

RIAC2



CRIMINAL LAW
LAW

FAMILY



IMMIGRATION LAW

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In This Issue: WAIVERS

UPCOMING EVENTS

Otsego County, WBASNY
Delaware-Chenango-Otsego
Chapter
Cooperstown, NY
April 24, 2019

Oswego County, Family Law CLE,
September 13, 2019

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The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

WAIVERS IN IMMIGRATION

We often deal with waivers in the criminal law as giving up a client's right in exchange for a favorable disposition from the prosecution, such as the waiver of a right to appeal or a waiver of speedy trial. In immigration, the U.S. government agrees to waive a ground of inadmissibility or deportation that applies against a noncitizen in a particular situation. Waivers are often required to avoid deportation or to obtain a benefit such as a Green Card, or admission to the U.S. There are explicit waivers set forth in the INA and there are implicit "waivers," usually listed as exceptions to the application of a particular ground of deportability/inadmissibility. Some require a specific application on a specific form; others require a written request or a motion in court. *All* waivers require extensive documentation to support the request that a particular ground of deportation or inadmissibility not be enforced against the applicant.

There are times when your client will end up in removal proceedings despite your best efforts to negotiate a favorable plea. (e.g., when your client has an extensive criminal history or your client is already "otherwise removable.") We previously discussed "Relief from Removal" in our January 2019 newsletter. Relief from removal can include getting a Green Card. However, if your client is "inadmissible" to the U.S. for some reason (see our newsletters from September and October 2018), he or she may require a "waiver of inadmissibility" to remain eligible for that Green Card.

In a different context, your client may wish or need to travel abroad but will be unable to return to the U.S. without a waiver of inadmissibility. Waivers are granted by USCIS and sometimes by an Immigration Judge. Waivers can be for LPRs and for nonimmigrant (temporary) visa holders. There are also waivers for victims of domestic violence.

As defense counsel, part of determining your client's ability to remain in the U.S. may mean preserving his or her eligibility for a waiver. Not only



Chief Defenders & Assigned Counsel Administrators:

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must your client be statutorily eligible, but he or she must also merit the granting of the waiver as a matter of discretion.

Although the requirements differ among the various waivers, here are the basic requirements for many, if not most waivers:

1. Proof of “extreme hardship” to a “qualifying relative”:

A qualifying relative is usually (but not always) a USC/LPR spouse, parent and/or minor child. The existence of family members in the U.S. and their immigration status is therefore paramount (intake, intake, intake...)! What constitutes “extreme hardship” is a matter of case law. Factors include serious medical issues with a qualifying relative; loss of financial support from your client; psychological/ emotional harm to the relative if the defendant is removed from the U.S. This is cumulative in that evidence of hardship is added altogether and examined in the “totality of the circumstances.” Although extreme hardship *to your client* is rarely if ever a factor, your client’s hardship can *indirectly* have an extreme effect upon a qualifying relative, so it is important to explore all aspects of the hardship equation as it relates to your client.

2. Your client’s immigration status:

Some waivers are unavailable to LPRs. For example, a waiver of criminal inadmissibility is not available to a LPR who has not been physically present in the U.S. for at least 7 years prior to the commencement of removal proceedings.

3. Length of time in the U.S.:

Some waivers depend on the length of time in the U.S. (See above.) Documents showing entry to the U.S. are therefore **critical** (again, intake, intake, intake...).

4. NO conviction for an Aggravated Felony:

An AF conviction precludes eligibility for most waivers, but for extremely limited exceptions.

5. Your client’s positive equities:

Positive equities must outweigh the negative consequences of any conviction(s). This is the “catch all” area of waivers that involve discretion on the part of USCIS or the IJ.

Use of a mitigation expert can greatly facilitate and improve the client’s chances for approval of a waiver. Often a client will meet the statutory requirements to apply for a waiver, yet be denied on discretionary grounds. There is no appeal from the denial of a waiver on the basis of discretion.

Eligibility for a waiver is a complicated determination. In the event that your client’s options are extremely limited and it appears that your client will be heading for Immigration Court, a waiver may be the saving grace for your client, allowing him or her to remain in the U.S. As always, it is crucial to contact the RIAC at the outset of the case so that we can either avoid a disposition that will avoid removal or, at the very least, help your client preserve eligibility for a waiver.