New Provisional Unlawful Presence Waiver Affecting Immigration Visa Applications

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Beginning March 4, 2013, certain immediate relatives (spouses, children and parents, as defined by law) of United States citizens who wish to apply for a visa to become legal permanent residents, but who are inadmissible solely due to their unlawful presence in the United States, may apply for a provisional waiver of the unlawful presence bar to admissibility before departing the U.S. in order to apply for an immigrant visa abroad. [1]

The new rule is expected to significantly lessen the time during which U.S. citizen family members are separated from their relatives who are applying to become legal permanent residents.

BACKGROUND

Certain immediate relatives of United States citizens who are not eligible to adjust their status in this country to become legal permanent residents are required to travel abroad to apply for an immigrant visa from the Department of State. If approved, they are then able to return to the United States and be admitted to the country as legal permanent residents.

However, persons who have accrued periods of unlawful presence in the U.S. become subject to mandatory three or ten-year bars to reentry once they leave the country.[2] In order to be permitted to return to the U.S., they must first obtain a waiver.

Prior to the implementation of the new provisional waiver process, persons in this category had to leave the United States and file the waiver application after they had appeared for their immigrant visa interview at the United States consulate in their home country and were found to be inadmissible on this basis. Applicants were required to remain outside of the country while their waiver application was being adjudicated. This process could take up to a year or longer in some instances.

In addition, if the waiver application was denied, applicants could file a new application, but were required to remain outside of the U.S. pending its approval. Because of the uncertainty involved and the hardship caused by family separation while the waiver application was being processed, many people who were otherwise eligible to apply for this waiver of inadmissibility chose not to depart from the United States to apply for an immigrant visa, which upon entry into the U.S., would grant the immigrant legal permanent resident status.

THE NEW PROCESS

Persons who are inadmissible solely due to unlawful presence may now apply for a provisional waiver of this basis of inadmissibility before departing the country using Form I-601A, Application for Provisional Unlawful Presence Waiver. This process requires the applicant to leave the U.S. for consular immigrant visa processing.

However, the intending immigrant will now leave the United States with a 'provisional' waiver. The Department of State will then be able to issue an immigrant visa to eligible applicants. Waivers will not be approved if there are other grounds of inadmissibility or if the applicant is otherwise ineligible for a visa, however, and the waiver is discretionary.

The basis for the waiver is limited to establishing that an applicant's United States citizen spouse or parent will experience extreme hardship if he or she is not permitted to return to the U.S. Hardship that the applicant's U.S. citizen children will endure is not considered for purposes of the waiver, unless it bears upon the hardship that the applicant's U.S. citizen spouse or parent would experience if the applicant is not permitted to return. Hardship that the applicant will face is not relevant to this determination. Economic, medical, and/or educational hardship are among the factors that may be considered.

There are a number of requirements that applicants who are or will be inadmissible due to unlawful presence in the U.S. at the time of their consular interview must meet in order to apply for this waiver. Practitioners must carefully review all applicable statutes and regulations as well as the form and instructions to determine eligibility, and to comply with all filing requirements.

In general, applicants must be the beneficiaries of an approved I-130 or I-360 Immigrant Petition. They must have an immigrant visa case pending with the Department of State based upon the approved immigrant visa petition and have paid the processing fee. They must be physically present in the U.S. and be at least 17 years old at the time of filing. Applicants cannot have an I-485, Application to Register Permanent Residence or Adjust Status

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pending with U.S. Citizenship and Immigration Services.

Applicants cannot have been scheduled by the Department of State for an immigrant visa interview prior to January 3, 2013. Persons who are subject to a final order of removal, deportation, or exclusion, or the reinstatement thereof are ineligible to apply for this waiver. Persons who are in removal proceedings must request to have their cases administratively closed and terminated, in conjunction with the provisional waiver process.

In the event that the waiver application is denied, the applicant may submit a new form I-601A, in accordance with the regulations and instructions with additional documentation in support of the waiver, if necessary. If the consular office discovers new facts regarding inadmissibility, the applicant may file a Form I-601 Application for Waiver of Grounds of Inadmissibility if the applicant is found to be inadmissible for one or more grounds for which a waiver may be available.

It is important to advise clients that the provisional unlawful presence waiver applies only to inadmissibility based on unlawful presence. Persons who may be inadmissible on other grounds including other immigration law violations and certain criminal convictions and those who may have misrepresented material facts in the context of prior immigration applications are not eligible for this waiver. Practitioners must carefully review their client's immigration history and criminal history, if applicable, to determine whether any additional grounds of inadmissibility exist. Although USCIS has stated that it does not envision putting I-601A applicants into removal proceedings, they will follow the Department of Homeland Security's policies regarding initiating removal proceedings where applicable. Finally, the filing and approval of a provisional waiver does not provide any interim immigration or other benefits.

ENDNOTES

1. 8 C.F.R. § 212.7(e).
2. INA § 212(a)(9)(B)(i)(I), INA §212(a)(9)(B)(i)(II).

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