



Questions and Answers

March 30, 2012

Provisional Unlawful Presence Waivers: Questions & Answers

Introduction

The following Q and As explain the proposed provisional unlawful presence waiver process.

Background

On March 30, 2012, U.S. Citizenship and Immigration Services (USCIS) posted a notice of proposed rulemaking (NPRM) in the [Federal Register](#) requesting public comment on its plan to create an improved process for certain immediate relatives of U.S. citizens to apply for and receive a provisional waiver of the unlawful presence ground of inadmissibility while still in the United States, if they can demonstrate that being separated from their U.S. citizen spouse or parent would cause that U.S. citizen relative extreme hardship. The goal of the proposed process is to reduce the time that U.S. citizens are separated from their immediate relatives while those family members go through the consular process overseas to obtain an immigrant visa.

Visit our [Proposed Provisional Unlawful Presence Waivers](#) webpage for more details.

Questions and Answers

Q1. How do I apply for the provisional unlawful presence waiver?

A1. The provisional waiver process is NOT in effect. USCIS will reject any application requesting a provisional waiver at this time and return the application and any fees filed. The provisional waiver process will only take effect after a final rule is published in the Federal Register with an effective date.

Q2. How do I comment on this proposed provisional unlawful presence waiver process?

A2. USCIS encourages the public to submit formal input on the proposed rule through www.regulations.gov during a comment period that runs from April 2, 2012 until June 1, 2012.

Q3. Why is this proposed waiver process limited to the immediate relatives of U.S. citizens who can demonstrate extreme hardship to a U.S. citizen spouse or parent?

A3. The goal of the provisional unlawful presence waiver process is to alleviate the extreme hardship certain U.S. citizens experience when they are separated for extended periods of time from their spouses, children, and parents ("immediate relatives"). USCIS expects that this new process will streamline the waiver process and reduce the length of time immediate relatives must remain abroad to obtain an immigrant visa. For additional information, see DHS Notice of Proposed Rulemaking (NPRM), section IV, Part B, Rationale for Proposed Change.

Q4. Will USCIS consider expanding this new process to relatives of lawful permanent residents who have visas that are currently available?

A4. The agency decided as a matter of policy and operations to make this process available only to immediate relatives of U.S. citizens. For additional information, see DHS [Notice of Proposed Rulemaking](#)

(NPRM), section IV, Part B, Rationale for Proposed Change. As part of the rulemaking process, you may submit your views and suggestions as formal comments to the [NPRM](#) at www.regulations.gov.

Q5. Why does USCIS refer to the waiver as “provisional?”

A5. USCIS refers to the waiver as “provisional” because it will not take effect until after the applicant departs the United States, appears for his or her immigrant visa interview, and is determined by the DOS consular officer to be otherwise admissible to the United States. In the proposed process, USCIS would determine eligibility for the provisional waiver and, if the application is approvable, approve the provisional waiver before the applicant leaves the United States for the immigrant visa interview abroad.

Q6. Will I have to be fingerprinted or appear for an interview as part of the provisional waiver process?

A6. All provisional unlawful presence waiver applicants will be required to appear at a USCIS Application Support Center for biometrics collection. Generally, USCIS will not require provisional waiver applicants to appear for an interview but may schedule an interview if the facts in a particular case warrant further inquiry and review.

Q7. Will I use the current Form I-601, Application for Waiver of Grounds of Admissibility to apply for a provisional waiver?

A7. No. USCIS is developing a new form for the proposed provisional unlawful presence waiver process – Form I-601A, Application for Provisional Unlawful Presence Waiver. The application filing fee is \$585.00, the same fee required for the Form I-601. There is an additional biometric fee of \$85.00 for applicants who are under 79 years of age. USCIS will post the proposed form in the Federal Register for formal comment in the near future.

Q8. Can I file a fee waiver request for the provisional waiver application?

A8. No. Fee waivers will not be available for the provisional waiver application fee of \$585.00 or the biometrics fee of \$85.00.

Q9. What documents will I be required to file with my application for a provisional unlawful presence waiver?

A9. USCIS will include instructions with the new Form I-601A that will describe the types of documents you will need to submit with your provisional waiver application. At a minimum, USCIS will require proof that you have an approved Form I-130, Petition for Alien Relative, or an approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, if you are a self-petitioning widow/widower, and an immigrant visa application fee receipt from the Department of State (DOS). Failure to follow the instructions on the form or submit required documentation may result in your application being rejected or denied. For more information on proposed rejection criteria, see DHS [NPRM](#) section IV, Part E – Filing, Adjudication, and Decisions.

Q10. Will I be able to file the provisional waiver application concurrently with my Form I-130?

A10. No. To be eligible for the provisional waiver process, applicants must already have an approved I-130 or I-360. The approved petition is what starts the immigrant visa process with DOS. For more information on eligibility and filing criteria, see DHS [NPRM](#) section IV, Parts C through E.

Q11. Will I be able to file the provisional waiver application concurrently with my Form I-212, Application for Permission to Reapply for Admission Into the United States After Removal?

A11. No. Aliens who must request permission to reenter the United States after removal are not eligible for the provisional unlawful presence waiver. In addition, USCIS will not accept concurrent filings of the Form I-601A and Form I-212 or Form I-130.

Q12. Will the proposed provisional waiver process affect existing standards for unlawful presence and extreme hardship?

A12. No. The proposed provisional waiver process will not alter the criteria USCIS will use to determine if an individual qualifies for a waiver of a ground of inadmissibility or if an individual has established the requisite extreme hardship to a U.S. citizen spouse or parent.

Q13. If I get a provisional waiver, can I adjust my status without leaving the United States?

A13. No. Individuals who receive a provisional unlawful presence waiver must leave the United States to attend their immigrant visa interview with a DOS consular officer in order for the provisional waiver to take effect and for the individual to be granted an immigrant visa. However, because of the way the proposed process for adjudicating provisional waivers is designed, individuals who receive a provisional waiver will likely be separated from their U.S. citizen relatives for significantly shorter periods than is the case under the current process.

Q14. I already have an immigrant visa interview scheduled for next month in my home country. Should I cancel it so that I can apply for the provisional unlawful presence waiver when the final rule takes effect?

A14. No. If you already have an immigrant visa interview scheduled with DOS, we urge you to keep your appointment. This proposed waiver process is not in effect and USCIS will not be publishing a final rule until later this year. If you trigger the unlawful presence bars upon departure from the United States, you may still file a Form I-601, Application for Waiver of Grounds of Inadmissibility, after you have appeared for your immigrant visa appointment and DOS has determined that you are inadmissible and need to file a waiver. If you fail to appear for your consular interview, [DOS may terminate](#) your immigrant visa registration.

Q15. I am currently in removal proceedings. Will I be able to apply for a provisional waiver?

A15. As part of the rulemaking process, DHS is considering how it will address provisional waiver requests from individuals who currently are in removal proceedings. We encourage you to submit your views and suggestions on this topic as formal comments to the [NPRM](#) at www.regulations.gov. For more information about eligibility criteria, see DHS NPRM section IV, Parts C and D.

Q16. If I have already filed a Form I-601, Application for Waiver of Grounds of Inadmissibility from outside the United States, will I be able to apply for a provisional waiver?

A16. No. The proposed provisional waiver process only applies to individuals who are physically present in the United States and have not yet been scheduled for their immigrant visa interview. For more information on eligibility criteria, see DHS [NPRM](#), section IV, Parts C and D.

Q17. What happens if I am not eligible for a provisional unlawful presence waiver?

A17. When the new process goes into effect, individuals who are not eligible for the provisional waiver process can continue to follow current agency processes for filing a Form I-601, Application for Waiver of Grounds of Inadmissibility, after the consular interview.

Q18. If I receive an approved provisional unlawful presence waiver, will I be able to work?

A18. No. Under the proposed rule, the filing or approval of a provisional unlawful presence waiver will not affect an individual's current immigration status in the United States. A pending or approved provisional waiver also will NOT:

- Provide interim benefits such as employment authorization or advance parole;
- Provide lawful status;
- Stop the accrual of unlawful presence;
- Provide protection from removal;
- Remove the requirement to depart the United States to seek an immigrant visa; or
- Guarantee visa issuance or admission to the United States.

Q19. If I apply for a provisional unlawful presence waiver but USCIS denies my request, can I appeal the decision or file a motion with USCIS asking for the decision to be reopened or reconsidered?

A19. No. Aliens seeking a provisional unlawful presence waiver would not be able to file a motion to reopen or motion to reconsider or to appeal a denial of a request for a provisional waiver. Such individuals, however, may still apply for a waiver through the current I-601 waiver process. USCIS also reserves the right to reopen and reconsider on its own motion an approval or a denial at any time.

Q20. If USCIS denies my request for a provisional unlawful presence waiver will I be placed in removal proceedings?

A20. For cases where the provisional unlawful presence waiver is denied, USCIS will follow its current Notice to Appear (NTA) policy which prioritizes the types of cases USCIS will focus on for initiation of removal proceedings. For more information on USCIS NTA priorities, see [USCIS Policy Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear \(NTAs\) in Cases Involving Inadmissible and Removable Aliens](#) (November 7, 2011).

Q21. What will happen at the consular interview if I present an approved provisional unlawful presence waiver?

A21. If the DOS consular officer determines that a provisional waiver applicant, in light of the approved waiver of the unlawful presence bar, is otherwise admissible to the United States and eligible for the immigrant visa, DOS would issue the immigrant visa, allowing the individual to travel to the United States. The provisional unlawful presence waiver would become permanent and cover the periods of unlawful presence on which the waiver was based for any future benefit requests. For more information on the validity a provisional waiver, see DHS [NPRM](#) section IV, Part H.

Q22. What will happen at the consular interview if I present an approved provisional unlawful presence waiver but the consular officer determines I have other grounds of inadmissibility?

A22. If the consular officer determines that you are subject to other grounds of inadmissibility beyond unlawful presence, the approved provisional waiver is automatically revoked. If a waiver is available for the other ground(s) of inadmissibility identified by the DOS consular officer, you will need to file a Form I-601, Application for Waiver of Grounds of Inadmissibility, with USCIS after the consular interview to request a waiver for all applicable grounds of inadmissibility, including any periods of unlawful presence. For more information on revocation of a provisional waiver, see DHS [NPRM](#) section IV, Part G.

Q23. How long will an approved provisional unlawful presence waiver be valid?

A23. Under the proposed rule, an approved provisional unlawful presence waiver would remain valid as long as the underlying approved immigrant visa petition (I-130 or I-360) is not revoked. If DOS terminates the immigrant visa registration process or the approved immigrant visa petition is revoked, the provisional unlawful presence waiver grant also is automatically revoked. For more information on the terms and conditions for a provisional waiver and periods of validity, see DHS [NPRM](#) section IV, Parts G and H.

Q24. What happens to an approved provisional unlawful presence waiver if I reenter the United States illegally?

A24. Illegal reentry into the United States after approval of a provisional unlawful presence waiver will automatically revoke the approval. Whether an individual has a pending or an approved immigration benefit application, reentry into the United States without being admitted or paroled by an immigration officer at the U.S. border can have severe consequences; such individuals may be permanently barred from the United States.