Provisional Waiver Update: "Let's Not Waive Goodbye"

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INTRODUCTION

Despite the Trump's Administration's sweeping immigration changes in 2017, the Provisional ("Stateside") Waiver of Unlawful Presence (I-601A) has, to date, remained unscathed. Introduced on March 4, 2013, the Provisional Waiver initially waived the unlawful presence ground of inadmissibility for immediate relatives of U.S. citizens who were physically present in the United States, and who could demonstrate extreme hardship to the U.S. citizen spouse or parent if the waiver was not granted.[1] The provisional waiver is adjudicated *before* the applicant departs the United States for the immigrant visa interview, thereby reducing the taxing duration of family separation significantly. The waiver is considered as "provisional" because it does not take effect until the applicant leaves the United States and receives a favorable decision after completion of the immigrant visa interview. An approved I-601A application is automatically revoked if the applicant is found inadmissible on another ground.[2] Upon revocation, a new waiver application would need to be filed for both the unlawful presence and other ground of admissibility.

Shortcomings of the Provisional Waiver Program

[1] 78 Fed. Reg. 536.
[2] 8 CFR §212.7(e)(14)(i).

The implementation of the I-601A waiver program came with various shortcomings. Until the provisional waiver program was expanded on August 29, 2016, the applicant needed a U.S. citizen spouse or parent in order to demonstrate extreme hardship to a qualifying relative. This limitation directly conflicted with the statute that permitted an INA[3] §212(a)(9)(B)(v) waiver based upon extreme hardship to a lawful permanent resident spouse or parent.[4] Also, USCIS's practice of automatically denying I-601A applications on a "reason to believe" finding forced many applicants to instead apply for the §212(a)(9)(B)(v) waiver abroad while enduring family separation for six to ten months. Lastly, applicants with final orders of removal were originally barred from submitting I-601A applications. Rather, these applicants were required to file a joint motion to reopen and terminate proceeding before filing an I-601A application. These recurring problems prompted some changes and improvements in the I-601A waiver process.

LIST OF QUALIFYING RELATIVES EXPANDED FOR EXTREME HARDSHIP DETERMINATION

As noted above, on August 29, 2016, the Provisional Waiver was expanded to include lawful permanent resident spouses or parents as qualifying relatives for purposes of extreme hardship. The expansion applies regardless of the applicant's immigrant visa classification (*i.e.*, employment-based preference category, a family-based preference category, the diversity visa lottery, or a special immigrant classification). This change alone according to USCIS will lead to an additional 10,000 foreign nationals a year being eligible for a stateside unlawful presence waiver. USCIS posted the updated Form I-601A to reflect the expansion.[5] As before, proof of the immigrant visa fee payment must be submitted with the I-601A application. There does not appear to be any requirement that an applicant's priority date must be current before the I-601A application can be filed. However, in practice, the date will need to be fairly close as the immigrant visa fee bill is issued only when the priority date is approaching. To request a copy of the immigrant visa fee payment receipt, you may send an email to NVCI601A@state.gov with the subject line: "Fee Payment Receipt Request" and also include the National Visa Center case number. As of now, the processing time for I-601A adjudication is approximately six to seven months.

ELIMINATION OF THE "REASON TO BELIEVE" STANDARD

The expansion of the I-601A program has also eliminated the confusing and often over applied "reason to believe" standard regarding applicants who may be found inadmissible on grounds other than INA §212(a)(9)(B). The "reason to believe" standard originated in *Matter of Isabel Diaz* where the Board of Immigration Appeals (BIA) found "reason to believe" to be a lower evidentiary standard than "clear and convincing," and more

[3] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).
[4] "Expansion of Provisional Unlawful Presence Waivers of Inadmissibility: Final Rule," 81 Fed. Reg. 50244 (to be codified at 8 CFR pt. 103 and 212), AILA Doc. No. 16072801.
[5] "USCIS Posts Updated Editions of Several Forms" (Aug.31, 2016), AILA Doc. No. 16083132.

comparable to "probable cause". The U.S. Department of State's *Foreign Affairs Manual* (FAM) provides a definition of "reason to believe" at 9 FAM 40.23 N2(b).[6]

As a result of USCIS's overuse and misapplication of the "reason to believe" standard in FY 2014, 48 percent of I-601A applications were denied on this basis.[7] On January 24, 2014, USCIS announced a new policy to end mandatory denials of I-601A hardship waivers on "reason to believe" grounds solely due to the applicant having a criminal background.[8] Rather, if the applicant's criminal offenses clearly fell within the petty offense exception or youthful offender section or he or she had a minor law enforcement encounter that would not realistically trigger a ground of inadmissibility, USCIS could continue to process the I-601A application.

Under the August 29, 2016 expansion of provisional waiver program, the "reason to believe" standard has been eliminated altogether and USCIS will no longer deny an I-601A application based solely on this standard.[9] However, if the consulate uncovers another ground of inadmissibility such as fraud, criminal conduct, or medical issues, etc., at the time of the immigrant visa appointment abroad, the provisional waiver will automatically be revoked forcing the applicant to seek a waiver for the uncovered ground of inadmissibility as well as the unlawful-presence inadmissibility while waiting outside of the United States.

Therefore, it is best practice for attorneys to check whether their clients may have additional grounds of inadmissibility as USCIS will no longer be doing same after the elimination of the "reason to believe" standard. Filing Freedom of Information Act (FOIA)[10] requests and criminal background checks are vital for obtaining a client's case, admission, and criminal history. As some grounds of inadmissibility are without waiver or can only be waived after a certain period of time is spent outside of the United States, the consequences of the elimination of the "reason to believe" standard can be potentially harsh for some I-601A applicants if due diligence is not performed.

FINAL ORDERS

Previously, it was unclear whether someone under an order of removal had to reopen his or her removal proceedings and request administrative closure or termination in order to file an I-601A provisional waiver. The U.S. Department of Homeland Security (DHS) has now clarified the process and specified how applicants may position themselves to become eligible to file a provisional waiver. Specifically, if an individual is under a final order of removal, the applicant must first secure a conditionally approved I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal.[11]

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[6] *In re Jose Manuel Isabel Diaz* (BIA Dec. 30, 2013).
[7] See "CLINIC Update from the NBC on Provisional Waivers" (Oct. 1, 2013), AILA Doc. No. 13100364.
[8] USCIS Memorandum, "Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers" (Jan. 24, 2014), AILA Doc. No. 14012455.
[9] 8 CFR §212.7(e)(14)(i).
[10] 5 USC §552, as amended by Pub. L. No. 104-231, 110 Stat. 3048.
[11] 81 Fed. Reg. 50255.

It is important to note that there is no concurrent filing of an I-601A and an I-212 application. An applicant with a final order must first secure a conditionally approved I-212, and then file an I-601A provisional waiver. During the notice and comment period for the expansion of the provisional waiver program, commenters advocated for a concurrent filing procedure for those individuals who needed both an I-212 and I-601A. However, DHS made clear in its' response that each form is intended to address two separate grounds of inadmissibility, and that there are two different waiver eligibility requirements at play. Therefore, USCIS will deny an I-601A application if the applicant's I–212 application has not yet been conditionally approved upon filing of the waiver application. This will significantly increase the wait time for individuals to eventually attend their immigrant visa interview abroad.

Practicing attorneys should be wary to keep the National Visa Center (NVC) updated on the processing of the I-212 and the I-601A applications as the NVC will commence the termination process on any immigrant visa applications which have been inactive for more than one year. Additionally, as previously noted, attorneys should vigilantly screen clients for crimes and other possible grounds of inadmissibility. If during the immigrant visa interview the consular officer finds that the applicant is inadmissible on other grounds that have not been waived, the approved provisional waiver will be automatically revoked.[12] But, the I-212 approval will remain valid.

Individuals who have previously been removed, or had a removal order executed and then re-entered the United States, and are subject to reinstatement of a prior removal order, are not eligible for provisional waivers. DHS has clarified that the prior removal order must actually be reinstated for an individual to be ineligible to apply for a provisional waiver under this provision. DHS has noted, however, that USCIS, as a matter of discretion, is likely to deny a provisional waiver application when records indicate that the applicant is inadmissible under INA §212(a)(9)(C), 8 USC §1182(a)(9)(C), for having unlawfully returned to the United States after a prior removal or prior unlawful presence. Moreover, even if such an individual obtains approval for a provisional waiver, such approval will be automatically revoked if he or she is ultimately determined to be inadmissible under that section at any time in the consular process.[13]

CONCLUSION

Now, more than ever, it is important to closely consider the strength of an I-601A application prior to filing and whether the applicant faces a heightened risk of being placed in removal proceedings, if the application were denied. USCIS's website continues to state that "[w]hile USCIS does not envision placing I-601A applicants in removal proceedings," USCIS will follow DHS guidance governing initiation of removal proceedings. As the Trump administration has altered previously issued guidelines under

[12] See 8 CFR §212.7(e)(14)(i).
[13] 81 Fed. Reg. 50256.

the Obama administration for immigration-enforcement priorities, this analysis is critical before proceeding with a Provisional Waiver case.[14]

[14] *See generally* Executive Order 13768 of Jan. 25, 2017: "Enhancing Public Safety in the Interior of the United States."