# Substance Use, Health-Related Inadmissibility and Waivers

*By Andrew J. Stevenson*[*]

The apprehension in the silence on your client's end of the phone is palpable. His case initially seemed straightforward, even predictable, to you. But then something unexpected happened at the medical examination.

He explains: "Well… um… the doctor really focused in on some questions when I went in. A couple of months back, I was at my neighbor's, and there were some drugs there. When the doctor asked if I had ever done illegal drugs, I said, 'well, not me, but I was at my neighbor's, you know, this party, and I didn't do any but they were there around me. Since I didn't do any, they shouldn't show up on any test, but I was right there, so…' The doctor asked me again if *I* had ever done any drugs, and I said, 'well, yeah, not that time, but I did just *try* marijuana a couple of times. That was about a year ago, though; since then, never again, and I never got charged or convicted of anything. *Is this going to be a problem for my case???*"

The short answer for this client is: yes, it could be a problem and it may even result in denial of his case. In fact, any applicant for U.S. immigration benefits who has even a minor history of substance use may be subjected to scrutiny upon consular processing of their visa or adjustment of status. This is not only limited to applicants who have a history of drug use, but may also include applicants who have struggled with alcoholism. DOS and USCIS have also recently increased scrutiny on applicants with a history of arrests or convictions for alcohol-related offenses, including Driving Under the Influence (DUI).

This article will focus on how U.S. immigration authorities define and identify substance use as a health-related ground of inadmissibility, and how they determine whether an applicant's substance use actually triggers inadmissibility. It also discusses what appeals of these determinations may be made and what waivers of inadmissibility are available. Understanding this topic is important for practitioners, especially because substance use issues are frequently undisclosed or underreported by clients, and they may arise unexpectedly at critical stages of a case.

## HEALTH-RELATED INADMISSIBILITY BASED ON SUBSTANCE USE

An applicant's history of substance use can trigger health-related inadmissibility under two distinct sections of the INA.

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First, INA § 212(a)(1)(A)(iv) declares inadmissible any alien "who is determined … to be a drug abuser or addict." This section is applied against applicants who have engaged in non-medical use of psychoactive substances. It is not necessarily limited to illegal drug use.

Second, INA § 212(a)(1)(A)(iii) declares inadmissible any alien:

> who is determined… (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior…

Drug or alcohol use may be deemed a "mental disorder" under this section. This ground of inadmissibility may be applied against applicants who have a history of drug- or alcohol-related incidents, arrests or convictions[1] that have involved personal injury or property damage.

In order to be declared inadmissible pursuant to either of these sections, a civil surgeon or panel physician must examine the applicant and classify them as having a "Class A" condition. The civil surgeon or panel physician's Class A diagnosis would confirm that the applicant is a "drug abuser or addict" or has a "physical or mental disorder" with associated harmful behavior,[2] and would automatically trigger inadmissibility.[3]

Alternatively, the civil surgeon or panel physician could classify the applicant as having a "Class B" condition, either as a drug abuser or addict in remission, or as a person with a mental disorder which is controlled by medication or in remission with no associated harmful behavior. A Class B diagnosis does not render the applicant inadmissible on health-related grounds,[4] although it does suggest to immigration authorities that follow-up medical care may be necessary in the United States.[5]

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[1] In addition to health-related inadmissibility, it is important to keep in mind that applicants with any criminal convictions related to drugs or alcohol may also be subject to criminal inadmissibility at INA § 212(a)(2).

[2] *See* 42 CFR § 34.2(d).

[3] *See* 9 FAM 40.11 N3.3(1) (DOS); AFM ch. 23.3(a).

[4] *See* 9 FAM 40.11 N3.3(2) (DOS); AFM ch. 23.3(a).

[5] If the reviewing physician deems the applicant will necessarily or likely undergo medical treatment in the United States related to this diagnosis, this could lead to public charge inadmissibility issues. *See* Centers for Disease Control and Prevention, Division of Global Migration and Quarantine, *Instructions to Panel Physicians for Completing New U.S. Department of State MEDICAL EXAMINATION FOR IMMIGRANT OR REFUGEE APPLICANT (DS-2053) and Associated WORKSHEETS (DS-3024, DS-3025, and DS-3026)*, *available at*: *http://www.cdc.gov/Ncidod/dq/pdf/ds-forms-instructions.pdf*, [hereinafter Panel Physicians Forms Instructions] at 1 (noting that one purpose of the migration health assessment is to "determine if medical conditions or mental disorders exist that would… [r]equire the applicant to receive

## U.S. GOVERNMENT DEFINITIONS AND CLASSIFICATIONS OF INADMISSIBILITY

### *"Drug Abusers or Addicts"*

Federal regulations and policy define which applicants may be classified as "drug abusers" and "drug addicts," and provide substantial guidance as to how applicants can be accordingly found inadmissible.

42 CFR § 34.2(g) defines "drug abuse" as the "non-medical use of a controlled substance listed in section 202 of the Controlled Substances Act,[6] as amended (21 U.S.C. 802), which *has not necessarily resulted in physical or psychological dependenc*e."[7] Similarly, 42 CFR § 34.2(h) defines "drug addiction" as the "non-medical use of a controlled substance listed in section 202 of the Controlled Substances Act… which *has resulted in physical or psychological dependence*."[8] The Technical Instructions written by the CDC's Division of Global Migration and Quarantine for Civil Surgeons and Panel Physicians clarify that "non-medical use" of "psychoactive substances" not listed in the Controlled Substances Act can also be grounds for a finding of drug abuse or addiction, but only if such use has resulted in "harmful or dysfunctional behavior patterns…or physical disorders."[9]

The phrase "non-medical use"—a central part of the regulatory definition for "drug addiction" or "drug abuse"—is defined as "more than experimentation with the substance."[10] Although "experimentation" is not explicitly defined, the Technical Instructions provide the example of "a single use or marijuana or other non-prescribed psychoactive substances such as amphetamines or barbiturates."[11] According to this strict definition, any applicant who has used marijuana, cocaine, amphetamines, barbiturates or any other controlled substance more than once may be declared inadmissible as a "drug abuser."[12]

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long-term institutionalization or maintenance income provided by the U.S. government after resettlement that is the become a *public charge*").

[6] Section 202 of the Controlled Substances Act lists a wide range of substances, from "commonly abused" illicit drugs to prescription drugs with widely accepted medical uses.

[7] (Emphasis added).

[8] (Emphasis added). Note that a criminal conviction classifying the defendant as an "addict" is not necessarily determinative for immigration purposes. *See Matter of K-C-B*, 6 I&N Dec. 274 (BIA 1954).

[9] *See* Centers for Disease Control and Prevention, Division of Global Migration and Quarantine, *Technical Instructions for Medical Examination of Aliens* [for panel physicians]; Centers for Disease Control and Prevention, Division of Global Migration and Quarantine, *Technical Instructions for Medical Examination of Aliens in the United States* [for civil surgeons], § III(C)(2)(a)(2), *available at http://www.cdc.gov/NCIDOD/dq/technica.htm* [collectively hereinafter "CDC-DGMQ Technical Instructions"].

[10] *Id.* at § III(C)(2)(c). *See also* 9 FAM 40.11 N9.1(c).

[11] CDC-DGMQ Technical Instructions, § III(C)(2)(c). *See also* 9 FAM § 40.11 N9.1(c).

[12] AILA, through its DOS liaison committee, has vigorously contested the Technical Instructions' definition of "drug abuse" as overly broad, alleging that it is inconsistent with CDC's *Instructions to Panel Physicians for Completing Medical History and Physical Examination Worksheet (DS-3026)*. *See* AILA, "Practice Alert on 'Drug Abuser or Addict' Grounds of Inadmissibility," *published on* AILA InfoNet at

Notwithstanding the number of times an applicant may have engaged in substance use, the *recency* of substance use is also a critical element in determining inadmissibility. The Technical Instructions state that an applicant who is currently using or has used a controlled substance in the past three years will be classified with a Class A condition[13] and will be declared inadmissible. The Instructions clarify that use of any controlled substance in the past three years is "illegal and qualifies as a Class A condition, whether or not harmful behavior is documented."[14] Any applicant who has used an unlisted (i.e. non-controlled) psychoactive substance in the past two years will also be classified with a Class A condition and declared inadmissible.[15]

In contrast, any applicant who has a history of substance use, but has not used a controlled substance in the past three years and has not used an unlisted psychoactive substance in the past two years will be considered in "remission." The Technical Instructions direct that applicants in "remission" should be classified with a Class B condition, and thus should not be automatically declared inadmissible as "drug abusers or addicts."[16]

To aid panel physicians and civil surgeons in distinguishing between circumstances warranting Class A and Class B determinations, the Technical Instructions include a Table entitled "Reporting Results of Evaluation for Psychoactive Substance Abuse."[17] A copy of this table is attached to this article as **Appendix 1.**

***Drug- and Alcohol-Related Offenses as "Mental Disorders" with Associated Harmful Behavior***

Federal policy and practice manuals also define when incidents of substance use may be classified as mental disorders with associated harmful behavior sufficient to trigger health-related inadmissibility.

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Doc. No. 06020110 (*posted* Feb. 1, 2006), at 2. The CDC's instructions to panel physicians completing Medical History Form DS-3026 appear to imply that the phrase "drug abuse" should be defined as a "maladaptive pattern of substance use" leading to "recurrent" or "continued use," as directed by the *Diagnostic and Statistical Manual of Mental Disorders*. *See* Panel Physicians Form Instructions, *supra* note 5, at 11. Accordingly, AILA-DOS liaison attorneys argued that a panel physician's analysis of whether an applicant is a "drug abuser" use should be made not just in light of the number of times of use, but also with regard to whether the applicant's use represents a "maladaptive pattern." However, AILA's appeals to DOS have not resulted in any policy changes, as DOS subsequently directed consular officers to defer to the "professional judgments" of CDC's panel physicians. *See* AILA, "Visa Office Clarification on Drug Abuse/Addict Ineligibility Standard," *published on* AILA InfoNet at Doc. No. 06052460 (*posted* May 24, 2006), at 1-2. In the aftermath of these liaison inquiries, consular practitioners consistently report that panel physicians make Class A findings of "drug abuse" according to the strict definition of the Technical Instructions—when an applicant has used a controlled substance more than once, and the last use occurred within the past three years.

[13] *See* CDC-DGMQ Technical Instructions, § III, Table 6.

[14] *Id.* at § III(C)(2)(a)(1).

[15] *See id.* at § III, Table 6.

[16] *See id.*

[17] *Id.*

The Technical Instructions indicate that alcoholism, alcohol abuse and drug abuse can all be classified as "mental disorders."[18] However, "the mere presence of a physical or mental disorder does not by itself render [an] applicant ineligible" for a visa."[19] In order for an applicant to be inadmissible, one or more incidents of substance use "must be associated with a … display of harmful behavior."[20]

"Harmful behavior" is defined as "a dangerous action or series of actions by the alien that has resulted in injury (psychological or physical) to the alien or another person, or that has threatened the health or safety of the alien or another person, or that has resulted in property damage."[21] A criminal conviction "is not determinative" as to whether the applicant has a history of harmful behavior.[22] Therefore, the nature of the behavior must be qualitatively examined by the medical examiner.[23]

Generally, the Technical Instructions direct that Class A certifications should only be made under this section if an applicant currently engages in substance use associated with harmful behavior, or has a history of substance use with harmful behavior which is likely to recur.[24] Conversely, if an applicant's pattern of substance use and associated harmful behavior is controlled by medication[25] or is in remission,[26] and thus the harmful behavior is unlikely to recur, a Class B diagnosis may be made.[27]

Similar to the table regarding drug abuser or addict determinations, the Technical Instructions also include a Table entitled "Reporting Results of Evaluation for Mental and Physical Disorders with Associated Harmful Behavior."[28] A copy of this table is attached to this article as **<u>Appendix 2.</u>**

## U.S. GOVERNMENT IDENTIFICATION AND INVESTIGATION OF AN APPLICANT'S SUBSTANCE USE

There are various ways in which an applicant's substance use may be disclosed by the applicant or affirmatively identified by U.S. immigration authorities. In all applications for immigrant visas or adjustment of status, substance use questions arise as

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[18] *See id.* at § III, Table 4 (items 7-8).
[19] 9 FAM 40.11 N8.
[20] *See id.*
[21] CDC-DGMQ Technical Instructions, § III(B)(2)(c); 9 FAM 40.11 N8.1(a).
[22] *See* 9 FAM 40.11 N8.1(b).
[23] Alcohol or drug use is not by itself is not considered a mental disorder with associated harmful behavior. *See* CDC-DGMQ Technical Instructions, § III, Table 4, "Mental Disorders for which Harmful Behavior Is an Element of the Diagnostic Criteria" (noting that "behavior [is] necessary to establish the diagnosis" of inadmissibility on this ground based on alcohol and drug use).
[24] *See id.* at Table 5.
[25] Applicants whose condition is controlled by medication may be required to certify in writing that he or she "will continue medication or other treatment to control the disorder and prevent harmful behavior." *See id.* at p. III-13, n. ****.
[26] "Remission" is defined as "no pattern of the behavioral element of the disorder for the past 2 years." *See id.*
[27] *See id.* at Table 5.
[28] *Id.*

part of the required medical examination by a civil surgeon or panel physician.[29] Additionally, applicants must disclose on many forms whether they are a "drug abuser or addict," have ever used illicit drugs, or have a substance-related "mental disorder" with associated harmful behavior.[30] Likewise, if an applicant has ever been arrested or convicted for a drug- or alcohol-related offense, this must also be disclosed on many forms. In some instances, regardless of whether the applicant has already completed a medical examination, USCIS or DOS officials may order the applicant to be re-examined by a civil surgeon or panel physician regarding substance use issues.

***Medical Examination and Screening by Civil Surgeons and Panel Physicians***

As part of the required medical examination for immigrant visa applicants, a civil surgeon or panel physician interviews all applicants regarding their medical history and conditions. The Technical Instructions direct the medical examiner to ask "specific questions about psychoactive drug and alcohol use [and] history of harmful behavior."[31] Initial substance use screening questions are normally general (e.g. "have you ever used illegal drugs"), but if an applicant reveals a history of use, questions become much more detailed regarding the substance(s) used, frequency of use, and date of last use. While not necessarily commonplace, some panel physicians have been reported to ask non-affirmative and confusing questions regarding substance use (e.g. "have you used drugs less than 10 times"). Medical examiners also frequently take blood or urine samples, which may be tested to detect substance use.

Additionally, the examining physician will inquire about records and likely ask to review all available documents pertaining to hospitalizations and institutionalizations,[32] including the applicant's participation in rehabilitation programs. Examiners may also ask to review police, military, school, employment or other records for evidence of "harmful behavior… nonmedical use of psychoactive substances or evidence of alcohol abuse or dependence."[33] An examiner might even go so far as to interview the applicant's family regarding substance use "when practical and clinically relevant…as this information may not be included in medical records."[34] The examining physician might ask questions, for example, to an applicant's spouse if he or she is undergoing a medical examination for immigration purposes on the same day as the applicant.

Finally, if the civil surgeon or panel physician cannot make a "definitive diagnosis" of whether the applicant has a Class A or Class B condition, they may refer the applicant to a specific medical or mental health specialist to evaluate their condition.[35]

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[29] *See* CDC-DGMQ Technical Instructions, § III(C)(1).
[30] *See, e.g.,* Form DS-156, Question 38; Form DS-230 Part II, Question 30a; Form I-485, Part 3, Question 1a. CBP Form I-94W Question A, also screens these issues for applicants for admission under the Visa Waiver Program.
[31] CDC-DGMQ Technical Instructions, § II(A)(1)(a)(4).
[32] *See id.* at §§ II(A)(1)(a)(1)-(2).
[33] *Id.* at § III(B)(3)(b).
[34] *Id.* at § III(B)(3)(c).
[35] *See id.* at § II(C).

After receiving a report from the specialist, the medical examiner will complete their report and diagnosis to DOS or USCIS.[36]

***Referrals for Medical Examination or Re-Examination of Certain Applicants***

DOS and USCIS officials also may ask screening questions regarding an applicant's substance use at in-person interviews, often as part of reviewing immigration forms. If information disclosed on an immigration form or an answer to a verbal question highlights that an applicant has engaged in substance use, the DOS or USCIS officer may refer the applicant to a panel physician or civil surgeon for examination or re-examination. As a practical matter, these referrals commonly occur when an applicant discloses substance use or convictions for the first time in an interview with immigration officials.

*Applicants with DUI Arrests or Convictions*

Over the past several years, DOS and DHS have issued specific guidance regarding alcohol use and applicants with DUI arrests or convictions. Agency memoranda and policy clearly reflect that U.S. immigration authorities consider drunk driving a serious mental disorder with great potential for harmful behavior. However, DOS and USCIS officials will not make any health-related inadmissibility determinations without first receiving a report and Class A diagnosis of the applicant by a medical professional. Thus, immigration and consular officers may refer applicants with a record of alcohol-related arrests or convictions to be examined or re-examined by a panel physician or civil surgeon with regard to these incidents.

These referrals commonly occur at the consular level with NIV applicants who have a record of DUI arrests or convictions, but have not previously visited a panel physician. They may also occur for consular IV applicants who did not discuss their record of DUI arrests or conviction with the panel physician during their medical examination. Likewise, USCIS will refer AOS applicants to civil surgeons for further review if the applicant has a record of arrests or convictions, and no discussion of the applicant's record appears in the medical examination report.

In June 2007, DOS released a cable mandating referrals to panel physicians for *all* visa applicants with "a single drunk driving arrest or conviction within the last three calendar years or two or more drunk driving arrests or convictions in any time period" or where "there is any other evidence to suggest an alcohol problem."[37] In the cases of IV applicants who have already undergone examination by a panel physician, medical examiners are directed to "evaluat[e] for the presence of a mental disorder previously unnoticed before… [becoming] aware of [an] alcohol-related arrest."[38] The cable clarifies that incidents of alcohol abuse or drunk driving alone are not a sufficient basis

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[36] *Id.* at § III(B)(4)(c).
[37] DOS Cable, "Guidance on Processing Visa Applicants with Drunk Driving Hits" (June 7, 2007), *published on* AILA InfoNet at Doc. No. 07071760 (*posted* Jul. 16, 2007), at 1.
[38] *Id.*

for health-related inadmissibility, and must be accompanied by harmful behavior to make an applicant ineligible to receive a visa.[39] However, this policy of mandatory referrals to panel physicians for further examination will add an extra step which complicates and delays consular processing for many applicants.

Similarly, USCIS officers are required to refer AOS applicants for re-examination by a civil surgeon "when the criminal record of [the] applicant… reveals a significant history of alcohol-related driving arrests and/or convictions, and the Form I-693 medical report does not reflect that the alcohol-related driving incidents were considered by the civil surgeon."[40] However, not all applicants with a record of DUI arrests or convictions will be re-examined. Referral for re-examination is only mandatory for applicants with a "significant criminal record of alcohol-related driving incidents," namely:

- One or more arrest/conviction for DUI/DWI while the applicant's driver's license was suspended, revoked or restricted at the time of the arrest due to a previous DUI/DWI incident;
- One or more arrest/conviction for DUI/DWI where personal injury or death resulted from the incident(s);
- One or more conviction for DUI/DWI where the conviction was a felony in the jurisdiction in which it occurred or where a sentence of incarceration was actually imposed;
- Two or more arrests/convictions for DUI/DWI within the preceding two years; or
- Three or more arrests/convictions for DUI/DWI where one arrest/conviction was within the preceding two years.[41]

In the re-examination, the civil surgeon will investigate the applicant's "mental status… specifically addressing the incidents revealed in the criminal record"[42] and must make a Class A diagnosis to trigger health-related inadmissibility.

## PRACTICE POINTERS: PREPARING YOUR CLIENT FOR A MEDICAL EXAMINATION OR A REFERRAL TO A MEDICAL EXAMINER

If a client has disclosed a record of substance use or related arrests or convictions to you, you should prepare your client to affirmatively disclose these facts to the panel physician, civil surgeon or immigration officer. Any applicant who gives incomplete or

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[39] *Id.*; *see also* 9 FAM 40.11 N8.3 (revised pursuant to the 6/7/07 DOS cable).
[40] DHS Memorandum, W. Yates, "Requesting Medical Re-examination: Aliens Involved in Significant Alcohol-Related Driving Incidents and Similar Scenarios" (Jan. 16, 2004), *published on* AILA InfoNet at Doc. No. 04022362 (*posted* Jan. 23, 2004), at 2-3.
[41] *Id.* at 3.
[42] *Id.*

inconsistent answers to a medical examiner regarding substance use may be subjected to further investigation of their medical history. If evidence of substance use is ultimately discovered through documents or interviews that contradict the applicant's attestations to the medical examiner, these inconsistencies may be documented in the medical examination report. According to such a report or other inconsistent statements made at the time of interview, a DOS or USCIS officer could declare an applicant inadmissible not only on health-related grounds, but also on the basis of fraud or willful misrepresentation.[43]

Immigration practitioners may also affirmatively address substance use and drug- and alcohol-related arrests and convictions in a short brief to support their client's admissibility. This may be submitted to DOS, attached to the requisite DS forms, or to USCIS, attached to Form I-485. A declaration from the applicant should be submitted with the legal brief, detailing which substances were used, frequency of use, date of last use, whether the applicant's use ever involved harmful behavior, and whether the applicant was ever arrested or convicted for substance-related offenses. Letters of support from friends, family, religious leaders or others may also be submitted to support an applicant's claims of being an infrequent user, in remission or having a history of no harmful behavior associated with use. The brief should also include copies of all applicable medical or criminal documentation for agency review, including:

- Medical records regarding hospitalization or treatment for substance use, including participation in rehabilitation programs;

- Documentation of any prescribed medication related to the above treatment;

- Certified court disposition(s) of any criminal case(s) relating to DUI/substance use; and/or

- Police report(s) relating to arrest(s) for DUI/substance use.

Copies of these documents should also be prepared to provide to the medical examiner upon request. Failure to provide these documents may result in delays in adjudication or issuance of an RFE.

As a practical matter, DOS and USCIS referrals to panel physicians and civil surgeons for examination or re-examination of substance use will, at minimum, delay the adjudication of an applicant's case. It may take as long as several months from the time of referral until the time of adjudication. This is especially true if the case is pending abroad, and it depends on the country, the appointment availability of panel physicians, and whether or not an applicant is referred to a psychiatrist or other specialist for further evaluation. At the same time, in some countries, referral to adjudication may take as little

[43] *See* INA § 212(a)(6)(C)(i). This is an especially important consideration because health-related inadmissibility based on substance use may be merely temporary (until an applicant has been in remission for several years), whereas fraud-based inadmissibility is permanent.

as one to two weeks. Other country-specific complications may also arise. For example, in Mexico, the only panel physicians certified to review applicants for health-related inadmissibility in the entire country are located in Ciudad Juarez. NIV applicants from all over Mexico who are referred for medical examination due to a DUI arrest in the past three years have no choice but to travel to Ciudad Juarez, and then back again to the post where they applied to await final adjudication and visa issuance. Different countries or consular posts, depending on local culture and other factors, may also define "other evidence suggesting an alcohol problem" in very different ways and therefore will have varying referral processes. In the United States, obtaining a referral-based appointment with a civil surgeon may present fewer challenges, but USCIS adjudication time may vary greatly depending on the Field Office with jurisdiction over the case.

## APPEALS AND WAIVERS OF HEALTH-RELATED INADMISSIBILITY DETERMINATIONS BASED ON SUBSTANCE USE

If an applicant is declared inadmissible on health-related grounds because of substance use, he or she still may have several options to be admitted to the United States. First, although on a practical level this strategy may have a very low chance of success, the applicant may request an advisory opinion or a medical re-examination by the CDC to contest a Class A diagnosis triggering inadmissibility. Second, the applicant may be eligible for a waiver of inadmissibility.

### *Seeking an Advisory Opinion or Medical Re-examination by the CDC after an Erroneous Class A Determination by a Medical Examiner*

If a visa applicant disagrees with a determination made by a panel physician characterizing the applicant as inadmissible on health-related grounds, they may request the consular officer to seek an advisory opinion from the CDC.[44] A CDC consultant physician will then review the panel physician's report and Class A diagnosis of the applicant, and will provide the consular officer with an opinion as to whether the diagnosis was correctly made.[45]

42 CFR § 34.8 also authorizes the CDC to re-examine the medical condition of an applicant classified by a civil surgeon or a panel physician as having a Class A condition triggering inadmissibility. However, there is no regulatory authority for applicants or attorneys to initiate this re-examination process directly with CDC. It appears that appealing parties must communicate with DHS to request a re-examination, although the process for doing so is unclear.[46] As part of the re-examination process, "a board of

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[44] AILA, "Visa Office Clarification on Drug Abuse/Addict Ineligibility Standard," *published on* AILA InfoNet at Doc. No. 06052460 (*posted* May 24, 2006).
[45] *Id.*
[46] *See* 42 CFR § 34.8(a)(2) (stating that re-examination may occur "[u]pon an appeal *to the INS* by an alien who … has been certified for a Class A condition") (emphasis added). A CDC representative acknowledged to the author that there is no clear interagency procedure set in place for applicants to communicate with DHS to request a medical re-examination by CDC. Telephone interview with Joe Foster, Legal Counsel, CDC (Feb. 29, 2008). However, the CDC representative also maintained that, according to federal regulations, it is not appropriate for applicants or attorneys to request such an

medical officers" convened by CDC will review all records submitted by the applicant and other witnesses, medical history documents and reports submitted by other physicians who have examined the applicant's mental condition.[47] The board will notify the applicant of a time and place for an official medical re-examination, and may discretionarily allow oral or written medical expert testimony on the applicant's behalf.[48] The board's decision is final and cannot be appealed or reconsidered except upon express authorization of the Director of the CDC.[49]

As a practical matter, either of these options may be a futile exercise for an applicant deemed inadmissible pursuant to findings in the medical examiner's report. According to practitioners' reports, CDC advisory opinions very rarely result in reversal of a panel physician's Class A diagnosis of an applicant. Additionally, CDC re-examinations of applicants rarely occur at all,[50] although their uncommonness may be attributable to logistical difficulties in initiating the re-examination process through DHS.

***Waivers of Health-Related Inadmissibility Based on Substance Use***

*Non-immigrant visa waivers*

INA § 212(d)(3) allows for discretionary waivers of all grounds of health-related inadmissibility for NIV applicants.[51] In considering whether to grant an NIV waiver, a consular officer will consider and balance three factors: (1) the recency and seriousness of the condition causing inadmissibility, (2) the reasons for the applicant's travel to the United States, and (3) the positive or negative effect, if any, of the applicant's travel on U.S. public interests.[52] It is important to note that waivers are not "limited to humanitarian or other exceptional cases" and that a consular officer can recommend a waiver "for any legitimate purpose."[53] Consular officers may recommend multiple-entry waivers for applicants deemed inadmissible as drug abusers, but waivers for applicants classified as drug addicts or having mental disorders are only eligible for single-entry waivers.[54]

To support an NIV waiver application, there is no required form,[55] but practitioners may submit supporting evidence to the consular officer. Such evidence should include a declaration from the applicant and letters of support from friends,

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examination directly from the CDC. *Id.* Clarifying how an applicant should request a medical re-examination from CDC appears to be an issue ripe for AILA liaison clarification with USCIS.

[47] *See* 42 CFR § 34.8(c).

[48] *See id.* at §§ 34.8(d)-(f).

[49] *Id.* at § 34.8(k).

[50] Telephone interview Joe Foster, Legal Counsel, CDC (Feb. 29, 2008).

[51] *See also* 9 FAM 40.11 N11.

[52] 9 FAM 40.301 N3(b); *see also Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978) (the seminal case in the area of INA § 212(d)(3) waivers).

[53] 9 FAM 40.301 N3(a). The FAM provides several examples of a "legitimate purpose," including "family visits, medical treatment (whether or not available abroad), business conferences, tourism, etc." *Id.*

[54] *Id.* at N.6.3(1) & (2).

[55] The one exception is for visa-exempt Canadian applicants, who must submit NIV waivers on Form I-192 to CBP officials at a port of entry.

family, religious leaders or others with a personal or professional relationship with the applicant. These statements should directly address the applicant's substance use, but should highlight that he or she is an infrequent user, in remission or has no history of harmful behavior associated with use. The statements should also emphasize that the applicant poses no threat or risk to U.S. national security or public health based on their history of substance use. Depending on the type of visa the applicant is seeking, you may also be able to present compelling evidence regarding the importance of the applicant's travel to the United States. For example, if the applicant has been invited to engage in business activities in the United States, you may wish to include letters of support from U.S. business partners describing the importance of the applicant's contributions and the positive ways his or her travel stands to affect the U.S. economy. If the applicant will only be a temporary visitor for personal or family reasons, it is still recommendable to submit evidence to clarify the personal importance of the trip to the United States. Finally, if the applicant may need medical treatment in the United States related to a past history of substance use or seeks entry to attend a rehabilitation facility, it is critically important to submit evidence of financial resources proving their ability to pay for treatment.[56]

As a matter of procedure, a consular officer must determine that an applicant is inadmissible to the United States before the post may consider a § 212(d)(3) waiver application. The applicant may be found inadmissible pursuant to a panel physician's Class A diagnosis made during the preceding three years, or the consular officer may directly refer the applicant for a new medical examination if substance use problems arise during the visa interview. In cases where the applicant is referred to a panel physician, the applicant should be prepared to disclose their substance use history, as well as provide related records to the panel physician. If drug use during the past three years will be at issue, it is recommendable for the applicant to also obtain independent drug test results showing that they have not used for a significant period of time. Clean drug tests can be significant proof that an applicant's use is neither recent nor serious, and can strongly support issuance of a waiver even if use has occurred within the past three years.

Once an applicant is declared inadmissible, evidence supporting the waiver application may be submitted, and the reviewing consular officer or their supervisor will make a recommendation either to grant or deny the waiver.[57] If the recommendation is favorable, DOS forwards the application to the Admissibility Review Office (ARO) in Washington, D.C. for final adjudication. NIV waivers routinely take 30-60 days to reach a final adjudication, and if approved, the consular post will issue the visa with a "§ 212(d)(3)" annotation.

Although all § 212(d)(3) waivers are adjudicated on a case-by-case basis, the factors in the FAM and controlling case law are a good common-sense guide for which waiver cases may be viable. Applicants who can present documentation proving remission or rehabilitation over a significant period of time, or can otherwise reasonably

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[56] *See* 9 FAM 40.11 N11.

[57] If the consular post's recommendation is to deny the waiver, the post will forward the waiver application request to a central DOS authority for review and recommendation. *See* 9 FAM 40.301 N6.2-1.

distance themselves from their last use by a year or more, may have better chances of being granted a waiver. Likewise, applicants with a very compelling reason to travel to the United States or whose presence would measurably benefit the United States may also present viable waiver cases. Conversely, applicants who are found to have recently engaged in substance use (especially if linked to harm to self or others), have a long pattern of use with no demonstrable rehabilitation and have no compelling reason to visit the United States may encounter difficulties in obtaining a waiver.

*Immigrant visa waivers*

IV waivers are categorically unavailable for applicants declared inadmissible as drug abusers or addicts.[58]

However, INA § 212(g)(3) does authorize IV waivers for applicants diagnosed with a mental disorder with associated harmful behavior.[59] The waiver application must be submitted on Form I-601 to DOS or USCIS, and is forwarded to CDC's Division of Global Migration and Quarantine (DGMQ) for review. Form I-601 must be accompanied by a medical report or a statement that arrangements have been made for submission of a medical report, including "a complete medical history of the alien… [and] [f]indings as to the current physical …[and] mental condition of the alien, with information as to prognosis…and with a report of a psychiatric examination."[60]

With regard to substance use and associated harmful behavior, this waiver may most commonly apply to applicants with criminal convictions implicating that alcohol abuse has resulted in harm to self, others or property. This may include, but is not limited to: DUI incidents resulting in damage to a person or property, and domestic violence, battery or assault incidents in which alcohol use was involved and well-documented in court and law enforcement documents reviewed by immigration officials. In some rare cases, applicants with multiple DUI convictions, even without any associated harm to persons or property, may be classified by panel physicians as "threaten[ing] the health or safety of the alien or others," and thus require a waiver to overcome inadmissibility.

In response to these scenarios, the medical reports and waiver application should be prepared very carefully, preferably by medical professionals who have a previous history with and knowledge of the applicant, and always with the guidance of an immigration attorney. Generally, the physician's report should detail any treatment the applicant has received, medication they have been prescribed, rehabilitation and the applicant's ability to function productively and self-sufficiently. Similarly, the psychiatric examination should highlight the applicant's progress toward rehabilitation and, if appropriate, the unlikely nature of recurring harmful behavior related to substance use. All reports should describe the applicant's habits or pattern of consuming alcohol. Medical professionals should comment as to how, if at all, this pattern of alcohol use

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[58] *See* INA § 212(g) (setting forth immigrant visa waiver options for all health-related inadmissibility categories except 212(a)(1)(A)(iv)); *see also* 9 FAM 40.11 N10.4.
[59] *See also* 9 FAM 40.11 N10.3.
[60] *See* DHS, USCIS, "Instructions for I-601, Application for Waiver of Grounds of Inadmissibility."

inhibits the applicant's ability to function professionally or care for others in family and social relationships. The reports should specifically mention whether the applicant's alcohol use has habitually or on any specific occasion posed danger to any other person or property or caused any harm. It should also mention whether the applicant's drinking has caused any harm or is particularly dangerous to his or her health. The reports should certify, to the extent that it is accurate, that the applicant is a fully functioning member of society whose use of alcohol is not detrimental or dangerous to his or anyone else's health or safety. If the applicant has an established record of harming or endangering self, others or property while under the influence, the report should address each incident and how the applicant has rehabilitated: physically, through remission, and psychologically, through therapy or self-examination. If medication or a specific treatment plan was prescribed or suggested by a medical professional, this should be reviewed in detail, and the applicant's positive performance and rehabilitation should be emphasized. Additionally, the reports should recognize completion of classes (regarding substance use or rehabilitation from particular criminal behavior) or participation in groups such as Alcoholics Anonymous.

As a matter of law, the medical reports are the most important pieces of the IV waiver application package. However, as a practical matter, other documents can also be helpful to establish an overall tone of rehabilitation and reform from prior incidents of alcohol use or abuse. A conciliatory affidavit from the applicant describing his or her personal strides to rehabilitate and achieve change to better the lives their family may be appropriate or meaningful. Likewise, affidavits or letters of support from family and close friends regarding the applicant's rehabilitation and positive character may help round out the waiver application.

If the IV waiver is approved, the applicant must provide a post-entry evaluation report conducted by a medical facility approved by the U.S. Public Health Service to CDC within 30 days after entering the United States.[61] DHS may also restrict the waiver to certain terms, conditions or controls it deems appropriate on a case-by-case basis, which may include posting of a bond.[62]

**CONCLUSION**

Health-related inadmissibility due to drug or alcohol use is an important issue to understand because it can result in unexpected denials at the critical end-stages of visa applications. The CDC's technical instructions are somewhat difficult to wade through and the definitions of inadmissibility are harsh. If an applicant's substance use is not disclosed or discovered until the time of their visa interview, the case may be complicated and delayed by a referral to a panel physician or civil surgeon. However, a basic understanding of all these issues can be a great asset in analyzing your client's record, anticipating adverse consequences, setting client expectations and making sure the case doesn't "go to pot."

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[61] *See* 8 CFR § 212.7(b)(4)(ii).
[62] INA § 212(g)(3); 8 CFR § 212.7(b)(5).

## Table 6

### Reporting Results of Evaluation for Psychoactive Substance Abuse

| Findings | Record on Medical Report Form |
|---|---|
| Current nonmedical use or use within the last 3 years of a substance listed in section 202 of the Controlled Substances Act | Class A condition<br><br>List substance(s) used. |
| History of nonmedical use of a substance listed in section 202 of the Controlled Substances Act<br><br>No use in last 3 years | Class B condition<br><br>Note whether dysfunctional behavior or associated physical disorder is present. |
| Current abuse or abuse within the last 2 years of a psychoactive substance other than those listed in section 202 of the Controlled Substances Act | Class A condition<br><br>List substance(s) used. |
| History of abuse of a psychoactive substance other than those listed in section 202 of the Controlled Substances act<br><br>No use in the last 2 years | Class B condition<br><br>Note whether dysfunctional behavior or associated physical disorder is present. |

## Table 5

## Reporting Results of the Evaluation for Mental and Physical Disorders with Associated Harmful Behavior*

| Findings | Record on Medical Report Form |
|---|---|
| No current evidence of physical or mental disorder<br><br>No history of physical or mental disorder and no history of harmful behavior | No Class A or Class B condition |
| Mental shortcomings due solely to lack of education and no harmful behavior | No Class A or Class B condition |
| Mental condition, with or without harmful behavior, attributable to remediable physical causes; or temporary--caused by a toxin, medically prescribed drug, or disease | (Treat underlying condition or refer for treatment; complete medical report form after reevaluation.) |
| History of physical or mental disorder and history of associated harmful behavior<br><br>Physical or mental disorder not currently present and harmful behavior not likely to recur ** | No Class A or Class B condition<br><br>(Report diagnosis and reason(s) for judging that harmful behavior will not recur.) |
| Current evidence of a physical or mental disorder and associated harmful behavior or history of associated harmful behavior | Class A condition<br><br>(Report diagnosis and description of harmful behavior.) |
| History of physical or mental disorder and history of associated harmful behavior, and harmful behavior likely to recur | Class A condition<br><br>(Report diagnosis, description of harmful behavior, and reason(s) for judging that harmful behavior is likely to recur.) |
| Current evidence of a physical or mental disorder but no history of associated harmful behavior | Class B condition<br><br>(Report diagnosis.) |
| History of physical or mental disorder and history of associated harmful behavior<br><br>Physical or mental condition controlled by medication or in remission.*** No currently associated harmful behavior, and behavior judged not likely to recur.**** | Class B condition<br><br>(Report diagnosis, description of harmful behavior and reason(s) for judging that behavior is not likely to recur.) |

*Includes alcohol abuse/dependence, which, under the new law, is to be considered as any other mental or physical disorder with associated harmful behavior.

**E.g., an otherwise normal person with a history of a physical or mental disorder and associated harmful behavior that is unlikely to recur (e.g., suicide attempt during reactive depression over the death of a spouse, and the person is no longer considered a suicidal risk).

***E.g., an alien with a history of harmful behavior due to a disorder or condition that continues but that has been managed with medication (e.g., person who has a manic-depressive illness that is treated with lithium) or that is in remission.

****The behavior can be judged not likely to recur if the alien is able to demonstrate that the disorder is in remission, remission being defined as no pattern of the behavioral element of the disorder for the past 2 years (5 years in the case of antisocial personality disorder, impulse control disorders not otherwise classified, paraphilias that involve behaviors that threaten others, and conduct disorders); or the alien's condition is controlled by medication and the alien certifies in writing that he or she will continue medication or other treatment to control the disorder and prevent harmful behavior.