

## Practice Advisory Provisional Waivers for Unlawful Presence

### *Introduction*

On November 20, 2014, President Obama announced a series of reforms modifying immigration policy (“Executive Action”). On the same day DHS Secretary Jeh Johnson issued agency-wide memoranda providing specific and more detailed information regarding the proposed changes. One of these memos concerned the agency’s plans to expand eligibility for the provisional waiver for unlawful presence. On July 22, 2015, the USCIS published a proposed rule expanding the program in two significant ways. This practice advisory offers strategies for practitioners representing clients in family-based immigration matters who may require a provisional waiver.

### *Who needs a waiver for unlawful presence?*

Applicants for adjustment of status or an immigrant visa are subject to the grounds of inadmissibility. The most common ground is for those who have accrued “unlawful presence” that has been triggered by a departure from the United States. The term “unlawful presence” is not defined in the statute or regulations, although the exceptions to unlawful presence are set forth at INA § 212(a)(9)(B)(iii). Agency guidance on how this term is to be interpreted is included in the Adjudicator’s Field Manual, Section 40.9. Those who have accrued more than 180 days of unlawful presence but less than one year are subject to a three-year bar to admission. Those who have accrued a year or more of unlawful presence are subject to a ten-year bar.

This ground of inadmissibility, set forth at INA § 212(a)(9)(B), may be waived by applicants who can establish that their absence would cause extreme hardship to a U.S. citizen or lawful permanent resident (LPR) spouse or parent. INA § 212(a)(9)(B)(v). Applicants who have accrued unlawful presence that has not been triggered by a departure and who are eligible to adjust status will not need to file a waiver. Those who will trigger the unlawful presence ground upon departing the United States to attend an immigrant visa interview may file a waiver upon being found inadmissible by the U.S. consulate.

### *What is the provisional waiver and who is eligible for it?*

On March 4, 2013 the USCIS implemented a new program allowing for the provisional adjudication of waivers for those who would be attending a consular appointment at a U.S. consulate and would be triggering the unlawful presence ground of inadmissibility. Eligibility for the provisional waiver is limited to those who will be inadmissible due solely to unlawful presence. Final regulations implementing the program were published in 78 Federal Register 536 on January 3, 2013, and can be found in 8 CFR § 212.7.

The program allows the agency to adjudicate waivers of unlawful presence *before* the applicant departs the United States for the immigrant visa interview. The applicant applies for the waiver after paying the immigrant visa fee with the National Visa Center (NVC). If the waiver is approved, the USCIS notifies the NVC, which in turn will forward the approval notice to the consulate where the applicant will be interviewed for the immigrant visa. The applicant can finalize any processing with the NVC and travel abroad for the consular interview with the knowledge that there will likely be no delay in issuance of the visa. The waiver is approved on a provisional basis because the Department of State will still conduct its own investigation as to potential inadmissibility based on other grounds, as well as verifying eligibility for the underlying visa. If the applicant is determined to be inadmissible based on a ground other than unlawful presence, the provisional waiver will automatically be revoked. The immigrant visa applicant would then have to re-apply for the unlawful presence waiver, as well as for a waiver of any other ground(s) of inadmissibility identified by the consulate, assuming a waiver is available.

### ***What are the proposed changes to the provisional waiver program?***

The provisional waiver program is currently available only to immediate relatives (spouses, unmarried children under 21, and parents of U.S. citizens). To qualify, the applicant must be at least 18 years old. The “qualifying relative” must be a U.S. citizen spouse or parent. For that reason, few parents of U.S. citizen children over 21 will qualify for the provisional waiver because they will not have the qualifying relative. The program is currently being utilized almost exclusively by the spouses of U.S. citizens.

The USCIS will be expanding eligibility for the provisional waiver program in two important ways. First, according to the proposed regulation, the agency will expand access to the program to all statutorily eligible classes of relatives for whom an immigrant visa is immediately available. This expansion will include preference category immigrants: adult sons and daughters of U.S. citizens, married sons and daughters of U.S. citizens, siblings of U.S. citizens, unmarried children (regardless of age) of LPRs, and spouses of LPRs. It will also include beneficiaries of employment-based petitions, widows and other special immigrants, and diversity visa lottery winners. Second, the agency will expand the definition of who can be a qualifying relative to include LPR parents and spouses. Only persons scheduled for an interview with the U.S. consulate on or after the regulation is finalized will be able to take advantage of this expansion.

In addition, the USCIS will be issuing specific guidance defining the term “extreme hardship.” The USCIS will be specifying the factors that should be considered, and these factors will likely include “family ties to the United States and the country of removal, conditions in the country of removal, the age of the U.S. citizen or permanent resident spouse or parent, the length of residence in the United States, relevant medical and mental health conditions, financial hardships, and educational hardships.” If the waiver applicant demonstrates that certain factors are present, the USCIS will presume the existence of extreme hardship. It is not clear whether this guidance will require a formal regulation or when the agency will issue it.

### ***What other Executive Action changes may impact on waivers?***

An expanded Deferred Action for Childhood Arrivals (DACA) program and a new Deferred Action for Parental Arrivals (DAPA) program that were scheduled to be implemented in 2015 have been enjoined by a federal court. If that injunction is lifted and the programs are put into place, they will create new opportunities for people to adjust status through travel. Persons granted deferred action under either of these two programs will be eligible for advance parole. Leaving the United States under advance parole is not considered a “departure” for purposes of triggering the unlawful presence grounds of inadmissibility. The Board of Immigration Appeals held this in a case involving two family-based adjustment applicants, *Matter of Arrabally*, 25 I&N Dec. 771 (BIA 2012). The USCIS has been instructed as part of Executive Action to issue a memorandum clarifying that no one who departs and returns under advance parole will be viewed as having made a departure. Persons who are paroled back into the United States are eligible to adjust status if they are immediate relatives.

In addition, Executive Action also expands eligibility for parole-in-place to the family members of those who enlist in the military. Parole-in-place is currently available to the parents, spouses, and children of those who are serving as active duty members of the U.S. Armed Forces, are current members of the Selected Reserve or the Ready Reserve, or previously served in the U.S. Armed Forces or Selected Reserve or the Ready Reserve. Parole-in-place is a status that provides those undocumented family members the right to reside in the United States and qualify for employment authorization. The status of parole also allows those family members who are immediate relatives eligibility to file for adjustment of status under INA § 245(a).

Therefore, there will be more persons eligible to adjust status, fewer people needing to consular process, and fewer needing to file a waiver for unlawful presence.

### ***Are the approval rates for provisional waivers the same as for waivers for unlawful presence filed while abroad?***

On April 29, 2015, the USCIS released statistics on the adjudication of Form I-601 filed after the applicant has left the United States, and for the provisional waivers filed on Form I-601A. From October of 2010 through January of 2015, the average approval rate for I-601s has been 79.6 percent and the average denial rate has been 20.4 percent. From March of 2013 through January of 2015, the average approval rate for I-601As has been 70.2 percent and the average denial rate has been 29.8 percent. The number of I-601s and I-601As that have been filed during those two periods is approximately the same. Therefore, the approval rate for I-601s is slightly higher, even though the same extreme hardship standard is applied. Some have reasoned that it is harder to obtain approval of the provisional waiver because the hardship to the qualifying relative is prospective and anticipated rather than with the I-601 where the hardship is currently being experienced.

### ***What should practitioners do now?***

Practitioners representing persons in family-based immigration matters are now weighing the effects of Executive Action and considering the additional options available to their clients. Some may be

eligible for DACA or parole-in-place now, which would allow them to qualify to file for adjustment of status if they are immediate relatives and travel on advance parole. Others may qualify for expanded DACA or DAPA upon the lifting of the injunction and implementation of those programs. The uncertainty about when or if these programs will ever launch, however, favors the pursuit of consular processing and waivers of inadmissibility rather than waiting for a possible opportunity to adjust status in the future. Those who would not qualify for these programs and who must consular process should be eligible to apply for a provisional waiver once the USCIS issues a final regulation and implements the changes.

When the provisional waiver program began, the USCIS limited eligibility to immediate relatives who had their interview with the consulate scheduled on or after January 3, 2013. In the expanded program the USCIS is proposing to maintain that cut-off date for immediate relatives, even if they became eligible for the expanded program for the first time under broader definition of “qualifying relative.” For all others, the cut-off date would be the effective date of the final regulation. Under the proposed regulation, those who are scheduled for a consular interview before that date will be ineligible to apply for the provisional waiver. Given the likelihood that the USCIS will maintain those cut-off dates in the final regulation, practitioners should counsel clients not to pay the immigrant visa fees and complete the Form DS-260 if they want to participate in the provisional waiver program. Those clients who are scheduled for an immigrant visa between now and the date of the final rule will not be able to take advantage of the expanded eligibility criteria.