Changes in the Processing of Waiver Applications –Part II

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Introduction

This is a second and concluding part of the article on changes in the processing of waiver applications under which an applicant who has incurred unlawful presence in the US and subject to 3/10 years bar and wished to travel abroad to apply for Immigrant Visa, would be able to apply for wavier application before departing from US.

Q. Who would be eligible for a provisional waiver?

A. Spouses and children of a U.S. citizen (1) who are seeking lawful permanent residence through an immigrant visa, (2) who are found inadmissible based on unlawful presence in the United States for more than 180 days, and (3) who meet the existing extreme hardship standard. Children under the age of 18 do not accrue unlawful presence and, as a result, are not required to obtain a waiver.

Q. Why is this proposed streamlined process limited to the spouses and children of U.S. citizens?

A. The policy objective of this proposed process change is to alleviate extreme hardship suffered by U.S. citizens. USCIS has thus identified immediate relatives of U.S. citizens as the class of aliens to consider for this procedural change. In addition, their immigrant visas, which are not subject to annual limitations, are always immediately available. The focus on U.S. citizens and their immediate relatives is consistent with Congress' prioritization in the immigration laws of family unification. This proposal meets the goals of both improving efficiency and reducing the length of time that American families are unnecessarily separated.

Q. How would the proposed process affect existing standards related to unlawful presence and the extreme hardship standard?

A. It would not. The proposed process retains all of the legal standards and policies related to unlawful presence determinations and establishing extreme hardship. It would simply provide for the processing of these waivers in the United States instead of abroad.

Q. Will individuals who receive the waiver be able to adjust their status without leaving the United States?

A. No. The visa process itself is not changing. Individuals who receive a provisional wavier would still be required to depart the United States to apply for their immigrant visa.

Q. Is everyone who has accrued more than 180 days of unlawful presence subject to a three- or 10-year bar from entering the U.S.?

A. Yes; however, some aliens do not accrue unlawful presence if they fall into certain categories. For example, children under the age of 18 do not accrue unlawful presence for any period of time

before their 18th birthday. Similarly, under current law, certain victims of crime and aliens with pending asylum applications do not accrue unlawful presence while their application is pending.

Q. If an individual already filed a Form I-601 from outside the U.S., would the proposed process affect him or her?

A. No. It would only affect individuals who have not yet filed a Form I-601 and who will file a waiver request after a final rule is published.

Q. Would USCIS collect biometrics as part of the streamlined process?

A. Yes. It is contemplated that applicants in the United States would be scheduled for biometrics collection at a USCIS Application Support Center.

Q. Why does USCIS refer to the waiver as "provisional?"

A. In the proposed process, USCIS would grant the provisional waiver before the applicant departs the U.S. for consular processing of their immigrant visa applications. The provisional waiver, however, would not take effect until the individual departs from the United States and triggers the covered ground of inadmissibility. Moreover, the provisional waiver covers only the unlawful presence grounds of inadmissibility. If the consular officer finds during the immigrant visa interview that the individual is subject to another ground of inadmissibility, the individual would need to file another waiver application with USCIS.

Q. What would happen at the consular interview?

A. If DOS found the individual otherwise eligible for the immigrant visa, the consular officer would then issue the visa, allowing the individual to immigrate to the U.S.

Q. What would happen to individuals who are not eligible to file a waiver under the proposed process?

A. They would continue to follow current agency processes for filing waiver requests after a determination of inadmissibility is made by a U.S. consular officer overseas.

Q. What would happen to individuals who are denied waivers under the proposed process?

A. They would be subject to USCIS guidance and law enforcement priorities for issuing Notices to Appear (NTA). For example, convicted criminals, public safety threats, and those suspected of fraud will receive NTAs.

Note: The proposed change of the process for waivers of 3/10 years bars due to unlawful presence is a welcome change and may provide relief too many individuals who are married to U.S. Citizens but cannot adjust status as a permanent resident.

Presently, if such person travels to his home country to apply for Immigrant Visa at the American Consulate based upon approved I-130 petition filed by his or her USC Spouse, the consul will deny the visa due to unlawful presence in the U.S. If unlawful presence is more than one year, the consul

will advise to file application for the waiver Form I-601 together with extensive documentation evidencing extreme hardship to a qualifying Immediate Relative, U.S. Citizen or Green Card Holder parent or spouse of the applicant. The application for waiver is filed at the consulate who will forward entire file to USCIS which has jurisdiction over the applicant's country of residence. Waiver applications for India are processed by USCIS New Delhi. The USCIS official in New Delhi will make determination about the approvability of the application and if approved, consul will issue the visa. If wavier is denied, the applicant has to remain outside of the US to complete 10 years from date of his departure from India. Of course, the applicant can file an appeal against the decision denying I-601 application for wavier. Under new change that would permit filing of I-601 in the U.S. before going abroad for visa processing. If the waiver application is approved, the applicant may travel abroad to apply for Immigrant Visa, and if there are no other grounds of inadmissibility such as Fraud, misrepresentation, smuggling, or crime, the consul may issue the visa. Of course the consul will still charge the applicant with 3 to 10 year bar but when the applicant presents the approval of the waiver by USCIS, the processing can be completed by the American Consulate without further delay.

CAUTION: Applicants who wish to take advantage of this change, must carefully review all the details and consult an experienced attorney to review whether any additional grounds of inadmissibility exist or may be applied other than unlawful presence. If at the time of interview, the consul charges the applicant with additional ground(s) of inadmissibility, the applicant would be required to file new I-601 for such additional ground(s) inadmissibility and it would then be up to USCIS to approve or deny the second waiver application. This may result in a long delay and hardship to the application.