

## USCIS Response to Coronavirus (COVID-19)



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# Part O - Victims of Trafficking

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# Chapter 1: Purpose and Background [Reserved]

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# Chapter 2 - Waivers for Victims of Trafficking

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## A. Inadmissibility

Victims of a severe form of trafficking in persons applying for T nonimmigrant status<sup>[1]</sup> must demonstrate that they are admissible to the United States.<sup>[2]</sup> This is also true for applicants for derivative T nonimmigrant status.<sup>[3]</sup>

Applicants for T nonimmigrant status are not subject to the public charge ground of inadmissibility.<sup>[4]</sup>

If an applicant is subject to one or more grounds of inadmissibility, the applicant may apply for a discretionary waiver of the ground(s) by filing an Application for Advance Permission to Enter as a Nonimmigrant ([Form I-192](#)).<sup>[5]</sup> However, there is no waiver available if an applicant is inadmissible under [INA 212\(a\)\(3\)\(C\)](#) (adverse foreign policy impact) or [INA 212\(a\)\(3\)\(E\)](#) (participants in Nazi persecution or genocide).<sup>[6]</sup>

## B. Waivers

### 1. Waiver Authority

For T nonimmigrant applicants, waivers are available under two sections of the Immigration and Nationality Act (INA):

- [INA 212\(d\)\(13\)](#), which provides USCIS with discretion to waive grounds of inadmissibility specific to T nonimmigrant status applications; and
- [INA 212\(d\)\(3\)\(A\)\(ii\)](#), which provides USCIS discretion to waive certain grounds of inadmissibility for nonimmigrants based on a general balancing of positive and negative discretionary factors.

The table below outlines which grounds of inadmissibility USCIS can waive under these two legal authorities. If an applicant meets the requirements of the legal standard, the officer must also determine whether to approve the waiver as a matter of discretion.<sup>[7]</sup>

### T Nonimmigrants: Applicable Grounds of Inadmissibility and Corresponding Waivers

Inadmissibility Ground	Waiver Available?	Legal Authority and Standard
<ul style="list-style-type: none"> <li>Health-related (<a href="#">INA 212(a)(1)</a>)</li> </ul>	Yes	In the national interest ( <a href="#">INA 212(d)(13)(B)(i)</a> )
<ul style="list-style-type: none"> <li>Unlawful presence bars (<a href="#">INA 212(a)(9)(A)</a> and <a href="#">INA 212(a)(9)(C)(i)(II)</a>)</li> <li>Illegal entrants and immigration violators (<a href="#">INA 212(a)(6)</a>)</li> <li>Documentation requirements (<a href="#">INA 212(a)(7)</a>)</li> <li>Practicing polygamists (<a href="#">INA 212(a)(10)(A)</a>)</li> </ul>	Yes	In the national interest and connection to victimization ( <a href="#">INA 212(d)(13)(B)(ii)</a> )
<ul style="list-style-type: none"> <li>Criminal grounds (<a href="#">INA 212(a)(2)</a>)</li> <li>Terrorist activities (<a href="#">INA 212(a)(3)(B)</a>)</li> <li>Terrorist organization membership (<a href="#">INA 212(a)(3)(E)</a>)</li> <li>International child abduction (<a href="#">INA 212(a)(10)(C)</a>)</li> <li>Renunciation of US citizenship to avoid taxation (<a href="#">INA 212(a)(10)(E)</a>)</li> </ul>	Yes	General balancing of positive and negative discretionary factors ( <a href="#">INA 212(d)(3)(A)(ii)</a> )

Inadmissibility Ground	Waiver Available?	Legal Authority and Standard
<ul style="list-style-type: none"> <li>• Espionage and unlawful activity (<a href="#">INA 212(a)(3)(A)</a>)</li> <li>• Adverse foreign policy considerations (<a href="#">INA 212(a)(3)(C)</a>)</li> <li>• Nazi persecution, genocide, torture, extrajudicial killing (<a href="#">INA 212(a)(3)(E)</a>)</li> <li>• Recruitment and use of child soldiers (<a href="#">INA 212(a)(3)(G)</a>)</li> </ul>	No	Grounds of inadmissibility ( <a href="#">INA 212(a)</a> ).

## Footnotes

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[<sup>1</sup>] For more information about T nonimmigrant status, see Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking [[3 USCIS-PM B](#)].

[<sup>2</sup>] See [INA 212\(a\)](#). See [8 CFR 214.1\(a\)\(3\)\(i\)](#).

[<sup>3</sup>] See [8 CFR 214.11\(k\)\(1\)\(iv\)](#).

[<sup>4</sup>] See [INA 212\(d\)\(13\)\(A\)](#). See [8 CFR 212.16\(b\)](#).

[<sup>5</sup>] See [INA 212\(d\)\(13\)\(B\)](#). See [8 CFR 212.16](#).

[<sup>6</sup>] See [INA 212\(d\)\(13\)\(A\)](#). See [INA 212\(d\)\(3\)\(A\)\(ii\)](#).

[<sup>7</sup>] See Part A, Waiver Policies and Procedures, Chapter 5, Discretion [[9 USCIS-PM A.5](#)].

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## Chapter 3 - INA 212(d)(13) Waivers

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### A. Waiver Eligibility

Because the waiver authority in INA 212(d)(13) was specifically created for T nonimmigrant applicants, USCIS first considers whether an applicant is eligible for a waiver under this section.<sup>[1]</sup>

In adjudicating INA 212(d)(13) waiver requests, there are two possible legal standards for an officer to consider, depending on which of the ground of inadmissibility applies:

- Health-related grounds of inadmissibility under INA 212(a)(1); or
- All other grounds of inadmissibility.

If the applicant is inadmissible based on health-related grounds, USCIS considers whether it is in the national interest to exercise its discretion to waive this ground of inadmissibility.<sup>[2]</sup>

For all other grounds of inadmissibility that are waivable under INA 212(d)(13), USCIS considers both the national interest and whether the activities rendering the applicant inadmissible were caused by, or were incident to, the victimization suffered due to being a victim of trafficking.<sup>[3]</sup>

USCIS cannot grant a waiver under INA 212(d)(13) for grounds other than health-related grounds unless the applicant establishes that the activities rendering the applicant inadmissible were caused by, or were incident to, the victimization.<sup>[4]</sup>

### B. Discretionary Analysis

If the officer determines that the applicant has met the legal standard for a waiver under INA 212(d)(13), the officer must still determine whether the waiver should be granted as a matter of discretion.<sup>[5]</sup> The

applicant bears the burden of demonstrating that USCIS should favorably exercise discretion.<sup>[6]</sup>

Neither Congress nor legacy Immigration and Naturalization Service defined the term “national interest” in either the Immigration and Nationality Act (INA) or the regulations in order to leave the application of this test as flexible and broad as possible.

Factors officers may consider in determining whether a waiver is in the national interest include, but are not limited to:

- Details of the applicant’s victimization;
- Level of victim’s cooperation with law enforcement;
- Contributions to public safety by strengthening the ability of law enforcement to investigate and prosecute criminal activity;
- Contributions to the community;
- Family unity; and
- Risk of harm if returned to home country.

The officer must weigh the social and humanitarian considerations against the adverse factors present in the applicant’s case.<sup>[7]</sup> The approval of a waiver as a matter of discretion depends on whether the favorable factors in the applicant's case outweigh the unfavorable ones.<sup>[8]</sup>

In cases involving violent or dangerous crimes, USCIS only exercises favorable discretion in extraordinary circumstances, unless the criminal activities were caused by, or were incident to, the victimization that the applicant suffered as a result of being trafficked.<sup>[9]</sup>

## C. Ineligible for INA 212(d)(13) Waiver

If an officer determines that the applicant is not eligible for a waiver under INA 212(d)(13), the officer must consider whether the applicant meets the legal standard and warrants a favorable exercise of discretion under the INA 212(d)(3)(A)(ii) nonimmigrant waiver.

## Footnotes

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<sup>[^ 1]</sup> See [INA 212\(d\)\(13\)\(B\)](#) (providing waiver authority specific to T nonimmigrants in addition to any other waivers that may be available).

<sup>[^ 2]</sup> See [INA 212\(d\)\(13\)\(B\)](#). See [8 CFR 212.16\(b\)\(1\)](#).

<sup>[^ 3]</sup> See [INA 212\(d\)\(13\)\(B\)](#). See [8 CFR 212.16\(b\)\(2\)](#).

<sup>[^ 4]</sup> See [INA 212\(d\)\(13\)\(B\)](#). See [8 CFR 212.16\(b\)\(2\)](#).

<sup>[^ 5]</sup> See [INA 212\(d\)\(13\)\(B\)](#) (indicating that INA 212(d)(13) waivers are only granted as a matter of discretion).

[^6] See [Matter of De Lucia \(PDF\)](#), 11 I&N Dec. 565 (BIA 1966). See *Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957).

[^7] See [Matter of Mendez-Moralez \(PDF\)](#), 21 I&N Dec. 296 (BIA 1996).

[^8] For a non-exhaustive list of relevant factors to consider in the discretionary analysis, see Part A, Waiver Policies and Procedures, Chapter 5, Discretion, Section A, Discretionary Factors [9 USCIS-PM A.5(A)]. See [Matter of Mendez-Moralez \(PDF\)](#), 21 I&N Dec. 296 (BIA 1996) (relating to a criminal waiver under [INA 212\(h\)\(1\)\(B\)](#)). See [Matter of Marin \(PDF\)](#), 16 I&N Dec. 581 (BIA 1978) (relating to an INA 212(c) waiver). See [Matter of Tijam \(PDF\)](#), 22 I&N Dec. 408 (BIA 1998) (relating to a fraud or misrepresentation finding ([INA 212\(a\)\(6\)\(C\)\(i\)](#)) and the discretionary waiver under former [INA 241\(a\)\(1\)\(H\)](#) (renumbered as INA 237(a)(1)(H) by IIRIRA)).

[^9] See [8 CFR 212.16\(b\)\(3\)](#).

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## Chapter 4 - INA 212(d)(3) Waivers

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### A. When to Consider INA 212(d)(3) Waiver

USCIS considers whether the applicant may be eligible for a discretionary waiver under INA 212(d)(3)<sup>[1]</sup> if the applicant is ineligible for a waiver under INA 212(d)(13), such as in the following circumstances:

- An applicant cannot establish that the conduct rendering the applicant inadmissible is connected to the trafficking; or
- The applicant is inadmissible under a ground not covered by INA 212(d)(13) but that is covered by INA 212(d)(3), which includes:
  - Security and related grounds ([INA 212\(a\)\(3\)](#));<sup>[2]</sup>
  - International child abduction([INA 212\(a\)\(10\)\(C\)](#));<sup>[3]</sup> and
  - Former citizens who renounced citizenship to avoid taxation ([INA 212\(a\)\(10\)\(E\)](#)).<sup>[4]</sup>

### B. Discretionary Analysis

The INA 212(d)(3) waiver analysis is a purely discretionary determination, and the analysis involves balancing social and humanitarian considerations against adverse factors.

In addition to considering a broad range of discretionary factors,<sup>[5]</sup> officers should also consider the following factors, as specifically outlined by the Board of Immigration Appeals, in determining whether to approve or deny a section INA 212(d)(3) waiver:

- The risk of harm to society if the applicant is admitted;

- The seriousness of the applicant’s prior immigration law or criminal law violations, if any; and
- The reasons for wishing to enter the United States.<sup>[6]</sup>

In addition to these factors, officers should take into account as a positive factor that the applicant has suffered a severe form of human trafficking in persons and has complied with any reasonable law enforcement requests for assistance.

## Footnotes

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<sup>[^1]</sup> Department of State (DOS) also adjudicates waiver applications. For more information on DOS waiver processing, See [9 FAM 305.4](#), Processing Waivers.

<sup>[^2]</sup> See [INA 212\(a\)\(3\)](#).

<sup>[^3]</sup> See [INA 212\(a\)\(10\)\(C\)](#).

<sup>[^4]</sup> See [INA 212\(a\)\(10\)\(E\)](#).

<sup>[^5]</sup> See Part A, Waiver Policies and Procedures, Chapter 5, Discretion [[9 USCIS-PM A.5](#)].

<sup>[^6]</sup> See [Matter of Hranka \(PDF\)](#), 16 I&N Dec. 491 (BIA 1978).

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# Chapter 5 - Adjudication and Post-Adjudication Matters

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## A. Approval [Reserved]

## B. Denial [Reserved]

## C. Appeal of Waivers

USCIS' decision to deny a nonimmigrant waiver is not appealable.<sup>[1]</sup> However, the applicant may file a motion to reopen or reconsider on a denied waiver application using the Notice of Appeal or Motion ([Form I-290B](#)).<sup>[2]</sup> An applicant can file a new waiver application in appropriate cases,<sup>[3]</sup> such as when there is new evidence relevant to the waiver consideration.

## D. Revocation of Waivers

USCIS, at any time, may revoke a waiver previously authorized under INA 212(d). There is no appeal of a decision to revoke a waiver.<sup>[4]</sup>

## Footnotes

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<sup>[^ 1]</sup> See [8 CFR 212.16\(c\)](#).

<sup>[^ 2]</sup> See [8 CFR 103.5](#).

[^3] See [8 CFR 212.16\(c\)](#).

[^4] See [8 CFR 212.16\(d\)](#).

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