

PROVISIONAL UNLAWFUL PRESENCE WAIVER, PART I

By Michael Phulwani, Esq. and David Nachman, Esq.

The Secretary of the Department of Homeland Security (DHS) has created a new process that will allow certain spouses, children, and parents of a U.S. citizen (immediate relatives) to apply for a provisional unlawful presence waiver while they are still in the United States and before departing for their immigrant visa interviews abroad.

Why did DHS create the Provisional Unlawful Presence Waiver?

Currently certain immediate relatives must travel abroad to obtain an immigrant visa from the Department of State (DOS) before they can return to the United States and be admitted as lawful permanent residents. In many cases, these immediate relatives also must request a waiver of inadmissibility of their unlawful presence in the United States. As a result, these immediate relatives must remain outside of the United States, separated from their U.S. citizen spouses, parents, or children, while U.S. Citizenship and Immigration Services (USCIS) adjudicates their waiver applications. In some cases, waiver application processing can be lengthy, prolonging the separation of these immediate relatives from their U.S. citizen spouses, parents, and children.

USCIS anticipates that this new provisional unlawful presence waiver process will significantly reduce the time that U.S. citizens are separated from their immediate relatives. USCIS approval of a provisional unlawful presence waiver prior to departure also will allow the DOS consular officer to issue an immigrant visa without delay, as long as there are no other grounds of inadmissibility and the immediate relative is otherwise eligible for an immigrant visa. Individuals who may be inadmissible on any other grounds of inadmissibility, are not eligible for the provisional unlawful presence waiver process.

How do I know if I am eligible for a provisional unlawful presence waiver?

You may be eligible for a provisional unlawful presence waiver if:

1. You are physically present in the United States;
2. You are at least 17 years of age at the time of filing;
3. You are the beneficiary of an approved immigrant visa petition classifying you as the immediate relative of a U.S. citizen;

4. You have an immigrant visa case pending with the U.S. Department of State (DOS), for which you have already paid the immigrant visa processing fee; and
5. You believe you are, or will be at the time of the immigrant visa interview, inadmissible based on having accrued a certain period of unlawful presence in the United States.
6. You meet all other requirements of the provisional unlawful presence waiver as listed in the regulations, the Form I-601A and its instructions.

How do I know if I am NOT eligible for a provisional unlawful presence waiver?

You are not eligible for a provisional unlawful presence waiver and your application will be rejected or denied if:

1. You do not meet one or more of the requirements listed above;
2. You have a pending **Form I-485**, Application to Register Permanent Residence or Adjust Status, with USCIS;
3. You are in removal proceedings unless your removal proceedings are administratively closed and have not been re-calendared as of the date of filing of the I-601A;
4. You have been ordered removed, excluded, or deported from the United States;
5. You are subject to reinstatement of a prior removal order;
6. DOS acted to schedule your immigrant visa interview prior to January 3, 2013, even if you failed to appear or you or DOS cancelled or rescheduled the interview on or after January 3, 2013.
7. You do not establish that the refusal of your admission to the United States would result in extreme hardship to your U.S. citizen spouse or parent, or that your application should be approved as a matter of discretion;
8. USCIS has reason to believe that DOS may find you inadmissible at the time of your immigrant visa interview for grounds other than unlawful presence.

How do I apply for the provisional unlawful presence waiver?

To apply for a provisional unlawful presence waiver you must file a **Form I-601A**, Application for Provisional Unlawful Presence Waiver. Make sure your application

is complete, signed, and submitted with the correct application and biometric fees. Follow the I-601A application instructions and check the USCIS web site at www.uscis.gov/forms for any updates to the instructions or required fees.

You should notify the Department of State of your intention to file a provisional unlawful presence waiver. See the DOS website at www.state.gov for more information on how to notify DOS.

How do I apply for the provisional unlawful presence waiver if I am in removal proceedings?

Only certain individuals in removal proceedings are eligible to apply for a provisional unlawful presence waiver. Individuals who are immediate relatives of U.S. citizens may apply for a provisional unlawful presence waiver while in removal proceedings, if the removal proceedings:

- Are administratively closed; **and**
- Have not been re-calendared as of the date of filing the I-601A.

You still must meet all the requirements for the provisional unlawful presence waiver, including the requirement that you have an immigrant visa case pending with DOS and have already paid the immigrant visa processing fee. Like individuals who are not in removal proceedings, you should also notify DOS of your intention to file a provisional unlawful presence waiver.

Although you are in removal proceedings, the application for a provisional unlawful presence waiver is filed with USCIS. You should inform the Immigration Judge and the local U.S. Immigration and Customs Enforcement (ICE) counsel that you have applied for a provisional unlawful presence waiver. Promptly notifying the immigration court and ICE counsel will help with the process to have the removal proceedings terminated or dismissed before you depart for your immigrant visa interview.

NOTE: Your removal proceedings should be terminated or dismissed **before** you depart the United States to avoid delays in your immigrant visa processing and to avoid the risk that you may be found inadmissible on other grounds.

We wish to advise our readers that Attorneys Michael Phulwani and David Nachman will be visiting India and available for meetings in January/February 2013.

For more information, please feel free to contact the Immigration and Nationality Lawyers at the NPZ Law Group at 201-670-0006 or by e-mailing us at info@visaserve.com.

To Be Continued...