



# The New Provisional Waiver—What it Means and Who Can Use It

There is a great deal of confusion about the new provisional waiver regulation published by the Obama administration. Let's be clear, this new regulation is nothing more than a locational change in waiver processing, with the benefit being a much shorter separation time between loved ones. Now, let's get into the details!

## What Does It Mean?

The waiver we are talking about is the waiver that is needed to be forgiven of the immigration offense of "unlawful presence." Unlawful presence occurs when someone is not in lawful status in the United States, regardless of their mode of entry. Typically, individuals who come into the US with a visa, retain a right to process for permanent residence in the United States, IF they are married to a U.S. Citizen, or have U.S. Citizens children over the age of 21. Those individuals who entered the U.S. **without inspection** (those who came illegally), **cannot** obtain permanent residence in the United States, even if they are married to a US Citizen or have US Citizen children over the age of 21. These people must leave the U.S. and process for their permanent residence abroad. But, as soon as they leave, because they have typically had more than one year of "unlawful presence (being illegal), they are then barred from returning to the United States for 10 years, as punishment for their unlawful entry and unlawful stay. There is already in place a "waiver" or forgiveness of this ten year bar, but the waiver or forgiveness can only be obtained AFTER the person leaves the U.S. This new regulation merely changes **Where** and **When** the waiver can be applied for. It does **NOT** eliminate the need of the person to leave the United States to process for residence through their spouse.

**Only certain relatives of US Citizens are eligible to apply for this provisional waiver. At this time, the provisional unlawful presence waiver process will remain available only to individuals who are immediate relatives of U.S. citizens (i.e., spouses, children, and parents (if the U.S. citizen is at least 21 years of age)).**

## Who Can Use the New Waiver?

To use the new process, the eligible individual must be currently **IN** the United States. The current centralized waiver process (with U.S. processing) will remain in place for those who have already departed the United States. This process is also not available to those who's interviews have already been set by DOS as of the date of publication of the final rule (likely January 3, 2013). If the interview is scheduled **AFTER** that date, then the person is still eligible to process using the new system.

The new waiver process is for individuals who, when they depart, will be subject to the three and ten

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year bars. The current law states that only individuals who have U.S. Citizens Spouses or Parents who will suffer

"Extreme Hardship" are eligible to be granted this waiver. This standard has not been changed by the new regulations. Children are NOT qualifying relatives for purposes of the waiver of the three and ten year bars. USCIS is open to considering expanding the provisional unlawful presence waiver process to include lawful permanent residents as qualifying relatives after USCIS has a better understanding of the impact of the provisional unlawful presence waiver process on agency resources and operations.

Individuals who are currently in removal proceedings are eligible for submitting the waiver, IF their removal proceedings have been administratively closed and not re-calendared at the time of filing of the waiver request. Persons in this situation need to have their immigration court cases terminated or dismissed before leaving the US to avoid delays in returning at the consulate. Supposedly, ICE will work with individuals and their attorneys to terminate deserving cases (that I will wait to give judgment on).

Individuals with final orders of removal are NOT eligible for this new program.

Simply put, the ONLY people eligible for this new waiver process are those whose only immigration problem is unlawful entry with unlawful presence.

### **How Does the New Waiver Process Work?**

The filing fee for the new waiver process is the same as it is for the current waiver process, \$585, plus an additional \$85 for the biometrics fee. USCIS will not accept a filing of the Form I-601A (the new form used to file for the waiver) until March 4, 2013, and it will only accept that form once the I-130 has been approved, and the National Visa Center has begun the process for consular processing, with the necessary initial fees paid by the applicant, evidenced by the Department of State Visa Processing Fee Receipt.

In this final rule, USCIS does not modify how it makes extreme hardship determinations or how it defines extreme hardship. Consistent with how USCIS currently makes extreme hardship determinations, USCIS will consider all factors and supporting evidence that an applicant submits with his or her provisional unlawful presence waiver application. USCIS also has included in the Form I-601A instructions examples of factors to help provisional unlawful presence waiver applicants understand what can be provided to establish the required extreme hardship to a U.S. citizen spouse or parent.

USCIS will not commit to a certain processing time for these waivers, which, in the grand scheme is not a big deal, since the applicant will be in the United States with their family, but experience suggests that a processing time of 60-120 would not be abnormal.

# WAIVER DOCUMENTATION

In order to qualify for that waiver, you must present evidence that shows, in the aggregate, that **you would suffer above and beyond that which people usually suffer** when their spouses are deported. This means that the standard is high and you must gather and present evidence which includes the following:

1. Evidence of financial hardship to you, including bills showing joint financial obligations which you would have to assume alone if spouse cannot return to the United States;
2. Evidence of spouse's income in which you both rely to meet those obligations;
3. Evidence of your income;
4. Evidence of your current employment and salary;
5. Evidence of any and all other expenses which you would have to cover if your spouse must remain in their country of birth;
6. Evidence of your spouse's family ties in the United States (for example, birth certificates of parents and brothers and sisters and any children);
7. Evidence of your spouse's employment history in the U.S. and salary, if applicable;
8. Evidence of your and your spouse's assets in the U.S.;
9. Evidence of psychological impact to you if spouse is not allowed to return to the United States – **We recommend that you see a licensed psychologist for therapy and for the psychologist to provide an evaluation:**
10. Notarized affidavits by persons who know you both and who can attest as to the hardship that you will suffer should your spouse remain in their country of birth. Letters from friends and/or relatives must include the person's name, address, telephone number, as well as their legal status in the U.S. They must also attach a copy of their birth certificate or lawful permanent resident card. The letters must indicate how the person knows you and be specific about the hardship they claim you will suffer;
11. Evidence showing your spouse's ties to a church, community clubs, school, sporting leagues, etc. and
12. **A sincere letter from you** explaining how you feel about the possibility of your spouse not being able to return to the United States, and how you feel about the prospect of living in their country of birth.

Please be diligent in obtaining as much of the above-referenced evidence as you can. This evidence will be attached to the waivers that your spouse will present personally at the consulate.

So there you have it. A simplified description of what this new process is, and what it is not. If you think you qualify for this new process, contact us today at **404-816-8611** for an analysis of your case and your options.

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