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## USCIS to Propose Changing the Process for Certain Waivers

Update: I-601 Provisional Waiver Is Not in Effect. To learn more, read [this alert](#).

### Introduction

On Jan. 6, 2012, U.S. Citizenship and Immigration Services (USCIS) posted a [notice of intent](#) in the Federal Register outlining its plan to reduce the time that U.S. citizens are separated from their spouses and children under certain circumstances while those family members go through the process of becoming legal immigrants to the United States. Currently, spouses and sons and daughters of U.S. citizens who have accrued a certain period of unlawful presence in the United States, and have to leave the country as part of the legal immigration process, are barred from returning to their families for as long as 3 or 10 years. They can receive a waiver to allow them to return to their families by showing that their U.S. citizen family member would face extreme hardship as a result of the separation. This proposal would streamline the processing of these individuals' waiver applications based on unlawful presence; USCIS proposes to process their waiver applications in the United States before any American family faces separation. The process would only apply to immigrants who are eligible for a visa.

Under the proposed process, the spouses and children of U.S. citizens who are eligible for a visa to immigrate legally to the United States, but who need a waiver of inadmissibility for unlawful presence in order to obtain that visa expeditiously, would apply for a provisional waiver before leaving the United States to have their immigrant visa application processed at a U.S. embassy or consulate abroad (as they must pursuant to law). The notice limits the streamlined process to those individuals who are inadmissible based solely on having accrued a period of unlawful presence and – pursuant to statutory requirements – who can demonstrate extreme hardship to their U.S. citizen relative. All individuals affected by this streamlined process would need to meet all legal requirements for admission to the United States, including the requirement that they process their visa application at a U.S. consulate abroad.

With the change outlined in the notice, individuals who currently qualify for a waiver of inadmissibility under the existing eligibility standards, and who can demonstrate that separation from their U.S. citizen spouse or parent would cause extreme hardship to that relative, would be allowed to apply for a waiver while still in the U.S.

By allowing these individuals to apply for waivers in the U.S. and making a provisional determination of waiver eligibility before the individuals must depart the country for visa processing, USCIS would provide a more predictable and transparent process and improved processing times, minimizing the separation of U.S. citizens from their families. The change would also streamline the process for both USCIS and the Department of State (DOS) when handling requests for these waivers. As a result, this change would encourage individuals who may be eligible for a waiver of inadmissibility to seek lawful readmission to the United States by limiting the amount of time they would need to spend away from their U.S. citizen spouse or parent.

Following publication of this notice, USCIS will undertake further analysis and collaborate with the Department of State to develop the streamlined process in greater detail. USCIS plans to publish a notice of proposed rulemaking in the coming months that will provide additional details and allow the opportunity for public comment. A final rule will then be published to implement the streamlined process. The rule will not modify the underlying standard for assessing whether denial of the waiver would result in extreme hardship to the U.S. citizen spouse or parent of such individuals. It would modify only the process by which these applications may be filed and accepted by USCIS for processing.

### Questions and Answers

Q. Why is USCIS proposing the change?

A. This proposed change will reduce the time that U.S. citizens are separated from their spouses and children under certain circumstances while those family members are going through the process of obtaining visas to become legal immigrants to the United States. Under current policy, individuals who wish to apply for a waiver of inadmissibility for unlawful presence must leave the U.S. and apply for a waiver at a U.S. consular office outside the United States. This process can be lengthy and discourages individuals who may be eligible for this waiver from applying, which delays their ability to lawfully reenter the U.S. The proposed change would reduce the amount of time that U.S. citizens would be separated from their spouses and children while the process to obtain a visa to immigrate takes place. This reflects the Administration's strong commitment to efficiency in the administration of immigration law and facilitation of legal immigration.

Q. How is the proposed process different from the current process?

A. Currently, U.S. citizens who petition for their spouses and children to become legal immigrants to the United States must petition for a visa, and in some circumstances, if the spouse or child has accrued more than 180 days of unlawful presence in the U.S., that spouse or child must also petition for a waiver of a ground of inadmissibility in order to have his or her visa application processed. The proposed process does not change the requirements for obtaining a visa or the standards for obtaining a waiver. Nor does it change the requirement that the spouse or child of a U.S. citizen ultimately depart the United States to have his or her visa application processed at a consulate abroad. The only change contemplated by this proposal is that the spouse or child would be able to apply for a waiver with USCIS in the U.S. and receive a provisional decision on that waiver before departing the U.S. for consular processing of their immigrant visa applications. Currently, applicants can only file for a waiver after having been determined inadmissible by the U.S. consular officer and must wait abroad for a decision, which significantly adds to the processing time for their case. The proposal limits the extent to which the process forces the lengthy

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separation of families.

Q. When will this streamlined process be implemented?

A. The process will be implemented only after USCIS issues a final rule. In the coming months, USCIS plans to publish a notice of proposed rulemaking and will consider the comments received as part of that process before publishing a final rule. The current process will remain in place until a final rule goes into effect. No one should file an application with USCIS based on this proposed change in process. Any applications filed with USCIS based on this notice will be rejected and the application package returned to the applicant, including any fees until the final rule is issued and the change becomes effective.

Q. Who would be eligible for a provisional waiver?

A. Spouses and children of a U.S. citizen (1) who are seeking lawful permanent residence through an immigrant visa, (2) who are found inadmissible based on unlawful presence in the United States for more than 180 days, and (3) who meet the existing extreme hardship standard. Children under the age of 18 do not accrue unlawful presence and, as a result, are not required to obtain a waiver.

Q. Why is this proposed streamlined process limited to the spouses and children of U.S. citizens?

A. The policy objective of this proposed process change is to alleviate extreme hardship suffered by U.S. citizens. USCIS has thus identified immediate relatives of U.S. citizens as the class of aliens to consider for this procedural change. In addition, their immigrant visas, which are not subject to annual limitations, are always immediately available. The focus on U.S. citizens and their immediate relatives is consistent with Congress' prioritization in the immigration laws of family unification. This proposal meets the goals of both improving efficiency and reducing the length of time that American families are unnecessarily separated.

Q. How would the proposed process affect existing standards related to unlawful presence and the extreme hardship standard?

A. It would not. The proposed process retains all of the legal standards and policies related to unlawful presence determinations and establishing extreme hardship. It would simply provide for the processing of these waivers in the United States instead of abroad.

Q. Will individuals who receive the waiver be able to adjust their status without leaving the United States?

A. No. The visa process itself is not changing. Individuals who receive a provisional waiver would still be required to depart the United States to apply for their immigrant visa.

Q. Is everyone who has accrued more than 180 days of unlawful presence subject to a three- or 10-year bar from entering the U.S.?

A. Yes; however, some aliens do not accrue unlawful presence if they fall into certain categories. For example, children under the age of 18 do not accrue unlawful presence for any period of time before their 18th birthday. Similarly, under current law, certain victims of crime and aliens with pending asylum applications do not accrue unlawful presence while their application is pending.

Q. If an individual already filed a Form I-601 from outside the U.S., would the proposed process affect him or her?

A. No. It would only affect individuals who have not yet filed a Form I-601 and who will file a waiver request after a final rule is published.

Q. Would USCIS collect biometrics as part of the streamlined process?

A. Yes. It is contemplated that applicants in the United States would be scheduled for biometrics collection at a USCIS Application Support Center.

Q. Why does USCIS refer to the waiver as "provisional?"

A. In the proposed process, USCIS would grant the provisional waiver before the applicant departs the U.S. for consular processing of their immigrant visa applications. The provisional waiver, however, would not take effect until the individual departs from the United States and triggers the covered ground of inadmissibility. Moreover, the provisional waiver covers only the unlawful presence grounds of inadmissibility. If the consular officer finds during the immigrant visa interview that the individual is subject to another ground of inadmissibility, the individual would need to file another waiver application with USCIS.

Q. What would happen at the consular interview?

A. If DOS found the individual otherwise eligible for the immigrant visa, the consular officer would then issue the visa, allowing the individual to immigrate to the U.S.

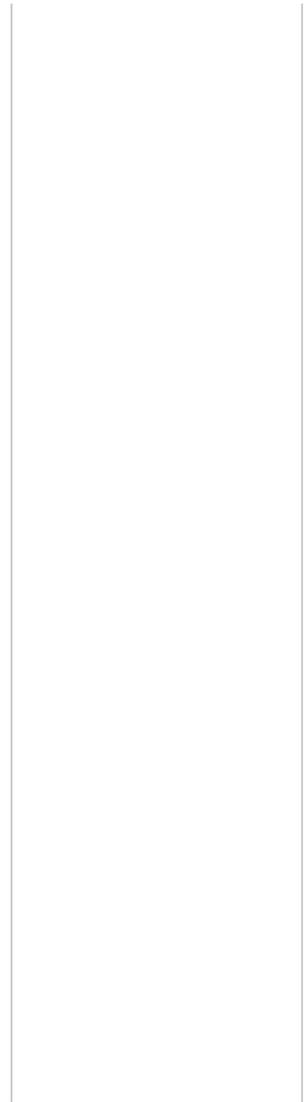
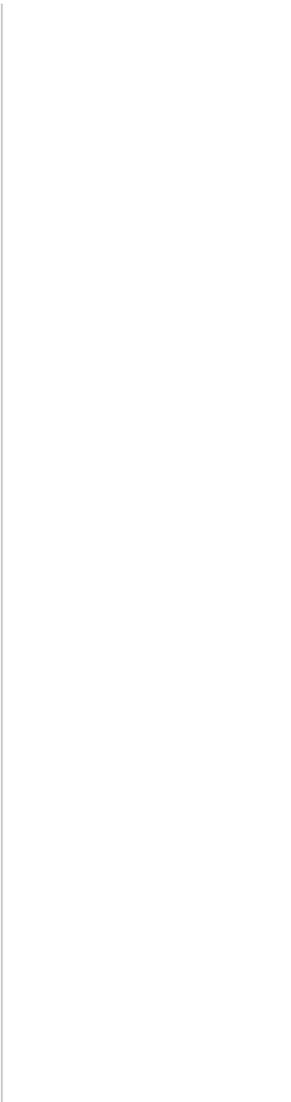
Q. What would happen to individuals who are not eligible to file a waiver under the proposed process?

A. They would continue to follow current agency processes for filing waiver requests after a determination of inadmissibility is made by a U.S. consular officer overseas.

Q. What would happen to individuals who are denied waivers under the proposed process?

A. They would be subject to USCIS guidance and law enforcement priorities for issuing Notices to Appear (NTA). For example, convicted criminals, public safety threats, and those suspected of fraud will receive NTAs.

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