

## USCIS Publishes Final Rule on Provisional Unlawful Presence Waivers



On January 2, 2013, U.S. Department of Homeland Security Secretary Janet Napolitano announced the long-awaited implementation of the new Provisional Unlawful Presence Waiver. The Final Rule on Provisional Unlawful Presence Waivers ("Stateside" I-601 Waiver Applications) was published in the Federal Register on January 3, 2013. The effective date for the new rule is March 4, 2013.

### Background Information

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), significantly impacting immigration law as it exists today. IIRAIRA created two new "bars" which prevent otherwise eligible applicants from obtaining Lawful Permanent Resident status. These admissibility bars are targeted at immigrants who either entered the United States without documentation or who have overstayed their lawful immigration status (visa).

Depending on circumstances, these immigrants are not eligible to apply for Permanent Residence within the U.S. Instead, they have to go back to their home country and apply for immigration benefits at a U.S. Embassy or Consulate. In addition, upon leaving the U.S., they become subject to a "bar" – a penalty of a period of time (3-10 years) during which they are forbidden to re-apply for admission to the U.S.

### The I-601 Application for Waiver of Grounds of Inadmissibility

At the same time, Congress also created a type of pardon which allows certain immigrants to waive the "bars." The waiver, if approved, allows the immigrant to re-enter the U.S. prior to spending the required period of time abroad. This is the "I-601 Application for Waiver of Grounds of Inadmissibility," commonly known as the "hardship waiver."

To qualify, the immigrant must prove that a qualifying U.S. citizen or Lawful Permanent Resident relative would suffer "extreme hardship" (defined as hardship that is above and beyond what a normal family or couple would experience if separated for 3-10 years). The waiver is filed with the U.S. Department of Homeland Security, Citizenship and Immigration Services (USCIS), and its approval is discretionary. Historically, approval rates are low, and processing times slow. Immigrants could spend many months abroad, separated from their families, waiting for the waiver to be approved.

### I-601 Application Processing

For some time, USCIS has been working on a plan to reduce the processing times for I-601 Waiver Applications. Initially, in 2012, USCIS moved the processing and adjudication of all I-601 Waiver Applications out of USCIS International Field Offices and into USCIS Service

Centers located in the U.S. This centralization of waiver processing is intended to accelerate waiver processing times across the board.

### The Provisional Unlawful Presence Waiver

The Provisional Unlawful Presence Waiver is slightly different from the standard I-601 Application for Waiver of Grounds of Inadmissibility.

Most important is that the Provisional Unlawful Presence Waiver will only cure inadmissibility due to unlawful presence. If an applicant has other grounds of inadmissibility (i.e. misrepresentation, criminal activity), he or she must file the standard version of the I-601 Application, not the Provisional Unlawful Presence Waiver.

Additionally, the Provisional Unlawful Presence Waiver is only available to "immediate relatives" of U.S. citizens, including spouses and unmarried minor (under 21) children. These are the only two categories of immediate relatives who are currently provisional waiver-eligible.

The Final Rule on Provisional Unlawful Presence Waivers, published January 3, 2013, details all of the eligibility criteria and the procedure by which applicants will be able to apply under the new system. [78 FR 535, 3 January 2013].

*(See Q & A on next page)*

## Q & A with Lopez Immigration Law at Murphy Desmond S.C. regarding Provisional Unlawful Presence Waivers

### **Will waiver applicants still need to leave the U.S. during processing?**

Yes. It is important to understand that Provisional Unlawful Presence Waiver processing does not eliminate the requirement that the immigrant leave the U.S. as part of the Immigrant Visa process.

USCIS will render a decision on the Provisional Unlawful Presence Waiver while the immigrant waits in the U.S. This will keep the immigrant together with his or her family while the waiver is adjudicated.

After the waiver is adjudicated, the immigrant will leave to attend the Immigrant Visa interview at the U.S. Embassy or Consulate in his or her home country. However, the immigrant will only have to be outside of the U.S. for a matter of weeks to complete the process – not months – as was often the case under the old system.

### **What is the benefit of the Provisional Unlawful Presence Waiver?**

The Provisional Waiver is intended to greatly reduce the amount of time the applicant must spend abroad, separated from his or her spouse and/or family while awaiting the I-601 Waiver's adjudication.

USCIS' intent is to reduce the hardship experienced by the families of I-601 Waiver Applicants who, in the past, have

been forced to live apart from their relative for many months due to USCIS backlogs and processing times.

### **What do I need to do to get started?**

The Final Rule clarifies that I-601 applicants must notify the U.S. Department of State (DOS), National Visa Center (NVC) if they intend to apply under the Provisional Unlawful Presence Waiver rule.

By notifying the NVC early, applicants can avoid having their case transferred to a U.S. Consulate abroad and/or scheduled for an Immigrant Visa interview appointment prematurely. This will prevent delays in case processing and waiver adjudication.

### **Is there a different USCIS form for the Provisional Unlawful Presence Waiver?**

Yes. USCIS anticipates publishing a new case form in support of the Provisional Unlawful Presence Waiver, under form number: I-601A Provisional Unlawful Presence Waiver. The form should be made available by USCIS prior to the implementation date of the new rule, of March 4, 2013.

### **Is it too late to apply if I was already scheduled an immigrant visa interview?**

Applicants whose Immigrant Visa interview was scheduled prior to January 3, 2013, are **not** eligible for Provisional Waiver processing.

Interviews scheduled on or after January 3, 2013, will not render an immigrant ineligible to apply for the Provisional Unlawful Presence Waiver. However, the immigrant must still be in the United States. In addition, the NVC will need to be contacted, and USCIS has indicated that case processing delays are likely.

If you have questions or concerns, contact an attorney to discuss the specifics of your case before filing any applications or submitting any fees.

### **Contact Murphy Desmond S.C.**

If you believe the new Provisional Unlawful Presence Waiver rule may affect your immigration case, or have questions about your Immigrant Visa interview appointment, please contact Attorney Lopez today at (608) 270-5550, to discuss your individual situation.



**Glorily López**  
Attorney

Attorney Lopez is a member of the American Immigration Lawyers Association (AILA), and is the past Chair of the AILA Wisconsin Chapter (2009-2011).

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