The following article is a supplement to the "*INA §212(a)(9)(B)(v) Waiver for Unlawful Presence*" section in Chapter 7 of AILA's *Immigration Law and the Family*, 4th Ed., edited by Charles Wheeler:

DHS Expands Eligibility for Provisional Waiver

Introduction

On July 29, 2016, the Department of Homeland Security published its long-awaited final regulation that expands eligibility to those who would be triggering the unlawful presence bar when they depart the country to attend their consular interview. Eligibility for the provisional waiver program has been extended to all family-based and other intending immigrants who would be found inadmissible due to unlawful presence. Furthermore, lawful permanent residents (LPRs) have been added as qualifying relatives who would suffer extreme hardship if an application for a provisional waiver is denied to a petitioner. The rule,[1] along with a new Form I-601A, went into effect on August 29, 2016. Additionally, the final guidance[1] on the definition of extreme hardship was issued on October 21, 2016.

Background

Persons who have accrued more than 180 days but less than one year of unlawful presence in the United States will trigger the three-year bar when they depart the country; those who have accrued one year or more will trigger the ten-year bar.[2] Prior to the expansion of the provisional waiver rule, only immediate relatives of U.S. citizens—spouses, unmarried children, and parents—could apply for a provisional waiver of that unlawful presence bar before departing the United States. All family-based and other intending immigrants who would otherwise be found inadmissible due to unlawful presence now qualify for the program. In order to obtain the waiver, the intending immigrant must establish that his or her "qualifying relative" will experience extreme hardship if the waiver is denied and the qualifying relative is required to reside abroad for the necessary period of time. The waiver is referred to as provisional because the ground of inadmissibility has not been triggered yet and the U.S. consulate may still determine that the applicant is inadmissible on another ground. Prior to the adoption of the new rule, the qualifying relatives were limited to U.S. citizen parents or a spouse.

Applicants for the provisional waiver complete a Form I-601A and submit it to the Chicago Lockbox after they have paid the immigrant visa fee with the National Visa Center. Proof of the approved I-130 petition and documents that support the hardship claim, including declarations from the applicant and qualifying relative, is also included. The I-601A applications are then forwarded to the National Benefits Center for adjudication.

Summary of the Final Rule

---

[1] https://www.gpo.gov/fdsys/pkg/FR-2016-07-29/pdf/2016-17934.pdf
[1] https://www.uscis.gov/policymanual/Updates/20161021-ExtremeHardship.pdf
[2] INA §212(a)(9)(B).

DHS made the following changes to the provisional waiver program with the final rule:

- Expanded the provisional waiver eligibility to all intending immigrants, including all family-based categories
- Expanded the qualifying relatives to include both U.S. citizen and LPR parents and spouses
- Eliminated the regulatory provision directing USCIS to deny the provisional waiver if it has a "reason to believe" the applicant will be inadmissible under a separate ground
- Eliminated restrictions on eligibility based on the date that DOS acted to schedule the consular interview
- Allowed persons with final orders of removal, exclusion, or deportation to be eligible for provisional waivers, provided that they have already applied for, and USCIS has approved, an Application for Permission to Reapply for Admission into the United States After Deportation or Removal, Form I-212
- Clarified that DHS must have reinstated a removal, deportation, or exclusion order in order for an individual who has returned to the United States unlawfully after removal to be ineligible for a provisional waiver, and
- Clarified that all persons seeking provisional waivers, including those in removal proceedings, must file applications for provisional waivers with USCIS.

Expanded Eligibility to Other Intending Immigrants, Including all Family-Based Categories

The rule expands the provisional waiver program by making it available to all those who are statutorily eligible to seek a waiver of unlawful presence inadmissibility. This means that all other beneficiaries of approved family-based petitions (Form I-130) may apply for the waiver, including all persons who fall under the preference-based categories:

- Adult children of U.S. citizens (first preference)
- Spouses and unmarried children of LPRs (second preference)
- Married children of U.S. citizens (third preference), and
- Siblings of U.S. citizens (fourth preference).

This change will have the biggest impact on the spouses of LPRs, who did not qualify for a provisional waiver under the previous regulations.

Expanded eligibility for the provisional waiver also means that beneficiaries of approved employment-based petitions (Form I-140), VAWA self-petitions (Form I-360), widow(er) petitions (Form I-360), special immigrants (Form I-360), and diversity lottery winners will be eligible to file an I-601A waiver application. The selection of the person for the diversity visa program would be the functional equivalent of having an approved immigrant visa petition.

LPR Qualifying Relatives

The new rule also expands the provisional waiver program to treat LPR parents and spouses as qualifying relatives. Previously, only U.S. citizen parents and spouses qualified for the program.

This expansion allows all "qualifying relatives"—defined in the statute as U.S. citizen and LPR parents and spouses—access to the program. This expansion allows the spouses and children (between the ages of 18–21) of LPRs to base their waiver applications on extreme hardship to their LPR spouses and parents. It also increases the options for immediate relatives and family members in the other preference categories. For example, if a U.S. citizen files a petition for his or her spouse, he or she could be a qualifying relative, as could the LPR mother or father. The foreign-born spouse's waiver application would be strengthened by including an additional qualifying relative.

It is important to remember that the I-130 petitioner does not need to be the qualifying relative. For example, a U.S. citizen son could file an immediate relative petition for his mother. The mother could base the waiver on extreme hardship to her LPR spouse or parents. The LPR parents would not qualify to petition for their married daughter, though they can be qualifying relatives. While the LPR spouse could file an I-130 for her, that petition would be in the second preference and is subject to a backlog.

Impact on Derivative Beneficiaries

The expansion also effectively allows derivative beneficiaries in the preference categories to map out a plan for provisional waiver eligibility. For example, the married son of a U.S. citizen may qualify for the provisional waiver by establishing extreme hardship to his U.S. citizen parent. Once he immigrates, his derivative spouse and children would qualify by establishing extreme hardship to him, since he would now be an LPR spouse and parent. Similarly, the adult, unmarried daughter of an LPR may qualify for the provisional waiver by establishing extreme hardship to her parent. Once she immigrates, her derivative children would qualify by establishing extreme hardship to her, since she would now be an LPR parent.

Reason to Believe

The final rule eliminates the authority of USCIS to deny the provisional waiver application when it has "reason to believe" the applicant is inadmissible under another ground of inadmissibility. This authority has previously allowed USCIS to deny provisional waiver applications where the adjudicator believed the applicant *might* have been subject to another ground of inadmissibility. While this is a welcome change, it is important to remember that attorneys and accredited representatives will now have sole responsibility for determining whether any other inadmissibility grounds are applicable to their clients. As before, those who are found inadmissible on a ground other than unlawful presence will have the approved provisional waiver revoked. If the additional inadmissibility found by the consular officer is waivable, the immigrant visa applicant can apply for a waiver of both the new ground of inadmissibility and the unlawful presence ground previously waived. However, this is a situation to be avoided at all costs, since the immigrant visa applicant will have departed the United States not expecting and unprepared for a prolonged separation from his or her family.

Scheduled for a Consular Interview

Under the previous rule, USCIS limited eligibility for the provisional waiver program to applicants who had their interview with the consulate scheduled on or after January 3, 2013. The final regulation eliminates restrictions based on the date that the State Department acted to schedule the immigrant visa interview.

Final Orders of Removal

The agency has broadened eligibility to include persons who have received a final order of removal, deportation, or exclusion. When the person departs the United States while a final order is outstanding, he or she effects or executes that order,[3] and execution of the order makes the person inadmissible for a period of five or 10 years (20 years in some situations)[4]. The person may apply for a "waiver" of this ground of inadmissibility on Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. The standard is simply a balancing of the equities, which is much lower than the extreme hardship standard.

If the person has not effected the order by leaving the country, he or she could move to reopen the case, vacate the order, and have it administratively closed. In addition, persons in removal proceedings who have not been ordered removed could also move to administratively close the case. The basis for this motion would be that the person is eligible for an immigrant visa and wishes to apply for the provisional waiver. Should the waiver be granted, the person is then advised to move to terminate the proceedings before departing the country.

The final regulation also allows persons who have been ordered removed to apply for a "waiver" of this ground of inadmissibility before it is effected by their departure. This is done by filing the Form I-212 with USCIS in the jurisdiction where the person was ordered removed.[5] Upon receiving such consent, the individual's order of removal, deportation, or exclusion would no longer bar him or her from obtaining an immigrant visa abroad. After obtaining such consent, the person would then be eligible to apply for the provisional waiver.

Persons who have effected the removal order by departing the United States and then reentering without inspection on or after April 1, 1997, have triggered a separate ground of inadmissibility called the "permanent bar."[6] This ground may not be cured through the provisional waiver process; instead the person must reside abroad for 10 years and then obtain a waiver (consent to reapply) by filing a Form I-212.

Finally, illegal reentry to the United States after a deportation, removal, or exclusion order renders the person subject to reinstatement of removal,[7] but in the final regulation, DHS clarified that ICE or CBP must have formally reinstated such an order for the person to be ineligible for a provisional waiver.

---

[3] INA §101(g); 8 CFR §241.7.
[4] INA §212(a)(9)(A).
[5] 8 CFR §212.2(j).
[6] INA § 212(a)(9)(C).
[7] INA § 241(a)(5); 8 CFR § 212.7(e)(4)(vii).