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Contents

Immigration Policy Shift on Unlawful Presence Waivers Benefits U.S. Citizens Facing Long Separation From their Immigrant Loved Ones

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I. INTRODUCTION

On January 3, 2013, the Department of Homeland Security (DHS) published a final rule in the Federal Register outlining a new procedure intended to reduce the long separation periods U.S. citizens have experienced when their undocumented spouses leave the U.S. to apply for waivers of inadmissibility due to unlawful presence in the U.S. Prior to this new procedure, an immigrant spouse had to wait outside the U.S. for several months while U.S. Citizenship and Immigration Services (USCIS) adjudicated the waiver.[1] The need for these unlawful presence waivers first arose in 1996, when Congress enacted the Immigration Reform and Immigrant Responsibility Act (IIRAIRA). The Act contains "three- and ten-year bars," which prohibit the admission of immigrants who previously stayed in the U.S. illegally unless USCIS grants a subsequent waiver.[2] An immigrant could request the waiver only at a U.S. consulate abroad, leading to a long waiting period for adjudication outside of the U.S. The new rule, which offers relief to some affected immigrants, became effective on March 4, 2013.

Many U.S. citizens have postponed filing immigrant visas to legalize their spouses' U.S. residence because they feared a long separation in the future, when the immigrant would need to obtain the waiver before returning under an immigrant visa. Often the immigrant spouse plays a key role in the U.S., taking care of the children, providing financial support to the household, or helping with the physical care of elderly family members. The risk that after leaving the U.S. the immigrant spouse would wait abroad for a decision for several months, and then if denied would face a bar to re-entering the U.S., potentially for years, was just too great. Many also feared for the safety of their loved one waiting in a foreign country. As a result, immigrants who would be eligible for legal status have remained hidden in the U.S., off the radar, and families put their lives on hold, never knowing when U.S. Immigration and Customs Enforcement (ICE) would come knocking on their door.

The new regulation provides a limited solution to this problem and has reduced the risk of long-term separation for some couples previously afraid to legalize their immigrant spouse's status. Despite this positive change in USCIS policy, the new proposal restricts those who can benefit from it and leaves many questions unanswered as to its implementation.

II. CURRENT LAW AND PROCEDURE

Under the Immigration and Naturalization Act (INA) 212(a)(9)(B)(i)(I), an immigrant who has been unlawfully present in the U.S. without valid status for more than 180 days but less than one year faces a three-year bar of re-entry once the immigrant departs the U.S. This bar applies even if the immigrant departs to process and interview abroad for his or her permanent U.S. residency. If the immigrant has been in the U.S. for one year or more without lawful status, the INA bars the immigrant from returning to the U.S. for ten years once the immigrant departs.[3]

These three- and ten-year bars create a "catch-22" for an immigrant and the U.S. citizen family member who petitions for the immigrant's visa and green card. An immigrant typically is ineligible to apply for adjustment of status – the process to become a permanent resident while remaining in the U.S. - if the immigrant entered the U.S. without inspection ("illegal entry").[4] Even if the immigrant is married to a U.S. citizen and USCIS approves the immigrant's visa petition in the U.S., the immigrant who illegally re-entered must still interview at a consulate abroad for issuance of an immigrant visa so the immigrant may return to the U.S. as a permanent resident. But leaving the U.S. for the immigrant visa interview often triggers the three- or ten-year bar and thus a waiver is critical. The immigrant can apply for the waiver only after the U.S. Department of State consular officer abroad determines that the immigrant has triggered one of the unlawful presence bars when reviewing his or her immigration history for issuance of an immigrant visa. To qualify for a waiver of the three- or ten-year bar, the immigrant must not only show that he or she deserves the waiver to be granted through an act of discretion, but also that his or her U.S. citizen (USC) or lawful permanent resident (LPR) spouse or parent would suffer extreme hardship if the immigrant were not

allowed to return to the U.S. within that three- or ten-year period.[5] An immigrant cannot qualify for an unlawful presence waiver through a USC or LPR child. Until the new regulation, there was no way an immigrant could apply for a waiver without first traveling abroad for his or her consular interview.

III. WHY NOW?

The unlawful presence waiver process has caused problems for years. DHS proposed the new regulation in January 2012 in response to President Obama's Executive Order 13563 calling for "agencies to consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[6] The Obama Administration and DHS have also faced external pressure to make the waiver process more efficient and cut down processing times, especially with recent and repeated news coverage of immigrants who have been killed or harmed while awaiting adjudication of their waivers under violent and unsafe conditions abroad.[‡] This regulation does not eliminate the requirement that the immigrant travel abroad for the immigrant visa interview; however, under the new process, USCIS grants the immigrant a provisional waiver *prior to leaving* the U.S., potentially reducing processing time from a matter of months to a matter of days or weeks.

IV. THE NEW PROCEDURE

DHS's new regulation allows immigrant's who are subject to the three- or ten-year bars for unlawful presence who have qualifying relatives who are U.S. citizens to file their applications for waivers with USCIS in the U.S. before leaving the country.[7] If USCIS grants his or her application, the immigrant then travels abroad for a consular interview with a provisional waiver in hand, potentially permitting the immigrant to return to the U.S. as a lawful permanent resident in a matter of days if no other grounds of inadmissibility exist.

A. Limited to unlawful presence only

Immigrants currently request waivers from inadmissibility on a variety of grounds, including "material misrepresentation" (lying to a USCIS agent, Customs & Border Protection agent, or Department of State officer in applying for a visa, immigration benefit, or entry into the U.S.) and certain criminal conduct.[8] The new process does not provide a provisional waiver for any of these grounds of inadmissibility as the rule addresses only waivers for unlawful presence (the three- or ten-year bars). If an immigrant seeking an unlawful presence waiver also needs a waiver of another ground of inadmissibility, the immigrant must apply for both waivers only after the immigrant has been found inadmissible at his or her consulate interview abroad.[9] The U.S. citizen spouse then applies in the U.S. for one or more waivers on behalf of the immigrant based on the grounds of inadmissibility originally found by the consulate officer. The immigrant must remain outside of the U.S. until USCIS grants all applicable waivers. Thus, even if married to a U.S. citizen and in possession of an approved immigrant visa requested by his or her U.S. citizen spouse, an immigrant who used fake documents to enter the U.S. will not benefit from the provisional waiver process.

B. Limited to immediate relatives of U.S. citizens

The new regulation reduces the time abroad only for an immigrant who is an immediate relative of a U.S. citizen. The immigrant must be considered an "immediate relative" in *both* the immigration visa petition and the waiver process to qualify for the provisional waiver process. For purposes of the immigration visa petition, an "immediate relative" is a child under 21, parent or spouse of a U.S. citizen. The immigrant must also have a qualifying relative who is either a U.S. citizen (USC) spouse or parent for purposes of the waiver. It is possible for one to qualify for the immigration visa petition but not the provisional waiver. This scenario could arise when an adult USC child (21 or older) has petitioned for his or her immigrant parent who entered the U.S. without inspection and must go through consular processing. The parent is considered an immediate relative for the immigrant visa petition, but the U.S. citizen adult child cannot be a qualifying relative for the provisional waiver. The parent would have to demonstrate hardship to his or her own U.S. citizen parent or U.S. citizen spouse to apply in the U.S. for a provisional waiver. Otherwise, the parent with the approved immigrant visa petition must utilize the standard waiver procedure and file the waiver abroad, assuming the parent has a qualifying lawful permanent resident parent or lawful permanent resident spouse as a qualifying relative. [10]

Because of the qualifying standards, sons and

daughters of U.S. citizens who are 21 or older and siblings of U.S. citizens do not benefit from the provisional waiver policy even though they are related to U.S. citizens. Further, beneficiaries of immigrant visa petitions filed by lawful permanent residents (LPRs, commonly called "green card holders") or waivers relying on LPRs as the qualifying relatives, are not eligible for the provisional waiver process.

USCIS has limited this new provisional waiver process to immediate relatives of U.S. citizens mainly because of Congressional intent. In the INA, Congress prioritized U.S. citizens above other family and employment means for immigrating to the U.S. by creating immediately available priority dates for visas and providing no limit to the number of immediate relatives whom USCIS may admit to the U.S. as permanent residents each year. USCIS can also process these relatives' petitions immediately upon approval, which speeds up case resolution and serves the Administration's goal of making the immigration process "more efficient."[11] The new provisional waiver process further supports this priority.

C. Those currently in process

The new regulation applies only to immigrants currently residing in the U.S., but even this has a catch. If the National Visa Center (NVC) has already received the approved Immigrant Visa application from USCIS, the couple has paid the Immigrant Visa fees, and the NVC scheduled the consulate interview before January 3, 2013, then the immigrant cannot delay the process and apply under the new provisional waiver process.[12] Even if the immigrant had set an interview abroad and did not leave the U.S. or request that the interview be rescheduled in the hope that the new provisional waiver program would become a reality, that immigrant still cannot utilize the provisional waiver system. In this scenario, the immigrant must first travel abroad and be deemed inadmissible, file the waiver, and then remain outside of the U.S. while it is adjudicated, subject to the longer wait times.

The only way around this obstacle is to request that the NVC terminate the pending immigrant visa registration so the couple can re-file a new Immigrant Visa petition and start the process over, or the immigrant must be sponsored for an Immigrant Visa by another family member as long as the immigrant still retains the qualifying immediate relative U.S. citizen family member needed to apply for both the Immigrant Visa and the provisional waiver itself.[13] As the regulation only applies to those residing in the U.S., immigrants – even those married to U.S. citizens – who are already abroad waiting for adjudication of pending unlawful presence waivers are not eligible for the process. Similarly, those already abroad but who have not yet requested the waiver cannot re-enter the U.S. to file the waiver application in the U.S. under the new process.

The new process also excludes those with cases pending before the EOIR (immigration courts), USCIS district offices or lockbox, on appeal with the USCIS Administrative Appeals Office (AAO), Board of Immigration Appeals (BIA), or currently subject to any other type of administrative or judicial review.[14] If an immigrant is currently in removal proceedings, USCIS must administratively close those proceedings before he or she may apply for a provisional waiver.[15] Immigrants under existing removal orders also cannot apply for a provisional waiver.[16] If the immigrant is still in the U.S., an Immigrant Judge has the option to reopen such removal orders – usually by a joint motion filed by the immigrant with DHS (ICE Trial Counsel) concurrence, which can be extremely difficult to obtain – and proceedings must be administratively closed or terminated for the immigrant to utilize this program.

The new proposal also does not change how the current waiver process is handled after submission – there are no interviews and no judges to appear before to argue the merits of the case. The waiver is still decided by an officer based on the documents submitted by the immigrant or petitioning relative. An application for waiver under this provisional process is treated as if it were filed abroad, as it lacks the "notice of intent to deny" procedural safeguard that is provided in most immigrant visa petitions and other types of waivers that are currently filed in the U.S.[17] The only addition to the process is a background check, which ordinarily would occur before the consulate interview to help the consular officer determine if any criminal grounds of inadmissibility existed in addition to the immigrant's history of unlawful presence. Fingerprinting could result in the denial of many provisional waiver applications if USCIS has "reason to believe" that another crime revealed by the background check, such as a "Crime of Moral Turpitude," creates grounds for inadmissibility requiring an additional waiver.

Most importantly, the provisional waiver regulation does not change the law.[18] It does not grant employment authorization to those awaiting adjudication of their waiver case. It also does not grant temporary legal status or the right to legally stay in the U.S. In addition, by utilizing this process and continuing to reside in the U.S. while their cases are being decided, immigrants will further expose their ongoing unlawful presence to USCIS and ICE (the enforcement wing of the DHS). At any time during this period, ICE may choose to detain undocumented immigrants and place them in removal proceedings, where an Immigration Judge can order an immigrant without legal residency status to be deported or "removed" from the U.S.[19] Although immigrants may petition ICE for prosecutorial discretion to terminate removal proceedings, there is no guarantee this discretionary relief will be granted. Notably, DHS has refused to offer a grant of "deferred action" to these cases (representing the lowest priority of those considered for deportation by the agency) to avoid issuance of Notices to Appear (the charging document placing an immigrant in a removal proceedings).

D. Processing times

The provisional waiver process does not allow an immigrant to file the Form I-130 (Immigrant Visa Petition) concurrently with the application for an unlawful presence waiver, which if allowed could cut down on processing times.[20] USCIS must first approve the Immigrant Visa petition in the U.S., before the immigrant may apply for the waiver. Although stateside processing of provisional unlawful presence waivers may reduce waiting times for waivers previously filed abroad, USCIS Director Alejandro Mayorkas indicated during his January 6, 2012 press conference that he does not foresee processing times changing.[21] How long these cases will realistically take remains unknown until the new procedure has been utilized on a widespread scale.

E. The unknown

USCIS began accepting applications for provisional waivers on March 4, 2013. Although this procedural change is welcome, uncertainties remain. This application process requires an immigrant to willingly expose himself or herself to DHS by filing for the Immigrant Visa and applying for the provisional waiver, with no guarantee of the result or that the immigrant will be able to avoid removal. For many who have lived in the shadows for so long, it is still a big decision to risk that a removal proceeding will ruin their lives in the U.S. if the application is unsuccessful. USCIS addressed some of the uneasiness surrounding this issue in two teleconferences that took place in January 2012 and in the recently published regulation, but enforcement concerns still remain. The biggest deterrent to filing under the new provision is the lack of certainty surrounding the status of immigrants whose waivers are denied.

Advocates and attorneys alike worry that USCIS will issue a Notice to Appear (NTA) and place the immigrant in removal proceedings upon a denial. DHS has announced that it plans to refer denied cases to ICE for issuance of NTAs only in those cases where DHS believes the immigrant has committed fraud, has numerous immigration violations, is a risk to national security, or has a criminal history, all grounds that are already top enforcement priorities for ICE.[22] Similarly, if after the approval of a provisional waiver, DHS discovers that the immigrant lied or left out critical information that would make him or her inadmissible on another ground or cast doubt on the hardship or discretionary aspects of the waiver, USCIS will also refer the person to ICE for initiation of removal proceedings.[23] This is more likely to happen to those filing in *pro per,* who do not realize the consequences of their misstatements or omissions on their immigration history. Making matters worse for those placed in removal is that often hiring an attorney to defend against the deportation process can cost just as much as having an attorney for the waiver process, making financial resources the deciding factor in whether an immigrant can successfully re-file for a waiver or will need to seek relief in court.

This new provisional waiver process can also provide a false sense of security to many immigrants and their families. Many families seek advice from cut-rate "notarios" or unlicensed notary publics, immigration consultants, form preparers or paralegals working on their own without attorney supervision.[24] These providers claim to be as knowledgeable as immigration attorneys but at half the price. Notarios take advantage of the immigrant population's perception that they are licensed attorneys because in many Latin American countries the term "notario" is synonymous with "attorney." Notarios surge in popularity whenever a new immigration policy is announced and usually target

their own ethnic communities, demand payment in cash, file a weak case if any case is filed at all, and then disappear, leaving their exposed clients with no recourse.

Another concern is that DHS announced in the final rule that it is not limiting the number of waiver filings that can be submitted - i.e., if the first is denied, another can be submitted, *ad infinitum*.[25] This could make the process much more time consuming and complicated than necessary if it leads couples to file waivers themselves without making a strong case, assuming that USCIS will allow them to re-file a provisional waiver over and over again until they get it right.

Immigrants and their family members may begin to believe that they can stay in the U.S. indefinitely and be protected from removal or being picked up by ICE because they have a pending waiver case, even if the case is the third weak case they have filed. The provisional waiver process is not intended to allow immigrants to buy time indefinitely. In applications to USCIS generally, the risk of denial increases with how swiftly a subsequent filing is made after the first denial. In general, immigrants will have a tougher time on a refile because USCIS refers to prior filings when reviewing a re-file. Thus, many immigrants can be trapped by their prior statements and evidence.

V. WHAT'S AHEAD

Immigration advocates hope that this policy shift is a sign of more beneficial immigration procedures and comprehensive reform to come. Since DHS first proposed the provisional waiver procedure in January 2012, President Obama has introduced the Deferred Action for Childhood Arrivals program (DACA) in June 2012, another policy shift that grants DHS the right to approve deferred action (a temporary stay from removal) for certain students without serious criminal records.[26] Significantly, both of these programs are policy shifts and not changes in the law. They were created in direct response to Congress's inaction on comprehensive immigration reform. With the November 2012 election behind President Obama and practical reform measures now having been introduced in the Senate, 2013 may finally be the year when wide-scale reform occurs in the nation's immigration system, eliminating the need for stop-gap policy changes such as this provisional waiver program.

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Endnotes

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2 Immigration and Naturalization Act of 1965, 8 U.S.C. §§ 212(a)(9)(B)(i)(I) –(II) (Bars became effective Apr. 1, 1997).

3 *Id*. § 212 (a)(9)(B)(i)(II).

4 *Id*. § 245(a); *see also* 8 C.F.R. §§ 245.1(b)(5), (6)(c)(1).

5 *Id*. § 212(a)(9)(B)(v).

6 Provisional Waivers of Inadmissibility for Certain Immediate Relatives of U.S. Citizens, 77 Fed. Reg. 1040, 1041 (proposed Jan. 9, 2012) (to be codified at 8 C.F.R. § 212); *see also CIS Fact Sheet: USCIS to Propose Changing the Process for Certain Waivers* (Jan. 6, 2012), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95356a0d87aa4310VgnVCM100000082ca60aRCRD&vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD; AILA InfoNet Doc. No. 12011065 (Feb.10, 2012).

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14 *Id*. at 545.

15 *Id*.; *see also* 8 C.F.R. §212.7(e)(4)(v); *In re Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (motion to administratively close before an Immigration Judge).

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19 *Id*. at 554.

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21 *Transcript, supra* note 11.

22 78 Fed. Reg. at 554; *see also* Policy Memorandum, U.S. Citizenship & Immigration Servs., *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (Nov. 7, 2011), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf; *see also* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf.

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