within the meaning of section 101(a)(42) of the Act, or is the spouse or child of a refugee;
- (iv) Has not been firmly resettled in any foreign country; and
- (v) Is admissible to the United States as an immigrant under the Act at the time of examination for adjustment without regard to paragraphs (4), (5)(A), (5)(B), and (7)(A)(i) of section 212(a) of the Act, and (vi) has a refugee number available under section 207(a) of the Act.

If the application for adjustment filed under this part exceeds the refugee numbers available under section 207(a) of the Act for the fiscal year, a waiting list will be established on a priority basis by the date the application was properly filed.

(2) An alien, who was granted asylum in the United States prior to November 29, 1990 (regardless of whether or not such asylum has been terminated under section 208(b) of the Act), and is no longer a refugee due to a change in circumstances in the foreign state where he or she feared persecution, may also have his or her status adjusted by the director to that of an alien lawfully admitted for permanent residence even if he or she is no longer able to demonstrate that he or she continues to be a refugee within the meaning of section 101(a)(42) of the Act, or to be a spouse or child of such a refugee or to have been physically present in the

United States for at least one year after being granted asylum, so long as he or she is able to meet the requirements noted in paragraphs (a)(1)(i), (iv), and (v) of this section. Such persons are exempt from the numerical limitations of section 209(b) of the Act. However, the number of aliens who are natives of any foreign state who may adjust status pursuant to this paragraph in any fiscal year shall not exceed the difference between the per country limitation established under section 202(a) of the Act and the number of aliens who are chargeable to that foreign state in the fiscal year under section 202 of the Act. Aliens who applied for adjustment of status under section 209(b) of the Act before June 1, 1990, are also exempt from its numerical limitation without any restrictions.

(3) No alien arriving in or physically present in the Commonwealth of the Northern Mariana Islands may apply to adjust status under section 209(b) of the Act in the Commonwealth of the Northern Mariana Islands prior to January 1, 2015.

Related Statutory Authority: *INA § 101(a)(42) [8 U.S.C. § 1101]; INA § 209(b) [8 U.S.C. § 1159]*

Related Case Law: *In re K-A-*, 23 I&N Dec. 661 (BIA 2004).

(b) Inadmissible Alien. An applicant who is inadmissible to the United States under section 212(a) of the Act, may, under section 209(c) of the Act, have the grounds of inadmissibility waived by the director (except for those grounds under paragraphs (27), (29), (33), and so much of (23) as relates to trafficking in narcotics) for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. An application for the waiver may be filed on Form I-602 (Application by Refugee for Waiver of Grounds of Excludability) with the application for adjustment. An applicant for adjustment who has had the status of an exchange alien nonimmigrant under section 101(a)(15)(J) of the Act, and who is subject to the foreign resident requirement of section 212(e) of the Act, shall be eligible for adjustment without regard to the foreign residence requirement.

Cross References: *See INA § 209(c) Waiver section of this toolkit.*

(c) Application. An application for the benefits of section 209(b) of the Act may be filed on Form I-485, with the correct fee, with the director of the appropriate Service office identified in the instructions to the Form I-485. A separate application must be filed by each alien. Every applicant who is 14 years of age or older must submit a completed Form G-325A (Biographic Information) with the Form I-485 application. Following submission of the Form I-485 application, every applicant who is 14 years of age or older will be required to execute a Form

FD-258 (Applicant Fingerprint Card) at such time and place as the Service will designate. Except as provided in paragraph (a)(2) of this section, the application must also be supported by evidence that the applicant has been physically present in the United States for at least 1 year. **If an alien has been placed in deportation or exclusion proceedings, the application can be filed and considered only in proceedings under section 240 of the Act.**

Cross References: See How-To section of this toolkit.

Related Case Law: *In re K-A-*, 23 I&N Dec. 661 (BIA 2004); *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999).

(d) Medical examination. An alien seeking adjustment of status under section 209(b) of the Act 1 year following the grant of asylum under section 208 of the Act shall submit the results of a medical examination to determine whether any grounds of inadmissibility described under section 212(a)(1)(A) of the Act apply. Form I-693, Medical Examination of Aliens Seeking Adjustment of Status, and a vaccination supplement to determine compliance with the vaccination requirements described under section 212(a)(1)(A)(ii) of the Act must be completed by a designed civil surgeon in the United States and submitted at the time of application for adjustment of status.

Cross References: See Strategies and Practice section of this toolkit.

(e) Interview. Each applicant for adjustment of status under this part shall be interviewed by an immigration officer. The interview may be waived for a child under 14 years of age. The Service director having jurisdiction over the application will determine, on a case-by-case basis, whether an interview by an immigration officer is necessary to determine the applicant's admissibility for permanent resident status under this part.

(f) Decision. The applicant shall be notified of the decision, and if the application is denied, of the reasons for denial. No appeal shall lie from the denial of an application by the director but such denial will be without prejudice to the alien's right to renew the application in proceedings under part 240 of this chapter. If the application is approved, the director shall record the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application, but not earlier than the date of the approval for asylum in the case of an applicant approved under paragraph (a)(2) of this section.

Regulatory Authority
8 C.F.R. § 1207.9
Termination of Refugee Status

The refugee status of any alien (and of the spouse or child of the alien) admitted to the United States under section 207 of the Act **shall be terminated by any district director in whose district the alien is found if the alien was not a refugee within the meaning of section 101(a)(42) of the Act at the time of admission.** The district director shall notify the alien in writing of the Service's intent to terminate the alien's refugee status. The alien shall have 30 days from the date notice is served upon him/her or, delivered to his/her last known address, to present written or oral evidence to show why the alien's refugee status should not be terminated. There is no appeal under this chapter from the termination of refugee status by the district director. Upon termination of refugee status, the district director shall process the alien under sections 235, 240, and 241 of the Act.

Related Statutory Authority: *INA § 207(c)(4) [8 U.S.C. § 1157].*

Related Case Law: *Matter of Garcia-Alzugaray*, 19 I&N Dec. 407 (BIA 1986).

Regulatory Authority
8 C.F.R § 1208.24(a)
Termination of Asylum or Withholding of Removal or Deportation –
Termination of Asylum by the Service

(a) Termination of asylum by the Service. Except as provided in paragraph (e) of this section, an asylum officer **may** terminate a grant of asylum made under the jurisdiction of an asylum officer or a district director if following an interview, the asylum officer determines that:

- (1) There is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted;
- (2) **As to applications filed on or after April 1, 1997, one or more of the conditions described in section 208(c)(2) of the Act exist; or**
- (3) **As to applications filed before April 1, 1997, the alien no longer has a well-founded fear of persecution upon return due to a change of country conditions in the alien's country of nationality or habitual residence or the alien has committed any act that would have been grounds for denial of asylum under § 208.13(c)(2).**

Related Statutory and Regulatory Authority: *INA § 208(c)(2) [8 U.S.C. 1158]; INA § 101(a)(43) [8 U.S.C. § 1101] “Aggravated Felony” definition; 8 C.F.R. § 208.13(c)(2).*

Related Case Law: *In re K-A-*, 23 I&N Dec. 661 (BIA 2004).

Regulatory Authority
8 C.F.R. § 1212.7(b)
Waiver of Certain Grounds of Inadmissibility [Vaccination Waiver]

(b) Section 212(g) (tuberculosis and certain mental conditions) –

(1) General. Any alien who is ineligible for a visa and is excluded from admission into the United States under section 212(a) (1), (3), or (6) of the Act may file an Application for Waiver of Grounds of Excludability (Form I-601) under section 212(g) of the Act at an office designated in paragraph (2). The family member specified in section 212(g) of the Act may file the waiver for the applicant if the applicant is incompetent to file the waiver personally.

(2) [Reserved]

(3) Section 212(a)(6) (tuberculosis). If the alien is excludable under section 212(a)(6) of the Act because of tuberculosis, he shall execute Statement A on the reverse of page 1 of Form I601. In addition, he or his sponsor in the United States is responsible for having Statement B executed by the physician or health facility which has agreed to supply treatment or observation; and, if required, Statement C shall be executed by the appropriate local or State health officer.

(4) Section 212(a) (1) or (3) (certain mental conditions) -

(i) Arrangements for submission of medical report. If the alien is excludable under section 212(a) (1) or (3) (because of mental retardation or because of a past history of mental illness) he or his sponsoring family member shall submit an executed Form I-601 to the consular or Service office with a statement that arrangements have been made for the submission to that office of a medical report. The medical report shall contain a complete medical history of the alien, including details of any hospitalization or institutional care or treatment for any physical or mental condition; findings as to the current physical condition of the alien, including reports of chest X-ray examination and of serologic test for syphilis if the alien is 15 years of age or over, and other pertinent diagnostic tests; and findings as to the current mental condition of the alien, with information as to prognosis and life expectancy and with a report of a psychiatric examination conducted by a psychiatrist who shall, in case of mental retardation, also provide an evaluation of the alien's intelligence. For an alien with a past history of mental illness, the medical report shall also contain available information on which the U.S. Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery. Upon receipt of the medical report, the consular or Service office shall refer it to the U.S. Public Health Service for review.

(ii) Submission of statement. Upon being notified that the medical report has been reviewed by the U.S. Public Health Service and determined to be acceptable, the alien or the alien's sponsoring family member shall submit a statement to the consular or Service office. The statement must be from a clinic, hospital, institution, specialized facility, or specialist in the United States approved by the U.S. Public Health Service. The alien or alien's sponsor may be referred to the mental retardation or mental health agency of the state of proposed residence for guidance in selecting a post-arrival medical examining authority who will complete the evaluation and provide an evaluation report to the Centers for Disease Control. The statement must specify the name and address of the specialized facility, or specialist, and must affirm that:

(A) The specified facility or specialist agrees to evaluate the alien's mental status and prepare a complete report of the findings of such evaluation.

(B) The alien, the alien's sponsoring family member, or another responsible person has made complete financial arrangements for payment of any charges that may be incurred after arrival for studies, care, training and service;

(C) The Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control, Atlanta, GA. 30333 shall be furnished: (1) The report evaluating the alien's mental status within 30 days after the alien's arrival; and (2) Prompt notification of the alien's failure to report to the facility or specialist within 30 days after being notified by the U.S. Public Health Service that the alien has arrived in the United States.

(D) The alien shall be in an outpatient, inpatient, study, or other specified status as determined by the responsible local physician or specialist during the initial evaluation.

(5) Assurances: Bonds. In all cases under paragraph (b) of this section the alien or his or her sponsoring family member shall also submit an assurance that the alien will comply with any special travel requirements as may be specified by the U.S. Public Health Service and that, upon the admission of the alien into the United States, he or she will proceed directly to the facility or specialist specified for the initial evaluation, and will submit to such further examinations or treatment as may be required, whether in an outpatient, inpatient, or other status. The alien, his or her sponsoring family member, or other responsible person shall provide such assurances or bond as may be required to assure that the necessary expenses of the alien will be met and that he or she will not become a public charge. For procedures relating to cancellation or breaching of bonds, see part 103 of this chapter.

Regulatory Authority
8 C.F.R. § 1207.3
Admission of Refugees – Waiver of Inadmissibility

(a) Authority. Section 207(c)(3) of the Act sets forth grounds of inadmissibility under section 212(a) of the Act which are not applicable and those which may be waived in the case of an otherwise qualified refugee and the conditions under which such waivers may be approved. Officers in charge of overseas offices are delegated authority to initiate the necessary investigations to establish the facts in each waiver application pending before them and to approve or deny such waivers.

(b) Filing requirements. The applicant for a waiver must submit Form I-602, Application by Refugee for Waiver of Grounds of Inadmissibility, with the Service office processing his or her case. The burden is on the applicant to show that the waiver should be granted based upon humanitarian grounds, family unity, or the public interest. The applicant shall be notified in writing of the decision, including the reasons for denial, if the application is denied. There is no appeal from such decision.

Case Law

Board of Immigration Appeals (BIA) Cases

***Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013):**

WHY THIS CASE IS IMPORTANT: This case holds that an Immigration Judge must first make a threshold determination regarding the termination of asylum status prior to ordering an asylee removed from the United States. In addition, the Board holds here that a grant of asylum is not an admission and that an asylee is properly charged under INA §212.

ISSUES:

- 1) Whether a grant of asylum is an admission under the INA.
- 2) How termination of asylum status should be handled by an Immigration Judge in removal proceedings.

STATEMENT OF FACTS: Respondent, a native and citizen of Albania, entered the United States in 2003 and was granted asylum, as a derivative beneficiary of his father's application, in 2004. In 2008 Respondent was designated a "youthful trainee" under Michigan law after entering a guilty plea to several drug related charges in 2007. Also in 2008, Respondent was convicted of second-degree home invasion. Based on Respondent's convictions, the Immigration Judge found him inadmissible and ineligible for asylum and withholding of removal after a determination that his drug offense was a "particularly serious crime" under sections 208(b)(2)(A)(ii) and 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1231(b)(3)(B)(i) (2006). The IJ also denied his application for CAT and ordered him removed to Albania.

COURT HOLDING: The BIA held that Respondent could not be removed from the United States unless and until his asylum status was terminated. Although DHS had filed a notice of intent to terminate Respondent's asylum status with the Immigration Judge, the Immigration Judge's decision did not include any analysis of the termination issue nor did the Immigration Judge formally terminate Respondent's asylum status. Contrary to the Respondent's argument that his grant of asylum constituted an "admission" to the United States, the BIA further held that Respondent's asylum status does not qualify him as an alien admitted to the United States within the meaning of INA §237. The BIA held that Respondent was properly subject to removal under INA §212 as an inadmissible alien.

***Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012):**

WHY THIS CASE IS IMPORTANT: This case purports to resolve many of the inconsistencies and confusion relating to refugee adjustment. For the first time, the Board held that a refugee is properly charged as removable under §237 of the INA rather than § 212. This means that refugees in removal proceedings will no longer be classified as "arriving aliens" and may have the right to a bond hearing before the immigration judge. Also, the Board ruled that a refugee may be placed in removal proceedings even if USCIS has not previously deemed such refugee inadmissible.

ISSUES:

- 1) Whether a refugee who has not adjusted status to LPR has been “admitted” to the United States such that s/he is properly charged under INA § 237 in removal proceedings.
- 2) Whether the Immigration Court has jurisdiction to adjudicate a refugee's application for adjustment of status if USCIS has not already made a determination that such refugee is inadmissible.

STATEMENT OF FACTS: Respondent was a refugee from Macedonia. He applied for adjustment of status before USCIS, but his application was denied for failure to submit requested information regarding his criminal history. Subsequently, he was convicted of distribution of cocaine within 1,000 feet of a public secondary school in violation of 21 U.S.C. § 860 (2006) and placed in removal proceedings. DHS initially charged Respondent as removable for conviction of a drug trafficking related aggravated felony, but then recharged him as inadmissible under section 212 of the INA. Respondent applied for adjustment of status, asylum, withholding of removal and CAT, but the IJ found him ineligible for all relief.

COURT HOLDING: The BIA held that refugees who have not adjusted their status to that of a lawful permanent resident may be placed in removal proceedings even if USCIS has not found them inadmissible. This includes individuals who never affirmatively applied for adjustment as well as those whose applications were denied for reasons other than inadmissibility (e.g. failure to provide requested documents.) The BIA also held that unadjusted refugees should be charged under § 237 of the INA since refugee status constitutes a “conditional admission,” instead of being charged as removable under INA § 212.

***In re S-I-K-*, 24 I&N Dec. 324 (BIA 2007):**

WHY THIS CASE IS IMPORTANT: This is one of several cases where the Board concluded that the plain language of the statute in INA § 209(a)(1)(C) does not allow a refugee who already “has acquired permanent resident status” to apply for adjustment of status and a waiver of inadmissibility.

ISSUE: Whether a refugee who previously acquired LPR status is prohibited from applying for adjustment of status and a waiver of inadmissibility.

STATEMENT OF FACTS: Respondent, a native and citizen of Ukraine, was first admitted to the United States in 1997 as a refugee. In 1999, his status was adjusted to that of an LPR. In 2004, Respondent was convicted of conspiracy and mail fraud. Respondent contended that he was eligible for withholding of removal to Ukraine and that he should be permitted to apply for adjustment of status in conjunction with a § 209(c) waiver.

COURT HOLDING: The BIA responded that Respondent’s eligibility for adjustment of status and a waiver of inadmissibility were foreclosed by the plain language of the statute. A refugee can be admitted as an immigrant only if he “has not acquired permanent resident status.” INA § 209(a)(1)(C). Here, Respondent had previously acquired LPR status and thus was prohibited from acquiring such status again by means of section 209(a) of the Act. Moreover, inasmuch as

Respondent was ineligible to apply for adjustment of status, he could not obtain a § 209(c) waiver, which was applicable only to a “noncitizen seeking adjustment of status under § 209.”

Matter of Smriko, 23 I&N Dec. 836 (BIA 2005):

WHY THIS CASE IS IMPORTANT: The BIA held that a refugee who had adjusted his status to that of an LPR may be placed in removal proceedings under INA § 237 even absent the termination of his refugee status.

ISSUE: Whether termination of a refugee status is a precondition to placing such refugee in removal proceedings.

STATEMENT OF FACTS: Respondent was admitted to the United States as a refugee in 1994. In 1996, he adjusted his status to Lawful Permanent Resident. Following his convictions for theft offenses in 1996 and 1999, Respondent was placed in removal proceedings and was charged with having been convicted of crimes involving moral turpitude. Respondent asserted that he could not be removed from the United States based on his criminal convictions because his refugee status had not been terminated pursuant to § 207(c)(4), and there was no other provision in the Act or the regulations that provided for termination or cancellation of refugee status.

COURT HOLDING: The BIA held that a noncitizen who had been admitted as a refugee and had adjusted his status to that of an LPR may be placed in removal proceedings for acts or conduct amounting to grounds for removal under INA § 237. According to the BIA, termination of refugee status was not a precondition to the initiation of removal proceedings against refugees who had adjusted their status. The consistent reference to “any noncitizen” in the statutory provisions governing removal proceedings and the absence of any language requiring prior termination of refugee status were strong indications that noncitizens admitted as refugees could be subject to removal proceedings without the preliminary step of terminating refugee status under § 207(c)(4). Citing 8 CFR § 209.1(e), the Board found that this regulation authorized the commencement of removal proceedings against noncitizens admitted as refugees who later adjusted without prior termination of refugee status under § 207(c)(4).

Matter of K-A-, 23 I&N Dec. 661 (BIA 2004):

WHY THIS CASE IS IMPORTANT: This case explains the procedural framework for asylee adjustment when the applicant has been placed in removal proceedings. First, once an asylee has been placed in removal proceedings, the Immigration Judge and BIA have exclusive jurisdiction over any application for adjustment and a waiver. An asylee does not need to have his adjustment and § 209(c) waiver first adjudicated by USCIS before the IJ can take jurisdiction. Thus, it is inappropriate to terminate or administratively close removal proceedings against an asylee so that he can apply for adjustment before USCIS.¹¹⁴ Also, asylees can adjust status in removal proceedings without first having their asylum status terminated by the agency that issued it. This prevents asylees from potentially being caught in limbo waiting for one agency to terminate their status before they can seek adjustment.

¹¹⁴ Note, however, that termination may still be appropriate for an asylee who has not had his asylum status terminated so that he can avoid removal proceedings.

Also, the Board discusses grants of a waiver under § 209(c) when an applicant has been convicted of an aggravated felony. First, the Board notes that an aggravated felony is *not per se* a “violent or dangerous crime” meaning that the heightened standard laid out in *Jean* should not automatically apply to adjustment applicants convicted of an aggravated felony. However, the Board does note that even nonviolent aggravated felonies “will generally constitute significant negative factors militating strongly against a favorable exercise of discretion” and that a non-citizen convicted of an aggravated felony will only merit a waiver under § 209(c) if he can successfully demonstrate “the existence of truly compelling countervailing equities.” *Matter of K-A-*, 23 I&N Dec. 661, 666 (BIA 2004).

- See INA § 209(c) Waiver section of this toolkit.

ISSUES:

- 1) Whether an IJ possesses jurisdiction to adjudicate an asylee’s application for adjustment of status under § 209(b) and her application for a waiver of inadmissibility under § 209(c).
- 2) Whether the IJ committed reversible error when she deferred consideration of the DHS’s termination request of asylee status pending adjudication of the asylee’s application for relief under § 209.

STATEMENT OF FACTS: The respondent, a native and citizen of Nigeria, was admitted to the United States in 1992 as a nonimmigrant visitor and was granted asylum in the U.S. She is the mother of two United States citizen children, one of whom suffers from cerebral palsy. In 1997, she committed the offense of second-degree criminal possession of a forged instrument. This crime resulted in a conviction and she was sentenced to a term of imprisonment of at least one year. When the DHS issued a notice of intent to terminate Respondent’s asylee status on the ground that she had been convicted of an aggravated felony, Respondent expressed an intention to apply for adjustment of status under INA § 209(b) in conjunction with a request for a waiver of inadmissibility under § 209(c).

COURT HOLDING: The BIA concluded that the IJ possessed original and exclusive jurisdiction to adjudicate Respondent’s application for adjustment of status under INA § 209(b) and for a waiver of inadmissibility under § 209(c). In affirming the IJ’s grant of a § 209(c) waiver, the Board reemphasized and elaborated on the AG’s guidance in *Matter of Jean*. The BIA stated that a noncitizen convicted of an aggravated felony would become the beneficiary of the AG’s discretion under § 209(b) and (c) only in those rare situations where he or she successfully demonstrates the existence of truly compelling countervailing equities, such as those present in the instant case.

***Matter of Jean*, 23 I&N Dec. 373 (AG 2002):**

WHY THIS CASE IS IMPORTANT: The Attorney General laid out new guidelines to use when determining § 209(c) waiver eligibility. He stated that individuals who have been convicted of “violent or dangerous” crimes should not be granted waivers “except in extraordinary circumstances.” However, the AG did not define the terms “violent or dangerous” or “extraordinary circumstances”. The AG gave two examples of “extraordinary circumstances”—cases involving national security or foreign policy matters, or exceptional and extremely unusual

hardship—but he did not limit the availability of relief to just these cases. IJs and the BIA will have to determine what the parameters of “violent or dangerous” crimes and “extraordinary circumstances” will be. Practitioners facing this issue should try to persuade the IJ that their clients merit a § 209(c) waiver by distinguishing the facts of their case from the facts in *Matter of Jean*.

- See Strategies and Practice and INA § 209(c) Waiver sections of this toolkit.

ISSUE: Whether a refugee’s conviction for manslaughter constitutes a “violent or dangerous” crime such that she must demonstrate extraordinary circumstances such as those involving national security or foreign policy considerations, or that the denial of status adjustment would result in exceptional and extremely unusual hardship, in order to qualify for a discretionary § 209(c) waiver.

STATEMENT OF FACTS: Respondent was a 45-year-old Haitian who was admitted into the United States as a refugee in 1994. In 1995, while babysitting a 19-month-old child, Respondent hit and shook the baby violently, which resulted in the baby’s death. She failed to contact emergency services. Respondent plead guilty to manslaughter and was sentenced to 2 to 6 years in prison. Following her prison term, Respondent requested adjustment of status under INA § 209(a).

COURT HOLDING: Reversing the BIA’s decision that Respondent merited a waiver under § 209(c), the AG ruled that the § 209(c) waiver would not be granted to individuals convicted of violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which a non-citizen clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship.

***Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002):**

WHY THIS CASE IS IMPORTANT: Like *Matter of Monreal*, *supra*, *Matter of Recinas* may be instructive for practitioners seeking a § 209(c) waiver for clients convicted of “violent or dangerous” crimes who need to demonstrate that their client's removal will cause exceptional and extremely unusual hardship to both the Respondent and his/her family.

ISSUE: Whether Respondent’s six U.S. citizen children will suffer “exceptional and extremely unusual hardship” if Respondent, a single mother, is ordered deported.

STATEMENT OF FACTS: Respondent was a 39-year-old native and citizen of Mexico. She was the single mother of six children, four of whom were U.S. citizens. Both of her parents were LPRs and her siblings were U.S. citizens. Respondent, who had resided in the United States since 1988, had no family ties in Mexico.

COURT HOLDING: The BIA found that Respondent’s children would suffer exceptional and extremely unusual hardship upon her removal to her native country because Respondent had no immediate family in Mexico, was the sole provider for her six children, and had limited financial resources. The factors considered in assessing the hardship to the Respondent’s children included the heavy burden imposed on the Respondent to provide the sole financial and familial support

for her six children if she is deported to Mexico, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to the United States.

Matter of Monreal, 23 I&N Dec. 56 (BIA 2001):¹¹⁵

WHY THIS CASE IS IMPORTANT: In this case, the BIA differentiated between the “extreme hardship” standard applied in a § 244(a)(1) suspension of deportation case and the “exceptional and extremely unusual hardship” standard used in a cancellation of removal case. This discussion is helpful for practitioners arguing the latter standard in § 209(c) cases.

NOTE: For purposes of § 240A(b) cases, only the potential hardship of qualifying relatives (U.S. citizen or LPR spouses, parents, or children) is evaluated in the hardship analysis. By contrast, for the purposes of the § 209(c) waiver, adjudicators should consider, and practitioners should argue, not only hardship to family members, but also hardship to Respondent.

ISSUE: Whether Respondent's United States citizen children or his LPR parents will suffer “exceptional and extremely unusual hardship” if Respondent is ordered deported.

STATEMENT OF FACTS: Respondent was a 34-year-old native and citizen of Mexico who had been living in the United States since 1980. He conceded that he was removable from the U.S. but applied for cancellation of removal under § 240A(b) as well as for voluntary departure. His wife voluntarily departed to Mexico shortly before Respondent's hearing on his application for cancellation of removal and she took their infant U.S. citizen child with her. The couple's two older children remained with Respondent in the U.S. The oldest child was 12 years old and the middle child was 8 years old; both children were U.S. citizens. Respondent's parents lawfully immigrated to the U.S. in 1995 and his seven siblings resided in the U.S. lawfully.

COURT HOLDING: Differentiating the more restrictive “exceptional and extremely unusual hardship” from the “extreme hardship” standard applied in a § 244(a)(1) suspension of deportation case, the BIA held that Respondent must demonstrate that his or her spouse, parent, or child would suffer hardship that is “substantially beyond that which would ordinarily be expected to result from the applicant's deportation” to establish “exceptional and extremely unusual hardship.” According to the BIA, factors relating to the applicant himself or herself may not be considered unless they may affect the hardship to a qualifying relative. The BIA in this case considered hardships such as the ages, health, circumstances of qualifying LPR and U.S. citizen relatives and a lower standard of living or adverse country conditions in Mexico only insofar as they might affect a qualifying relative. Respondent's appeal was dismissed.

Matter of H-N-, 22 I&N Dec. 1039 (BIA 1999):

WHY THIS CASE IS IMPORTANT: The BIA provides a detailed list of what factors adjudicators should consider when deciding whether or not to grant a discretionary waiver under § 209(c). Practitioners should note that this case was criticized by the Attorney General in

¹¹⁵ Although this case does not involve adjustment of status under § 209 (this is a cancellation of removal case under INA § 240A(b)), the “exceptional and extremely unusual” prong of this case is similar to the prong identified under § 209. For this reason, it may be useful for practitioners to review the factors elaborated in this case and those that follow.

Matter of Jean and overruled in part by, and distinguished by, *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004).

ISSUES:

- 1) Whether a refugee may renew her application for adjustment of status before the Immigration Judge when legacy INS [now DHS] denied her first application and concurrent § 209(c) waiver.
- 2) What factors adjudicators should consider when determining whether to grant a waiver under § 209(c).

STATEMENT OF FACTS: The respondent was a 37-year-old citizen of Cambodia who arrived in the United States as a refugee in 1984. In 1996, she was convicted of second-degree robbery and was sentenced to 3 to 6 years in prison. She then applied for adjustment of status. As Respondent's conviction rendered her inadmissible, she applied for a waiver of her conviction under INA § 209(c). The legacy INS [now DHS] denied her adjustment and waiver applications and placed her in removal proceedings. She sought to renew her applications for relief before the IJ. The IJ granted her request. Legacy INS [now DHS] appealed, arguing that because she was a refugee, only legacy INS [now DHS] had jurisdiction to adjudicate the waiver.

COURT HOLDING: The Board disagreed with legacy INS [now DHS] and held that a refugee may renew such application before the IJ and that the IJ had proper jurisdiction in such a case. The Board also concluded that the equities in the respondent's favor outweighed her 1996 robbery conviction. The Board cited her "four United States citizen children, a husband who legally resides [in the United States], and over 15 years of residence in the United States" as factors in her favor. The Board also mentioned letters from her friends and prison case worker and concluded that the record "indicat[ed] that the respondent's conviction [was] not indicative of her overall character." The Board further stated that the respondent was "a person who would be an asset to our society." As a result, the Board upheld the IJ's decision to grant the Respondent a § 209(c) waiver.

***Matter of Garcia-Alzugaray*, 19 I&N Dec. 407 (BIA 1986):**

WHY THIS CASE IS IMPORTANT: This is one of the Board's foundational cases involving refugee adjustment. However, in the wake of *Matter of D-K-*, its significance is less pronounced.

ISSUE: Whether a refugee can be placed in removal proceedings without either proper termination of his status as a refugee or a determination of inadmissibility by USCIS.

STATEMENT OF FACTS: The applicant was a 39-year-old native and citizen of Cuba, who was admitted to the U.S. in 1980 as a refugee. He was convicted of burglary of a vehicle. He was sentenced to 3 years in prison and was placed on probation for a period of 3 years. He was subsequently placed in exclusion proceedings under INA §212.

COURT HOLDING: The BIA concluded that the applicant's status as a refugee was not terminated, nor was the applicant found inadmissible by a USCIS officer. The sole basis for terminating the status of a noncitizen who was admitted to the U.S. as a refugee under § 207 was a determination that he was not a refugee within the meaning of § 101(a)(42) at the time of his

admission. INA § 207(c)(4) and 8 C.F.R. § 207.8. There was no evidence that the applicant's status as a refugee was terminated. The applicant's subsequent conviction for burglary did not provide a basis for terminating his refugee status under § 207. The Board held that USCIS must determine a refugee to be inadmissible prior to initiating removal proceedings.

FEDERAL CIRCUIT COURT CASES:

Affirming *Matter of Jean*, 23 I&N Dec. 373 (BIA 2002)

***Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006):**

WHY THIS CASE IS IMPORTANT: The Fifth Circuit Court affirmed the AG's new guidance that "violent or dangerous" individuals should never be granted waivers under § 209(c) except in extraordinary circumstances.

➤ See INA § 209(c) Waiver section of this toolkit

ISSUE: Whether the Attorney General's decision in *Matter of Jean*, 23 I&N Dec. 373 (BIA 2002) was *ultra vires* when the AG imposed the heightened "extreme hardship" on those who "engaged in violent criminal acts" in determining their waiver eligibility under § 209(c).

STATEMENT OF FACTS: Respondent was a 45-year-old Haitian who was admitted into the United States as a refugee in 1994. In 1995, while babysitting a 19-month-old child, Respondent hit and shook the baby violently, which resulted in the baby's death. She failed to contact emergency services. Respondent plead guilty to manslaughter and was sentenced to 2 to 6 years in prison. Following her prison term, Respondent requested adjustment of status under INA § 209(a).

COURT HOLDING: The court found that the AG did create and impose a heightened standard in *Matter of Jean*. However, the court concluded that in adjusting the factors, the AG acted lawfully. First, he did not impose the heightened "extreme hardship" standard on all noncitizens with convictions but "only on those who 'engage in violent criminal acts.'" Second, the AG did not add a class of noncitizens to those who are statutorily ineligible for waiver, nor did he instruct the BIA to ignore statutory consideration of family unity, humanitarian concerns, and public interest.

***Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006):**

WHY THIS CASE IS IMPORTANT: The Seventh Circuit Court joined the Ninth Circuit and the Fifth Circuit in affirming that the AG did not exceed his statutory authority in articulating the heightened standard in *Matter of Jean*. In *Rivas-Gomez v. Gonzales*, the Ninth Circuit Court approved *Matter of Jean*'s heightened waiver standard for refugees who commit violent crimes because it found the standard rationally related to the "national immigration policy of not admitting noncitizens who would be a danger to society." In *Jean v. Gonzales*, the Fifth Circuit Court held the AG permissibly exercised broad discretion stating that the AG did not add a class of noncitizens to those who are statutorily inadmissible for waiver, nor did he instruct the BIA to ignore statutory considerations of family unity, humanitarian concerns, and public interest.

- See INA § 209(c) Waiver section of this toolkit.

ISSUE: Whether the AG’s heightened standard articulated in *Matter of Jean* is inconsistent with and unauthorized by INA § 209(c) of the Act.

STATEMENT OF FACTS: Petitioner was born in Somalia and was admitted to the U.S. as a refugee in 1999 at the age of 19. He was later convicted of substantial battery with a dangerous weapon, a felony. He was diagnosed with posttraumatic stress disorder caused by his experiences in Somalia where his two brothers were killed. Petitioner sought relief in the form of a waiver of inadmissibility, asylum, withholding of removal and deferral of removal under the CAT.

COURT HOLDING: The Seventh Circuit Court stated that the language of § 209(c) gave the AG the discretion to decide on a case-by-case basis whether to grant relief for any of the three listed reasons – for humanitarian purposes, family unity, or when it is otherwise in the public interest. Two other federal courts of appeals (the Ninth Circuit and the Fifth Circuit) rejected similar challenges to *Matter of Jean*. The court agreed with these circuits and held that the AG did not exceed his statutory authority when he articulated a heightened standard in *Matter of Jean*.

***Rivas-Gomez v. Gonzales*, 441 F.3d 1072 (9th Cir. 2006):**

WHY THIS CASE IS IMPORTANT: The Ninth Circuit Court emphasized that the AG in *Matter of Jean*, 23 I&N Dec. 373 (BIA 2002) did not impose the heightened “extreme hardship” standard on all noncitizens with convictions, only those who “engage in violent criminal acts.” Accordingly, practitioners should attempt to distinguish their client’s criminal conviction from that at issue in *Matter of Jean*, arguing that their client’s conviction does not rise to the level of “violent or dangerous.”

- See INA § 209(c) Waiver section of this toolkit.

ISSUE: Whether the heightened standard provided by the AG in *Matter of Jean* could be applied to an asylee who pleaded guilty to felony rape in the third degree without determining his crime was “violent or dangerous” based on the facts underlying his conviction.

STATEMENT OF FACTS: Petitioner, a native of Guatemala, entered the U.S. in 1997 as an asylee. In 2001, he pleaded guilty to felony rape in the third degree and was placed on three years of probation.

COURT HOLDING: The Ninth Circuit Court stated that the AG had broad discretion to grant or deny waivers and may establish general standards governing the exercise of such discretion “as long as these standards are rationally related to the statutory scheme.” However, the court said that the AG in *Matter of Jean* did not impose the heightened “extreme hardship” standard on all noncitizens with convictions, only on those who “engage in violent criminal acts.” Moreover, according to the Court, the determination in *Jean* was fact-based, not categorical. The Court stated that in a subsequent decision the BIA specifically limited *Jean*’s heightened waiver requirement to “dangerous or violent crimes.” *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004). Thus, the court concluded that the IJ erred when he applied the “extreme hardship” standard without first making a decision based on the facts underlying Rivas’s conviction that his crime was violent or dangerous.

***Makir-Marwil v. Attorney General*, 681 F.3d 1227 (11th Cir. 2012):**

WHY THIS CASE IS IMPORTANT: The Eleventh Circuit found that the BIA erred in failing to consider country conditions and related circumstances presented by the Petitioner in support of the Petitioner’s § 209(c) waiver of inadmissibility. The Eleventh Circuit affirmed the Attorney General’s guidelines in *Matter of Jean* for granting discretionary waivers in the case of refugees convicted of crimes.

ISSUE: Whether the BIA erred in concluding that *Jean* does not require a “fact-based” analysis of Respondent’s criminal conviction(s). Whether, in ruling on the Petitioner’s request for adjustment of status and a waiver of inadmissibility, the BIA erred in failing to consider evidence of the hardship Makir-Marwil would suffer upon removal to Sudan.

STATEMENT OF FACTS: Petitioner, a native and citizen of Sudan, was admitted to the United States as a refugee in 2000, at age 12. In 2006, Petitioner was convicted of grand theft and burglary and sentenced to 31 months’ imprisonment. He was later placed in removal proceedings. Petitioner requested a § 209(c) waiver and adjustment of status and also applied for asylum, withholding of removal, and deferral of removal under the Convention Against Torture. The IJ and BIA found that Petitioner was a “violent or dangerous” individual and applied the exceptional and extremely unusual hardship standard. The Immigration Judge held that Petitioner failed to meet the standard but granted deferral under CAT.

COURT HOLDING: The Eleventh Circuit held that the Attorney General in *Jean* required neither a “categorical” nor a “fact-based” analysis in determining whether a refugee’s conviction renders him a “violent or dangerous” individual. Rather, all that *Jean* requires is an adequate consideration of the nature of the refugee’s crime. Further, the Eleventh Circuit held that the IJ erred as a matter of law in not considering the evidence of hardship presented by the Petitioner including the country conditions in Sudan, the abject poverty, war, genocide, and severe humanitarian crisis that Respondent would face if removed there. The court held that these circumstances would be appropriate to consider in the “exceptional and extremely unusual hardship” analysis under *Jean*. The court remanded the case to the BIA (in order to remand to the IJ) to determine whether the denial of the waiver would impose an extreme hardship upon the Petitioner.

FEDERAL CIRCUIT COURT CASES:

***Affirming Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005)**

***Romnishyn v. Attorney General*, 455 F.3d 175 (3rd Cir. 2006):**

WHY THIS CASE IS IMPORTANT: This is one of the federal circuit court cases affirming the holding in *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005).

ISSUE: Whether refugee status must be terminated before a refugee is placed in removal proceedings.

STATEMENT OF FACTS: Petitioner was born in the Ukraine. In 1996, at the age of 11, he entered the United States as a refugee. In 1997, he adjusted his status to that of an LPR. In 2003, he was convicted twice for burglary.

COURT HOLDING: In 2004, the Third Circuit Court ordered the BIA to address this precise question. *Smriko v. Ashcroft*, 387 F.3d 279 (3rd Cir. 2004). The BIA then held that a noncitizen whose refugee status had not been terminated and who had acquired LPR status may be placed in removal proceedings without first having their status terminated. The Third Circuit found that the BIA's reasoning and its conclusion was not unreasonable, ultimately affirming the BIA's interpretation of the law to hold that refugee status does not provide complete protection or immunity from removal and a refugee may be placed in removal proceedings.

***Gutnik v. Gonzales*, 469 F.3d 683 (7th Cir. 2006):**

WHY THIS CASE IS IMPORTANT: The Seventh Circuit Court affirmed the BIA's holding in this case that refugee status ends when the refugee adjusts to LPR status. This holding seems to be stronger than the wording (i.e., refugees who entered the U.S. and subsequently adjusted their status to LPR were subject to removal on the basis of their subsequent criminal convictions without first determining their refugee status) used in *Matter of Smriko*.

ISSUE: Whether refugee status comes to an end once a refugee adjusts to LPR status.

STATEMENT OF FACTS: Petitioner was a 26-year-old native and citizen of the Ukraine who came to the United States as a refugee in 1993 when he was 14 years old. Twenty months later, he became an LPR. He was later convicted of four crimes, for theft and possession of controlled substances, and placed in removal proceedings on this basis.

COURT HOLDING: Referring to *Smriko v. Ashcroft*, 387 F.3d 279 (3rd Cir. 2004), the Seventh Circuit concluded that Petitioner no longer qualified as a refugee and was therefore ineligible to apply for a waiver of inadmissibility in conjunction with his application for adjustment of status.

***Kaganovich v. Gonzalez*, 470 F.3d 894 (9th Cir. 2006):**

WHY THIS CASE IS IMPORTANT: The Ninth Circuit Court, following the Third Circuit in *Romnishyn* and the Board in *Smriko*, held that a refugee who has adjusted his status to that of an LPR may be placed in removal proceedings.

ISSUE: Whether an LPR who adjusted his status from that of refugee may be removed absent termination of his refugee status.

STATEMENT OF FACTS: Petitioner, a Ukrainian citizen, arrived in the United States as a refugee in 1994. After residing in the U.S. for one year, he became an LPR. In early 2001, he was stopped at the port of entry on the Mexico-U.S. border as he attempted to drive from Mexico back into the U.S. The passenger in his car was a Ukrainian citizen who presented false

documentation to the border patrol and petitioner was charged with inadmissibility for “alien smuggling.”

COURT HOLDING: In determining this issue, the Ninth Circuit cited *Smriko*. The Ninth Circuit concluded that under a plain reading of the text in the statute and in deference to the BIA’s interpretation in *Matter of Smriko*, a noncitizen who arrived in the U.S. as a refugee may be removed even if his refugee status has not been terminated pursuant to INA § 207(c)(4).

***Vong Xiong v. Attorney General*, 484 F.3d 530 (8th Cir. 2007):**

WHY THIS CASE IS IMPORTANT: The Eighth Circuit Court joined the Third and the Ninth Circuits in affirming the holding of *Matter of Smriko* that refugees who enter the United States and subsequently adjust their status to LPR may be subject to removal on the basis of subsequent criminal convictions absent termination of their refugee status.

ISSUE: Whether a refugee who subsequently adjusted his status to LPR and was convicted of crimes in the United States is removable absent termination of his refugee status.

STATEMENT OF FACTS: Petitioner, a 29-year-old native and citizen of Laos, entered the United States in 1993, as a refugee. He subsequently adjusted his status to that of LPR. In 1997, he was convicted of third-degree criminal sexual conduct and was sentenced to 60 days in a workhouse and 5 years of probation.

COURT HOLDING: The Eighth Circuit denied the petition for review, agreeing with holdings of the BIA and the Third Circuit in *Romanishyn* and the Ninth Circuit in *Kaganovich* that a noncitizen who entered the United States as a refugee, subsequently adjusted his status to an LPR, and was later convicted of a removable offense could be placed in removal proceedings even though his refugee status was never terminated.

FEDERAL CIRCUIT COURT CASES:

Interpreting Exceptional and Extremely Unusual Hardship Standard

***Pareja v. Attorney General*, 615 F.3d 180 (3d Cir. 2010):**

WHY THIS CASE IS IMPORTANT: The Third Circuit held that the BIA’s interpretation of “exceptional and extremely unusual hardship” in *Monreal* was a “permissible construction of the statute,” and thus entitled to deference.

ISSUE: Whether *Matter of Monreal* should be overruled because the BIA misinterpreted the phrase “exceptional and extremely unusual hardship”

STATEMENT OF FACTS: Petitioner, a native and citizen of Mexico, entered the United States without inspection when she was 13 years old, in 1991. She is the mother to a United States citizen minor child. In 2006, she was placed in removal proceedings and applied for cancellation of removal. The IJ denied her application, finding that her removal would not result in “exceptional and extremely unusual hardship” to her US citizen child.

COURT HOLDING: The court held that the BIA’s interpretation of “exceptional and extremely unusual hardship” in *Monreal* was a “permissible construction of the statute,” and thus entitled to deference. Specifically, that a showing of “exceptional and extremely unusual hardship” requires an applicant to demonstrate hardship to a qualifying relative that is “substantially” beyond the ordinary hardship that would be expected to result from the deportation of a family member.

FEDERAL CIRCUIT COURT CASES:

Interpreting Adjustment of Status Limitations

***Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008):**

WHY THIS CASE IS IMPORTANT: The Fourth Circuit Court emphasized the plain language of INA § 209(a)(1) and concluded that a refugee who had already acquired LPR status could not satisfy the third criterion of § 209(a)(1).

ISSUE: Whether a refugee who has already acquired LPR status could reapply for an adjustment of status under INA § 209(a) and a waiver of inadmissibility under § 209(c).

STATEMENT OF FACTS: Petitioner fled his native country of Haiti in 1994 to escape political violence and was subsequently admitted to the United States as a refugee. In 1995, he became an LPR. After convictions for petty larceny, petitioner was convicted of robbery and sentenced to 15 years’ confinement. In removal proceedings, he sought deferral of removal under CAT. In addition, he sought relief in the form of an adjustment of status under § 209(a) and a waiver of inadmissibility under § 209(c).

COURT HOLDING: Relying on *Chevron*, the Fourth Circuit Court found the BIA’s interpretation to be “based on a permissible construction of the statute” and therefore controlling. According to the interpretation of the BIA, petitioner cannot satisfy the third criterion of § 209(a)(1) and thus cannot pursue adjustment of status a second time. According to the court, the third criterion limits the relief to noncitizens “who have not acquired permanent resident status,” and *Saintha* had already acquired LPR status once.

***Robelto-Pastora v. Holder*, 591 F.3d 1051 (9th Cir. 2009):**

WHY THIS CASE IS IMPORTANT: The Ninth Circuit held that a noncitizen must be an asylee in order to adjust under 209(b) and thus Petitioner was not entitled to adjust his status under § 209(b) with a § 209(c) waiver after being convicted of an aggravated felony. The Ninth Circuit acknowledged decisions in the Seventh Circuit and the Fourth Circuit which held that a refugee who had adjusted his or her status to lawful permanent resident was ineligible for relief under § 209(a).

ISSUE: Whether the BIA erred in not allowing Petitioner to “re-adjust” his status to that of lawful permanent resident under § 209(b) by applying for a § 209(c) wavier of Petitioner’s inadmissibility because the Petitioner’s asylum status was never terminated.

STATEMENT OF FACTS: Petitioner was a native of Nicaragua who entered the United States in 1984, was granted asylum and adjusted status to lawful permanent resident in 1988. Petitioner was convicted of an aggravated felony and ordered removed. The IJ found that Petitioner was ineligible to apply for adjustment of status under § 209(b) because the section did not apply to lawful permanent residents but instead applied only to asylees.

COURT HOLDING: The court declined to rule on whether Petitioner's asylee status had ever been terminated but held that § 209(b) applied only to asylees seeking to adjust their status to lawful permanent resident and not lawful permanent residents seeking to adjust, such as Petitioner.

***Siwe v. Holder*, 2014 U.S. App. LEXIS 2344 (5th Cir. Feb. 6, 2014):**

WHY THIS CASE IS IMPORTANT: The Fifth Circuit held that a noncitizen was not barred from applying for adjustment of status under § 209(b) despite failing to maintain asylum status.

ISSUE: Whether the BIA erred as a matter of law in concluding that the termination of Siwe's asylum status rendered him ineligible for adjustment of status under § 209(b).

STATEMENT OF FACTS: The Petitioner entered the United States in 2001 from Cameroon on a visitor's visa and applied for, and was granted, asylum. The IJ found that the Petitioner had been convicted of an aggravated felony and a particularly serious crime, and ordered the Petitioner removed. The BIA affirmed the IJ's finding that the Petitioner was ineligible to adjust his status under § 209(b) because his status as an asylee had been terminated.

COURT HOLDING: The court held that the statute did not require a noncitizen to maintain asylum status to be eligible for adjustment of status under § 209(b) as the language in 8 U.S.C § 1159(c) said "any alien granted asylum." The Court differentiated between § 209(a), where "admission as a refugee must not have been terminated," and § 209(b)(3), where asylees must "continue to be a refugee." The Fifth Circuit explained that finding a noncitizen ineligible for adjustment under § 209(b) because his or her asylum had been terminated and he or she was otherwise inadmissible—without any consideration as to whether the noncitizen was eligible for a waiver under § 209(c)—violated the discretion afforded to the Attorney General to allow otherwise removable individuals to remain in the country. Therefore, since the requirement that the noncitizen maintain his or her asylum status was "conspicuously absent" from the statute, the Court found that a noncitizen whose asylum status had been terminated was not prohibited from applying for adjustment of status.

INA § 209(c) WAIVER

Section 209(c) of the Immigration and Nationality Act allows the Attorney General (“AG”) and the Secretary of Homeland Security to waive certain grounds of inadmissibility “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.” This section will provide a general overview of the 209(c) waiver, including the heightened standard of proof in the case of violent or dangerous crimes and strategies for successful advocacy.

A § 209(c) waiver may be adjudicated by either USCIS or by an Immigration Judge. An individual who is denied a waiver by USCIS may seek review in Immigration Court, although Immigration Judges can also adjudicate these cases as a matter of first impression.¹¹⁶ The grant of a § 209(c) waiver is discretionary and the adjudicator must balance the equities presented in a refugee’s case against any adverse factors, most commonly, criminal convictions.

General Overview

In addition to satisfying the statutory eligibility requirements under § 209(a) or (b), **an applicant for the § 209(c) waiver must establish that he warrants a waiver as a matter of discretion.** The following provides a summary of the statutory language of § 209(c), including the waivable and non-waivable grounds of inadmissibility.

- § 209(c) provides that in determining an applicant’s admissibility under both § 209(a)(1) or § 209(b), the following grounds of inadmissibility shall **NOT** apply:
 - § 212(a)(4) - an alien likely to become a public charge;
 - § 212(a)(5) - an alien not in possession of a labor certificate;
 - § 212(a)(7)(A) - an immigrant not in possession of a valid unexpired immigrant visa or other entry document or not in possession of a valid unexpired passport or other travel document or whose visa has been issued without compliance with Section 203 of the Act ;

Therefore, a practitioner does not need to request a waiver under § 209(c) for applicants who are only inadmissible under these grounds.

2. § 209(c) can **NOT** waive the following grounds of inadmissibility:

- a. § 212(a)(2)(C) – an alien who the consular or immigration officer knows or has reason to believe is an illicit trafficker in controlled substances;
- b. § 212(a)(3)(A) – an alien who a consular officer or the AG knows or has reasonable ground to believe seeks to enter the U.S. to violate any law of the U.S. relating to espionage or sabotage or to violate any law prohibiting the export of goods,

¹¹⁶ See *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012). See also *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004); 8 C.F.R. § 1240.11(a) (2010).

- technology, or sensitive information, or to engage in any activity to overthrow the Government of the U.S., or any other unlawful activity;
- c. § 212(a)(3)(B) – an alien who has engaged or is likely to engage in terrorist activity;
 - d. § 212(a)(3)(C) – an alien whose entry or proposed activity in the U.S. would adversely affect foreign policy;
 - e. § 212(a)(3)(E) – an alien who participated in persecution by the Nazi government of Germany or its allies.

Except for those provisions of § 212(a) listed above, § 209(c) allows the Attorney General to waive any other provisions of § 212(a) for humanitarian reasons, to assure family unity, or if it is otherwise in the public interest. It is important to note that an aggravated felony conviction does not per se bar an applicant from eligibility for the § 209(c) waiver, nor does being subject to any other ground of deportability under INA § 237(a)(2).

To request a waiver, an attorney should complete Form I-602, Application by Refugee for Waiver of Grounds of Excludability. This Form requires the applicant to disclose any grounds of inadmissibility that apply and describe the equities involved in his case.¹¹⁷

The Application of the Heightened Standard and Strategies for Successful Advocacy

Although the standard for a § 209(c) waiver appears generous on its face, there is no guarantee that a waiver request will be granted where the refugee or asylee has criminal convictions.¹¹⁸

Historically, the § 209(c) waiver was granted even in cases where the Respondent had been convicted of a serious crime. *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999). In *Matter of Jean*, however, Attorney General John Ashcroft set forth new guidelines for exercising the discretionary relief authorized by § 209(c) with respect to individuals convicted of “**violent or dangerous crimes.**” Applicants who have been convicted of “**violent or dangerous**” crimes may not be granted a discretionary waiver under § 209(c) except in “**extraordinary circumstances**, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of adjustment of status would result in exceptional and extremely unusual hardship.” *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002).

The AG did not define the term “violent or dangerous.” Therefore, Immigration Judges have broad discretion when deciding whether the crime underlying the refugee or asylee’s inadmissibility is “violent or dangerous.” If the Immigration Judge makes this determination, the crime’s seriousness must be balanced against the equities involved in the applicant’s case and the

¹¹⁷ An application for a waiver is filed on Form I-602. However, USCIS policy provides that to improve the efficiency of the 209(c) waiver adjudication process, an adjudicator may grant a waiver *without* an I-602 “provided that USCIS records and other information available contain sufficient information to assess eligibility for the waiver and there is no evidence to suggest that negative factors would adversely impact the exercise of discretion to grant a waiver.” Memorandum, U.S. Citizen and Immigr. Serv., Waivers under Section 209(c) of the Immigration and Nationality Act (AFM Update 05-33), *supra*.

¹¹⁸ IMMIGRATION TRIAL HANDBOOK, *supra*, at § 6:115 (2010).

applicant must meet a heightened burden by clearly demonstrating that “the denial of status adjustment would result in **exceptional and extremely unusual hardship**.” Also, depending on the gravity of the noncitizen’s underlying criminal offense, such a showing might still be insufficient.¹¹⁹

It is important for an attorney to argue that the heightened standard delineated in *Matter of Jean* does not apply to her client’s case.¹²⁰ It is not uncommon for Immigration Judges and DHS trial attorneys to believe that the heightened standard set forth in *Jean* should be applied in all cases where refugees or asylees have been convicted of crimes, even minor or non-violent crimes. Practitioners must insist that adjudicators make an on-the-record determination that a crime is violent or dangerous before applying the heightened standard.

Even if a client is convicted of a serious crime, practitioners should argue that, for purposes of a § 209(c) waiver the client’s conviction does not involve a “violent or dangerous” crime as set forth by the AG in *Matter of Jean*. Because the AG did not delineate specific criteria for what is a violent or dangerous crime, practitioners should argue by comparison – pointing out the ways in which their own client’s crime is *less* serious and *less* violent than that at issue in *Jean*.

Attorneys should also take care to ensure that the court and trial attorneys understand that neither *Matter of Jean* nor *Matter of K-A-* held that being convicted of an aggravated felony automatically triggers the heightened standard in *Matter of Jean*. In fact, many crimes that can be aggravated felonies (e.g. fraud, forgery, money laundering, theft, or perjury) are not inherently violent or dangerous. At the same time, practitioners should be aware that the BIA, in *Matter of K-A* has stated that “nonviolent aggravated felonies will generally constitute significant negative factors militating strongly against a favorable exercise of discretion.” Thus, a noncitizen convicted of an aggravated felony will become the beneficiary of the Attorney General’s discretion under sections § 209(b) and (c) only in those rare situations where he or she successfully demonstrates the existence of truly compelling countervailing equities.

If, despite a practitioner’s arguments, the adjudicator decides that the applicant has been convicted of a violent or dangerous crime, the practitioner will need to demonstrate that a denial of adjustment “would result in exceptional and extremely unusual hardship.” Practitioners should note that for the purposes of the § 209(c) waiver, exceptional and extremely unusual hardship includes not only hardship to family members, but also to the applicant himself.

In addition to cases discussing “exceptional and extremely unusual hardship,” practitioners handling refugee and asylee adjustment cases may also benefit from reviewing the BIA’s discussion of weighing positive and negative equities for the purposes of cancellation of removal. While not directly applicable, the factors noted by the BIA may serve as a helpful organizational framework. *See e.g. Matter of Marin* 16 I&N Dec. 581 (BIA 1978), *Matter of C-V-T-*, 22 I&N Dec. 7, (BIA 1998), *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990).

Additional Forms of Relief

Since the grant of a waiver application is a matter of discretion, practitioners should prepare other applications for relief, if available. Practitioners should interview the applicant to ascertain

¹¹⁹ *See Case Law, supra.*

whether he may be eligible for asylum, withholding of removal, or relief under CAT, and applications for these forms of relief, and any others that apply, should be filed along with the applications for adjustment of status and a § 209(c) waiver.¹²¹

If an applicant for asylum suffered severe past persecution, he may qualify for a grant of humanitarian asylum even if he no longer has a well-founded fear of future persecution.¹²² A grant of humanitarian asylum may be based on either “compelling reasons rising out of the severity of the past persecution” or on the “reasonable possibility that he or she may suffer other serious harm” upon removal to his or her country under 8 C.F.R. § 1208.13(b)(1)(iii)(B) (2011); *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). The “other serious harm” must be as severe as persecution, but need not be related to the reasons for past persecution, and does not need to be based on race, religion, nationality, political opinion, or membership in a particular social group. Civil strife, extreme economic deprivation, or the potential for new physical or psychological harm are examples of other serious harm that may be considered. Note however, that applicants that have been convicted of aggravated felonies will not be eligible for asylum, and, even absent a conviction for an aggravated felony, an applicant's criminal record may be a negative factor in the adjudicator’s discretionary determination.

Documenting the Equities

When exercising discretion¹²³ on a § 209(c) waiver, an Immigration Judge will balance any criminal history against any humanitarian, family unity or public interest factors.

In *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999), the Board concluded that the equities in the respondent’s favor outweighed her previous robbery conviction. The Board described the following positive factors:

- Family ties within the U.S.;
- Residency of long duration in the U.S.;
- Evidence of hardship to the respondent and family if deportation occurred;
- Evidence of value and service to the community;
- Evidence attesting to a respondent’s good character.

In addition to the aforementioned positive factors, the Board also described in *Matter of K-A-*, 23 I&N Dec. 661 (2004), the hardship that the respondent’s removal to Nigeria would cause to her severely disabled U.S. citizen child.

The examples above are not the only equities that the Immigration Judge should consider. Practitioners who are able to thoroughly and creatively document all possible equities will build a stronger case for their clients.

An attorney representing an applicant for a § 209(c) waiver should provide the court with documentation regarding **all** of the equities in the applicant’s case,¹²⁴ such as:¹²⁵

¹²¹ IMMIGRATION TRIAL HANDBOOK, *supra*, at § 6:115 (2010). See also Strategies and Practice, *infra*.

¹²² See *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008).

¹²³ For a more in depth discussion of discretion in the 209(c) context, see E. Keyes, “Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System,” 26 Geo. Immigr. L.J. 207 (Winter, 2012)

Family ties within the U.S.:

- A copy of the marriage certificate if the noncitizen is married or, if the noncitizen is divorced, then a certified copy of any divorce decrees, and, where relevant, maintenance or support orders, child support orders, and visitation orders;
- Copies of birth certificates of biological and adopted children;
- Copies of evidence of family members in the U.S., including U.S. birth certificates, U.S. passports, certificates of naturalization or citizenship, alien registration cards, employment authorization documents, I-94s, other evidence of authorized presence in the U.S., etc.; family members for whom evidence should be provided include grandparents, aunts, uncles, siblings, and grandchildren;
- Proof of child support payments;
- Tax returns showing the child as a dependent;
- Affidavits from family members establishing their positive relationship with the applicant and existence (or lack thereof) of family in the country designated for removal;
- Death certificates of deceased immediate family members, where relevant.

Residency of long duration in the U.S.:

- Copies of rental agreements, house title, mortgage, and any other documents proving the noncitizen's residence in the U.S.;
- School records of the noncitizen;
- Employment history of the noncitizen;
- Medical and/or dental records of the noncitizen.

Educational background of the noncitizen:

- Grade school, high school, or GED certificate and college, technical, or vocational school and graduate diplomas if completed;
- Where a noncitizen has not completed a program, transcripts of courses completed;
- Certificates for any employment-courses that have been completed.

Evidence of hardship to the applicant and family if deportation occurs:

- Affidavits attesting to the hardship to family members;
- Affidavits from religious organization members, religious leaders, employers, neighbors, etc.;
- If the hardship is connected to a family member's medical or mental health condition, medical/mental health records attesting to that condition and statements from medical providers;

¹²⁴ Under INA § 209(c), the central inquiry is whether the waiver is justified “for humanitarian purposes” or “to assure family unity,” or “otherwise in the public interest.” Section 209(c) does not require an applicant to meet all three of these equitable grounds; one would be sufficient but practitioners should argue all three if possible.

¹²⁵ The following list of documents come from a combination of sources including: IMMIGRATION TRIAL HANDBOOK, *supra*, at § 6:115, and Political Asylum/Immigration Representation Project, A Self-Help Guide for Detainees Facing Deportation (2012).

- If the hardship is related to a child, letters or affidavits from the child's teacher, counselor, coach or pediatrician;
- Evidence of lack of medical care in native country (if health is an issue);
- Documentation related to country conditions, including unemployment, economic growth, political conditions, educational opportunities (State Department,¹²⁶ CIA, or other country reports; human rights reports; newspaper and magazine articles, etc.), language(s) spoken in country designated for removal, availability of medical care and location of medical facilities, and attitudes toward U.S. citizens if U.S. citizen family members were to move to the country upon removal of the noncitizen from the U.S.

Service in Armed forces:

- If the noncitizen has served in the military, submit a copy of his discharge papers; for male citizens, evidence of selective service registration can be obtained at <http://www.sss.gov>.

History of employment:

- Copies of pay stubs;
- Letters or affidavits from current and former employers verifying dates of employment, position, salary or wage and any related positive factors;
- Copies of federal income tax returns, Form W-2 and/or 1099, and any schedules filed; where payment of taxes is owed, evidence of payment plan agreed to between the noncitizen and the IRS should be submitted to the immigration court, along with proof of payments made.

Existence of property or business ties:

- A copy of the title of any motor vehicle owned by the noncitizen and/or his spouse;
- Property title if the noncitizen or his spouse owns a house or other real estate in the U.S.;
- If the noncitizen runs his own business, copies of the company's income tax returns, a copy of the business license, and other documentation to demonstrate that the company is in compliance with Federal and state laws;
- If the noncitizen is a member of local, state, or national business organizations, a letter from each organization verifying membership and any leadership roles of the noncitizen;
- Letter(s) from bank(s) regarding account(s) held by the noncitizen, whether the accounts are joint accounts and with whom, and, if applicable, that the accounts are in good standing (if not, consider not submitting).

Evidence of value and service to the community:

¹²⁶ See *A-Z List of Country and Other Area Pages*, DEP'T OF STATE, <http://www.state.gov/misc/list/index.htm> (last visited Aug. 4, 2014), for current country conditions and other information.

- Affidavits and letters from neighbors and community members attesting to the noncitizen's good character and the effect of his removal on family, friends, and the community;
- Evidence of any community service or volunteer awards or honors;
- Newsletters or other documents which mention the noncitizen's community or volunteer work;
- Letters from any religious organizations and members of the organization regarding his membership and/or attendance at services and activities;
- Letters from community organizations to which the noncitizen belongs or in whose activities the noncitizen participates.

Proof of genuine rehabilitation if a criminal record exists:

- A certified copy of the noncitizen's criminal record;
- Evidence of completion of any prison or jail term(s), community or public service hours, Alcoholic Anonymous (AA) or Narcotics Anonymous (NA) attendance, rehabilitation classes, probation/supervision/conditional discharge/parole, payment of fines and court costs, etc.;
- Where a noncitizen has reported to a probation or parole officer, a letter from that officer should be obtained, if possible;
- Certificates of completion for classes (e.g., anger management, career development, life skills training, AA or NA programs);
- If relevant, prison records attesting to the noncitizen's participation in rehabilitative activities, including affidavits from counselors/case managers
- If appropriate and possible, a written release/re-entry to the community plan describing how the client will transition back into their community. This can be especially important for clients who began removal proceedings immediately after being released from criminal custody since they have not had an opportunity to demonstrate rehabilitation outside of custody. The plan should include details such as where in their community a client intends to obtain assistance with counseling, employment, housing, substance abuse, or other relevant issues. If the plan can be prepared by or in collaboration with a professional in social service provision (e.g. clinical social worker), it may add credibility to the plan.

When exercising discretion on a 209(c) waiver case, an Immigration Judge will also consider **adverse factors** that may include the following:

- Criminal history;
- History of violence;
- Lengthy arrest record;
- Substance abuse;
- Lack of family ties;
- Poor employment history/unexplained history of unemployment;
- Failure to pay taxes;
- Failure to take responsibility for one's actions;
- Absence of demonstrated rehabilitation and/or absence of rehabilitation/re-entry plan.

GOVERNMENT-CREATED FORMS

The following relevant forms are available on the USCIS website (<http://www.uscis.gov/forms>). Forms are regularly updated, so practitioners should be sure to confirm that forms are current before submitting them.

- AR-11 Alien's Change of Address Card
- EOIR-27/28 Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals/Immigration Court
- G-28 Notice of Entry as Appearance as Attorney or Accredited Appearance
- G-325A Biographic Information
- I-485 Application to Register Permanent Residence or Adjust Status; and Instructions for I-485
- I-589 Application for Asylum and for Withholding of Removal
Supplement A to Form I-589
Supplement B to Form I-589
- I-602 Application by Refugee for Waiver of Grounds of Excludability
- I-643 Health and Human Services Statistical Data for Refugee/Asylee Adjusting Status
- I-693 Report of Medical Examination and Vaccination Record

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The Immigrants' Rights Clinic is an in-house clinic at the Boston University School of Law that represents newly arrived unaccompanied immigrant children facing deportation, refugees fleeing human rights abuses, and other vulnerable immigrants in immigration court and in administrative proceedings. Students in the Immigrants' Rights Clinic assume primary responsibility for building their cases, just as a lawyer would – through client interviewing and counseling, factual investigation, legal research and writing, working with expert witnesses, and conducting full hearings. Students also participate in “Know-your-Rights” visits at local jails/detention centers. Clinic students Peter Brocker, Drew Tobias and Diona Vakili contributed to this toolkit under the supervision of Clinical Teaching Fellow, Sarah Sherman-Stokes.

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