Defending Non-Citizens in Illinois, Indiana, and Wisconsin

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"[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

DISCLAIMER

This manual is NOT INTENDED to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to public defenders and criminal defense attorneys who are working with non-citizen clients. Due to the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, and federal court rulings, attorneys are strongly urged to contact and collaborate closely with an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.

CHAPTER

4

Grounds of Inadmissibility

Inadmissibility

An applicant for admission to the United States, including an applicant for adjustment of status, must overcome the grounds of inadmissibility in order to be granted lawful permanent residence. The grounds of inadmissibility are enumerated under I.N.A. § 212, 8 U.S.C. § 1182 and include the presentation of a false alien registration ("green") card to a U.S. official at a U.S. border, which may be considered to be the fraudulent or willful misrepresentation of a material fact to obtain an immigration benefit.[550] With the passage of IIRAIRA, grounds of inadmissibility were added, including lack of proof of vaccinations, unlawful presence, and a permanent bar for false claims to United States citizenship made on or after September 30, 1996.[551] Certain grounds of inadmissibility also correspond to the grounds of deportability, such as false claims to U.S. citizenship.

[550] *See, e.g.*, Kalejs v. I.N.S., 10 F.3d 441 (7th Cir. Nov. 17, 1993), *rehearing denied* Dec. 30, 1993, *cert. denied* 510 U.S. 1196, 127 L. Ed. 2d 656, 114 S. Ct. 1305 (1994) (holding that the non-citizen gave false and material statements regarding involvement with Nazis in his application for a visa); Esposito v. I.N.S., 936 F.2d 911 (7th Cir. Jul. 3, 1991), rehearing and rehearing en banc denied Aug. 8, 1991 (holding that a non-citizen who used false documents to enter the U.S. was not admissible and not entitled to a waiver to obtain the status of lawful permanent residency); Patel v. I.N.S., 811 F.2d 377 (7th Cir. Feb. 3, 1987); *see also*, 212(i) Waivers, *infra* at 6-62 (discussing a discretionary waiver for fraud or willful misrepresentations of material facts).

[551] *See* Kechkar v. Gonzales, 500 F.3d 1080 (10th Cir. Jul. 11, 2007) (finding that where a non-citizen has checked the box "U.S. citizen or national" on Form I-9 for employment after September 30, 1996, her action constitutes a claim for any purpose or benefit under state or federal law and thus falls within INA § 212(a)(6)(C)(ii), 8 U.S.C. §1182(a)(6)(C)(ii) for which a waiver is not available under INA § 212(i), 8 U.S.C. §1182(i)); Theodros v. Gonzales, 490 F.3d 396 (5th Cir. Jun. 25, 2007); Ateka v. Ashcroft, 384 F.3d 954 (8th Cir. Sept. 24, 2004); U.S. v. Karaouni, 379 F.3d 1139 (9th Cir. Aug. 24, 2004); *see also*, False Claims to U.S. Citizenship, *supra* at 3-60. Note: a refugee or asylee who falsely claims to be a U.S. citizenship may have this ground of inadmissibility waived under INA §209(c), 8 U.S.C. §1159(c) in the conjunction with an application for adjustment of status under INA §209, 8 U.S.C. §1159.

Where a non-citizen made a false claim to United States citizenship prior to September 30, 1996, he may be eligible for a waiver.[552] A limited exception to the ground of inadmissibility for false claims to U.S. citizenship exists where:

4. each natural parent of the non-citizen (or each adopted parent) is or was a U.S. citizen;
5. the non-citizen permanently resided in the U.S. before age 16; and
6. the non-citizen reasonably believed at the time that he made the representation that he was a U.S. citizen.[553]

Whether a ground of inadmissibility may be waived depends upon the circumstances of an individual non-citizen. For example, almost every ground of inadmissibility may be waived for a non-citizen who is applying for a non-immigrant visa or admission to the U.S. for a temporary period.[554]

In comparison to waivers available for non-immigrants, there are limited waivers available for lawful permanent residents and non-citizens applying for adjustment of status or an immigrant visa who have qualifying U.S. citizen or lawful permanent resident relatives. Certain grounds of inadmissibility, including visa fraud, unlawful presence, prostitution, and crimes involving moral turpitude, may be waived under I.N.A. § 212(h), 8 U.S.C. § 1182(h) or I.N.A. § 212(i), 8 U.S.C. § 1182(i). Permanent bars, which cannot be waived for an applicant for adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255 or for an applicant for an immigrant visa at a U.S. Embassy or Consulate, include any conviction or admission for violation of a controlled substance law (other than where a non-citizen qualifies for a waiver for a single simple possession offense for less than thirty grams of marijuana) and any conviction or admission of facts related to murder or torture. S visa holders, U visa holders, T visa holders, and VAWA applicants for adjustment of status may be eligible for waivers of certain permanent bars to inadmissibility.[555]

Unlike other non-citizens who apply for adjustment of status under I.N.A. § 245, 8 U.S.C. § 1255, refugees and asylees apply for adjustment of status under I.N.A. § 209, 8 U.S.C. § 1159. This section of the Immigration and Nationality Act provides refugees and asylees with the opportunity to apply for a very broad waiver of almost all of the grounds of inadmissibility, including possession of a controlled substance and false claims to U.S. citizenship.[556]

Unlike the grounds of deportability, which require a conviction as defined under I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) to sustain a finding of deportability, a conviction is <u>not</u> required to sustain a finding that a non-citizen is inadmissible for certain criminal activity. A non-citizen is inadmissible if he has been convicted of, admits having

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[552] I.N.A. §212(i), 8 U.S.C. §1182(i); *see* §212(i) Waivers, *infra* at 6-62.
[553] I.N.A. § 212(a)(6)(c)(ii)(II), 8 U.S.C. § 1182(a)(6)(c)(ii)(II).
[554] *See* I.N.A. § 212(d), 8 U.S.C. § 1182(d).
[555] *See* S Visas, *infra* at 6-76; U visas, *infra* at 6-72; T visas, *infra* at 6-74; VAWA Adjustment of Status, *infra* at 6-67.
[556] *See* Termination of Asylum and Adjustment of Status for Refugees and Asylees, *infra* at 6-36.

committed, or admits having committed acts which constitute the essential elements of a crime involving moral turpitude or a controlled substance offense.[557] To constitute a valid admission, the interviewing DHS officer, U.S. Department of State official, or Immigration Judge must explain the offense in plain terms and the non-citizen must voluntarily admit to the elements of the offense.[558]

A non-citizen does <u>not</u> have to be *convicted* of an offense to be found inadmissible. The voluntary sworn admission of facts related to a crime involving moral turpitude or a controlled substance offense before a CIS officer, a U.S. Department of State official, or an Immigration Judge is sufficient to render the non-citizen inadmissible.

Non-citizens who have not previously adjusted their status to become lawful permanent residents and who are inadmissible on account of their criminal activities or convictions may be eligible for a § 212(h) waiver in conjunction with their applications for adjustment of status, even if they have been convicted of an aggravated felony.[559] A non-citizen who is not a lawful permanent resident, including a conditional permanent resident, and who has been convicted of an aggravated felony may be expeditiously removed by the DHS without a hearing before the Immigration Court or before his applications for adjustment of status and a § 212(h) waiver are adjudicated by the CIS.[560]

Convictions for most crimes involving moral turpitude can be waived, depending upon the immigration status of the non-citizen at the time of her application for adjustment of status. Discretionary waivers for criminal grounds of inadmissibility are available under I.N.A. § 212(h), 8 U.S.C. § 1255(h), to non-citizens present in the United States and abroad.[561] Waivers are not available to non-citizens with convictions involving controlled substances other than for one conviction for simple possession of thirty grams or less of marijuana.[562] A conviction for a firearms violation does not preclude a showing of admissibility under I.N.A. § 245(a), 8 U.S.C. § 1255(a), because it is not a ground of

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[557] *See* I.N.A. § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i); "LSD as Therapy? Write About it, Get Barred from U.S.: BC Psychotherapist Denied Entry After Border Guard Googled His Work," *The Tyee*, http://thetyee.ca/News, Apr. 25, 2007.

[558] *See, e.g.*, *In re* G.M., 7 I&N Dec. 40 (A.G. Apr. 2, 1956).

[559] *See* I.N.A. § 245(i), 8 U.S.C. § 1255(i); I.N.A. § 212(h), 8 U.S.C. § 1182(h); *In re* Michel, 21 I&N Dec. 1101 (BIA Jan. 30, 1998); *see also*, *In re* Ayala-Arevalo, 22 I&N Dec. 398 (BIA Nov. 30, 1998).

[560] *See* I.N.A. § 238(b), 8 U.S.C. § 1228(b); *see also* U.S. v. Hernandez-Vermudez, 356 F.3d 1011, 1012 (9th Cir. Jan. 26, 2004) (holding that a non-citizen who illegally enters the U.S. and commits an aggravated felony is subject to administrative removal pursuant to I.N.A. § 238(b), 8 U.S.C. § 1228(b)).

[561] *See* De Lucia v. I.N.S., 370 F.2d 305, 308, n.2 (7th Cir. Nov. 17, 1966), *cert. denied*, 386 U.S. 912, 87 S.Ct. 861, 17 L.Ed.2d 784 (1967); *In re* Alarcon, 20 I&N Dec. 557 (BIA Jul. 13, 1992); *In re* Parodi, 17 I&N Dec. 608, 611-12 (BIA Dec. 23, 1980).

[562] *See* I.N.A. § 212(h), 8 U.S.C. § 1182(h). For a broader waiver available only to refugees and asylees for possession of controlled substances other than 30 grams or less of marijuana, *see* Termination of Asylum and Adjustment of Status for Asylees and Refugees, *infra* at 6-36.

inadmissibility under I.N.A. § 212(a)(2)(A), 8 U.S.C. § 1282(a)(2)(A).[563] Certain firearms convictions may, however, be found to be aggravated felonies and preclude the favorable exercise of discretion in applications for adjustment of status for non-citizens who are not lawful permanent residents; such non-citizens may also be subject to receiving final administrative removal orders issued by the DHS and removal from the U.S. without review by the Immigration Court.[564]

In a significant departure from past law, lawful permanent residents who have committed certain crimes and have not been granted a waiver under I.N.A. § 212(h)[565] or cancellation of removal[566] are subject to the grounds of inadmissibility upon their return to the United States.[567] This includes permanent residents who fly to another country for business or vacation as well as those who cross the Canadian or Mexican border to shop or visit family members for only a few hours and then return to the United States. When a lawful permanent resident presents herself at the border, she will have to answer questions from a federal officer, including whether she has ever been convicted of any crimes. If a lawful permanent resident has been convicted for a crime which is a ground of inadmissibility but has not previously been granted a waiver in the past, she may be detained without bond by ICE and placed in removal proceedings.

A lawful permanent resident who is deportable for having been convicted of a crime not deemed to be an aggravated felony or a controlled substance offense (other than one simple possession conviction of 30 grams or less of marijuana) may be eligible to apply for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a). In comparison, a lawful permanent resident who has been convicted of an aggravated felony which falls within the grounds of inadmissibility is statutorily barred from applying for a waiver under I.N.A. § 212(h), 8 U.S.C. § 1182(h), in conjunction with an application for adjustment of status.[568] In very limited situations where a lawful permanent resident has been convicted of an aggravated felony which does not fall within one of the grounds of inadmissibility and she has not been aggregately sentenced for criminal offenses to 5 years or more of imprisonment, she may be eligible to adjust her status to become a lawful permanent

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[563] *See, e.g.*, *In re* Rainford, 20 I&N Dec. 598 (BIA Sept. 9, 1992); *In re* Azurin, 23 I&N Dec. 695, 697-99 (BIA Mar. 9, 2005) (reaffirming *In re* Gabryelsky, 20 I&N Dec. 750 (BIA Nov. 3, 1993); *In re* Gabryelsky, 20 I&N Dec. 750 (BIA Nov. 3, 1993) (holding that a non-citizen could simultaneously apply for a waiver of deportability under I.N.A. § 212(c), 8 U.S.C. § 1182(c) in conjunction with an application for adjustment of status under I.N.A. § 245(a), 8 U.S.C. § 1255(a)); *see also*, Snajder v. I.N.S. 29 F.3d 1203, 1208 (7th Cir. Jul. 21, 1994).

[564] *See* I.N.A. § 238(b), 8 U.S.C. § 1228(b); Final Administrative Removal Orders, *infra* at 6-3.

[565] *See* § 212(h) Waivers, *infra* at 6-58.

[566] *See* Cancellation of Removal, *infra* at 6-23.

[567] In *In re* Collado, 21 I&N Dec. 1061 (BIA Feb. 28, 1998) (en banc), the Board of Immigration Appeals held that the language of I.N.A. § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v), compelled the finding that when a lawful permanent resident who has committed an offense identified under I.N.A. § 212(a)(2), 8 U.S.C. § 1182(a)(2) and who has not since such time been granted relief under 8 U.S.C. §§ 1182(h) and 1229b(a) departs the United States and returns, he shall be regarded as seeking an admission into the United States despite his lawful permanent resident status. The Board stated that the permanent resident is seeking an admission and that the *Fleuti* doctrine regarding entry and a "brief, casual, and innocent departure" does not apply under the clear change in the law. *Id.*

[568] *See* I.N.A. § 212(h), 8 U.S.C. § 1182(h); *see also*, § 212(h) Waivers, *infra* at 6-58.

resident again as a § 212(h) waiver will not be required.[569] A returning lawful permanent resident may be eligible for a "stand-alone" §212(h) waiver.[570]

Smuggling, broadly defined, can constitute a permanent bar to adjustment of status. A non-citizen who knowingly aids another non-citizen to enter the U.S. illegally is inadmissible under I.N.A. § 212(a)(6)(E)(i), 8 U.S.C. § 1182(a)(6)(E)(i).[571] A waiver may be available under I.N.A. § 212(d)(11), 8 U.S.C. § 1182(d)(11) where the person who the non-citizen encouraged, aided, assisted or abetted was his spouse, parent, son, or daughter at the time of illegal entry.

Foreign Offenses

A foreign conviction may also constitute a ground of inadmissibility. A foreign conviction will still have immigration consequences if it is recognized as involving a criminal offense by U.S. standards.[572] Thus, a foreign proceeding must be criminal in nature under the governing laws of the prosecuting jurisdiction at a minimum.[573] Where, however, a foreign conviction is not "purely political" and there is substantial evidence that the offense was not fabricated or trumped-up, then it will not fall within the "purely political offense" exception to the grounds of inadmissibility for a crime involving moral turpitude.[574]

Application to Cases

Case of Herbert from France

Herbert came to the United States as an F-1 student in August 2003. In March 2006, he pled guilty to possession of 6 grams of cocaine and was placed on first offender probation under 720 ILCS 570/410. In January 2007, he married a United States citizen, Harriet. Harriet and Herbert went to file applications for a family visa and lawful permanent residency for him at the CIS office. At the filing window, the clerk reviewed his application

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[569] *See In re* Torres-Varela, 23 I&N Dec. 78 (BIA May 9, 2001) (upholding a grant of adjustment of status to a lawful permanent resident with a DUI conviction found to be an aggravated felony but not a crime involving moral turpitude or other ground of inadmissibility). Note: A DUI conviction with a one year sentence imposed is no longer considered an aggravated felony. *See* Leocal v. Ashcroft, 543 U.S. 1 (Nov. 9, 2004).

[570] *See In re Abosi*, 24 I&N Dec. 204, 207 (BIA Jun. 19, 2007) (holding that a returning lawful permanent resident seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in conjunction with an application for a § 212(h) waiver).

[571] *See* Olowo v. Ashcroft, 368 F.3d 692 (7th Cir. May 11, 2004); Sanchez-Marquez v. I.N.S., 725 F.2d 61, 63 (7th Cir. Jan. 10, 1984) (allowing proof by circumstantial evidence that a non-citizen knowingly assisted several other non-citizens to enter the U.S. illegally).

[572] *See In re* De La Nues, 18 I&N Dec. 140 (BIA Oct. 5, 1981); *In re* McNaughton, 16 I&N Dec. 569 (BIA Jul. 26, 1978) *aff'd,* 612 F.2d 457 (9th Cir. Jan. 2, 1980).

[573] *See In re* Eslamizar, 23 I&N Dec. 684, 688 (BIA Oct. 19, 2004).

[574] *See In re* O'Cealleagh, 23 I&N Dec. 976, 980 (BIA Aug. 30, 2006) (discussing three recognized types of political offenses: 1. a fabricated, baseless or trumped-up charge; 2. act(s) directed against the state, such as treason, sedition, or espionage that contain none of the elements of ordinary crimes; and 3. a common offense so connected with a political act that it is regarded as a "political offense").

and noted that he had checked the box for having been arrested, with an explanation about his conviction for cocaine possession on a separate page. She called an ICE officer who came to the counter and arrested him.

Analysis: Herbert is permanently inadmissible (as well as deportable) for having violated a controlled substance law.[575] No waivers are available for controlled substance violations unless it is for one simple possession of thirty grams or less of marijuana and the non-citizen qualifies for a § 212(h) waiver.[576] Herbert may be placed in removal proceedings by the DHS immediately after his arrest. He has no defense from removal unless a petition for post-conviction relief is successful.[577] If Herbert were to try to return to the U.S. with a non-immigrant visa, a wavier may be available to him under I.N.A. § 212(d)(3), 8 U.S.C. § 1182(d)(3).

Case of Pamela from Guinea

Pamela came to the United States as a lawful permanent resident in 1989 based on the family visa petition filed in 1983 by her lawful permanent resident father. In October 1991, she pled guilty to charges for theft of a camcorder valued at $1200, a Class 3 felony, under 720 ILCS 5/16-1(a)(5)(A) and 720 ILCS 5/16-1(b)(4). The court placed her on probation for 3 years. In December 2006, she went to Toronto, Canada to visit her sister who was studying at a university in Toronto. When she presented herself to CBP officers in Detroit upon her attempted return to the United States in January 2007, she was questioned by the officers. They asked her how long she had been out of the country, why she had gone to Canada, and if she had committed any crimes in the United States before she went to visit her sister in Toronto. She told them that she had been convicted for theft but did not serve any jail time. The officers arrested her and detained her at the local DHS detention facility.

Analysis: Pamela is inadmissible. As a lawful permanent resident, she is subject to the grounds of inadmissibility upon her return to the United States. Pamela has been convicted of a crime involving moral turpitude which does not meet the petty offense exception under I.N.A. § 212(a)(2)(A)(ii), 8 U.S.C. § 1182(a)(2)(A)(ii), since the maximum penalty possible for the crime for which she was convicted exceeds one year of imprisonment. In addition, she did not apply for or receive a grant under § 212(h) or cancellation of removal prior to going to Canada. She will have a hearing with an Immigration Judge under removal proceedings to determine whether she is eligible for and merits either a § 212(h) waiver or a § 212(c) waiver to avoid removal from the United States.[578] She is ineligible for cancellation of removal as she committed her theft offense within two years of being a lawful permanent resident.[579]

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[575] *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999); *see also*, Definition of Conviction, *supra* at 2-3.
[576] *See* § 212(h) Waivers, *infra* at 6-58.
[577] *See* Post-Conviction Relief, *infra* at 8-12 to 8-24.
[578] *See* § 212(h) waivers, *infra* at 6-58; § 212(c) waivers, *infra* at 6-48.
[579] *See* Cancellation of Removal for Lawful Permanent Residents, *infra* at 6-23.

NSEERS

After September 11, 2001, the U.S. government took aggressive steps to end terrorist acts in the U.S. Congress mandated a requirement for a comprehensive entry-exit program, and the U.S. Department of Justice responded with the National Security Entry-Exit Registration System (NSEERS).[580] Implemented on September 11, 2002, NSEERS was designed to track certain non-immigrants entering, exiting, and remaining in the U.S.

The classification of non-immigrants includes persons who are not lawful permanent residents or U.S. citizens and are admitted into the U.S. for a temporary period. Efforts focused on non-citizens from many Middle Eastern countries and other countries suspected of having high numbers of terrorists or terrorist organizations. Nationals or citizens of these designated countries were called to re-register their presence in the U.S. within 30 days of initial registration at a port of entry and annually if they remained in the U.S. beyond one year.[581]

Countries Currently Designated for NSEERS Registration[582]

- All citizens or nationals from Iran, Iraq, Libya, Sudan or Syria.
- Male citizens or nationals between ages 16-45 from Pakistan, Saudi Arabia, and Yemen.
- Non-citizens with unexplained travel to the above countries and others such as North Korea, Cuba, Afghanistan, Egypt, Indonesia, and Malaysia may also be required to comply.

The DHS is now responsible for carrying out NSEERS and has suspended several of the requirements. For example, designated non-immigrants no longer need to re-register their presence after entry during their stay. However, as a matter of discretion, the DHS may call in a non-immigrant for an interview to verify that he is complying with the requirements of his stay.[583] Some of the original requirements remain, however, and designated non-immigrants are still required to register their entry upon arrival to the U.S. If a DHS official requires the non-immigrant to register his entry, he must always register his exit from the U.S. as well.[584] Only certain ports of entry and exit have the capability of executing NSEERS requirements.[585]

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580 *See* U.S. Immigration and Customs Enforcement, www.ice.gov.

581 *See* "Changes to NSEERS," www.ice.gov, Dec. 1, 2003.

582 *See Immigration & Nationality Law Handbook*, American Immigration Lawyers Association 2006-2007 Ed., "National Security Entry-Exit Registration System (NSEERS) (Special Registration)," pp. 711-13.

583 *See* "Changes to NSEERS," www.ice.gov, 12/01/03.

584 *See* 8 C.F.R. § 264.1(f).

585 A listing of ports can be found at www.dhs.gov. *See Immigration & Nationality Law Handbook*, American Immigration Lawyers Association 2006-2007 Ed., "Actions at the Time of Departure May Affect the Ability to Return," p. 713.

NSEERS should not be confused with US-VISIT, another security enhancement program using biometrics that required all non-immigrants to register entry and departure from the U.S. US-VISIT was a three year pilot program that ended on May 6, 2007. Non-citizens exiting the U.S. are no longer required to comply with US-VISIT. However, the DHS is working to make biometrics part of the existing international departure process, a strategy that is based on the lessons learned from the US-VISIT program.[586] Until regulations are established, all non-immigrants subject to the requirements of NSEERS must continue to register with NSEERS.[587]

If a designated non-immigrant does not comply with NSEERS requirements, he will be considered out of status and subject to arrest, detention, fines and/or removal from the country.[588] He may also be considered inadmissible upon his next attempt to be admitted to the U.S., including in the context of an application for a change of status or adjustment of status.[589] If a non-immigrant fails to register his exit when required and seeks subsequent reentry, the DHS may presume that he seeks entry in order to engage in unlawful activity, a ground of inadmissibility under I.N.A. § 212(a)(3)(A)(ii), 8 U.S.C. § 1182(a)(3)(A)(ii).[590] A non-immigrant is also required to notify the DHS of any address change within 10 days if he is in the U.S. for more than 30 days.[591] If he fails to register his changes of address, he may be subject to criminal prosecution under I.N.A. § 266(b), 8 U.S.C. § 1306(b) and deportable under I.N.A. § 237(a)(3)(A), 8 U.S.C. § 1227(a)(3)(A).

Adam Walsh Child Protection Act of 2006

The Adam Walsh Child Protection and Safety Act of 2006 was signed into law on July 27, 2006 with the aim of countering violent and sexual crimes against children.[592] It is named after Adam Walsh, a six year old boy who was abducted and later found murdered in 1981.[593]

What does the Adam Walsh Child Protection Act do?

- Establishes the National Sex Offender Registry, for which convicted sex offenders are required to register and appear for check-in appointments. The number of years for which a sex offender is required to register and the number of times for which he is required to appear for check-ins depends on the severity of the offense.

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586 *See* "US-VISIT Moves Out of Biometric Exit Pilot Phase," *Department of Homeland Security,* www.dhs.gov, May 4, 2007.

587 *See Kurzbans: Immigration Law Sourcebook*, 11th Ed. 2008-2009, "Special Registration – NSEERS," pp. 148-51.

588 *See* U.S. Immigration and Customs Enforcement, www.ice.gov; Hadayat v. Gonzales, 458 F.3d 659, 665 (7th Cir. Aug. 15, 2006) (holding that it did not have jurisdiction to review a constitutional challenge to the NSEERS registration program).

589 *See* 8 C.F.R. § 264.1(f)(8)(ii).

590 *See id.*

591 Form AR-11 and instructions can be found on the CIS website at www.uscis.gov.

592 *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (Jul. 27, 2006).

593 *See* "Legislative Notice: H.R. 4472 – Adam Walsh Child Protection and Safety Act of 2006," *U.S. Senate and Republican Policy Committee*, Jul. 20, 2006.

- Increases penalties for a variety of sex offenses and violence against children.
- Expands funding for local law enforcement authorities to track Internet sexual exploitation of minors.
- Instructs the U.S. Department of Health and Human Services to create a national registry of persons who have been found to abuse or neglect children. This database will protect children from being adopted or taken in by foster parents who are known child abusers.[594]

How does the Adam Walsh Child Protection Act Affect Non-citizens and U.S. Citizens?

The Adam Walsh Child Protection Act can affect non-citizens and U.S. citizens. First, any non-citizen who fails to register for the National Sex Offender Registry is deportable.[595]

Second, unless a waiver is granted by the CIS, a U.S. citizen or lawful permanent resident who has been convicted of a certain offense related to sexual or physical violence against a child is not eligible to file a petition for an immigrant visa for a qualifying family member (either an adult or a minor) or for a non-immigrant visa for a fiancée. This means that the intended beneficiary will be ineligible for adjustment of status or, if abroad, to enter the U.S. on an immigrant visa or a fiancée visa. The petitioner is also ineligible to file an immigrant visa petition to classify a non-citizen orphan, who he has adopted or will be adopting, as an immediate relative for purposes of bringing the child into the U.S.[596]

Note: An individual who was a U.S. citizen at the time of his plea and imposition of sentence to first offender probation or court supervision can argue that he is not barred from having his visa petition granted because the immigration definition of a conviction at I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) only applies to non-citizens, not U.S. citizens.

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[594] *See id.*

[595] *See* Appendix 3A, I.N.A. § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v).

[596] *See* I.N.A. §§ 204(a)(1), 101(a)(15)(k), 8 U.S.C. §§ 1154(a)(1), 1101(a)(15)(k).

Offenses against children that render a U.S. citizen or lawful permanent resident ineligible to petition for a family member or fiancée[597]

- An offense involving kidnapping (unless committed by a parent or guardian).
- An offense involving false imprisonment (unless committed by a parent or guardian).
- Solicitation to engage in sexual conduct.
- Use in a sexual performance.
- Solicitation to practice prostitution.
- Video voyeurism as described in 18 U.S.C. § 1801.
- Possession, production, or distribution of child pornography.
- Criminal sexual conduct involving a minor or use of the Internet to facilitate or attempt such conduct.
- Any conduct that by its nature is a sex offense against a minor.

These restrictions on petitioners may be waived by the Secretary of the Department of Homeland Security if he determines that the petitioner poses no threat to the family member for whom the petitioner wishes to file the visa petition.[598] The factors that should be considered include but are not limited to:

- The nature and severity of the petitioner's specified offense(s) against the minor, including all facts and circumstances underlying the offense(s);
- The petitioner's criminal history;
- The nature, severity, and mitigating circumstances of any arrest(s), conviction(s), or history of alcohol or substance abuse, sexual or child abuse, domestic violence, or other violent or criminal behavior that may pose a risk to the safety or well-being of the principal beneficiary or any derivative beneficiary;
- The relationship of the petitioner to the principal beneficiary and any derivative beneficiary;
- The age and, if relevant, the gender of the beneficiary;
- Whether the petitioner and beneficiary will be residing either in the same household or within close proximity to one another; and
- The degree of rehabilitation or behavior modification that may alleviate any risk posed by the petitioner to the beneficiary, evidenced by the successful completion of appropriate counseling or rehabilitation programs and the significant passage of time between incidence of violent, criminal, or abusive behavior and the submission of the petition. [599]

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[597] For a complete list of applicable offenses, *see* Pub. L. No. 111. *See* I.N.A. §§ 204(a)(1), 101(a)(15)(k), 8 U.S.C. §§ 1154(a)(1), 1101(a)(15)(k); Pub. L. §§ 401-02; "State Department Issues Cable on Referral of All I-130 Petitions to USCIS Service Offices for Adjudication," Vol. 84 *Interpreter Releases* 288, Feb. 5, 2007.

[598] *See* I.N.A. § 204(a)(1), 8 U.S.C. § 1154(a)(1).

[599] *See* Memorandum from Michael Aytes, Associate Director, Domestic Operations, "Guidance for Adjudication of Family-Based Petitions and I-129F Petition for Alien Fiance(e) under the Adam Walsh Child Protection and Safety Act of 2006," Feb. 8, 2007, available at www.uscis.gov.

The CIS will automatically presume that a risk of harm exists to an intended child beneficiary, irrespective of the nature and severity of the petitioner's specified offense and other past criminal acts and whether the petitioner and child beneficiary will be residing in the same household or within close proximity.[600] The burden is upon the petitioner to rebut and overcome the presumption of risk by providing credible and persuasive evidence of rehabilitation and other relevant evidence that beyond any reasonable doubt proves that he does not pose any risk to the child.

In adjudicating the waiver related to an adult beneficiary, prior acts of spousal abuse and other acts of violence will be considered. The fact that a petitioner's past criminal acts may have been perpetrated only against children or that the petitioner and beneficiary will not be residing either in the same household or within close proximity to one another may not, standing alone, be sufficient to persuade the CIS that the petitioner poses no risk to an adult beneficiary.

The provisions of the Adam Walsh Child Protection Act will impact both non-citizens and U.S. citizens rather harshly, particularly where the offense involved is essentially statutory rape with consensual relations. The processing of the waiver will also result in delays for the processing of the visa petition. If the waiver is not granted, the visa petition will be denied and the family member will be unable to immigrate to the U.S. based on the visa petition.

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[600] *See id.*

General Classes of Aliens Ineligible to Receive Visas and Ineligible for Admission; Waivers of Inadmissibility

I.N.A. § 212, 8 U.S.C. § 1182[1]

(a) Classes of Aliens Ineligible for Visas or Admission

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

(1) Health-Related Grounds . . . .

(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 county relating to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802), 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 visa or other documentation and the date of application for admission to the United States, [juvenile offense exception] 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) 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). [petty offense exception]

(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 actually imposed 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 any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the

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[1] [Emphasis in bold and abbreviated information in brackets added by the author.]

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.[2]

(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 . . . .

(F) Waiver Authorized

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

(G) Foreign government officials who have engaged in particularly severe violations of

religious freedom[3] . . . .

(3) Security and Related Grounds

(A) In General

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in [espionage, sabotage, export of technology, overthrow of the United States government by force or other unlawful means, and "any other unlawful activity."]

(B) **Terrorist Activities**

(i) In General ... [Relates to past terrorist acts, likelihood to engage in future terrroristic activity, past incitement of terrorism, being a representative of a terrorist organization, and being a member of a terrorist organization.]

(ii) **Terrorist Activity Defined**

[This section generally refers to actions such as hijacking, sabotage, kidnapping, attacks upon diplomats, assassination, and the use of weapons of mass destruction. However, its terms can be read broadly, and include "any activity which is unlawful under the laws of the place where it is committed . . . and which involves . . . the

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[2] Intelligence Authorization Act for Fiscal Year 2000, § 809, Pub. L. No. 106-120 (Dec. 3, 1999).

[3] Par. (G) added by Sec. 604(a), International Religious Freedom Act of 1998, Act of Oct. 27, 1998, Pub. L. No. 105-292, 112 Stat. 2787; effective date [as provided in section 604(a) of the Act]: "(B) Effective Date. – The amendment made by subsection (a) shall apply to aliens seeking to enter the United States on or after the date of the enactment of this Act."

seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained."]

(iii) **Engage in Terrorist Activity Defined** . . .

(C) Foreign Policy . . . .

(D) Immigrant Membership in [Communist or other] Totalitarian Party . . . .

(E) Participants in Nazi Persecutions or Genocide . . . .

(4) [Possibility of becoming a "Public Charge"]

(5) Labor Certification and Qualifications for Certain Immigrants . . . .

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for Certain Battered Women and Children . . . .

(B) Failure to Attend Removal Proceeding . . . .

(C) Misrepresentation

(i) In General

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(ii) Falsely Claiming Citizenship

(I) In general—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.[4]

(II) Exception—In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.[5]

(iii) Waiver Authorized

For provision authorizing waiver of clause (i), see subsection (i).

(D) Stowaways . . . .

(E) Smugglers

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[4] This subsection is effective for claims made on or after September 30, 1996.

[5] As amended by section 201(b)(2), (3) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000): "Effective dates—The amendment made by paragraph (2) shall be effective as if included in section 344 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009-637) and shall apply to representations made on or after September 30, 1996. Such amendments shall apply to individuals in proceedings under the Immigration and Nationality Act on or after September 30, 1996."

(i) In General

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Subject of Civil Penalty [document fraud]

(i) In General

An alien who is the subject of a final order for violation of section 274C is inadmissible.

(ii) Waiver Authorized

For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) Student Visa Abusers . . . .

(7) Documentation Requirements

(A) Immigrants [Must be in possession of valid, unexpired document.]

(B) Nonimmigrants [Must be in possession of valid, unexpired document.]

(8) Ineligible for Citizenship [Relating to draft-dodging and renunciation of citizenship.]

(9) Aliens Previously Removed

(A) Certain Aliens Previously Removed

(i) Arriving Aliens

Any alien who has been ordered removed under section 235(b)(1) [summary removal at port of entry] or at the end of proceedings under section 240 [removal proceedings] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other Aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens Unlawfully Present

(i) In General

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien' departure or removal from the United States, is inadmissible.

(ii) Construction of Unlawful Presence

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions

(I) Minors

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees

No period of time in which an alien has a bone fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family Unity

No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered Women and Children

Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if 'violation of the terms of the alien's nonimmigrant visa' were substituted for 'unlawful entry into the United States' in subclause (III) of that paragraph.

(iv) Tolling for Good Cause

In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No

court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) Aliens Unlawfully Present After Previous Immigration Violations

(i) In General

Any alien who—(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(4), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's—

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.[6]

(10) Miscellaneous

(A) Practicing Polygamists . . . .

(B) Guardian Required to Accompany Helpless Alien . . . .

(C) International Child Abduction

(D) Unlawful Voters[7]

(i) In general—Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) Exception—In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien

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[6] As amended by section 1505(a) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-406, 114 Stat. 1464 (Nov. 1, 2000).

[7] As amended by sections 201(b)(1), (3) of the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2000): "Effective dates—The amendment made by paragraph (1) shall be effective as if included in section 347 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208, 110 Stat. 3009-546) and shall apply to voting occurring before, on, or after September 30, 1996. . . Such amendments shall apply to individuals in proceedings under the Immigration and Nationality Act on or after September 30, 1996."

shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) Former Citizens who Renounced Citizenship to Avoid Taxation . . . .

(b) through (r) . . . .

Petitioning Procedure as Affected by Adam Walsh Child Protection Act

I.N.A. § 204(a), 8 U.S.C. § 1154(a)[8]

(a)(1)(A)(i) *Except as provided in clause (viii), any* citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 1153(a) of this title may file a petition with the Attorney General for such classification.

(viii)(I) *Clause (i) shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition described in clause (i) is filed.*

(II) *For purposes of subclause (I), the term specified offense against a minor is defined as in section 111 of the Adam Walsh Child Protection and Safety Act of 2006.*

(B)(i)(I) *Except as provided in subclause (II), any alien* lawfully admitted for permanent residence claiming that an alien is entitled to a classification by reason of the relationship described in section 1153(a)(2) of this title may file a petition with the Attorney General for such classification. *Subclause (I) shall not apply in the case of an alien lawfully admitted for permanent residence who has been convicted of a specified offense against a minor (as defined in subparagraph (A)(viii)(II), unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that such person poses no risk to the alien with respect to whom a petition described in subclause (I) is filed.*

I.N.A. § 101(a)(15)(k), 8 U.S.C. § 1101(a)(15)(k)

(K)(i) is the fiancée or fiancé of a citizen of the Untied States, *other than a citizen described in section 1154(a)(1)(A)(viii)(I),* and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

(ii) has concluded a valid marriage with a citizen of the United States, *other than a citizen described in section 1154(a)(1)(A)(viii)(I),* who is the petitioner, is the beneficiary of a petition to accord a status under section 1151(b)(2)(A)(i) of this title that was filed under section 1154 of this title by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa, or...

[8] Changes in statute are italicized by the author.