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The Immigrant Visa: The "Reason to Believe" Provision Under the INA in the Context of Consular Processing

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**THE IMMIGRANT VISA: THE “REASON TO BELIEVE”
PROVISION UNDER THE INA IN THE CONTEXT OF
CONSULAR PROCESSING**

Eddie Corona*

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INTRODUCTION

“Everywhere immigrants have enriched and strengthened the fabric of American life.”¹ Immigration laws, in the United States, have increasingly become an intensely debated issue, specifically, the issue of creating a path towards lawful permanent residency for undocumented immigrants residing within the United States.² One thing is abundantly clear from these debates: the United States immigration system is faulty.³ But what about it makes it faulty? Some journalists focus on policy issues surrounding the need to integrate undocumented immigrants to the work force and the benefits surrounding integration,⁴ while other journalists focus on humanitarian policies and its financial costs.⁵ Immigration laws “are intended to promote family unification, facilitate immigrant assimilation, and unleash immigrants’ economic dynamism.”⁶ However, the current policies promote “the opposite by forcing families to wait years to be reunited” and hindering economic growth.⁷

Immigration law is a complicated structural area of federal substantive law, partly embedded in the United States executive branch under the Department of Homeland Security and Department of State.⁸

1. Brent R. Carney, *Teresa Heinz Kerry Gives Keynote Address at Immigration Ceremony for More Than 200 New Citizens*, JOHN F. KENNEDY PRES’L LIBRARY & MUSEUM (Sep. 14, 2005), <https://www.jfklibrary.org/About-Us/News-and-Press/Press-Releases/Teresa-Heinz-Kerry-Gives-Keynote-Address-at-Immigration-Ceremony-for-More-Than-200-New-Citizens.aspx>.

2. See Richard Cowan, *Trump Call for Immigration Legislation Sparks Republican Interest*, Reuters (Sep. 6, 2017), <https://www.reuters.com/article/us-usa-immigration-congress/trump-call-for-immigration-legislation-sparks-republican-interest-idUSKCN1BH3AO>.

3. Ruzan Sarwar, *This is What’s Wrong With Our Immigration Policy*, HUFF. POST (Aug. 14, 2012, 12:13 PM), https://www.huffingtonpost.com/ruzan-sarwar/student-visas-immigration-reform_b_1775425.html.

4. See *id.*

5. See generally Jerry Markon & Joshua Partlow, *Unaccompanied Children Crossing Southern Border in Greater Numbers Again*, WASH. POST (Dec. 16, 2015) https://www.washingtonpost.com/news/federal-eye/wp/2015/12/16/unaccompanied-children-crossing-southern-border-in-greater-numbers-again-raising-fears-of-new-migrant-crisis/?utm_term=.39983a8dd552.

6. *Featured Issue: Business and Family Immigr.*, AM. IMMIGR. LAW. ASS’N (Dec. 6, 2016), <http://www.aila.org/advo-media/issues/the-basics/business-immigration>.

7. *Id.*

8. Jennifer Chacon, *Who is Responsible for U.S. Immigration Policy?*, Insights on Law and Society, American Bar Association, https://www.americanbar.org/publications/insights_on_law_and_society/14/spring-2014/who-is-responsible-for-u-s-immigration-policy-.html; The immigrant visa process for undocumented immigrants is more daunting than for people that are not present in the United States applying for lawful permanent residency because they have more to lose if not granted a visa. This Note focuses solely on the undocumented immigrants applying for lawful permanent residency.

The lawful permanent resident application process, for undocumented immigrants specifically, is a daunting process for applicants⁹ as well as for immigration lawyers.¹⁰ This is because the lawful permanent resident application process, and the applicable laws, are not as clear as they should be.¹¹ According to practicing immigration attorney Alisa S. Thomas, lawful permanent resident applicants, who seek her legal representation, are usually undocumented immigrants who have reached the age of majority and have resided in the United States unlawfully between one-hundred-eighty days to over a year.¹² The application process for these applicants commonly involves three steps:¹³ (1) applying for a family based visa¹⁴ with the Department of Homeland Security, (2) applying for a provisional waiver¹⁵ with the Department of Homeland Security, and (3) completing an interview with a consular officer at the applicant's country of origin¹⁶ with the Department of State. These steps, at the outset, seem simple, but in reality are riddled with uncertainties. The current immigration laws have become unworkable, so much so that the outcome of cases are unpredictable. Such unpredictability leads immigration lawyers to render uncertain advice in fear of receiving a letter from a consular officer denying their client entry into the United States.¹⁷

The issue with applying for lawful permanent residency mainly occurs at the consulate interview stage.¹⁸ Applicants seeking to acquire a U.S. visa must undergo an interview with a consular officer at a U.S.

9. Telephone Interview with Alisa S. Thomas, Attorney at Law, THOMAS IMMIGR. L. (December 15, 2016) [hereinafter *Interview with Alisa S. Thomas*]. Alisa S. Thomas is a practicing immigration attorney with over fifteen years of experience.

10. *Id.*

11. *Id.*

12. *Id.*; See generally Jie Zong, Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute (March 8, 2017), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Unauthorized>.

13. *Interview with Alisa S. Thomas, supra* note 9. There exist three steps for undocumented immigrants, over the age of eighteen, applying for lawful permanent residency who have unlawfully resided in the United States longer than one year.

14. *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/i-130> [hereinafter *Petition for Alien Relative*] (last visited Jan. 10, 2017).

15. *I-601A, Application for Provisional Unlawful Presence Waiver*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/i-601a> [hereinafter *I-601A*] (last visited Jan. 10, 2017).

16. U.S. Visas, *Interview*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/interview.html> [hereinafter *Interview for a U.S. Visa*] (last visited Jan. 10, 2017).

17. *Interview with Alisa S. Thomas, supra* note 9.

18. *Id.*

Embassy or Consulate who will determine their admissibility into the United States¹⁹ based on immigration admissibility laws.²⁰ The Department of State details the instances in which a consular officer may deny an applicant a visa.²¹ However, what is not detailed is that consular officers hold the power to deny visas based on a subjective standard.²² This standard is known as the “Reason to Believe” standard.²³ Generally, consular officers may use this power to deem an applicant inadmissible solely for the reason that the consular officer has “reason to believe” the applicant is a drug trafficker,²⁴ or other “reason to believe” inadmissibility grounds which are found within the statute.²⁵

Rather than providing a clear standard, the “reason to believe” provision is confusing because it allows consular officers to exercise discretion to determine an applicant’s admissibility based on subjective determinations, even though the applicant satisfies all admissibility grounds.²⁶ Furthermore, the consular officer’s visa denial is non-appealable because the United States, as a sovereign, enjoys immunity from unconsenting suits,²⁷ thus, leaving the applicant without recourse other than to re-file and start the lengthy process over again.²⁸ In order to repair an outdated immigration system,²⁹ the Immigration and Nationality Act’s (hereinafter “INA”) provision, INA 212 (a)(2)(c), should be ousted or modified. In Part I of this Note the technical aspects of applying for lawful permanent residency will be explained. Part II of this Note critiques the INA 212 (a)(2)(c) “reason to believe” provision and explains why the “reason to believe” provision is unworkable in the immigration visa process. Finally, Part III proposes alternatives to the “reason to believe” provision that could ultimately foster legal immigration.

19. U.S. Visas, *Visa Denials*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-denials.html> (last visited Jan. 10, 2017) [hereinafter *Visa Denials*].

20. 8 U.S.C. § 1182 (2012).

21. *Visa Denials*, *supra* note 19.

22. *See* 8 U.S.C. § 1182(a)(2)(C).

23. *See generally id.*

24. *Id.*

25. 8 U.S.C. § 1182.

26. *Interview with Alisa S. Thomas*, *supra* note 9.

27. *See* U.S. v. Mitchell, 445 U.S. 535, 538 (1980).

28. *Visa Denials*, *supra* note 19.

29. Cowan, *supra* note 2.

I. IMMIGRATION LAW BACKGROUND

A. History

Immigration laws, before the incident of 9/11, were controlled by an agency called the United States Immigration and Naturalization Services (INS) under the Department of Justice.³⁰ 9/11 prompted the creation of the Department of Homeland Security, pursuant to the Homeland Security Act of 2002,³¹ to safeguard the country by, amongst other strategic reasons, ensuring border protection and administering and enforcing immigration laws.³² The Homeland Security Act of 2002, thus, absorbed what was the INS and re-created it as separate agencies under the newly created Department of Homeland Security cabinet of the executive branch of the Federal Government.³³ Thus, immigration laws are presently controlled and administered by the U.S. Citizenship and Immigration Services agency (USCIS), U.S. Immigration and Customs Enforcement agency (ICE), and U.S. Customs and Border Protection agency (CBP), under the Department of Homeland Security agency (DHS).³⁴

Today the United States has been facing a consistent flow of unauthorized immigrants since 2009; mostly all coming after a dramatic increase of unauthorized immigrants from 3.5 million in the 1990's to 12.2 million in 2007.³⁵ Furthermore, a majority of undocumented immigrants have been living in the United States for at least a decade.³⁶ According to Pew Research Center, there were 11 million undocumented immigrants in the United States in 2015.³⁷ Of those who applied for immigrant visas and had their cases adjudicated in the 2016 fiscal year, only 617,752 immigrant visas were granted.³⁸ 309,061 of those

30. HAROLD C. RELYEA, CONG. RES. SERV., *HOMELAND SECURITY: ORG. & MGMT.* (August 7, 2002), <https://fas.org/irp/crs/RL31493.pdf>.

31. *Creation of the Department of Homeland Security*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/creation-department-homeland-security> (last visited Jan. 10, 2017).

32. *About DHS, Our Mission*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/our-mission> (last visited Jan. 10, 2017).

33. 6 U.S.C. § 202(3) (West 2016).

34. *Who Joined DHS*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/who-joined-dhs> (follow "Chronology of Events" hyperlink) [hereinafter *Who Joined DHS*] (last visited Jan. 10, 2017).

35. Jens M. Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Nov. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>.

36. *Id.*

37. *Id.*

38. *Worldwide Immigration Visa Issuances*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/dam/visas/Statistics/Graphs/Worldwide%20IV%20Issuances>.

applications were refused³⁹ under the INA because a consular officer deemed them to be ineligible.⁴⁰

*B. The Road to Lawful Permanent Resident Status*⁴¹

The lawful Permanent Resident (LPR) process requires understanding the government organizations involved and their respective functions. The process starts with a visa petition formally called an I-130, Petition for Alien Relative (hereinafter “petition”).⁴² The petition is available to a lawful permanent resident or citizen of the United States who seeks to establish the existence of a relationship with an alien relative who wishes to immigrate to the United States.⁴³ The petition instructions detail strict requirements, such as, which relatives the resident or citizen may file for and which documents are needed to establish a truthful familial relationship with the alien relative.⁴⁴ The petition is then filed with the U.S. Citizenship and Immigration Services agency for review,⁴⁵ which form part of the Department of Homeland Security.⁴⁶ Petitions are usually approved by the United States Citizenship and Immigration Services, unless they require additional proof to establish a familial relationship or a required document is missing.⁴⁷

Once the resident or citizen files the required documents and I-130 form on behalf of the alien relative, the applicant will be placed on a preference category, depending on the type of relationship, and must wait until a visa becomes available in order to continue the LPR process.⁴⁸ However, if the petition is for an immediate relative, such as a spouse, parent, or unmarried minor child of a United States citizen, the

pdf (last visited Jan. 10, 2017).

39. *Immigrant and Nonimmigrant Visa Ineligibilities*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXX.pdf> (last visited Jan. 10, 2017).

40. *Ineligibilities and Waivers: Laws*, U.S. Dep’t of State, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/waivers.html> (last visited on Jan. 22, 2018).

41. Please note: the following discussion and materials in this note are for educational and informational purposes only and not for the purpose of providing legal advice. You should contact an attorney to obtain advice with respect to any particular issue or problem.

42. *Petition for Alien Relative*, *supra* note 14.

43. *Instructions for Form I-130*, U.S. DEP’T OF HOMELAND SECURITY (Feb. 27, 2017), <https://www.uscis.gov/sites/default/files/files/form/i-130instr.pdf> [hereinafter *Instructions for Form I-130*].

44. *Id.*

45. *Id.*

46. *Who Joined DHS*, *supra* note 34.

47. *Interview with Alisa S. Thomas*, *supra* note 9.

48. *Instructions for Form I-130*, *supra* note 43.

applicant need not wait until a visa becomes available and may continue the LPR process once the petition is approved.⁴⁹

Once a visa becomes available or the petition is approved, applicants must, almost always, then proceed through a second step before undergoing their visa interview with a consular officer.⁵⁰ This is because undocumented applicants, who are not eligible to adjust their status in the United States, will need to travel out of the United States to their country of origin, and undergo a consular interview with the U.S. Consulate or Embassy to obtain an immigrant visa.⁵¹ Nonetheless, because undocumented applicants have been living in the United States unlawfully, the applicants are deemed inadmissible pursuant to the Immigration and Nationality Act, and will not be able to re-enter the United States unless the applicant stays outside the United States for ten years or acquires a waiver.⁵² Thus, in order to re-enter the United States after the consular interview, the applicant must go through the second step, which is called the “waiver process,”⁵³ to avoid waiting outside the United States for ten years.

The waiver is used when an undocumented applicant, at least the age of seventeen, has been present in the United States unlawfully for more than one-hundred-eighty days and is seeking to re-enter the United States lawfully.⁵⁴ Thus, the waiver is an essential component to complete the LPR process. In order to complete this step, the applicant must complete an application called I-601A, Provisional Unlawful Presence Waiver (hereinafter “waiver”).⁵⁵ The waiver is available to those who are the principal beneficiary to an approved I-130, Petition for Alien Relative,⁵⁶ before departing the United States to appear at a U.S. Embassy or consulate for an immigrant visa interview.⁵⁷

The process was created to expedite the process for applicants to acquire their LPR status.⁵⁸ However, not all visa applicants qualify for the waiver. Apart from needing an approved I-130 petition, the visa

49. *Id.*

50. *Interview with Alisa S. Thomas, supra* note 9.

51. *Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP AND IMMIGR. SERV. <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> [hereinafter *Unlawful Presence Waivers*] (last visited Jan. 10, 2017).

52. 8 U.S.C. § 1182(a)(9)(C)(ii) & (iii).

53. *Interview with Alisa S. Thomas, supra* note 9.

54. U.S. DEP’T OF HOMELAND SECURITY, OMB No. 1615-0123, INSTRUCTIONS FOR APPLICATION FOR PROVISIONAL UNLAWFUL PRESENCE WAIVER (2016), <https://www.uscis.gov/sites/default/files/files/form/i-601ainstr.pdf>.

55. *Id.*

56. *Id.*

57. *I-601A, supra* note 15.

58. *Unlawful Presence Waivers, supra* note 51.

applicant must also show that a qualifying relative will suffer extreme hardship if they are refused admission into the United States.⁵⁹ This is the most critical part of applying for a waiver and a lot of evidence goes into the application.⁶⁰ Qualifying relatives consist of the visa applicant's U.S. Citizen or Legal Permanent Resident parent or spouse.⁶¹

Once all of the evidence is collected, it is filed, along with the I-601A form, with the United States Citizenship and Immigration Services agency of the Department of Homeland Security, who will adjudicate the application.⁶² Waiver applications are difficult to get approved mainly because the immigration officer in charge of reviewing the application exercises full discretion over the approval.⁶³ There must be sufficient evidence of extreme hardship in order to approve the waiver. However, even when there is ample evidence of extreme hardship, waivers still are denied.⁶⁴ Extreme hardship may be established by proof of health related consequences, financial considerations, and educational related consequences to the qualifying relative if the visa applicant does not get LPR status.⁶⁵ But having a pending waiver application or an approval will not automatically grant the applicant LPR status,⁶⁶ the applicant must still go to the consular interview abroad to finish the LPR process.⁶⁷

Once the visa applicant's I-130 Petition and I-601A application are approved, the next and final step in the immigrant visa process is attending a consular interview in the visa applicant's country of origin.⁶⁸ However, the interview is not with the United States Citizenship and Immigration Services agency under the Department of Homeland Security. Rather, it is with a United States consulate or embassy that is abroad under the Bureau of Consular Affairs, an agency under the Department of State⁶⁹

The Bureau of Consular Affairs is charged with protecting U.S. borders through reviewing and adjudicating visas.⁷⁰ The Bureau of

59. *Id.*

60. *Interview with Alisa S. Thomas, supra* note 9.

61. *Unlawful Presence Waivers, supra* note 51.

62. *Id.*

63. *Interview with Alisa S. Thomas, supra* note 9.

64. *Id.*

65. *Unlawful Presence Waivers, supra* note 51.

66. *Id.*

67. *Interview with Alisa S. Thomas, supra* note 9.

68. *Id.*

69. *Interview*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/interview.html> (last visited Jan. 22, 2018).

70. *Mission*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/about-us.html> (last visited Jan. 22, 2018).

Consular Affairs is led by the Assistant Secretary for Consular affairs⁷¹ who manages Visa Services.⁷² The Visa Services office is in charge of all visa policy and procedure related to the issuance of U.S. visas for foreign citizens applying through consulates and embassies abroad.⁷³ Thus, although the Department of Homeland Security approves the I-130 Petition and the I-601A waiver application, the visa applicant must attend a final interview with the Department of State, a completely different agency. This is because the visa applicant must travel out of the United States converting the immigrant visa process into an issue of foreign affairs, an area that the Department of State has sole jurisdiction over.⁷⁴

The visa applicant's approved I-130 Petition and I-601A Waiver are then forwarded to the National Visa Center⁷⁵ for immigrant visa pre-processing.⁷⁶ Some immigrant visa categories, such as family preference categories or employment based categories, have yearly caps causing immigrant visa applicants to wait a lengthy amount of time for an immigrant visa interview.⁷⁷ Immigrant visas based on immediate relatives, however, do not have yearly caps and are immediately available for immigrant visa pre-processing.⁷⁸ Nonetheless, visa applicants available for immigrant visa pre-processing will be notified by mail or email by the National Visa Center and will receive instructions about how to complete six steps in order to complete visa pre-processing.⁷⁹

Immigrant visa pre-processing involves (1) choosing an agent, (2) paying fees, (3) submitting visa application form, (4) collecting financial documents, (5) collecting supporting documents, and (6) submitting documents to the National Visa Center.⁸⁰ Choosing an agent and paying fees are straight forward steps, which involve choosing a representative

71. *Id.*

72. *Id.*

73. *The Immigrant Visa Process*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process.html> (last visited Jan. 22, 2018).

74. *See generally id.*

75. *See Petition*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/petition.html>.

76. *Id.*

77. *Id.*; *See Per Country Limit*, United States and Immigration Services, <https://www.uscis.gov/tools/glossary/country-limit> (Last visited Jan. 26, 2018)

78. *Family-Based Immigrant Visas*, U.S. Dep't of State, <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/family-based-immigrant-visas.html>

79. U.S. Visas, *Begin National Visa Center (NVC) Processing*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/contact.html> (last visited Jan. 10, 2017).

80. *Id.*

to receive correspondence from the National Visa Center and paying the processing fees. The agent selected may be the applicant himself or another trusted representative, such as a family member or an attorney.⁸¹ In order to select an agent the visa applicant must complete a DS-261 form.⁸² After selecting an agent, the applicant must then pay processing fees, which include an Immigrant Visa Application Processing Fee and an Affidavit of Support Fee.⁸³

The next step involves completing a visa application form and collecting financial and supporting documents to submit to the National Visa Center. The visa applicant needs to complete a DS-260 form which will comprise part of a visa application.⁸⁴ However, completing and submitting the DS-260 form does not itself execute a visa application, the application is formally submitted after the visa applicant completes an interview with a consular officer.⁸⁵

The applicant must then collect financial documents. In this step the petitioner, the person who filed the I-130 Petition for Alien Relative on behalf of the visa applicant, must complete an Affidavit of Support form and collect the required financial documents.⁸⁶ There are a limited group of applicants who do not need to complete an Affidavit of Support form.⁸⁷ The Affidavit of Support is required by U.S. law under the Immigration and Nationality Act (INA)⁸⁸ and is a legal contract between the I-130 petitioner and the U.S. Government in regards to the visa applicant whom the petitioner is sponsoring.⁸⁹ The petitioner, thus, must establish that they have the financial means to support the visa applicant, if necessary.⁹⁰ The petitioner must prove this by collecting financial

81. U.S. Visas, *Step 1: Choosing an Agent*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/Step_1_Choose_an_agent.html (last visited Jan. 10, 2017).

82. *Id.*

83. U.S. Visas, *Step 2: Paying Fees, The Immigrant Visa Process*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/approved/step_2_pay_fees.html (last visited Jan. 10, 2017).

84. U.S. Visas, *Step 3: Submit Visa Application Form*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Submit_Visa_Application.html (last visited Jan. 10, 2017).

85. *Id.*

86. U.S. Visas, *Step 4: Collect Financial Documents*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Step_4_Collect_Financial_Documents.html [hereinafter *Step 4*] (last visited Jan. 10, 2017).

87. *Affidavit of Support*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-support> [hereinafter *Affidavit of Support*] (last visited Jan. 10, 2017).

88. 8 U.S.C. § 1182(a)(4).

89. *Step 4*, *supra* note 86.

90. *Id.*

evidence such as income, tax returns, proof of domicile and relationship to the visa applicant, Social Security Administration earnings statement, and/or proof of assets.⁹¹

When the petitioner does not meet the minimum threshold to support the visa applicant, the petitioner must still submit an Affidavit of Support form.⁹² However, the visa applicant must find a “joint sponsor” who is willing to financially sponsor the visa applicant, accept the legal responsibilities with the original sponsor, and meets the required financial threshold.⁹³ The financial thresholds are measured by the I-864P form, HHS Poverty Guidelines for Affidavit of Support.⁹⁴ The joint sponsor must also meet all of the requirements as the original sponsor, such as, be a lawful permanent resident or citizen of the United States and have his or her domicile in the United States.⁹⁵ However, the joint sponsor need not be related to the visa applicant.⁹⁶ If a joint sponsor is needed, the joint sponsor must complete an Affidavit of Support form and provide the same financial documents as the original sponsor.⁹⁷

To complete immigrant visa pre-processing, the visa applicant must collect required supporting documents.⁹⁸ Supporting documents consist of birth certificates, court records, marriage and marriage termination certificates, petitioner documents, and the biographical page of the visa applicant’s passport.⁹⁹ The civil documents must be original or certified copies and, if not in the English language, must include certified translations from the foreign language to the English language.¹⁰⁰ The applicant must then submit supporting documents, along with financial documents, in one single package to the National Visa Center,¹⁰¹ wait for the National Visa Center to review all forms and documents for completeness, and issue the visa applicant an interview appointment letter.¹⁰²

91. *Id.*

92. *Affidavit of Support*, *supra* note 87.

93. *Id.*

94. *I-864P, 2017 HHS Poverty Guidelines for Affidavit of Support*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (2016).

95. *Affidavit of Support*, *supra* note 87.

96. *Id.*

97. *Id.*

98. U.S. Visas, *Step 5: Collect Supporting Documents*, U.S. DEP’T OF STATE, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Supporting_documents.html (last visited Jan. 10, 2017).

99. *Id.*

100. *Id.*

101. U.S. Visas, *Step 6: Submit Documents to the NVC*, U.S. DEP’T OF STATE, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/documents/Submit_documents.html (last visited Jan. 10, 2017).

102. *Interview for a U.S. Visa*, *supra* note 16.

The last phase of the immigrant visa process is the interview stage.¹⁰³ In preparing for the interview, the visa applicant must take certain steps to avoid delays in the visa processing.¹⁰⁴ Such steps require the applicant to schedule and complete a medical examination by an embassy-approved physician in the country where the applicant will be interviewed.¹⁰⁵ Medical examinations conducted by physicians other than those specified are not permitted.¹⁰⁶ The visa applicant must also register for courier services.¹⁰⁷ The service is for returning passports, civil documents, and visas to the applicant after the interview.¹⁰⁸ Lastly the visa applicant must gather documents required for the interview, such as, original and photo-copies of civil, financial, and supporting documents regardless if they were already submitted to the National Visa Center.¹⁰⁹ The visa applicant is advised by the National Visa Center to bring the required documents with them to the interview or else risk a significant delay or denial of the visa.¹¹⁰

The visa applicant, and any other person listed on the interview appointment letter, must then attend the consular interview¹¹¹ in order to be considered for, and complete the process of, an immigrant visa application. The interview is one of the most important phases of the visa immigrant process.¹¹² During the interview, a consular officer will interview the visa applicant and determine whether or not the applicant may receive an immigrant visa.¹¹³ Although there are no specific questions that a consular officer asks during the interview, the consular officer may ask questions regarding the visa applicant's immigration history, criminal history, moral qualities, and work history.¹¹⁴ The consular officer draws out questionable issues regarding the visa application, the visa applicant's history, or answers to certain interview

103. *Id.*

104. U.S. Visas, *Prepare for the Interview*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/prepare.html> [hereinafter *Prepare for the Interview*] (last visited Jan. 10, 2017).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. U.S. Visas, *Required Documents*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/prepare/interview-preparation-required-documents.html> (last visited Jan. 10, 2017).

110. *Prepare for the Interview*, *supra* note 104.

111. U.S. Visas, *Applicant Interview*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/applicant_interview.html [hereinafter *Applicant Interview*] (last visited Jan. 10, 2017).

112. *Interview with Alisa S. Thomas*, *supra* note 9.

113. *Applicant Interview*, *supra* note 111.

114. *Interview with Alisa S. Thomas*, *supra* note 9.

questions.¹¹⁵

The consular officer then executes a decision whether to grant or deny the visa applicant an immigrant visa based on the interview.¹¹⁶ The applicant is notified the day of the interview whether the visa has been approved or denied.¹¹⁷ Thus, the grant or denial of an immigrant visa rests highly on the consular officer's decision in light of all applicable U.S. laws, despite the visa applicant having completed all of the petitions, applications, and steps aforementioned.¹¹⁸ If the visa is approved the applicant will be notified after the interview and the applicant's passport and documents will be returned¹¹⁹ via courier service. The applicant will receive their visa printed on a page of their passport and will also receive a sealed packet containing documents that must be presented at any U.S. port of entry when attempting to re-enter the United States.¹²⁰ The applicant must travel to the United States before the visa expiration date printed, which is indicated on the visa.¹²¹ Before traveling to the United States, the applicant must pay a processing fee to the United States Citizenship and Immigration Services in order to be issued a Permanent Resident card and finalize the LPR process.¹²²

However, according to the Department of State, not all visa applicants are eligible or qualify for an immigrant visa.¹²³ Many factors can make an applicant ineligible to receive a visa.¹²⁴ These factors are based on U.S. law under the INA.¹²⁵ The INA establishes the types of visas available and the conditions that need to be met before an applicant is issued a visa.¹²⁶ When an applicant is found ineligible, the applicant will be informed verbally and in writing of the reason for the denial based on the applicable sections of the laws under the INA.¹²⁷ In certain cases, ineligible applicants may apply for a waiver for their ineligibility

115. *Id.*

116. U.S. Visas, *After the Interview*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/after.html> [hereinafter *After the Interview*] (last visited Jan. 26, 2018).

117. U.S. Visas, *After the Interview*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/immigrant-process/interview/after.html>

118. U.S. Visas, *Ineligibilities and Waivers: Laws*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/waivers.html> [hereinafter *Ineligibilities and Waivers*] (last visited Jan. 10, 2017).

119. *After the Interview*, *supra* note 117.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Ineligibilities and Waivers*, *supra* note 118.

126. *Id.*

127. *Id.*

under the INA.¹²⁸ Applicants who are not eligible for a waiver are left with no recourse but to reapply for an immigrant visa and start the process all over again.¹²⁹

II. IDENTIFICATION OF THE LEGAL ISSUE AND ANALYSIS

A. *The INA and the “Reason to Believe” Provision*

The Immigration and Nationality Act was created in 1952 and served to organize all immigration laws into one body of law.¹³⁰ The INA stands alone as a body of law, but it is also contained in the United States Code (U.S.C.).¹³¹ The INA, among other things, governs the admissibility of immigrants into the United States in the LPR process.¹³² Consular officers base their decision to admit or deny a visa applicant on the INA.¹³³ However, provisions within the INA do not clearly answer whether a visa applicant meets the INA requirements of admissibility. One of these provisions, the “reason to believe” standard, requires consular officers to utilize discretion in determining a visa applicant’s admissibility.

The reason to believe provision grants a consular officer the discretion to determine whether the visa applicant is inadmissible due to a reason to believe that the applicant is a drug trafficker.¹³⁴ The same provision applies to crimes such as human trafficking, money laundering, espionage, and terrorist activities.¹³⁵

The “reason to believe the visa applicant is a drug trafficker” provision is found under INA 212 (a)(2)(c) which reads:

“Any alien who the consular officer . . . knows or has reason to believe—is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in Section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible.”¹³⁶

128. *Id.*

129. *Interview with Alisa S. Thomas, supra* note 9.

130. *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGR. SERV., <https://www.uscis.gov/laws/immigration-and-nationality-act> [hereinafter *Immigration and Nationality Act*] (last visited Jan. 10, 2017).

131. *Id.*

132. *Ineligibilities and Waivers, supra* note 118.

133. *See id.*

134. 8 U.S.C. § 1182(a)(2)(C).

135. 8 U.S.C. § 1182(a)(2)(H); 8 U.S.C. § 1182(a)(2)(I); 8 U.S.C. § 1182(a)(3)(A); 8 U.S.C. § 1182(a)(3)(B).

136. 8 U.S.C. § 1182(a)(2)(c).

The first phase of the provision directs the consular officer to exercise discretion¹³⁷ if it is not known by the consular officer that the visa applicant is in fact a drug trafficker. The “reason to believe” portion of the provision is what allows the consular officer to exercise discretion since there is nothing in the provision that guides the consular officer on how to measure the “reason to believe.” The consular officer essentially decides whether there exists a reason to believe that the visa applicant is a drug trafficker and may deem the applicant inadmissible based on that reason.¹³⁸

B. Case Law Surrounding INA 212 (a)(2)(c)

The case law surrounding INA 212(a)(2)(c) expands and provides more grounds for the consular officer to deny a visa applicant. *In Matter of Rico*, 16 I. & N. Dec. 181 (BIA 1977),¹³⁹ the Board of Immigration Appeals Court held that a criminal conviction was not necessary to deem the visa applicant inadmissible if the consular officer has a “reason to believe” the alien is an illicit drug trafficker.¹⁴⁰

In Matter of Rico, the alien, who was an LPR, was caught with a truckload of marijuana.¹⁴¹ The alien, however, was never convicted, but this event gave the Department of State “reason to believe” the alien was trafficking drugs as per the INA.¹⁴² The alien argued that the underlying case was dismissed for insufficient evidence and, in light of the criminal proceeding, the Board of Immigration Appeals (BIA) should reverse the findings of inadmissibility.¹⁴³ The BIA, however, rejected the alien’s argument and held the criminal proceeding is a separate judicial matter and it does not bear upon the present admissibility issue.¹⁴⁴ The BIA further held that the matter is based on the current immigration record and the applicable immigration law governs.¹⁴⁵ Moreover, the BIA held that the burden of proof is a different standard than that of a criminal proceeding where finding of inadmissibility is based upon reasonable, substantial, and probative evidence, which had been proved under the “Reason to Believe” provision.¹⁴⁶

Similarly, the Fifth Circuit Court of Appeals held that a conviction

137. *Ineligibilities and Waivers*, *supra* note 118.

138. 8 U.S.C. § 1182(a)(2)(C).

139. *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

140. *Id.* at 186.

141. *Id.* at 182.

142. *See generally Id.*

143. *Id.* at 185.

144. *Id.*

145. *Matter of Rico*, 16 I&N Dec. 181, 185 (BIA 1997).

146. *Id.* at 185–186 (citing *Mason v. Tillinghast*, 27 F.2d 580 (1st Cir. 1942)).

of a drug trafficking offense is not necessary to find an alien inadmissible and described the standard of evidence that the Department of Homeland Security needs to provide to find a “reason to believe” the alien is engaged in illicit trafficking.¹⁴⁷ In *Cuevas v. Holder*, 737 F.3d 972 (5th Cir. 2013),¹⁴⁸ Cuevas, an LPR, was found with a large amount of cocaine concealed in his car and claimed he did not know it was in there.¹⁴⁹ He was found inadmissible under INA 212 (a)(2)(c) based on a “reason to believe” he was engaged in illicit drug trafficking.¹⁵⁰ The fifth circuit relied on other circuit’s precedents and the plain language of the statute to determine that a prior conviction is not necessary to be found inadmissible under INA 212 (a)(2)(c).¹⁵¹ Moreover, the court held that the burden of proof to find an alien inadmissible under the “reason to believe” provision requires a lower threshold of evidence than that needed to hold a criminal defendant guilty under the “Beyond a Reasonable Doubt” standard.¹⁵² The Court ultimately utilized a “reasonable, substantial, and probative” measure of evidence standard to find an alien inadmissible under the “reason to believe” standard.¹⁵³

Consular officers may also use the underlying facts of a vacated criminal case, in which a criminal defendant had plead guilty, to deem an alien inadmissible under INA 212 (a)(2)(c) “reason to believe.”¹⁵⁴ In *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014),¹⁵⁵ Mr. Chavez was convicted for drug trafficking after he was arrested for driving a truck carrying a large quantity of cocaine.¹⁵⁶ The criminal conviction was later overturned on the grounds that the officers lacked sufficient suspicion to make the traffic stop.¹⁵⁷ The government, however, charged Mr. Chavez as a drug trafficker and was deemed inadmissible under INA 212 (a)(2)(c) because the consular officer had a “reason to believe” he was an illicit drug trafficker, even though his criminal case had been vacated.¹⁵⁸ The Ninth Circuit court ultimately held the voluntary guilty plea not only provided a “reason to believe” Mr. Chavez was an illicit drug trafficker, but it also established that there was a reason to know he

147. *Cuevas v. Holder*, 737 F.3d 972, 974–75 (5th Cir. 2013).

148. *Id.* at 972.

149. *Id.* at 973.

150. *Id.*

151. *Id.* at 975.

152. *Id.*

153. *Cuevas*, 737 F.3d at 975.

154. *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014).

155. *Id.*

156. *Id.* at 2.

157. *Id.*

158. *Id.*

was engaged in illicit drug trafficking¹⁵⁹ (however, a guilty plea may carry little or no probative weight, which does not automatically establish a reason to believe, when the plea is involuntary¹⁶⁰). This holding nonetheless, fortifies the broadening of the scope of INA 212 (a)(2)(c) for consular officers because their findings is not challenged like it is in aforementioned proceedings.

Consular officers may still charge an applicant under INA 212 (a)(2)(c) “reason to believe” standard even if the applicant was acquitted of all criminal charges.¹⁶¹ In *Mena-Flores v Holder*,¹⁶² Mr. Mena-Flores was charged for drug charges and was later acquitted.¹⁶³ The government initiated removal proceedings for Mr. Mena-Flores and deemed him inadmissible under INA 212 (a)(2)(c) “reason to believe” he was an illicit drug trafficker.¹⁶⁴ The Court relied on the evidence offered in the criminal drug trial to find a reason to believe he was a drug trafficker.¹⁶⁵ The Court held the standard to find a person inadmissible under the “Reason to Believe” provision was a lower standard than the “Beyond a Reasonable Doubt” standard.¹⁶⁶ Thus, the “reason to believe” standard follows precedent in that, an alien or visa applicant need not be convicted of a criminal drug charge in order to be found inadmissible under INA 212 (a)(2)(c) “reason to believe” standard where the agency has a reason to believe the alien is an illicit drug trafficker.¹⁶⁷ Moreover, the evidence of a criminal case, despite the alien’s acquittal, may be used to form the basis for a “reason to believe” the alien is an illicit drug trafficker under INA 212 (a)(2)(c).¹⁶⁸ The same rule applies to cases that have been expunged.¹⁶⁹ Case law demonstrates that there are evident issues with the “reason to believe” provision of the INA.¹⁷⁰ Logically, it does not make sense to render an applicant inadmissible for a criminal charge that was vacated, where the applicant was acquitted, or simply where no conviction existed.

159. *Id.* at 3.

160. *Id.* (citing *Garces v. Att’y Gen. of the U.S.*, 611 F.3d 1337, 1344–45 (11th Cir. 2010)).

161. *Mena-Flores v. Holder*, 776 F.3d 1152, 1156 (10th Cir. 2015).

162. *Id.* at 1152.

163. *Id.* at 1156.

164. *Id.*

165. *Id.* at 1156–57.

166. *Id.* at 1156.

167. *See generally Mena-Flores*, 776 F.3d at 1156 (citing to *Cuevas v Holder*, 737 F.3d 972, 975 5th Cir.2013).

168. *Id.* at 1156–57, 1166–67.

169. *See Castano v INS*, 956 F.2d 236 (11th Cir. 1992).

170. *See Part III.B.*

C. Decisions Rendered by the Department of State officials are non-appealable

Immigrant visa decisions rendered by Department of State consular officers in foreign U.S. consulates and embassies are non-appealable¹⁷¹ leaving the applicant no recourse but to re-apply for an immigrant visa.¹⁷² This would be costly and lengthy¹⁷³ for the visa applicant especially because they have not been granted permission to re-enter the United States. This means the visa applicant would be forced to re-apply for an immigrant visa in a foreign country, which they likely do not call their home, with limited amounts of resources to embark on the immigrant visa process. What is further daunting for applicants is that once they arrive at the consular interview stage again,¹⁷⁴ their visa may be denied on erroneous standards that do not align with the guidelines set forth by the State Department's Foreign Affairs Manual.¹⁷⁵ For example, such a standard may include the consular officer re-opening the applicant's previous interview file and denying the immigrant visa based on the same grounds as the first denial.¹⁷⁶

When a visa applicant is denied admission to the United States under INA 212 (a)(2)(c) "reason to believe" the applicant is an illicit drug trafficker, the consular officer, during the second interview, may determine that the applicant is inadmissible for the same reasons after reviewing all of the relevant records. It follows that every attempt to apply for an immigrant visa will likely be denied based on the first denial under INA 212 (a)(2)(c), even though the reason to believe the applicant was an illicit drug trafficker was not based on a conviction,¹⁷⁷ was based on the facts of a vacated conviction¹⁷⁸ or expungement,¹⁷⁹ was based on a voluntary guilty plea that has been vacated,¹⁸⁰ or was based on the facts of a criminal case where the defendant was acquitted.¹⁸¹

It is important to note, however, the differences between case

171. Assuming the visa applicant is not eligible for a waiver. *Visa Denials*, *supra* note 19.

172. *Id.*; Donald S. Dobkin, *Challenging the Doctrine of Nonreviewability in Immigration Cases*, 24 *Geo. Immigr. L.J.* 113, 2 (Nov. 2009).

173. Applying for an immigrant visa is lengthy in general and applicant would need to re-pay all of the processing fees. *See generally id.*

174. Assuming the applicant successfully re-applies for an immigrant visa. *Visa Denials*, *supra* note 19.

175. Dobkin, *supra* note 172 at 9.

176. *Visa Denials*, *supra* note 19; *see generally* Dobkin, *supra* note 172, at 9.

177. *See Cuevas*, 737 F.3d at 974–75.

178. *See Chavez-Reyes*, 741 F.3d at 2.

179. *See Castano*, 956 F.2d at 238–39.

180. *See Garces*, 611 F.3d at 1344–45.

181. *See Mena-Flores*, 776 F.3d at 1156–57.;

precedent and the issue surrounding INA 212 (a)(2)(c) during the interview stage of the immigrant visa application at a U.S. Consulate or Embassy. Case precedent only involves cases adjudicated on U.S. soil where the acting government organization was the Department of Justice.¹⁸² The present issue however, involves a *Department of State* consulate officer at a consulate or embassy in a *foreign country*. This means the decisions rendered by consular officers are not appealable¹⁸³ and thus consulate officers never have to prove that the evidence relied on, when issuing a decision based on the “reason to believe” standard, was reasonable, substantial, and probative, like the government must prove in administrative hearings.¹⁸⁴ Moreover, the fact that government attorneys, in such administrative hearings, are held to a “reasonable, substantial, and probative” standard, it allows the respondent to challenge the evidence offered. Thus, this leaves immigrant visa applicants at a disadvantage and consular officers with overbroad discretion to deny visas under INA 212 (a)(2)(c) because applicants may not challenge consular officer decisions.¹⁸⁵

D. Subjective decision making under INA 212(a)(2)(c) generates uncertainty for immigrants and lawyers

The INA structured the immigration laws into one body of law.¹⁸⁶ In 1963, President John F. Kennedy expressed his concern with restructuring the immigration laws which he perceived as “intolerable”.¹⁸⁷ Although he was concerned with the distribution of preference visa quotas in the 1960’s,¹⁸⁸ the situation with U.S. immigration laws today may similarly be perceived as “intolerable.” The INA set out the immigration laws and improved the quota limits. However, the INA still has flaws which are becoming “intolerable” for

182. See generally *Cuevas*, 737 F.3d at 974; *Chavez-Reyes*, 741 F.3d at 2; *Castano*, 956 F.2d at 237; *Garces*, 611 F.3d at 1339–43; *Mena-Flores*, 776 F.3d at 1156; *Executive office for Immigration Review*, U.S. Dep’t of Justice, <https://www.justice.gov/eoir/about-office> (the Department of Justice hears and handles all administrative immigration hearings under the Executive Office for Immigration Review)

183. See *U.S. v Mitchell*, 445 U.S. 535, 538 (1980) (The United States holds sovereign immunity).

184. See *Cuevas*, 737 F.3d at 974–75 (the amount of evidence required to establish a reason to believe that an alien is engaged in illegal trafficking is a “reasonable, substantial, and probative” standard).

185. Dobkin, *supra* note 172 at 7.

186. *Immigration and Nationality Act*, *supra* note 130.

187. John F. Kennedy, 235 - *Remarks to Delegates of the American Committee on Italian Migration*, THE AM. PRESIDENCY PROJECT (Jun. 11, 1963), <http://www.presidency.ucsb.edu/ws/?pid=9269>.

188. *Id.*

current immigration issues. INA (a)(2)(c) is one of the reasons the immigration laws are intolerable today. Rather than basing immigrant admissibility to the United States on objective grounds, the INA includes provisions that require consular officers to exercise discretion to determine whether a visa applicant warrants admissibility.¹⁸⁹ This is true despite the visa applicant meeting all the criteria of admissibility, the I-130 family based petition, and I 601-A waiver (if needed).¹⁹⁰

The issue that admissibility is largely based on a consular officer's decision¹⁹¹ poses problems for immigration lawyers and illegal immigration in general. One notable issue that arises is whether immigration lawyers are providing accurate legal advice to clients. The Model Rules of Professional Conduct state,¹⁹² "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹⁹³ Comment 5 of the Model Rules of Professional Conduct rule 1.1elaborates that the required attention and preparation are determined in part by what is at stake.¹⁹⁴ Because visa applicants are required to exit the country to rectify their immigration status,¹⁹⁵ and because visa applicants cannot re-enter the country if they are not granted the visa after the consular interview,¹⁹⁶ the stakes are high. Thus, it makes it difficult for immigration lawyers to prepare their clients for the consular interview abroad because admissibility is not governed by admissibility grounds, rather, they are highly dependent on the consular officer's discretion, something that the immigration lawyer cannot predict, guide through, or adequately prepare their client for.

As a result of the uncertainties under INA 212 (a)(2)(c), undocumented immigrants may be reluctant to start the application process to acquire lawful permanent residence. The fear that applicants may get stuck in a country, which is now foreign to them, because their visa was denied, likely deters undocumented immigrants from attempting to acquire lawful status. This ultimately promotes illegal immigration because the risk is just too large to take.

189. 8 U.S.C. § 1182(a)(2)(c).

190. See generally 8 U.S.C. § 1182(a)(2)(c); *Interview*, U.S. Dep't of State, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/interview/after-the-interview.html> (consular officers render the ultimate decision of whether visa applicants are admitted).

191. 8 U.S.C. § 1182(a)(2)(c).

192. MODEL RULES OF PROF'L CONDUCT R. 1.1 (AM. BAR ASS'N 2016).

193. *Id.*

194. See *id.* at comment 5.

195. See *Interview for a U.S. Visa*, *supra* note 16 (this is assuming that the visa applicant must apply for an immigrant visa through consular processing)

196. *Visa Denials*, *supra* note 19.

E. INA 212 (a)(2)(c) is an inequitable and outdated provision

President John F. Kennedy expressed his desire to revolutionize immigration laws in 1963 because there were people in foreign countries who wanted to become U.S. citizens, who brought useful skills, and who desired to reunite with their families.¹⁹⁷ The INA as it stands does not foster this idea. INA 212 (a)(2)(c) is only one provision that should be criticized and revisited. INA 212 (a)(2)(c) invites consular officers to exercise discretion as to whether they believe the visa applicant may be an illicit drug trafficker.¹⁹⁸ In case of a visa denial, the INA does not require the consular officer to notify the visa applicant of the section of law that applies to their denial.¹⁹⁹ This means the consular officer may abuse their discretion and deny an applicant their visa under INA 212 (a)(2)(c) without detailing why exactly they denied the visa.

As detailed above, INA 212 (a)(2)(c) is insufficient because it does not allow immigration attorneys to predict the outcome of the LPR representation and, as a result, stunts legal immigration.²⁰⁰ Furthermore, the fact that the decisions rendered by consular officers are non-appealable²⁰¹ makes INA 212 (a)(2)(c) an inequitable and outdated provision. There could be an erroneous visa denial based on INA 212 (a)(2)(c) and because consular officers are not obligated to state the applicable law as to why the visa was denied, it could leave the visa applicant without a waiver to file²⁰² and without recourse. The aspiring immigrant would need to stay in the foreign country and re-file for an immigrant visa²⁰³ or attempt to enter the United States unlawfully again.

The stakes for an undocumented immigrant attempting to apply for an immigrant visa to acquire lawful permanent resident status are high. Because of INA 212 (a)(2)(c), it could cause visa applicants to spend an extended amount of time outside of the United States, apart from their family. Moreover, their family may wholly depend on the visa applicant financially or for medical purposes. INA 212 (a)(2)(c) is an insufficient provision because it provides for subjectivity to play a role in

197. See Kennedy, *supra* note 187.

198. 8 U.S.C. § 1182(a)(2)(c).

199. *Visa Denials*, *supra* note 19 (denied immigrant visa applications describe the section that applies in *most* cases, but not all).

200. Stunts legal immigration of those living undocumented in the United States. Citation needed.

201. *Visa Denials*, *supra* note 19 (Visa denials cannot be appealed, only re-filed for reconsideration).

202. *Id.* (while not obligated to tell an individual why their visa was denied, the Department of State source states “if a consular officer finds you are not eligible to receive a visa . . . your visa application will be denied, and you will be provided a reason for the denial.”); See Dobkin, *supra* note 172, at 3.

203. *Id.*

inadmissibility grounds, rather than inadmissibility being based on the clear INA inadmissibility provisions.²⁰⁴ Immigration laws, at least the laws governing inadmissibility, should have bright lines. Either the visa applicant qualifies for an immigrant visa, or not.

III. PROPOSAL

It is apparent that the immigration laws under the INA are in dire need of restructuring.²⁰⁵ President John F. Kennedy called for an overhaul of the immigration laws in 1963²⁰⁶ in order to adapt the United States to the immigration issues that the United States was facing at the time.²⁰⁷ The INA and its immigration laws are outdated today as the United States has been facing a consistent influx of unauthorized immigrants since 2009; after a dramatic increase of unauthorized immigrants from 3.5 million in the 1990's to 12.2 million in 2007.²⁰⁸ Furthermore, a majority of undocumented immigrants have been living in the United States for at least a decade,²⁰⁹ evidencing that undocumented immigrants are long-term residents and seek to contribute to the life of the U.S. Like the immigration dilemma in the 1960's and the enactment of the INA in 1965 in response to it, the INA is in need of a major amendment to adjust to the current immigration issues.

INA 212 (a)(2)(c) is only one, yet critical, provision which needs amending. INA 212 (a)(2)(c) states "Any alien who the consular officer . . . knows or has reason to believe . . . is or has been an illicit drug trafficker . . . is inadmissible."²¹⁰ Rather than allow consular officers to utilize discretion and their subjectivity during the consular interview stage of the immigrant visa process, the consular officers decision of whether to approve a visa applicant's visa should be based on an objective standard. Such an objective standard would be one where the consular officer cannot deem the visa applicant as a deportable alien, pursuant to 8 U.S.C. § 1227. If the visa applicant is not a deportable alien, then their immigrant visa should be approved.

Essentially, consular officers should be using the INA admissibility provisions as a checklist rather than inferring the applicant is an illicit drug trafficker. One of several problems with consular officers utilizing

204. For a description of what makes an alien deportable see 8 U.S.C. § 1227.

205. See Sarwar, *supra* note 3.

206. See Kennedy, *supra* note 187.

207. *Id.* (during the 1960's immigration laws were not up to date with the current immigration issues which caused the malapportionment of visas to certain countries which Kennedy was concerned about).

208. Krogstad, *supra* note 35.

209. *Id.*

210. 8 U.S.C. § 1182.

INA 212 (a)(2)(c), is that the applicant may have their visa denied even though they have been acquitted from drug charges because the applicant was mistaken as a suspect.²¹¹ INA 212 (a)(2)(c) arises several inconsistencies in the immigration process and should be amended.

The legislature may approach this by amending the INA to abolish INA 212 (a)(2)(c) and its partner “Reason to Believe” provisions applying to other criminal acts.²¹² INA 212 (a)(2)(c) should read, “Any alien who the consular officer . . . knows from the evidence on the record . . . is or has been an illicit drug trafficker . . . is inadmissible.” The “Reason to Believe” statement should be removed and replaced with “knows from the evidence on the record” in order to make INA 212 (a)(2)(c) a more objectively applicable law. This prohibits consular officers from introducing their subjective inferences and admitting or denying an immigrant visa based on the clear law. If the consular officer does not know, from the record evidence, that the visa applicant is an illicit drug trafficker, then the applicant should not be denied a visa based on INA 212 (a)(2)(c).

Issues may arise as to when a consular officer knows the visa applicant is a drug trafficker. Therefore, the amended INA 212 (a)(2)(c) provision should use an intermediate threshold to measure when a consular officer has knowledge of drug trafficking, such as, by a preponderance of the evidence. Evidence to prove knowledge of drug trafficking would include relevant criminal drug arrest and conviction records or any other records that establishes by a preponderance of the evidence that the applicant is a drug trafficker. Moreover, if the consular officer claims to have knowledge that the applicant is a drug trafficker, they should be required to refer to the evidence used to arrive at their decision. Essentially, visa denials based on INA 212 (a)(2)(c) should require a higher threshold for consulate officers to meet especially because applicants cleared several immigration hurdles and because they cannot appeal the decision.²¹³

A different proposal to this issue would be to amend INA 212 (a)(2)(c) to limit the use of the provision to attorney generals and judges in the United States for deportation cases. INA 212 (a)(2)(c) would read, “Any alien who the attorney general . . . knows or has reason to believe . . . is or has been an illicit drug trafficker . . . is inadmissible.” This would mean consular officers may not base immigrant visa denials on

211. See generally *Mena-Flores v. Holder*, 776 F.3d 1152 (10th Cir. 2015).

212. 8 U.S.C. § 1182 (the “Reason to Believe” provisions are found sporadically within the statute).

213. *Visa Denials*, *supra* note 19 (Visa applicants can only re-file if they do not qualify for a waiver in case of a Denial of an Immigrant Visa).

INA 212 (a)(2)(c) and it would effectively limit consular officers from exercising discretion. Moreover, all court cases where INA 212 (a)(2)(c) is an issue, involve lawful permanent residents who are in removal proceedings within the United States. Thus, the applicability of INA 212 (a)(2)(c) should not extend beyond U.S. borders where its evidentiary grounds cannot be litigated or challenged.

CONCLUSION

The two proffered alternatives to INA 212 (a)(2)(c) would only be a minor, but critical, amendment to the INA and its immigration laws. John F. Kennedy called for a revamping of the nation's immigration laws in the 1960's.²¹⁴ The immigration laws are due for another revitalization to adjust to the current immigration issues. There were about 11 million unauthorized immigrants living in the United States²¹⁵ who aspire to become part and contribute to the life of the United States as lawful immigrants. Several unauthorized immigrants qualify for a visa petition and an I-601A unlawful presence waiver through a U.S. citizen family member. However, current immigration laws avert unauthorized immigrants from applying because of uncertainties in the immigration process, usually at the consular interview stage. Thus, illegal immigration will continue.

The propositions advanced by this Note affect unauthorized immigrants living in the United States and their process to acquire lawful permanent residency under a family based visa petition. The immigrant visa process should be based on objective standards to foster legal immigration. Objective standards would provide currently unauthorized immigrants, and their lawyers, sufficient guidance to predict the outcome of their immigrant visa applications. The revitalization of INA 212 (a)(2)(c) would help unauthorized immigrants become Americans. As President John F. Kennedy said in his Remarks to Delegates of the American Committee on Italian Migration in 1963, "all people can make equally good citizens, and that what this country needs and wants are those who wish to come here to build their families here and contribute to the life of our country."²¹⁶

214. See Kennedy, *supra* note 187.

215. See Krogstad, *supra* note 35.

216. See Kennedy, *supra* note 187.