Musings on Inadmissibility

By Joseph P. Whalen (Wednesday, November 16, 2016)

Much ink has been spilled on the subject of the multitude of eligibility requirements necessary to obtain visa classification. I’ve spilled more than my fair share of that ink. There is one requirement that is common to all visa classifications. That requirement is generally simply stated as “otherwise eligible” which means that the alien must be “admissible”. In order to be admissible, one must not be “inadmissible”. There is some truly circular logic! The reader is likely aware that the Immigration and Nationality Act (INA) lists numerous grounds of inadmissibility. However, the INA also provides a variety of “waivers” for some, but not all; of those grounds.

Additionally, certain grounds of inadmissibility are automatically waived for certain classifications, such as “public charge” grounds waived for “refugees” and for those who qualify as “victims of abuse” under VAWA. Certain grounds have very specific “exceptions” that require the adjudicator to very carefully consider whether a particular ground applies or not. The majority of aliens seeking admission must proactively apply for the waivers they seek by submitting the applicable Form for USCIS adjudication.

Some waivers hinge upon the negative consequences to the Applicant’s qualifying relative. Depending on which waiver (or other relief from removal) is sought, the list of qualifying relatives is different. Sometimes Applicants are confused about which relative qualifies for the particular waiver or relief they require. If the Applicant has the correct relative for their purpose, he or she must then establish sufficient hardship to their qualifying relative(s), and that he or she warrants a favorable exercise of discretion. An Applicant must convince the Immigration Judge or other Immigration Adjudicator or Official, that he or she is worthy and deserving of a favorable exercise of discretion on their behalf. Some Applicants might need to show a reform of character or rehabilitation.
The level of hardship to be demonstrated varies between “extreme” and “exceptional and extremely unusual” hardship. The BIA and various I.N.S. Officials have issued an avalanche of Precedent Decisions listing: factors to be considered, and principles guiding the evaluation of those factors; when ruling on waiver requests. Waivers for which affirmative application must be made are discretionary decisions of either the Secretary of Homeland Security or the Attorney General. Discretionary determinations are unreviewable by the Courts. That fact does not preclude all judicial review. All Courts are free to, and obligated to, determine their own jurisdiction. In addition, Courts can review the non-discretionary portions of the decision-making process. For instance, when an administrative determination is made as to the legal eligibility to apply for the relief sought, then that determination may be reviewed by a Court.

The aforementioned different types of “decisions” are not reviewed equally. Here is the Fifth Circuit’s approach, which is the basic approach taken by all Courts because it is based on the same federal statute. See INA § 242(b)(4)(B)-(D) [8 U.S.C. § 1252(b)(4)(B)-(D)] “Judicial review of orders of removal”.

“Generally, we review only the final decision of the BIA. Zhu v. Gonzales, 493 F.3d 588, 593 (5th Cir. 2007). When, as in the present case, the BIA's decision is affected by the IJ's ruling, however, we also review the IJ's decision. Id. We review the legal conclusions of the IJ and the BIA de novo, and we review their factual findings for substantial evidence. Majd v. Gonzales, 446 F.3d 590, 594 (5th Cir. 2006). Under the substantial evidence standard, “the BIA's finding is conclusive unless, based on the evidence presented in the record, any

§1252. Judicial review of orders of removal
(b) Requirements for review of orders of removal
(4) Scope and standard for review
Except as provided in paragraph (5)(B)-
(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,
(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,
(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and
(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.
reasonable adjudicator would be compelled to conclude to the contrary.”  

*Martinez-Martinez v. Holder, 769 F.3d 897, 899 (5th Cir. 2014).*

*Sealed Petitioner v. Sealed Respondent, 829 F.3d 379, 383 (5th Cir. 2016).*  

2 Slip Op. at p. 6. Stated another way, the Circuit Courts of Appeals, in this example—the Tenth Circuit, will “... review the BIA’s decision *de novo.*  

*Mena-Flores v. Holder, 776 F.3d 1152, 1162 (10th Cir. 2015)* (“In reviewing the Board’s decision, we engage in *de novo* review of constitutional and other legal questions.”).  


It is necessary to consider the *standard of review* because certain grounds of inadmissibility make reference to, or cross-reference, other statutes or other sections of the INA. For instance, among the ‘criminal and related’ grounds, controlled substance are “defined in *section 802 of title 21*” which makes further cross-references. When there is not an exact match between a state or foreign statute of conviction and, the “federal” or “generic” or “common law” version; then these statutory provisions must be analyzed and reconciled. These complex determinations cannot be easily set aside. While *categorical* matches are preferred, they are not prevalent.

In my mind and as eluded to above, the most obvious example of inadmissibility grounds that require deep analysis are the ‘criminal and related’ grounds found at *INA § 212*(a)(2) [*8 U.S.C. § 1182*(a)(2)], *infra.*  

As a preliminary matter in this complex process, an adjudicator must first determine the proper mode of analysis and other basic issues. Will they use a *categorical* or *modified categorical* approach? Is the statute that is being reviewed, divisible or not? Would it be appropriate and justified to utilize a *de novo* review or, maybe an *ad hoc* examination of mixed questions of fact and law? When is an adjudicator able to *look beyond* the “record of conviction”? Also, what currently constitutes the permissible “record of conviction” available for review? What exactly is a “crime

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2 [http://www.ca5.uscourts.gov/opinions/pub/14/14-60697-CV0.pdf](http://www.ca5.uscourts.gov/opinions/pub/14/14-60697-CV0.pdf)

3 “(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.”
involving moral turpitude” (CIMT)? For that matter, what is “moral turpitude”, or a “purely political offense”, which is excluded from consideration of admissibility?

Anyway, it is very often necessary to analyze statutes of conviction to determine if they are excludable from the further deliberations on the question of admissibility. Did you follow all that? What are the “essential elements” that constitute a CIMT? What qualifies as “a single scheme of misconduct”? Amazingly, “aggravated felony” is not, in and of itself, a basic ground of inadmissibility unless previously deported based on one of them. This is not to say that our borders are wide open to “aggravated felons”, no way. Many “aggravated felonies” qualify as something else, either within the ‘criminal and related’ grounds or other subsections. The purpose in laying out all of these questions is to impress upon the reader the complexity of this process. It’s just not that simple!

To further illustrate the complexity faced by frontline adjudicators, consider the following. As shown below, the BIA concurrently issued these two decisions that deal with the same or similar issue. It has been generally accepted that certain broad categories of behavior tend to qualify as morally turpitudinous. Such behaviors include fraud and theft, among others. However, not absolutely every fraud or theft is a CIMT. It is easy to call a particular theft offense a CIMT when there is a clear intent involved in the actions by the offender. However, when one’s intent is not so clear-cut, the analysis becomes more difficult. The BIA was recently called upon to ponder these issues more closely. As I was writing this article, the BIA issued the following two decisions on November 16, 2016. I felt it was fortuitous so I decided to include them in my discussion. Here are the holdings, look for more discussion below.

**Matter of DIAZ-LIZARRAGA, 26 I&N Dec. 847 (BIA 2016),** held:

(1) A theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another’s property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner’s property rights are substantially eroded.

(2) Shoplifting in violation of section 13-1805(A) of the Arizona Revised Statutes is categorically a crime involving moral turpitude.
Matter of OBEYA, 26 I&N Dec. 856 (BIA 2016), held:

Petit larceny in violation of section 155.25 of the New York Penal Law, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner’s property rights are substantially eroded, is categorically a crime involving moral turpitude. Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016), followed.

In Obeya, we learn that it was the Department of Homeland Security (DHS) that first determined that he was removable under INA § 237(a)(2)(A)(i) [8 U.S.C. § 1227(a)(2)(A)(i)], as an alien who “has been convicted of a crime involving moral turpitude that was committed within 5 years of admission, for which a sentence of 1 year or longer may be imposed”. That means that a DHS Officer was the first person to decide that Obeya’s criminal conviction for § 155.25 of the New York Penal Law qualified as a CIMT, regardless of sentence imposed. That Officer wrote a Notice To Appear (NTA). The NTA was likely reviewed by the ICE Trial Attorney who agreed, as did the Immigration Judge (IJ), and then the BIA agreed with all of them.

The Second Circuit Court of Appeals found fault with all of them and remanded the case for the BIA to determine in the first instance whether Obeya’s conviction for petit larceny under NYPL § 155.25 constitutes a CIMT but by performing an alternate analytical process, focusing on intent and deprivation. The remand was due the IJ’s misstatement of law via sweeping language incorrectly concluding that “any type of larceny or theft offense under the [i]mmigration laws constitutes a crime involving moral turpitude”, which the BIA accepted through its own “sweeping language affirm[ing] the IJ’s misstatement of law”. The BIA had previously required that “a permanent taking [be] intended” for it to be a CIMT. They watered down that condition by including circumstances “where the owner’s property rights are substantially eroded”.

Upon remand, the BIA held as shown above. Obeya, followed on the heels of, and cited to, Matter of Diaz-Lizarraga issued the same day. Matter of Diaz-Lizarraga dealt with the same basic issue but based upon § 13-1805(A) of the Arizona Revised Statutes which defined shoplifting in that state.

That’s My Two-Cents, For Now!

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4 Class “A” Misdemeanor in New York is punishable by imprisonment of 15 days but may not exceed one year, a fine, or both.
5 Shoplifting can be punished by confinement from 30 days to 1 1/2 years, a fine, or both, and/or public service.

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)⁶,

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements)

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⁶ Title 21-FOOD AND DRUGS, CHAPTER 13-DRUG ABUSE PREVENTION AND CONTROL, SUBCHAPTER I-CONTROL AND ENFORCEMENT, Part A-Introductory Provisions § 802. Definitions

As used in this subchapter:
(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.
did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

**(B) Multiple criminal convictions**

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

**(C) Controlled substance traffickers**

Any alien who the consular officer or the Attorney General knows or has reason to believe-

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assist, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

**(D) Prostitution and commercialized vice**

Any alien who-

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.
(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien-

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General [Secretary of Homeland Security] knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.
(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien-

(i) who a consular officer or the Attorney General [Secretary of Homeland Security] knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General [Secretary of Homeland Security] knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section; is inadmissible.

§ 212 (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and
(2) the Attorney General [Secretary of Homeland Security], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General [Secretary of Homeland Security] to grant or deny a waiver under this subsection.

§ 212 (i) Admission of immigrant inadmissible for fraud or willful misrepresentation of material fact

(1) The Attorney General [Secretary of Homeland Security] may, in the discretion of the Attorney General [Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General [Secretary of Homeland Security] regarding a waiver under paragraph (1).

(s) Consideration of benefits received as battered alien in determination of inadmissibility as likely to become public charge

In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General [Secretary of Homeland Security] shall not consider any benefits the alien may have received that were authorized under section 1641(c) of this title.