

New Waiver Process Will Help Many Seeking to Become Permanent Residents

JANUARY 2013

The U.S. Department of Homeland Security (DHS) has issued a new rule that will allow certain people who have U.S. citizen family members, but who must leave the U.S. as part of the process of becoming eligible for lawful permanent residence, to complete a critical part of the application process before they leave the U.S. The new process lowers the risk that such people will be denied reentry into the U.S. and reduces the time they spend abroad apart from their families. DHS issued the new rule on January 3, 2013. The change in process will take effect March 4, 2013.

Background

People who enter the U.S. without being “inspected” by a U.S. immigration officer are generally not able to obtain permanent residence—green cards—while in the U.S. Instead, they must leave the U.S. and complete the processing of their green card applications at a U.S. consulate abroad.

After a 1996 change in immigration law created what are known as the “unlawful presence bars,” leaving the U.S. so their green card applications could be processed at a consulate was no longer a viable option for most people who’d entered the U.S. without inspection. This is because, under the unlawful presence bars, people who have been in the U.S. without permission for six months are barred from reentering the U.S. for three years once they leave. In addition, anyone who has been in the U.S. without permission for one year or more is barred from reentering the country for ten years, unless the person is granted a waiver.

Waivers of the 3- or 10-year unlawful presence bars are available only to people who can show that certain members of their family would suffer “extreme hardship” should they be denied reentry into the U.S. Under the current rule (the one in effect until March 4), a person can apply for this waiver only at the consulate abroad after the unlawful presence bar is triggered—that is, only after the person leaves the U.S. As a result of this process, thousands of people with strong family ties in the U.S. have been “fenced in” inside the U.S., where they are not eligible to obtain their green cards, because they don’t want to risk a decade-long separation from their loved ones should they leave the country and their waiver application is denied.

What is a provisional “stateside” waiver?

The new DHS rule would eliminate this risk of family separation for certain people with U.S. citizen family members. The rule changes processing of the reentry bar waiver by

LOS ANGELES (Headquarters)
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax



WASHINGTON, DC
1444 Eye Street, NW, Suite 1110
Washington, DC 20005
202 216-0261
202 216-0266 fax

allowing qualifying people to apply for a “provisional waiver” before departing the U.S. People whose provisional waiver applications are approved would then be able to travel abroad knowing that a waiver will be granted, reducing the risk they would be denied reentry. The new process also will reduce the time that such people spend abroad apart from their families, since a time-consuming part of the green card process will already have been completed before they leave the U.S.

Who may apply for this new waiver?

To qualify for a provisional waiver, an applicant must first be the beneficiary of an immigrant visa petition as an *immediate relative*. An immediate relative is a person who fits into one of the following categories: (1) has a spouse who is a U.S. citizen; (2) has a parent who is a U.S. citizen, if the individual is under age 21 and unmarried; or (3) has a son or daughter who is a U.S. citizen, if the son or daughter is over age 21.

After the immigrant visa petition is approved, the applicant should then begin “consular processing.” The applicant can seek the provisional waiver by filing Form I-601A.¹ To obtain approval of the waiver, the applicant has to demonstrate that his or her U.S. citizen spouse or U.S. citizen parent would suffer “extreme hardship” if the applicant were denied reentry into the U.S. Note that while the family member who suffers this hardship will often be the sponsor of the applicant’s immediate relative petition, he or she doesn’t have to be.²

After the I-601A is approved, the applicant completes a series of forms and is scheduled for a consular interview abroad. If the forms and interview don’t reveal any other grounds for denying the applicant admission to the U.S., the applicant is granted an immigrant visa to enter the U.S.

Who is not eligible for this waiver?

An individual is not eligible for the waiver if he or she:

- Was convicted of a crime, or engaged in conduct, that make him or her *inadmissible* to the U.S.;
- Is under 17 at the time of application;
- Is in removal proceedings (unless they are administratively closed) or has an outstanding removal order; or
- Was scheduled prior to January 3, 2013, for a consular interview on the immediate relative petition that is the basis for the provisional waiver application.

¹ When the I-601A form is published, it will be available from the “Forms” section of U.S. Citizenship and Immigration Services’ website: <http://tinyurl.com/y3ffyd>.

² In fact, for individuals who qualify as *immediate relatives* because they have an adult son or daughter who is a U.S. citizen (category 3, above), the family member who suffers the hardship cannot be the petitioning family member because hardship is only considered if it is suffered by a U.S. citizen spouse or U.S. citizen parent.

What happens if a waiver application is denied?

People whose applications for a provisional waiver are denied do not need to depart the U.S. to complete consular processing. DHS has said it does not envision initiating removal proceedings against people whose applications are denied, unless they have a criminal history, committed fraud, or pose a public safety threat.

Does an applicant need an attorney to help file for the waiver?

Applying for a green card through this new process will require the person to submit forms and paperwork at three different stages: (1) the immediate relative petition stage; (2) the waiver application stage; and (3) the consular processing stage, which includes an interview. While each case is different, the waiver application will be the most complicated part of the process for most applicants. Proving that a family member will suffer “extreme hardship” is a challenging task that involves a thorough review of that family’s financial, medical, and mental-health states and histories. An attorney can help you assess whether there are any other issues that might prevent you from being able to return to the U.S. if you use this process to apply for a green card.

If you need legal assistance, consult only a qualified immigration attorney or accredited representative.