AILA Frequently Asked Questions (FAQs): The 2016 Provisional Unlawful Presence Waiver Rule

On July 29, 2016, DHS published a final rule expanding the availability of the provisional unlawful presence waiver to individuals who would be statutorily eligible for an unlawful presence waiver under INA §212(a)(9)(B)(v). The rule also makes additional changes to the current provisional waiver process. The following FAQs provide background information on the unlawful presence bars, the provisional waiver process and an overview of the changes that will be implemented as of the effective date of the rule, August 29, 2016.

BACKGROUND

Q: What Are the "Unlawful Presence" Bars to Admissibility?

A: Under INA §212(a)(9)(B), a person who has accrued more than 180 days of "unlawful presence" in the United States is subject to a 3-year bar to readmission that is triggered upon departure from the United States. A person who has accrued one year or more of unlawful presence will trigger a 10-year bar to readmission. "Unlawful presence" is a term of art that is not defined in the regulations. On May 6, 2009, USCIS rescinded its prior unlawful presence guidance and issued a 51-page consolidated unlawful presence memorandum with corresponding updates to the USCIS Adjudicator's Field Manual.

In general, individuals who have an approved immigrant visa petition, but who are present in the United States without having been inspected and admitted or paroled, are ineligible to adjust their status to lawful permanent resident (LPR) while remaining in the United States. Instead, such individuals must leave the United States and apply for an immigrant visa at a U.S. embassy or consulate abroad. However, as described above, departure may trigger a 3- or 10-year bar to readmission. As a general matter, the 3- or 10-year bar to readmission may be waived, under INA §212(a)(9)(B)(v), if the applicant can demonstrate that the refusal of his or her admission would cause "extreme hardship" to a U.S. citizen or LPR spouse or parent.

Q: What Is a Provisional Waiver and How Is it Different from a Regular Waiver?

A: Prior to 2013, when the provisional waiver process was rolled out, an individual who departed the United States to apply for an immigrant visa at a U.S. embassy or consulate, and who was found inadmissible based on prior unlawful presence, could only apply for a waiver of inadmissibility by filing Form I-601, Application for Waiver of Grounds of Inadmissibility, with USCIS, and only after a consular officer made a finding of inadmissibility at the visa interview. In 2013, in recognition of the hardships that are imposed upon American families during the lengthy separation that often accompanies the "regular" waiver process, USCIS published a final rule implementing a new "provisional" unlawful presence waiver. The

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provisional waiver process allows an applicant who knows he or she will be subject to the 3- or 10-year bar upon departure to apply for "provisional" approval of an unlawful presence waiver prior to departing the United States for the immigrant visa interview. Assuming there are no other eligibility or admissibility issues, an approved provisional waiver should permit a consular officer to issue an immigrant visa without undue delays. AILA members report that the average length of time a person must remain outside the United States to await issuance of an immigrant visa following the grant of a provisional waiver is about two weeks. Prior to the implementation of the provisional waiver process, it was not uncommon for individuals to be stuck outside the United States for many months, and sometimes years, while they awaited approval of a waiver.

THE 2016 RULES

Q: Who Can Apply for a Provisional Waiver Under the 2016 Rule and How Is This Different From the 2013 Rule?

A: A number of changes to the threshold eligibility requirements are included in the final 2016 rule:

Visa Classification/Qualifying Relative:

- **2013 Rule**: Under the 2013 rule, a provisional waiver was limited to those immigrating to the U.S. as "immediate relatives," (spouses and children of U.S. citizens and parents of adult U.S. citizens) who could demonstrate extreme hardship to a U.S. citizen spouse or parent.

- **2016 Rule**: Under the 2016 rule, anyone who is statutorily eligible for an unlawful presence waiver under INA §212(a)(9)(B)(v), may apply for a provisional unlawful presence waiver, regardless of their immigrant visa classification. In other words, if the visa applicant can demonstrate extreme hardship to a U.S. citizen or LPR spouse or parent, he or she may apply for and receive a provisional waiver, whether the basis for the immigrant visa is an employment-based preference category, a family-based preference category, the diversity visa lottery, or a special immigrant classification.

Elimination of Cut-off Dates:

- **2013 Rule**: Under the 2013 rule, if the Department of State (DOS) initially acted to schedule the immigrant visa interview prior January 3, 2013 (the date of publication of the final 2013 rule), the individual was ineligible for a provisional unlawful presence waiver. The actual date and time of the interview was not relevant to the eligibility determination. This rule applied even if the individual failed to appear for the interview, cancelled the interview, or requested that it be rescheduled.

- **2016 Rule**: Under the 2016 rule, DHS is eliminating the restrictions based on the date that DOS acted to schedule the immigrant visa interview.

Final Order of Removal:

- **2013 Rule**: Under the 2013 rule, an individual with a final order of removal, deportation, or exclusion was ineligible for a provisional waiver.

- **2016 Rule**: Under the 2016 rule, an individual with a final order of removal, deportation, or exclusion may apply for a provisional waiver if he or she has filed a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, and such application has been conditionally approved.

Q: I Heard that USCIS Is Eliminating the "Reason to Believe" Standard. What Does This Mean?

A: One significant change in the 2016 rule is the elimination of the "reason to believe" standard. Under current 8 CFR §212.7(e)(4)(i), USCIS must deny a provisional waiver application if USCIS has "reason to believe" that the applicant may be subject to a ground of inadmissibility other than unlawful presence at the time of the immigrant visa interview.

The "reason to believe" standard has been the source of much confusion. Since its implementation in 2013, AILA received persistent reports from members that USCIS was applying an overly rigid interpretation of "reason to believe," and denying applications for individuals who would clearly *not* be deemed inadmissible for reasons other than unlawful presence at a consular interview. In a memorandum dated August 6, 2013, AILA pushed for the implementation of a "reason to believe" review based on the totality of the evidence submitted. On January 24, 2014, USCIS issued a memorandum revising its policy in this area, but only when reviewing potential criminal ground of inadmissibility. AILA continued to advocate for an expansion of the January 24, 2014, memorandum to instruct adjudicators to consider the totality of the evidence in situations involving potential misrepresentation under INA §212(a)(6)(C), among other changes.

Noting the confusion that has persisted over the past few years, USCIS is eliminating the "reason to believe" standard from the provisional waiver adjudication process with the 2016 rule. Thus, when adjudicating a provisional waiver application, USCIS will only consider whether extreme hardship has been established and whether the applicant warrants a favorable exercise of discretion.

Q: How Does the Elimination of the "Reason to Believe" Standard Change Things for My Client?

A: Though it remains to be seen how this will play out, members should be aware of a few issues. First, USCIS will still conduct full background and security checks on each provisional waiver applicant and may still deny a provisional waiver as a matter of discretion. Thus, it is possible that some applications that would have been denied for "reason to believe" will still be denied as a matter of discretion. At the same time, some applications that might have been denied for "reason to believe" may now be approved, even if there are factors that could render the applicant inadmissible on grounds other than unlawful presence. If DOS finds the applicant ineligible for an immigrant visa or inadmissible on grounds other than unlawful presence, the approval of the provisional waiver application is automatically revoked. Though the individual

may apply for a waiver of unlawful presence and for any other waivable ground of inadmissibility, using Form I-601, he or she will be forced to remain outside the United States, separated from his or her family while the waivers are adjudicated, and may ultimately be denied and not permitted to reenter the United States at all.

Thus, under the new process, there are additional risks for clients who proceed abroad with an approved provisional waiver, and attorneys must advise clients accordingly. In addition, it is incumbent upon the attorney to thoroughly review the client's entire immigration, criminal, and personal background and ensure all potential grounds of inadmissibility are vetted and reasonably eliminated prior to filing. This includes, but may not be limited to, the filing of FOIA requests to obtain all immigration records, the submission of fingerprints to the FBI to obtain federal law enforcement records, and the careful review of all arrest and court records regarding the disposition of any criminal issues.

Q: What Does the New Rule Say About Reinstatement of Removal?

A: Under current 8 CFR §212.7(e)(4)(vii), an individual is ineligible for a provisional waiver if he or she is "subject to" reinstatement of a prior removal order under INA §241(a)(5). In the 2016 rule, USCIS clarified that individuals are ineligible for a provisional waiver if ICE or CBP, after following notice procedures outlined in 8 CFR §241.8, has reinstated a prior removal order, either before the client filed a provisional waiver application or while the application is pending. Thus, individuals who are "subject to" reinstatement, but have not yet received notice under 8 CFR §241.8, may apply for a provisional waiver under the 2016 rule. However, members should be aware that the provisional waiver approval would be automatically revoked if the applicant is ultimately found inadmissible under INA §212(a)(9)(C) for having unlawfully returned to the United States after a prior removal or prior unlawful presence.

Q: **Did USCIS Address "Extreme Hardship in the 2016 Rule?**

A: No, USCIS did not define or otherwise address the "extreme hardship" standard in the 2016 rule, saying only that it will continue to make extreme hardship determinations on a case-by-case basis, consistent with agency guidance. However, on October 7, 2015, USCIS released proposed guidance on extreme hardship determinations, including information on the burden of proof, relevant case law, factors that adjudicators should consider, and special circumstances that may exist. AILA submitted comments on the guidance in November 2015. While USCIS has not yet published the final guidance, it is expected to be released in the coming weeks.

Q: Will There Be a New Version of Form I-601A, Application for Provisional Unlawful Presence Waiver?

A: Yes, USCIS announced in the supplementary information to the 2016 rule that changes to Form I-601A, Application for Provisional Unlawful Presence Waiver, are forthcoming. USCIS stated in a press release that these changes would go into effect along with the final rule, and that the updated form would be posted on USCIS's website on August 29, 2016.

Q: When Does the 2016 Rule Become Effective?

A: The 2016 rule is effective August 29, 2016.