



HQPRD 70/23.10

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS
NATIONAL BENEFITS CENTER DIRECTOR

From: Michael Aytes /S/
Acting Director of Domestic Operations

Date: October 31, 2005

Re: Waivers under Section 209(c) of the Immigration and Nationality Act (AFM Update 05-33)

1. Purpose

This memorandum directs adjudicators to use revised standards for determining whether Form I-602, Application by Refugee for Waiver of Grounds of Excludability, is required for granting waivers under section 209(c) of the Immigration and Nationality Act (the Act).

2. Background

Section 209 of the Act permits the Secretary of Homeland Security to adjust the status of eligible refugees and asylees to that of lawful permanent resident. Under section 209(c) of the Act, eligible asylees and refugees seeking adjustment of status are exempt from the following grounds of inadmissibility: sections 212(a)(4) [public charge], 212(a)(5) [labor certification], and 212(a)(7)(A) [immigrant documentation requirements] of the Act. Section 209(c) of the Act prohibits the Secretary of Homeland Security from waiving a ground of inadmissibility under sections 212(a)(2)(C) [controlled substance traffickers] and 212(a)(3)(A), (B), (C), and (E) [security and related grounds] of the Act. Notwithstanding, section 209(c) grants the Secretary of Homeland Security the discretion to waive any other ground of inadmissibility under section 212(a) for humanitarian, family unity, and public interest purposes.

Generally, refugees and asylees seeking adjustment of status have been required to submit Form I-602 if they need a waiver of inadmissibility. Form I-602 has been submitted either concurrently with Form I-485, Application to Register Permanent Residence or Adjust Status, or in response to an officer's request for Form I-602 prior to the adjudication of Form I-485. On July 11, 2003, United States

Citizenship and Immigration Services (USCIS) issued a memorandum, entitled “Waivers of Inadmissibility for Asylees Applying for Adjustment of Status Under Section 209 of the INA,” which enumerated standards for determining when a Form I-602 may not be required. The standards, however, were limited to asylees seeking adjustment of status who were inadmissible under section 212(a)(6)(A)(i) [present without inspection or admission] and/or section 212(a)(9)(B) [unlawful presence] of the Act.

3. Policy Consideration

Many applicants for adjustment of status under section 209 of the Act who are inadmissible based upon a ground of inadmissibility that may be waived under section 209(c) of the Act do not submit a Form I-602 with their application for adjustment of status. Prior to this memorandum, USCIS policy was that only section 212(a)(6)(A)(i) and section 212(a)(9)(B) could be waived without requiring submission of a Form I-602. This was true even if USCIS records and other information available to the adjudicator contained sufficient information to assess eligibility for waiver of another ground of inadmissibility that may be waived and there was no evidence to suggest that negative factors would adversely impact the exercise of discretion to grant a waiver. Consequently, applicants were often required to submit, and USCIS processed, a Form I-602 and attachments providing information already available in other records accessible to the adjudicator (e.g., documentation from the applicant’s refugee or asylum application).

To improve the efficiency of the 209(c) waiver adjudication process, this memorandum provides adjudicators with the discretion to adjudicate and grant a waiver without a Form I-602 to refugee and asylee adjustment applicants who are inadmissible under any ground that may be waived, except for section 212(a)(1) [health-related grounds] of the Act, which has its own unique waiver requirements at section 212(g) of the Act, provided that USCIS records and other information available to the adjudicator 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. This policy change will reduce the submission of duplicative information that is already available in records accessible to the adjudicator.

4. Field Guidance

Adjudicators are directed to comply with the instructions in section 6 of this memorandum, which amends Chapter 41.6 of the Adjudicator’s Field Manual (*AFM*). The substantive changes are limited to section 41.6(b), which provides guidance regarding (1) when Form I-602 is required and may not be required, and (2) other aspects of waiver adjudication. Section 41.6(a) has been revised for clarity but remains substantively the same. The former section 41.6(b), governing medical waivers for asylees and refugees, has been moved to section 41.6(c) but is otherwise unchanged.

5. Contact Information

Questions regarding inadmissibility waivers available to refugee and asylee adjustment applicants under section 209(c) of the Act may be directed to Jonathan Mills, Office of Program and Regulations Development. Questions concerning section 209 adjustment of status issues, in general, may be directed to Mark Phillips, Office of Program and Regulations Development.

6. AFM Update

1. Chapter 41.6 of the *AFM* is revised as follows:

(a) Legal Authority. Under section **section 209(c)** of the Act, the inadmissibility grounds set out in sections 212(a)(4) (public charge), 212(a)(5) (labor certification), and 212(a)(7)(A) (immigrant documentation requirements) of the Act do not apply to asylee and refugee adjustment applicants.

Section 209(c) of the Act prohibits the Secretary from waiving the following grounds of inadmissibility:

- Section 212(a)(2)(C) of the Act relating to drug trafficking;
- Section 212(a)(3)(A) of the Act relating to security grounds;
- Section 212(a)(3)(B) of the Act relating to terrorist activities;
- Section 212(a)(3)(C) of the Act relating to foreign policy considerations; and
- Section 212(a)(3)(E) of the Act relating to Nazi persecution and genocide.

The Secretary may waive any other ground of inadmissibility under section 212(a) of the Act for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

(b) Adjudication of Waiver. An asylee or refugee may submit a Form I-602, Application By Refugee For Waiver of Grounds of Excludability, concurrently with the submission of the Form I-485, Application to Register Permanent Residence or Adjust Status. The grant of asylee or refugee status does not automatically waive any ground of inadmissibility. Each waiver request or application must be evaluated and adjudicated on a case-by-case basis. The grant and other information available

to the adjudicator may provide a sufficient basis for determining that a waiver is warranted on humanitarian, family unity, or other public interest grounds.

In adjudicating a discretionary waiver application under 209(c) of the Act, the humanitarian, family unity, or public interest considerations must be balanced against the seriousness of the offense that rendered the alien inadmissible. In making this determination, the adjudicator should recognize that the alien has established past or a well-founded fear of future persecution, which is an extremely strong positive discretionary factor. Therefore, unless there are negative factors that outweigh the positive ones, the adjudicator should generally approve the waiver application.

If an alien is inadmissible under section 212(a)(2) of the Act because he or she committed a violent or dangerous crime, the adjudicator should not grant a waiver under section 209(c) of the Act except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that denying adjustment of status would result in exceptional and extremely unusual hardship. Depending on the gravity of the alien's underlying criminal offense, such a showing of exceptional and extremely unusual hardship might still be insufficient. See *Matter of Jean*, 23 I.&N. Dec. 373 (A.G. 2002).

Neither section 209 of the Act nor 8 C.F.R. 209 requires submission of Form I-602 in all cases where an alien is found inadmissible under a ground that may be waived. Paragraph (b)(1) below specifies when USCIS may grant a waiver without requiring the applicant to file Form I-602. Paragraph (b)(2) below specifies how to process a case when a Form I-602 is required.

(1) When Form I-602 is Not Required. In certain instances, USCIS has determined that submission of Form I-602 is not required. When an adjudicator determines that a refugee or asylee requires a waiver prior to adjustment of status, the adjudicator may grant the waiver without requiring submission of Form I-602 if:

- The applicant is inadmissible under a ground of inadmissibility that may be waived other than section 212(a)(1) of the Act [health related grounds];
- USCIS records and other information available to the adjudicator contain sufficient information to assess eligibility for a waiver; and

- There is no evidence to suggest that negative factors would adversely impact the exercise of discretion.

If these requirements are met, it is in the public interest to grant the waiver without requiring submission of Form I-602. In addition, it is in the public interest to decrease the burden on both the applicant and USCIS with respect to processing paperwork that is already available to the adjudicator.

The adjudicator should indicate that the waiver has been granted by annotating and initialing the “Remarks” section of the Form I-485 that the inadmissibility violation has been waived. For example, if the adjudicator grants a waiver of section 212(a)(6)(A)(i) (present without admission or parole) or section 212(a)(9)(B) (unlawfully present) of the Act, then the adjudicator should annotate and initial in the “Remarks” section: “212(a)(6)(A)(i) violation waived” or “212(a)(9)(B) violation waived.”

(2) When Form I-602 is Required. If the ground of inadmissibility may be waived but the requirements noted in (b)(1) are not satisfied, the adjudicator should require the refugee-based or asylum-based adjustment applicant to submit Form I-602 if the applicant has not already done so.

Example: If it is determined that a refugee adjustment applicant is inadmissible under section 212(a)(6)(C) of the Act because he or she entered the U.S. under a false identity, this could be considered a negative factor that adversely impacts the exercise of discretion. In this situation, an adjudicator must require the refugee-based adjustment applicant to file a Form I-602 with an explanation, and supporting documentation if available, demonstrating that the alien is eligible for and should be granted a waiver under section 209(c) as a matter of discretion.

(A) Approval of Form I-602. If the waiver is approved under section 209(c) of the Act for a refugee or asylee applying for adjustment of status under section 209 of the Act, the adjudicator should place the waiver notation on Form I-181 [Memorandum of Creation of Record of Lawful Permanent Residence]. In addition, the adjudicator should place the waiver notation on Form I-602 and retain it in the A-file.

Since the approval of the adjustment application will indicate the approval of the waiver application, there is no need for a separate approval notice. The adjudicator should simply stamp the Form I-602 approved, check the block labeled “Waiver of Grounds of Inadmissibility is Granted,” and make the appropriate endorsements in the space labeled “Basis For Favorable Action.”

(B) Denial of Form I-602. If the alien submits on his or her own initiative a Form I-602 application seeking waiver of inadmissibility of [section 212\(a\)\(2\)\(C\)](#), [212\(a\)\(3\)\(A\)](#), [212\(a\)\(3\)\(B\)](#), [212\(a\)\(3\)\(C\)](#) or [212\(a\)\(3\)\(E\)](#) of the Act, or if there are sufficient negative factors to warrant denial of a Form I-602 application for waiver of a ground of inadmissibility that may be waived, the adjudicator should check the block labeled "Waiver of Grounds of Inadmissibility is Denied," and write "See Form I-291" in the space labeled "Reasons." The denial of the waiver should be fully discussed in the denial of the adjustment application. While there is no appeal from the denial of a Form I-602 waiver application, the immigration judge may consider the waiver application if the adjustment application is renewed during removal proceedings.

(c) Medical Waivers for Refugees and Asylees. A refugee or asylee adjustment applicant who is inadmissible on medical grounds may be granted a waiver in accordance with the general provisions described in Chapter 41.6(a). Depending on the medical ground of inadmissibility that has been found, however, additional steps and/or documentation may be required.

(1) HIV. For additional filing requirements relating to HIV, refer to Chapter 41.3(a)(2).

(2) Waivers of Vaccination Requirements for Refugees and Asylees. The vaccination requirements under section 212(a)(1)(A)(ii) of the Act are discussed generally in Chapter 23.3 of this field manual. The special designation of state and local health departments for refugees adjusting under section 209 of the Act is generally discussed in Chapter 83.4 of this field manual. The following are examples of situations that would be considered humanitarian reasons for granting a waiver of this requirement under section 209(c) of the Act to a refugee or asylee adjustment applicant:

- The refugee or asylee adjustment applicant receives the missing vaccinations or the civil surgeon certifies that the missing vaccination is not medically appropriate. When the civil surgeon certifies that a refugee or asylee adjustment applicant has received the vaccinations that were missing upon the initial application or that the missing vaccination is not medically appropriate, neither Form I-602 nor a fee is required. Streamlined procedures should be used to grant a waiver under section 209(c) of the Act, similar to the streamlined procedures used to grant a waiver under section 212(g)(2)(A) or (B) of the Act as discussed in Chapter 41.3 of this field manual.

- Objection to vaccinations because of religious beliefs or moral convictions or establishment of other reasons that would merit a waiver under section 209(c) of the Act. A refugee or asylee adjustment applicant who states that compliance with the vaccination requirements would be contrary to his or her religious beliefs or moral convictions may also benefit from a waiver under section 209(c) of the Act for humanitarian reasons. In these cases, Form I-602 is required. Form I-602 is also required when the applicant expresses other reasons for the waiver that would be considered humanitarian, assure family unity, or otherwise be in the public interest. In either of these two cases, no fee is required with Form I-602. The adjudicator should also consult Chapter 41.3 of this field manual.

NOTE: The same general considerations for granting an automatic waiver under section 212(g)(2)(B) of the Act due to vaccination shortages (described in Chapter 41.3(d)(3)(B) of this field manual) also apply to waivers under section 209(c) of the Act.

(3) Physical or mental disorder with associated harmful behavior. Generally, an asylee or refugee applicant for adjustment is inadmissible when a civil surgeon certifies that the adjustment applicant has a physical or medical disorder (including other substance-related disorder) with harmful behavior or history of such behavior that is likely to recur. In such cases, adjustment applicants may seek a waiver of this ground of inadmissibility. USCIS receives these waiver applications and forwards them to the Centers for Disease Control (CDC) Division of Global Migration and Quarantine (DGMQ) for review before USCIS makes a final decision on the waiver.

For adjustment of status applicants, the USCIS adjudicator shall forward a copy of all the following documents to DGMQ prior to making a final decision on the waiver:

- Form I-693, Medical Examination of Aliens Seeking Adjustment of Status;
- Form I-602, Application by Refugee for Waiver of Grounds of Excludability (require applicant to submit if not already submitted); and
- Any other supporting documentation regarding the mental or physical disorder and associated harmful behavior. (These documents may include mental status evaluation, doctor records/letters, hospital records, police records, school records, etc.)

The documents should be forwarded by mail to:
CDC, 1600 Clifton Rd., Atlanta, GA 30333, Attention-DGMQ, MS-E 03

Upon receipt, the documents will be reviewed by a CDC consultant psychiatrist. The results of this review will be forwarded to the USCIS office requesting such review. If the CDC's review indicates that the applicant's medical condition is: a ground for exclusion from the United States (Class A), or otherwise represents such significant health problems that it must be brought to the attention of consular or immigration authorities (Class B), then the CDC will issue CDC Form 4.422-1, Statement in Support of Application Waiver, to the requesting USCIS office. The USCIS adjudicator will then request that the applicant or applicant's sponsor identify an appropriate health care provider to oversee the applicant's medical care, and return the completed form to the CDC. After CDC has received and reviewed this completed form, the CDC will endorse the form and return it to the USCIS office that requested the waiver review.

USCIS adjudicators will make a final decision on the waiver application upon receipt of the CDC endorsed 4.422-1 form.

NOTE: The CDC's DGMQ will also review cases where the adjudicating officer has additional documentation indicating that the applicant may not have been correctly classified by the civil surgeon and would like an opinion on the diagnosis and classification.

2. The *AFM Transmittal Memoranda* button is revised by adding a new entry, in numerical order, to read:

AD 05-33 10/31/05	Chapter 41.6	This memorandum replaces Chapter 41.6 of the <i>Adjudicator's Field Manual (AFM)</i> with a revised Chapter 41.6 .
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cc: CIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection