DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 212

RIN 1615-ZB10

Provisional Waivers of Inadmissibility For Certain Immediate Relatives of U.S. Citizens

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice of intent.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS) intends to change its current process for filing and adjudication of certain applications for waivers of inadmissibility filed in connection with an immediate relative immigrant visa application. Specifically, USCIS is considering regulatory changes that will allow certain immediate relatives of U.S. citizens to request provisional waivers under section 212(a)(9)(B)(v) of the Immigration and Nationality Act of 1952, as amended (INA or Act), 8 U.S.C. 1182(a)(9)(B)(v), prior to departing the United States for consular processing of their immigrant visa applications. An alien would be able to obtain such a waiver only if a Petition for Alien Relative, Form I-130, is filed by a U.S. citizen on his or her behalf and that petition has been approved, thereby classifying the alien as an "immediate relative" for purposes of the immigration laws, and he or she demonstrates that the denial of the waiver would result in extreme hardship to the alien's U.S. citizen spouse or parent "qualifying relative." The qualifying relative for purposes of the waiver is not necessarily the immediate relative who filed the immigrant visa petition on the alien relative's behalf.

FOR FURTHER INFORMATION CONTACT: Roselyn Brown-Frei, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2099, telephone (202) 272-1470 (this is

not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

The proposed process is intended to reduce the time that U.S. citizens are separated from immediate relatives who are required to remain outside the United States for immigrant visa application processing and during the adjudication of waivers of inadmissibility. Through this change, USCIS does not intend to modify the standard for assessing eligibility for these waivers, including whether the denial of the waiver would result in extreme hardship to a U.S. citizen spouse or parent ("qualifying relative"). For purposes of the waiver under section 212(a)(9)(B)(v) of the Act, a "qualifying relative" is a U.S. citizen spouse or parent or a lawful permanent resident spouse or parent who would suffer extreme hardship if their relative were not allowed to immigrate. For purposes of this provisional waiver program, DHS intends to limit who may participate in this program to immediate relatives who can demonstrate extreme hardship to a U.S. citizen spouse or parent. Even if they obtain a provisional waiver, eligible aliens who are required to obtain a visa through consular processing would still be required to depart from the United States to apply for an immigrant visa. The purpose of the new process is to reduce the time that U.S. families remain separated while their relative proceeds through the immigrant visa process.

Certain grounds of inadmissibility can bar aliens from being admitted to the United States or obtaining an immigrant visa, preventing U.S. citizens from reuniting with their immediate relatives. However, the Secretary of Homeland Security, through USCIS, may waive some of those grounds. An alien who is subject to one or more grounds of inadmissibility must obtain a

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waiver, if available, from USCIS before he or she may be issued an immigrant visa by a Department of State consular officer at a U.S. embassy or consulate overseas.

The bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the INA, 8 U.S.C. 1182(a)(9)(B)(i)(I) and (II), based on accrual of unlawful presence in the United States, comprise one such ground. Typically, under current processes, aliens who are immediate relatives of U.S. citizens applying for immigrant visas at Department of State consular posts must apply for waivers of unlawful presence while outside the United States after a finding of inadmissibility is made by a Department of State consular officer in conjunction with their immigrant visa applications. As a result, U.S citizen petitioners are often separated for long periods of time from their immediate relatives who are applying for immigrant visas and have accrued a certain period of unlawful presence in the United States. This revised process, which eliminates the time-consuming interchange between the Department of State and USCIS, would significantly reduce the amount of time that American families will be separated from their immediate relatives. USCIS also believes that efficiencies can be gained through this revised process for both the U.S. Government and most applicants.

USCIS intends to limit consideration for the provisional waiver to aliens who qualify for classification as immediate relatives of U.S. citizens, who have a U.S. citizen spouse or parent who would suffer extreme hardship if the waiver were denied, and for whom the sole basis for inadmissibility is unlawful presence in the United States of more than 180 days. USCIS would grant a provisional waiver if the alien meets the eligibility requirements described in this Notice, including demonstrating that the applicant's qualifying U.S. citizen spouse or parent would suffer extreme hardship and that the applicant warrants a favorable exercise of discretion. The provisional waiver would be granted before the alien leaves the United States to attend his or her

immigrant visa interview with a consular officer. The provisional waiver, however, would not become effective unless and until the alien departs from the United States. If the alien is otherwise eligible for the immigrant visa, the consular officer may then approve the issuance of the visa so that the alien may proceed to immigrate to the United States for permanent residence.

This notice of intent generally describes the proposal that USCIS is considering. USCIS will further develop, and ultimately finalize, this proposal through the rulemaking process. This effort is consistent with Executive Order 13563's call for agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." Do not send an application requesting a provisional waiver under the procedures under consideration in this notice. Any application requesting this new process will be rejected, and the application package returned to the applicant, including any fees, until a final rule is issued and the change becomes effective.

B. Authority

The Homeland Security Act of 2002, Public Law 107-296, section 102, 116 Stat. 2135, 6 U.S.C. 112, and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary of Homeland Security with administration and enforcement of the immigration and naturalization laws. The Secretary would effectuate these proposed changes under the broad authority to administer the Department of Homeland Security and the authorities provided under the Homeland Security Act of 2002, the immigration and nationality laws, and other delegated authority.

C. Grounds of Inadmissibility

U.S. immigration laws provide mechanisms for U.S. citizens to petition for certain family members for admission to the United States for purposes of family reunification. At the same

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time, however, the immigration laws prescribe acts, conditions, and conduct that bar aliens, including immediate relatives of U.S. citizens, from being admitted to the United States or obtaining an immigrant visa. Such acts, conditions, and conduct include certain criminal offenses, public health concerns, fraud, misrepresentation, failure to possess proper documents, accrual of more than 180 days of unlawful presence in the United States, and terrorism. The grounds of inadmissibility are set forth in section 212(a) of the INA, 8 U.S.C. 1182(a).

The Secretary of Homeland Security has the discretion to waive certain inadmissibility grounds, upon the filing of a request by an alien who meets the relevant statutory requirements. If the Secretary, through USCIS, grants such a waiver, the waived ground will no longer bar the alien's admission, readmission, or immigrant visa eligibility based on that specific ground of inadmissibility.

One of the inadmissibility grounds is described in section 212(a)(9)(B)(i) of the Act, 8 U.S.C. 1182(a)(9)(B)(i). Under part (I) of this provision, an alien who was unlawfully present in the United States for more than 180 days but less than one year, and who then departs voluntarily from the United States before the commencement of removal proceedings, will be inadmissible for three years from the date of departure. Under part (II) of the same provision, an alien who was unlawfully present for one year or more and then departs before, during, or after removal proceedings, will be inadmissible for ten years from the date of the departure.

The three- and ten-year unlawful presence bars do not take effect unless and until an alien departs from the United States. By statute, aliens are not considered to be accruing unlawful presence for purposes of section 212(a)(9)(B)(i) if they fall into certain categories. For example, aliens do not accrue unlawful presence while they are under 18 years of age. See INA section 212(a)(9)(B)(iii)(I), 8 U.S.C. 1182(a)(9)(B)(i)(iii)(I). Similarly, individuals with pending asylum

claims generally are not considered to be accruing unlawful presence while their applications are pending. See INA section 212(a)(9)(B)(iii)(II), 8 U.S.C. 1182(a)(9)(B)(i)(iii)(II). Battered women and children and victims of a severe form of trafficking in persons are not subject to the section 212(a)(9)(B)(i) ground of inadmissibility at all if they demonstrate that there was a substantial connection between their victimization and their unlawful presence. See INA 212(a)(9)(B)(iii)(IV)-(V), 8 U.S.C. 1182(a)(9)(B)(i)(iii)(IV)-(V). Aliens who are subject to the unlawful presence bars must apply for and be granted a waiver in order to receive an immigrant visa and be admitted to the United States.

The Secretary of Homeland Security has the discretion to waive the three- and ten-year unlawful presence bars if the alien is seeking admission as an immigrant and if the alien demonstrates that the denial of his or her admission to the United States would cause "extreme hardship" to the alien's qualifying relative. See INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). The qualifying relative for purposes of the waiver is not necessarily the relative who filed the immigrant visa petition on the alien relative's behalf. For example, an alien applicant's U.S. citizen spouse may have filed the immigrant visa petition on the applicant's behalf, but the applicant's unlawful presence waiver application may be based on extreme hardship to the applicant's U.S. citizen parent. Because the granting of a waiver is discretionary, the alien also must establish that he or she merits a favorable exercise of discretion.

D. Current Process and Problems

An alien who must apply for permanent residence through consular immigrant visa processing outside the United States must appear for an interview with a Department of State consular officer abroad. Currently, if the consular officer determines that the alien is subject to

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the three- or ten-year bar, the consular officer advises the alien that he or she is eligible to apply for a section 212(a)(9)(B)(v) waiver by filing a Form I-601, Application for Waiver of Grounds of Inadmissibility, with USCIS. Under current rules, an individual is not permitted to apply for the section 212(a)(9)(B)(v) waiver before the consular officer has made the inadmissibility determination.

Once the Form I-601 is filed, in most cases, the file is transferred from the Department of State to USCIS. USCIS adjudicates that waiver request while the alien remains outside the United States and awaits a decision. If USCIS approves the waiver, USCIS notifies the Department of State, and the Department of State may then issue the immigrant visa if the applicant is otherwise eligible. If the waiver is denied, the alien may appeal the decision to the USCIS Administrative Appeals Office and, if the denial is upheld, the alien must remain outside the United States for three or ten years before being able to reapply for an immigrant visa. However, a denial does not preclude the alien from filing another Form I-601 in the future.

The three- and ten-year unlawful presence bars under section 212(a)(9)(B)(i)(I) and (II) of the Act do not apply unless and until the applicant departs from the United States. At the same time, many aliens who would trigger these bars if they depart from the United States are, for other reasons, statutorily ineligible to apply for adjustment of status to lawful permanent residence while remaining in the United States. Consequently, they must depart to regularize their immigration status by applying for their immigrant visas at a U.S. embassy or consulate abroad. The action required to regularize the status of an alien, departure from the United States, therefore is the very action that triggers the section 212(a)(9)(B)(i) inadmissibility that bars that alien from obtaining the immigrant visa.

II. Proposed Waiver Process

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A. Proposed Process

The proposed change would create a more streamlined and efficient process for waiver applicants whose sole inadmissibility ground is unlawful presence, while simultaneously minimizing family separation. If the waiver determination, with respect to unlawful presence, were made in advance of the immigrant visa interview and the applicant otherwise were eligible for the immigrant visa, the consular officer could simply issue the immigrant visa at the time of the visa interview. The new process thus will reduce the movement of the case back and forth between the Department of State and USCIS, which significantly prolongs the overall process and increases the time that U.S. citizens are separated from their immediate family members. Additionally, the new process would reduce U.S. Government costs associated with the movement of cases, and provide a more efficient visa process overall.

B. Affected Visa Categories

USCIS intends to limit this process change to aliens who are immediate relatives of U.S. citizens, as defined in section 201(b)(2)(A)(i) of the Act, 8 U.S.C. 1151(b)(2)(A)(i), who must depart from the United States to obtain immigrant visas, and whose U.S. citizen spouse or parent would suffer extreme hardship if the applicant were denied admission to the United States. The term "immediate relative" means the spouse, parent or child (unmarried and under 21 years old) of a U.S. citizen, except that, in the case of a parent, the U.S. citizen son or daughter petitioning for an immigrant visa must be at least 21 years old. Certain self-petitioners (i.e., widows/widowers of U.S. citizen and their minor unmarried children) may also be considered immediate relatives. See INA 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i). Individuals applying for a waiver must also establish that the grant of the provisional waiver is warranted as a matter of discretion.

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Because the focus on family unification of U.S. citizens and their immediate relatives is consistent with Congress' prioritization in the immigration laws, USCIS has identified immediate relatives of U.S. citizens as the class of aliens to consider for this procedural change. In addition, Congress did not set an annual limitation for the number of immediate relatives of U.S. citizens admitted to the United States. Therefore, these relatives always have an immigrant visa immediately available, and the visa thus can be processed immediately upon approval.

C. Ground of Inadmissibility Considered for Provisional Waiver

USCIS intends to further limit this procedural change to waivers filed by immediate relatives of U.S. citizens whose only ground of inadmissibility is the three- or ten-year unlawful presence bar under section 212(a)(9)(B)(i)(I) or (II) of the Act, 8 U.S.C. 1182(a)(9)(B)(i)(I) or (II). Aliens who require waivers for one or more additional grounds of inadmissibility, such as fraud or willful misrepresentation (section 212(i) waiver) or certain criminal offenses (section 212(h) waiver), in conjunction with their immigrant visa applications must continue to file a Form I-601 while outside of the United States in accordance with the existing process.

To qualify for the provisional waiver process, an applicant must establish not only that he or she is the immediate relative of a U.S. citizen, but also that denial of the waiver would result in extreme hardship to a qualifying relative. The qualifying relative must be a U.S. citizen spouse or parent but does not need to be the U.S. citizen petitioner. Only extreme hardship from the denial of a waiver to a qualifying U.S. citizen relative makes an alien eligible for the provisional waiver process; extreme hardship to the alien himself or herself as a result of denial does not make the alien eligible. An alien whose waiver application is based on extreme hardship to a lawful permanent resident spouse or parent must continue to apply for the waiver from outside the United States in accordance with existing procedures. Eligible aliens,

furthermore, must be the beneficiaries of petitions classifying them as immediate relatives of U.S. citizens, and thus have visas immediately available. Because the granting of a waiver is discretionary, eligible aliens also must establish that they merit a favorable exercise of discretion. The standard for assessing whether denial of the waiver would result in extreme hardship to the U.S. citizen spouse or parent of such aliens will remain unchanged.

D. Adjudication and Decisions

After filing the Form I-601 with USCIS, DHS envisions that an alien seeking a provisional waiver would be required to undergo biometrics collection. USCIS would deny the application for a provisional waiver if other possible grounds of inadmissibility are found or arise during adjudication.

If the application is approved, USCIS would notify the Department of State and the alien of the provisional approval. In all instances, a Department of State consular officer would make the formal inadmissibility finding during or following the immigrant visa interview abroad, and if no other grounds of inadmissibility arise, the provisional waiver under section 212(a)(9)(B)(v) of the Act granted by USCIS would facilitate immigrant visa issuance. If, however, the consular officer finds during adjudication of the immigrant visa application that the individual is subject to another ground of inadmissibility that can be waived, the alien would need to file another waiver application with USCIS.

This process would not alter the requirement that an alien depart from the United States to apply for an immigrant visa. An alien who receives a provisional waiver under section 212(a)(9)(B)(v) of the Act for the three- or ten-year bar under section 212(a)(9)(B)(i)(I) or (II) of the Act would not gain the benefit of such waiver unless he or she departs from the United States. The departure from the United States would have to take place to activate the provisional

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waiver under section 212(a)(9)(B)(v) of the Act.

E. Excluded Visa Categories

Aliens who would not be eligible for this provisional waiver adjudication process and aliens who are denied provisional approval of their waiver requests would continue to follow current agency processes for filing and adjudication of waiver requests. Aliens who fall under any other family- or employment-based or other visa category or whose section 212(a)(9)(B)(v) waiver eligibility would be based on extreme hardship to a lawful permanent resident alien relative would not be considered for provisional waivers. Aliens who are subject to other grounds of inadmissibility or removal also would not be considered for provisional waivers. Further, aliens with waiver applications under section 212(a)(9)(B)(v) of the Act currently pending in either administrative or judicial proceedings would not qualify for this new process.

III. Conclusion

This document outlines the key elements of USCIS's proposed change to its current process for filing and adjudication of waivers of inadmissibility for unlawful presence for immediate relative of U.S. citizens. The focus on family unification of U.S. citizens and their immediate relatives is consistent with Congress's prioritization in the immigration laws; the new process will reduce the movement of the case back and forth between the Department of State and USCIS, which significantly prolongs the overall process and increases the time that U.S. citizens are separated from their immediate family members. The proposed change would affect only when and where certain aliens can apply for waivers of the unlawful presence grounds of inadmissibility; it would not change the extreme hardship standard for evaluating eligibility for the waiver nor would it change whether aliens subject to these grounds of inadmissibility must depart the U.S. to apply for their immigrant visas. USCIS plans to effectuate this proposal

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through the regulatory process. USCIS will issue a proposed rulemaking that will explain the proposal in further detail and that will invite comment from all interested parties. Note: Do not send an application requesting a provisional waiver under the procedures under consideration in this notice. Any application requesting this new process will be rejected and the application package returned to the applicant, including any fees, until a final rule is issued and the change becomes effective.

Janet Napolitano,
Secretary of Homeland Security.

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