IMMIGRATION BRIEFINGS®
From the Publisher of INTERPRETER RELEASES
Practical Analysis of Imigration and Nationality Issues

I-601A PROVISIONAL UNLAWFUL PRESENCE WAIVERS: A PRACTITIONER'S GUIDE FOR PRESERVING FAMILY UNITY

by Dree K. Collopy[*]

Family unity is a pillar of U.S. immigration law. One of the main purposes of our immigration system is to unite families in the United States, and family reunification has been recognized as the "dominant feature of current arrangements for permanent immigration to the United States."[1] Yet, countless families are kept apart by a U.S. immigration system that is bursting with backlogs, unreasonably punitive, and often marred by bureaucratic incompetence. Thousands of others face the risk of imminent separation due to their inability to obtain lawful status while physically present in the United States as well as the risk of a decade-long separation if they ever leave the U.S. to pursue lawful status. However, new federal regulations have recently been issued to make a procedural change that will impact thousands of these families—the new I-601A provisional unlawful presence waiver process.[2] This *Briefing* discusses the state of the law before this important change, considers who might benefit from this new process, dissects the eligibility requirements and factors barring eligibility for an I-601A provisional unlawful presence waiver (hereinafter "provisional waiver" or "I-601A provisional waiver"), and provides a step-by-step guide for practitioners' use in representing their clients throughout the provisional waiver process.

IN THIS ISSUE:

[*] *Dree K. Collopy is a Partner of Benach Ragland LLP in Washington, D.C. She devotes her practice to representing individuals in removal proceedings, asylum applications, federal court litigation, VAWA and U visa petitions, waivers of inadmissibility, and other complex matters. Dree has authored several articles and frequently lectures on cutting-edge immigration issues. She is the Chair of AILA's Asylum and Refugee Committee and also serves as Co-Chair of the ABA Section of Litigation's Immigration Litigation Committee. As Co-Chair of the AILA-DC Pro Bono Committee, Dree is deeply committed to securing access to counsel for indigent clients. She is an Adjunct Professor at The Catholic University of America Columbus School of Law.*

THE PROBLEM: THE INABILITY TO OBTAIN LAWFUL STATUS WITHOUT RISKING A DECADE OF FAMILY SEPARATION

There are various grounds of inadmissibility under the Immigration and Nationality Act (INA).[3] If a noncitizen is found to be "inadmissible," he or she is ineligible to receive most immigration benefits, including a visa to enter the United States. A noncitizen may be inadmissible for a number of reasons: immigration violations, criminal convictions, certain health disorders, fraud or misrepresentations, and security-related concerns, among others.[4] This *Briefing* addresses the immigration violation of "unlawful presence"[5] as this is the only inadmissibility ground that can be waived through the provisional waiver process.[6]

While present in the United States, many noncitizens are able to obtain lawful permanent resident (LPR) status based on certain familial relationships with U.S. citizens even if they have overstayed a visa, have worked without authorization, or are not currently in a lawful immigration status.[7] However, noncitizens who initially entered the United States without inspection, even if they are married to U.S. citizens and even if they have U.S.-citizen children, are ineligible to adjust status to that of a lawful permanent resident while physically present in the United States.[8] This is because only "[t]he status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General . . . to that of an alien lawfully admitted for permanent residence."[9] Instead, if these noncitizens want to apply for LPR status, they must return to their home countries to apply for immigrant visas through the U.S. consulates abroad. However, because of their period of unlawful presence in the United States, these noncitizens would immediately become "inadmissible" upon their departure, triggering a three or 10-year bar to their readmission to the United States.[10]

If a noncitizen has been unlawfully present in the United States for more than 180 days but less than one year and then departs the United States, he or she triggers a three-year bar to admissibility upon his or her departure.[11] Similarly, if a noncitizen has been unlawfully present in the United States for one year or more and then departs, he or she triggers a 10-year bar to admissibility upon his or her departure.[12] Thus, these individuals are ineligible to receive visas to reenter the United States and must remain outside of the United States for three or 10 years.[13] The only exception is if the noncitizen is eligible for a waiver of the unlawful presence inadmissibility ground under INA § 212(a)(9)(B)(v) [8 U.S.C.A. § 1182(a)(9)(B)(v)].[14] To be eligible for this waiver, the noncitizen must have a U.S. citizen or LPR spouse or parent and must show that this spouse or parent would suffer "extreme hardship" if he or she is refused admission to the United States.[15]

Prior to the new provisional waiver process, noncitizens who had periods of unlawful presence but who were statutorily eligible for a waiver would have to depart the United States if they ever wanted to obtain lawful status based on their family relationship. Once the noncitizen was outside of the United States, he or she would apply for an immigrant visa at the U.S.

Immigration Briefings (USPS 002-557) is published monthly 12 times per year; published and copyrighted by Thomson Reuters. Address corespondence to Editor, 50 Broad Street East, Rochester, NY 14694. For Subscription information: call (800)221-9428, or write West, Credit Order Procesing, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. POSTMASTER: send address changes to Immigration Briefings, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

Cite as: YY-MM Immigration Briefings 1

consulate in his or her home country.[16] However, as noted by the Department of Homeland Security (DHS), "[t]he action required to regularize the status of an alien, departure from the United States, . . . [was] the very action that trigger[ed] the section 212(a)(9)(B)(i) inadmissibility that bar[red] that alien from obtaining the immigrant visa."[17] Accordingly, the consular officer would then deny the visa application due to the noncitizen's inadmissibility and would accept his or her application for a waiver of unlawful presence under INA § 212(a)(9)(B)(v). This waiver application was filed on Form I-601. The consular officer would complete the initial review of the waiver application and then forward it, along with his or her recommendation, to U.S. Citizenship and Immigration Services (USCIS) in the United States.[18] The I-601 application would then remain pending before USCIS for many months and, often times, for up to two years. Even then, there would be no guarantee that the I-601 waiver application would be approved. The legal standards are high for demonstrating "extreme hardship,"[19] and, thus, waivers can be quite difficult to obtain. Therefore, these applicants and their families would suffer years of uncertainty if they wanted to attempt to obtain lawful status in the United States.

Eventually, if USCIS approved the waiver, the consulate would issue the immigrant visa to the applicant, and he or she could then reenter the United States. However, if USCIS denied the waiver, the noncitizen would have no choice but to remain outside of the United States for the remainder of his or her three or 10 years before applying for an immigrant visa anew. Thus, noncitizens who had certain periods of unlawful presence would have to leave the United States, apply for an immigrant visa, have the visa denied, submit an I-601 at their visa interview, and then wait for months and months, separated from their families, all with no guarantee that they would be able to return in less than three or 10 years.[20] At a minimum, these noncitizens would face a period of separation from their families of at least two years due to visa and waiver application processing times.

Consequently, prior to the new provisional waiver process, U.S. immigration law placed many undocumented family members of U.S. citizens and LPRs in a "catch-22." They could either leave the U.S. to seek an immigrant visa through a U.S. consulate abroad, thereby triggering inadmissibility and a three- or 10-year bar to their reentry to the United States,[21] or they could do nothing and remain in the shadows, fearful of removal and unable to participate fully in American society. Given the lengthy processing times for both the immigrant visa and the I-601 waiver application, as well as the difficulty in demonstrating "extreme hardship," proceeding abroad in order to obtain lawful immigration status involved serious risk. More often than not, the risk of a decade of separation from their families, homes, and careers was too great, and only noncitizens with the strongest evidence of hardship were willing to take that gamble. Most others would decide to forego the ability to apply for LPR status and, instead, would choose to remain in the United States in the shadows.

THE SOLUTION: A NEW PROCESS FOR CERTAIN NONCITIZENS TO SEEK UNLAWFUL PRESENCE WAIVERS

In January of 2012, the Obama Administration announced its intention to make a procedural change in the current system that would allow certain noncitizens to seek unlawful presence waivers under INA § 212(a)(9)(B)(v) *before* departing the United States.[22] This procedural change was a direct response to the "catch-22" described above with the goal being a reduction in the period of separation of families to potentially just a few weeks.[23] On April 2, 2012, DHS published its proposed regulations for implementing this change.[24] This proposed rule was followed by a notice and comment period and, after receiving over 4,000 comments, DHS issued the final rule, entitled "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives," on January 3, 2013.[25] According to Secretary of Homeland Security Janet Napolitano, "This final rule facilitates the legal immigration process and reduces the amount of time that U.S. citizens are separated from their immediate relatives who are in the process of obtaining an immigrant visa."[26] The rule became effective on March 4, 2013.[27]

Although the new rule does not change the legal standard or the requirement to demonstrate "extreme hardship," it does change the procedures by creating the new I-601A provisional unlawful presence waiver. This initiative will permit certain immediate relatives of United States citizens to remain in the United States with their families while USCIS processes their provisional waiver applications, thereby eliminating the risk of long-term separation that was previously required for these undocumented individuals to even seek to legalize their immigration status.[28] If their provisional waivers are approved, these noncitizens may then proceed abroad to apply for their immigrant visas before the U.S. consulates.[29] The issuance of the waiver prior to the noncitizen's departure should allow the Department of State consular officer to issue the immigrant visa without delay, assuming that there are no other grounds of inadmissibility and that the noncitizen is otherwise eligible for an immigrant visa.[30] Thus, this new procedure means that eligible families will no longer have to hide in the shadows, deterred from seeking LPR status by the heavy toll of separation and the uncertainty of success.

WHO QUALIFIES FOR A PROVISIONAL WAIVER?

As with any immigration benefit, certain eligibility criteria must be met for a noncitizen to apply for a provisional waiver. The eligibility criteria under 8 C.F.R. § 212.7(e)(3) require that the applicant (1) be present in the United States at the time of filing the provisional waiver application and for biometrics collection at a USCIS application support center,[31] (2) be inadmissible only under INA § 212(a)(9)(B)(i)(I) or (II) [8 U.S.C.A. § 1182(a)(9)(B)(i)(I) or (II)] upon his or her departure and at the time of his or her consular interview,[32] (3) qualify as an immediate relative under INA § 201(b)(2)(A)(i) [8 U.S.C.A. § 1151(b)(2)(A)(i)],[33] (4) be the beneficiary of an approved immediate relative petition,[34] (5) have a case pending with the Department of State based on an approved immediate relative petition and have paid the immigrant visa processing fee as evidenced by a State Department visa processing fee receipt,[35] (6) depart the U.S. to obtain the immediate relative immigrant visa abroad,[36] and (7) demonstrate that denial of the waiver of inadmissibility would result in extreme hardship to his or her U.S.-citizen spouse or parent.[37]

In addition to meeting these eligibility criteria, a noncitizen must not be disqualified for the provisional waiver under 8 C.F.R. § 212.7(e)(4). A noncitizen is disqualified if (1) USCIS has "reason to believe" that he or she is subject to inadmissibility grounds other than unlawful presence,[38] (2) the individual is under age 17,[39] (3) the individual does not have a case pending with the Department of State based on an approved immediate relative petition or has not paid the immigrant visa processing fee,[40] (4) the Department of State "initially acted" to schedule his or her immigrant visa interview prior to January 3, 2013, for the approved immediate relative petition on which the provisional waiver is based even if the interview was cancelled or rescheduled after January 3, 2013,[41] (5) the individual is in removal proceedings unless the proceedings are administratively closed and are not recalendared at the time of filing the provisional waiver application,[42] (6) the individual is subject to a final order of removal, exclusion, or deportation,[43] (7) the individual is subject to reinstatement of a prior order of removal under INA § 241(a)(5) [8 U.S.C.A. § 1231(a)(5)],[44] or (8) the individual has a application pending before USCIS for lawful permanent resident status.[45] This *Briefing* discusses some of these eligibility criteria and disqualifying factors in detail.

The Applicant Must Be an Immediate Relative with an Approved Petition

To be eligible for a provisional waiver, the applicant must qualify as an immediate relative under INA § 201(b)(2)(A)(i) [8 U.S.C.A. § 1151(b)(2)(A)(i)].[46] This means that the applicant must be the minor child (under age 21) of a U.S. citizen,[47] the spouse of a U.S. citizen, or the parent of an adult U.S. citizen over age 21.[48] "Immediate relative" includes adult sons and daughters of U.S. citizens who are still classified as immediate relative children based on the Child Status Protection Act.[49] The term "immediate relative" also includes qualified widows and widowers of U.S. citizens who self-petition on Form I-360.[50]

On the other hand, "immediate relative" does not

include adult sons and daughters 21 years of age and older of United States citizens.[51] It also does not include brothers and sisters of U.S. citizens, children and spouses of lawful permanent residents, or any other categories of family relationships.[52] After the announcement of the proposed regulations on April 2, 2012, many advocates argued that the provisional waiver process should apply to certain additional family and employment-based visa preference categories, noting that the previous I-601 waiver process is not limited to immediate relatives of U.S. citizens. USCIS addressed these comments in the Federal Register, explaining that the provisional waiver process would remain limited to immediate relatives for two reasons: (1) unlike immigrant visas in the family and employment-based preference categories, no limits exist on the number of visas that can be awarded to immediate relatives of U.S. citizens and (2) opening the process only to U.S. citizens could provide an incentive for eligible lawful permanent residents to naturalize and become full participants in American society.[53] However, USCIS did state that the agency would consider expanding the provisional waiver process to other categories of individuals after it is able to assess the effectiveness of the program.[54]

In addition to being an immediate relative of a U.S. citizen, an applicant for a provisional waiver must also be the beneficiary of an approved immediate relative petition.[55] This means that an I-130, Petition for Alien Relative, or an I-360, Petition for Amerasian, Widow(er), or Special Immigrant, must have already been filed on behalf of the applicant with USCIS and that USCIS must have already reviewed and approved that petition.[56]

The Applicant Must Have a Case Pending Before the Department of State and Must Have Paid the Immigrant Visa Processing Fee

To be eligible to apply for a provisional waiver, not only must the applicant have an approved immediate relative petition but also he or she must have an immigrant visa case pending before the Department of State based on that petition.[57] Additionally, the applicant must demonstrate that he or she has paid the immigrant visa processing fee by providing the State Department visa processing fee receipt.[58] If the applicant does not have a case pending before the Department of State or if he or she has not paid the immigrant visa processing fee, he or she will be disqualified from provisional waiver eligibility.[59] Accordingly, the applicant must have an approved immediate relative petition, a case pending before the Department of State, and the State Department's visa processing fee receipt in hand all before submitting his or her provisional waiver application.[60]

Provisional Waivers Are Not Available to Applicants Scheduled for Visa Interviews Prior to January 3, 2013

Although an applicant must show that he or she has a case pending before the Department of State, provisional waivers are not available to those who were scheduled for an immigrant visa interview at a U.S. consulate abroad prior to publication of the final provisional waiver rule on January 3, 2013.[61] If the Department of State has "initially acted" to schedule the applicant's immigrant visa interview prior to January 3, 2013, for the approved immediate relative petition on which the provisional waiver is based, the individual is not eligible to apply for a provisional waiver.[62] "Initially acted" means that the Department of State has acted at some point to schedule the immigrant visa interview and applies even if the applicant failed to appear for the interview, the interview was later cancelled, or the interview rescheduled for after January 3, 2013.[63] The date that governs whether the Department of State "initially acted" is the date when the interview was scheduled, not the date of the interview itself.[64] The relevant date may be found on the Department of State's interview appointment letter; the date of that letter is the date when the interview was scheduled.[65] If that date is prior to January 3, 2013, the individual is not eligible to apply for a provisional waiver.[66] However, if that date is on or after January 3, 2013, the individual may be eligible to apply for a provisional waiver.[67]

There are two exceptions to this rule. First, if the Department of State terminates the immigrant visa registration associated with the previously scheduled

interview and a new immediate relative petition is filed, the individual may then apply for a provisional waiver.[68] Second, if the individual is the beneficiary of a new immediate relative petition filed by a different petitioner, he or she may apply for a provisional waiver.[69]

Provisional Waivers Are Only Available to Overcome Unlawful Presence

An applicant for a provisional waiver must show that, upon his or her departure from the United States and at the time of his or her consular interview, he or she is not subject to any grounds of inadmissibility other than unlawful presence under INA § 212(a)(9)(B)(i)(I) or (II).[70] Individuals who are inadmissible for other reasons, including certain criminal activity or fraud, are not eligible for a provisional waiver.[71] If USCIS has "reason to believe" that the applicant is subject to inadmissibility grounds other than unlawful presence, the applicant will be disqualified, and the provisional waiver will be denied.[72] "Reason to believe" is a low legal standard; if there is any reasonable possibility that a criminal conviction, misrepresentation, or other act would independently make the applicant inadmissible, USCIS will likely deny the provisional waiver application.[73] Thus, practitioners must thoroughly discuss with their potential provisional waiver clients their complete immigration and criminal histories as well as each potential ground of inadmissibility before filing a provisional waiver application.

Provisional Waivers Are Not Available to Applicants in Removal Proceedings

Provisional waivers are not available to applicants who are currently in removal proceedings.[74] If a noncitizen is in removal proceedings before an immigration court, he or she must first move for those proceedings to be administratively closed or terminated prior to applying for a provisional waiver. If proceedings are administratively closed and not recalendared at the time of filing the provisional waiver application, the applicant will not be disqualified from applying for the provisional waiver.[75]

This disqualification ground presents some difficult strategic decisions for practitioners and their clients. First, if an individual's case before the immigration court is administratively closed or terminated, he or she may no longer actively seek any applications for relief that may have been filed before the court. Thus, practitioners will want to consider whether their clients should pursue a provisional waiver in lieu of relief before the immigration court. Of course, this is a very case-specific determination. Practitioners must consider and advise their clients on all of the pros and cons of seeking relief from removal before the immigration court versus seeking administrative closure or termination along with a provisional waiver.

Second, if the noncitizen does decide to seek a provisional waiver in lieu of relief before the immigration court, practitioners will want to consider whether to seek administrative closure or termination. There are benefits to both. Termination would mean that the noncitizen is no longer in removal proceedings and is not being threatened with forced removal from the United States. Additionally, if the provisional waiver is approved, the applicant will eventually have to seek termination of the proceedings prior to departing the United States for his or her immigrant visa interview.[76] Termination in lieu of administrative closure would complete this step in advance. However, administrative closure has other benefits as applications filed before the immigration court may still be considered "pending" after administrative closure. This means that, if the applicant has work authorization through his or her application that is pending before the immigration court, the applicant should be able to renew his or her work authorization following administrative closure. Additionally, seeking administrative closure may reserve the option of seeking relief before the immigration court as a backup if the provisional waiver application is not approved. Thus, it may be advisable for an applicant to seek administrative closure first and termination only if and when the provisional waiver is approved. Of course, every case is different, and thus, this should be a case-by-case determination made by practitioners after thorough discussion of the options with their clients.

Procedurally, if the noncitizen decides to seek administrative closure or termination followed by a

provisional waiver, the practitioner should first contact DHS' U.S. Immigration and Customs Enforcement's Office of Chief Counsel having jurisdiction over the matter before the immigration court to obtain his or her position on administrative closure or termination. If DHS agrees to administrative closure or termination, a joint motion should be filed with the court.[77] If DHS does not agree to administrative closure, the practitioner should prepare and file a motion for administrative closure directly with the immigration court pursuant to *Matter of Avetisyan*.[78] Such a motion should be supported with the relevant legal authority as well as evidence of the noncitizen's prima facie eligibility for a provisional waiver. If a motion for administrative closure or a motion to terminate proceedings (either jointly filed or otherwise) is granted by the immigration court, the noncitizen may then be eligible to apply for a provisional waiver before USCIS.[79]

If the noncitizen's provisional waiver application is ultimately granted following administrative closure of removal proceedings, he or she must then file with the immigration court a motion to terminate proceedings along with evidence that the provisional waiver has been approved. The immigration court must terminate removal proceedings before the individual departs the United States for his or her immigrant visa interview.[80] Otherwise, if proceedings are not terminated prior to departure, the individual will be considered to have "self-deported" during the pendency of removal proceedings and may trigger other inadmissibility grounds upon his or her departure.[81] This may lead to revocation of the approved provisional waiver as the individual would no longer be inadmissible only under INA § 212(a)(9)(B)(i).[82]

Provisional Waivers Are Not Available to Applicants Subject to a Final Order of Removal or Reinstatement of Removal

Provisional waivers are also not available to applicants who are subject to a final order of removal, exclusion, or deportation[83] nor are they available to applicants who are subject to reinstatement of a prior order of removal under INA § 241(a)(5).[84] If a noncitizen is subject to a final order of removal, prior to seeking a provisional waiver, he or she must first successfully move for his or her proceedings to be reopened and the final order rescinded. Then, the noncitizen must successfully move for his or her proceedings to be administratively closed or terminated as described above.[85] Once proceedings have been reopened and then administratively closed or terminated, the noncitizen would then become eligible to apply for a provisional waiver as he or she would no longer have a final order of removal and would not currently be in removal proceedings.[86] An applicant cannot concurrently file an I-212, Application for Permission to Reapply for Admission After Removal, with a provisional waiver application in order to provisionally cure inadmissibility under both INA § 212(a)(9)(A) and INA § 212(a)(9)(B).[87] Thus, if a noncitizen cannot successfully reopen his or her proceedings to rescind the prior removal order, the noncitizen must seek waivers through the previously existing waiver process.[88]

Provisional Waiver Applicants Must Demonstrate Extreme Hardship to Their U.S.-Citizen Spouses or Parents

Although the procedures for seeking waivers of inadmissibility for unlawful presence have changed for certain noncitizens, these applicants still must demonstrate "extreme hardship."[89] First, the applicant must demonstrate that he or she has the requisite qualifying relative—a U.S.-citizen spouse or parent.[90] Despite the fact that U.S.-citizen children are qualifying relatives for waivers of criminal convictions,[91] U.S.-citizen children are *not* qualifying relatives for purposes of a waiver for unlawful presence under INA § 212(a)(9)(B)(v).[92]

After demonstrating that he or she has the requisite qualifying relative for a provisional waiver, the applicant must then show that the U.S.-citizen spouse or parent would suffer "extreme hardship" if the applicant is refused admission to the United States as a lawful permanent resident.[93] Of course, every family member who is forcibly separated from his or her loved ones suffers some degree of hardship. However, the provisional waiver requires a showing that the hardship would be extreme.[94]

Extreme hardship is hardship beyond the normal

hardship that is suffered when family members are separated from one another.[95] The factors considered in determining whether the U.S.-citizen spouse or parent will suffer extreme hardship may include, among others:[96]

- the presence of family ties within and outside of the United States, particularly within the country of relocation;
- the emotional and psychological impact of separation on the U.S.-citizen relative;
- the political, economic, and social conditions in the country of relocation;
- the financial and professional impact on the U.S.-citizen relative;
- any significant health conditions, particularly when tied to the unavailability of suitable medical care in the country of relocation;
- the U.S. citizen's ability to raise children in the country of relocation and other quality-of-life factors; and
- the U.S. citizen's age, length of residence in the United States, health, technical skills, and employability.

These factors are weighed in the aggregate, so it is important to highlight and thoroughly document every possible hardship factor—what matters in the extreme hardship analysis is the totality of the circumstances.[97] Moreover, the applicant must show extreme hardship to the U.S.-citizen spouse or parent in each of two different scenarios: (1) if the U.S. citizen remained in the United States without the applicant and (2) if the U.S. citizen accompanied the applicant to his or her home country. Whether the applicant's U.S.-citizen spouse or parent will suffer extreme hardship is a discretionary determination based on the totality of the circumstances.[98] Thus, practitioners should prepare and file substantial evidence of medical, psychological, emotional, financial, and other types of hardship.[99]

HOW DO YOU APPLY FOR A PROVISIONAL WAIVER?

Once practitioners have thoroughly analyzed their clients' eligibility for a provisional waiver and the strength of the extreme hardship factors, it is time to apply. The new process that has been developed for provisional waivers can be quite complicated. This *Briefing* breaks down the process, providing a step-by-step guide for applying for a provisional waiver.

The Immediate Relative Petition

To initiate the provisional waiver process, the first step is to obtain an approved immediate relative petition, whether an I-130, Petition for Alien Relative, or an I-360, Petition for Amerasian, Widow(er), or Special Immigrant.[100] The Form I-130 would be filed by the U.S.-citizen spouse or parent to petition for, or "sponsor," his or her noncitizen relative to become a lawful permanent resident of the United States. If the noncitizen relative is a widow or widower and is eligible to self-petition,[101] this initial filing would be on a Form I-360 in lieu of an I-130. The immediate relative petition must be filed with USCIS along with the requisite filing fees,[102] required forms,[103] two standard passport photographs of the beneficiary, two standard passport photographs of the petitioner, evidence of the petitioner's U.S. citizenship (birth certificate, U.S. passport, or naturalization certificate), the beneficiary's identification documents (birth certificate and passport), and supporting documentation establishing the bona fide nature of the family relationship. It is the petitioner's burden to demonstrate by a preponderance of the evidence that the family relationship is valid and not one that was entered into for immigration purposes.[104] Documentation establishing the bona fides of the relationship may include:[105]

- evidence of the legal nature of the qualifying relationship—i.e., a copy of the marriage or birth certificate between the petitioner and beneficiary;
- evidence of joint residence, including lease or mortgage documents;
- evidence of commingled assets and joint financial responsibilities, including bank statements, car

titles, utility and phone bills, credit card bills, and health/life/car insurance documents;

- if a spousal petition, birth certificates for any children that a couple has together, evidence of the wedding and/or honeymoon, and evidence of the legal termination of any prior marriages for both spouses;
- if a parent-child petition, evidence of financial support, child custody, and involvement in the child's life;
- telephone records, correspondence, and flight itineraries;
- photographs of the family members together; and
- evidence of any legal name changes.

On the Form I-130, page two, part C, question 22, it is important for the applicant to note that he or she will apply for a visa abroad and to state the U.S. consulate where he or she will be processing. If, instead, the applicant indicates that he or she is present in the United States and will apply for adjustment of status, the petition will not be forwarded to the correct location upon its approval.[106]

Once the immediate relative petition and all supporting documentation has been submitted to USCIS, the agency will issue an official receipt notice and will then initiate processing of the petition. At the time of writing this *Briefing*, USCIS' current estimated processing time for immediate relative petitions is approximately six months.[107]

The Department of State National Visa Center

If the immediate relative petition is approved, it will then be forwarded to the Department of State National Visa Center (NVC) for initial processing. By forwarding the approved petition to the NVC, USCIS initiates processing of an immigrant visa to eventually be completed at the U.S. consulate in the applicant's home country.

Approximately three to six weeks after the approval of the petition,[108] the NVC will then contact the applicant to request that he or she identify an agent for the immigrant visa case and to request payment of the fees for the immigrant visa application.[109] The fees may be paid online or by mail. The immigrant visa case must be pending before the Department of State and the immigrant visa processing fees must be paid to the NVC before any provisional waiver application may be submitted.[110]

After the case has been forwarded to the NVC, the applicant must notify the NVC of his or her intent to seek a provisional unlawful presence waiver.[111] The applicant should notify the NVC of his or her intent by sending an email to NVCi601a@state.gov. This email should (1) reference the NVC case number or USCIS receipt number in the subject line of the email, (2) provide the petitioner and beneficiary's names and dates of birth, (3) provide the attorney's name and contact information, (4) include a statement that the applicant will be applying for a provisional waiver with USCIS, and (5) if the immigrant visa processing fee has not been paid yet, notify the NVC of the applicant's intent to apply immediately after the fee has been paid.[112] By sending this email, the applicant ensures that the NVC does not schedule his or her immigrant visa interview until USCIS has finished processing the provisional waiver application. If the NVC is not notified of the applicant's intent to apply for a provisional waiver and the immigrant visa interview is scheduled at the consulate prior to the filing of the provisional waiver application, the immigrant visa processing may be delayed.[113] If the NVC has already scheduled the applicant's immigrant visa appointment, the applicant should notify the specific U.S. consulate where the appointment has been scheduled of his or her intent to apply for a provisional waiver before USCIS.[114]

As soon as the immigrant visa processing fees have been paid to the NVC and the applicant is in possession of the fee receipt, he or she may then prepare and file the provisional waiver application.[115] While the provisional waiver application is being prepared and while it remains pending before USCIS, the NVC will continue with its regular processing of the immigrant visa case.[116] The only difference is that the NVC will

wait to schedule the immigrant visa interview at the consular post until it has received notice from USCIS that the provisional waiver has been adjudicated.[117] Throughout its processing of the case, the NVC may require submission of the following documentation:[118]

- Form DS-230, Parts 1 and 2, Application for Immigrant Visa and Alien Registration;
- Form G-28, Notice of Entry of Appearance, if an attorney is preparing the applications;
- complete copy of the beneficiary's passport;
- original or certified copy of the beneficiary's birth certificate;
- original or certified copies of marriage and/or birth certificates as well as any divorce and/or death certificates;
- original or certified copies of any legal name change documentation;
- two passport-style photographs of the beneficiary;
- police certificates from all countries in which the beneficiary has lived for six months or more since age 16;
- certified copies of any court, prison, and/or military records;
- Form I-864, Affidavit of Support, completed by the petitioner;
- copies of the petitioner's tax returns with all schedules and W-2 forms;
- evidence of the petitioner's employment, which may include a letter from his or her employer or copies of his or her pay stubs;
- copy of the petitioner's U.S. passport, birth certificate, or certificate of naturalization; and
- evidence of fee payments for the immigrant visa and affidavit of support.

It is important for the applicant to continue providing any requested documentation to the NVC while USCIS is processing his or her provisional waiver application in order to avoid any processing delays.[119]

Preparing the Provisional Waiver Application

Once the immediate relative petition has been approved by USCIS and the immigrant visa and affidavit of support fees have been paid to the Department of State NVC, the applicant may proceed with preparing his or her provisional waiver application. This application is filed on Form I-601A, Application for Provisional Unlawful Presence Waiver, with USCIS.

Documenting Extreme Hardship. The most labor-intensive aspect of preparing a provisional waiver application is demonstrating that the U.S.-citizen spouse or parent will suffer extreme hardship if the applicant's waiver is not approved. As noted above, extreme hardship is hardship beyond the normal hardship that is suffered when family members are separated from one another.[120] All hardship factors will be weighed in the aggregate and USCIS will consider the totality of the circumstances in determining whether the applicant has met his or her burden of proof.[121] Thus, it is important for the applicant to include documentary evidence of all possible hardship factors.

Demonstrating extreme hardship requires extensive documentation.[122] The applicant must document who he or she is as well as any connections to the United States, familial and otherwise. Such documentation may include government-issued identification, passports, marriage certificates, children's birth certificates, a list of all U.S.-citizen and permanent resident family members with proof of their immigration status and relationship to the applicant, a list of all relatives in the country of relocation, photographs with family members, personal declarations, and letters of support from relatives, employers, friends, and community members. The applicant and the qualifying relative's personal declarations are quite possibly the most important documentation for demonstrating extreme hardship as they fully describe in the applicant's and relative's own words the totality of all of the hardship factors that would affect their family if the I-601A provisional waiver is not granted.

The applicant and U.S.-citizen relative should also submit documentation that shows their financial ties to the United States, debt incurred in the United States, and the financial hardship that would be caused by the applicant's continued inadmissibility to the United States. This may include mortgage, lease, or deed documentation, documentation of property ownership, evidence of loans or other debts, monthly bills, insurance, other regular family expenses, tax returns and W-2 forms, social security records, evidence of current employment, or documentation showing financial support of family members in the U.S. and abroad. Additionally, evidence of the economic and financial conditions in the applicant's home country may assist in establishing extreme financial hardship. If a country has a high unemployment rate or significantly lower wages than those paid for the same job in the United States, those factors may be helpful in showing that the U.S. citizen would suffer financially either because he or she no longer has the spouse's income to help support the family or because he or she would be unable to obtain a similar position in the applicant's home country.

Medical and psychological hardship is often one of the strongest hardship factors to highlight in preparing a provisional waiver application. To document this factor, applicants should obtain letters from medical professionals, including treating physicians, specialists, psychiatrists, psychologists, or therapists, explaining the family member's diagnosis and his or her medical and treatment needs. It is also helpful to submit documentation of doctor and hospital visits, prescription medications, and evidence of family medical history or risk factors. Quite possibly the most important piece of evidence of medical hardship is a thorough report prepared by the family member's treating physician or licensed mental health professional. If mental health is a relevant hardship factor in the applicant's case, it may also be advisable for the family member to work with a forensic psychologist who is experienced in documenting extreme psychological hardship, which can range from anxiety and depression to more serious psychological disorders. Finally, it is important to also document the health care system of the applicant's home country, as well as any deficiencies, to demonstrate that the U.S.-citizen family member could not relocate to that country without experiencing extreme medical hardship.

Although children are not considered "qualifying relatives" for purposes of the I-601A provisional waiver process,[123] their hardship factors may still be relevant if they directly impact and cause hardship to the U.S.-citizen spouse or parent. For instance, if a child has a learning disability that requires special education and increased parental involvement, the inability of the applicant to remain with that child in the United States may cause his U.S.-citizen spouse to suffer extreme hardship because, without the applicant, the spouse would suddenly have to provide for that child's needs on his or her own. Thus, any documentation of children's special needs, their progress in school, and their awards and activities may also be helpful evidence in demonstrating extreme hardship.

Finally, since the grant of an I-601A provisional waiver is a discretionary determination, it is important to document the applicant's good moral character and contributions to the communities of which he or she is a part.[124]

Additional Provisional Waiver Application Materials. In addition to documenting the extreme hardship that the applicant's U.S.-citizen spouse or parent would suffer, the applicant must prepare the following additional documentation:[125]

- Form I-601A, Application for Provisional Unlawful Presence Waiver, which must be signed by the applicant and completed in full;
- $585 filing fee, made payable to U.S. Department of Homeland Security;
- $85 biometrics fee, made payable to U.S. Department of Homeland Security;
- the receipt number for the approved I-130 or I-360 immediate relative petition;
- copy of the USCIS I-130 or I-360 approval notice; and
- copy of the fee receipt from the NVC for the immigrant visa processing fees.

The fees for the I-601A include a $585 filing fee and an $85 biometrics fee.[126] No fee waivers are available for the provisional waiver process,[127] and, if the I-601A is eventually withdrawn by the applicant, there are no fee refunds.[128] Once all of the evidence of extreme hardship and above-listed documentation has been gathered and compiled, it is time to file with USCIS.

Filing the Provisional Waiver Application

The I-601A provisional waiver application, along with the filing fees and all supporting documentation, should be filed with the USCIS Chicago Lockbox facility.[129] The USCIS National Benefits Center will notify the Department of State NVC when it has received the I-601A.[130] The National Benefits Center will then proceed with an initial review of the I-601A filing to verify eligibility. The filing will be automatically rejected in the following circumstances:[131]

- the filing fee of $585 is not paid;
- the applicant fails to sign the application;
- the applicant fails to provide his or her name, domestic address, and date of birth;
- the applicant is under age 17;
- the applicant does not include evidence of an approved petition that classifies him or her as the immediate relative of a U.S. citizen;
- the applicant fails to include a copy of the fee receipt evidencing that he or she has paid the Department of State's immigrant visa processing fee; and
- it is clear that the Department of State initially acted to schedule the immigrant visa interview prior to January 3, 2013.

In regard to the filing fees, if the $585 is not included, the I-601A will be automatically rejected.[132] However, if the $585 is included but the $85 biometrics fee is not, the applicant will be notified of the deficiency and will be given the opportunity to correct the error.[133] USCIS will not, however, process the application until the biometrics fee has been paid.[134]

In reviewing whether the Department of State has "initially acted" to schedule the immigrant visa interview prior to January 3, 2013, USCIS will first consider whether the scheduled interview is based on the approved immediate relative petition that accompanies the Form I-601A. If it is, USCIS will then review the Department of State's Consular Consolidated Database to determine the date that the Department of State scheduled the immigrant visa interview. If the date is prior to January 3, 2013, the application will be rejected or denied.[135]

Filing an I-601A provisional waiver application does not provide the applicant with any interim benefits, such as employment authorization or advance parole. Additionally, it does not confer lawful immigration status or protection from removal.[136]

Awaiting Adjudication of the Provisional Waiver Application

While the provisional waiver application remains pending before USCIS, the applicant should continue to submit the required immigrant visa application and supporting documentation to the NVC.[137]

Unlike many other applications for benefits before USCIS, the agency does not anticipate that interviews will be routinely required to adjudicate I-601A applications.[138] This is because the USCIS National Benefits Center does not conduct onsite interviews, and, to schedule an interview, the National Benefits Center would have to transfer the file to a local USCIS field office.[139] This can take several months, and such delay would defeat the purpose of the provisional waiver initiative. However, USCIS has reserved the right to interview I-601A applicants on a case-by-case basis.[140]

As USCIS reviews an I-601A application, it may determine that additional information is necessary in order to complete its adjudication. Where critical information is missing, particularly information related to extreme hardship or whether the applicant merits a favorable exercise of discretion, USCIS will issue a request for evidence (RFE) to which the applicant will have the opportunity to respond.[141] USCIS will not, however, issue any notices of intent to deny for provisional waiver applications.[142]

If new evidence of hardship arises after the I-601A application has been filed, the applicant may supplement the I-601A application with the additional materials at any time prior to its adjudication.[143] The applicant may also withdraw the I-601A application and refile it as long as the underlying immigrant visa case is still pending with the Department of State.[144] In this situation, the applicant should notify the Department of State of his or her intention to refile the I-601A.[145]

Throughout the pendency of the I-601A application before USCIS, applicants may submit any inquiries to USCIS through the USCIS' designated email address: lockboxsupport@dhs.gov.[146]

Approval of the Provisional Waiver Application

If the applicant's provisional waiver application is approved, the National Benefits Center will notify the applicant as well as the Department of State NVC.[147] The NVC will then schedule the immigrant visa interview at the U.S. consulate abroad and will forward the applicant's file to the U.S. consulate.[148] If the applicant has already submitted all of the required documentation to the NVC,[149] the interview should be scheduled within two to three months of USCIS approval of the I-601A.[150] However, if the immigrant visa interview was already scheduled and the applicant previously notified the consular post of his or her intent to apply for an I-601A provisional waiver, the applicant should contact the consular post to reschedule the interview following USCIS approval of the I-601A.[151]

I-601A approval does not confer legal status, stop or eliminate the accrual of unlawful presence, allow entry into the U.S. without an appropriate visa or entry document, allow an individual to apply for work authorization or advance parole, protect an individual form being placed in removal proceedings or removed from the United States, allow an individual to receive a social security card or driver's license, guarantee return to the U.S., or waive any ground of inadmissibility other than INA § 212(a)(9)(B)(i)(I) or (II).[152] Thus, it is important that all applicants—even those whose I-601A applications have been approved—consult with their attorneys prior to departing the United States for their immigrant visa interviews.

Once the immigrant visa interview has been scheduled, the applicant will travel abroad to apply for his or her immigrant visa at the U.S. consulate in his or her home country. Typically, the applicant will need to complete his or her required medical examination upon arrival in his or her home country. This medical examination is usually completed in the applicant's home country prior to the immigrant visa interview and pursuant to the specific consulate's instructions.

On the day of the immigrant visa interview, the applicant must appear at the U.S. consulate to seek issuance of an immigrant visa. The consular officer will review the applicant's immigrant visa application as well as all of the supporting documentation. If all eligibility criteria have been met, the officer will issue the immigrant visa. The individual may then use that immigrant visa to reenter the United States as a lawful permanent resident.

It is important to note, however, that approval of the I-601A provisional waiver does not guarantee visa issuance as the consulate may discover new ineligibility or additional inadmissibility grounds during the immigrant visa interview.[153] USCIS has reserved the right to reopen an approved I-601A application on its own motion at any time, including if new factors come to light during or following the immigrant visa interview abroad.[154] Moreover, an approved provisional waiver may be automatically revoked in certain circumstances, including if a consular officer determines at the immigrant visa interview that the individual is inadmissible for reasons other than unlawful presence.[155] There is no right to appeal the revocation of an approved I-601A.[156] For these reasons, it is imperative that all applicants thoroughly consult with their attorneys prior to departing the United States.

Denial of the Provisional Waiver Application

On the other hand, if the I-601A provisional waiver application is denied, USCIS will notify the applicant and the NVC of the denial.[157] The NVC will still proceed with processing the immigrant visa application and will schedule the immigrant visa interview abroad.[158] If the applicant decides to proceed abroad to apply for the immigrant visa, he or she will need to go

through the previously-existing I-601 waiver process at the U.S. consulate in his or her home country.[159] If USCIS approves the I-601 waiver application, the U.S. consulate may then issue the immigrant visa.[160] If USCIS denies the I-601 waiver application, the applicant may file an appeal with the USCIS Administrative Appeals Office.

There is no direct administrative appeal for a denied I-601A provisional waiver application, and motions to reopen or reconsider are not permitted.[161] If the individual decides not to proceed abroad to apply for an immigrant visa and waiver through the previously established process, the only option for him or her is to file a new I-601A application along with the appropriate filing fees and additional evidence to overcome the reasons for the denial.[162] If the applicant elects to refile, his or her immigrant visa case must still be pending before the Department of State, and the applicant must notify the NVC of his or her intent to file a new Form I-601A.[163] Once the new provisional waiver application has been filed, USCIS will notify the NVC that the applicant has filed a new I-601A.[164] Typically, the Department of State will not proceed immediately with scheduling the immigrant visa interview at the consulate abroad. However, if the interview has already been scheduled and the applicant plans to file a new I-601A, he or she should contact the consular post directly to notify the post of his or her intent to refile.[165] Usually, the applicant will not need to pay the immigrant visa processing fees again unless a significant amount of time has passed between the payment of the fees and the refiling of a new I-601A application.[166]

If the applicant's I-601A application is denied by USCIS, another option may be to seek review before the U.S. federal courts. However, before filing a federal lawsuit, it is important to consider whether the USCIS decision was purely discretionary in nature as discretionary decisions are generally not subject to review in federal court.[167] Whether the federal courts will assume jurisdiction over denied I-601A applications remains to be seen and is beyond the scope of this *Briefing*.

A common concern expressed throughout the notice and comment period for the new rule was whether an applicant would be placed in removal proceedings upon the denial of his or her provisional waiver application. There is no provision in the new rule stating that USCIS will not issue notices to appear and place individuals in removal proceedings. However, USCIS has stated that it will adhere to its latest guidance on the issuance of notices to appear[168] as set forth in its memorandum dated November 7, 2011.[169] According to this guidance, USCIS will not place denied applicants in removal proceedings by issuing a notice to appear unless there is evidence that the applicant is an enforcement priority, such as a convicted criminal, an individual who has committed immigration fraud, an individual who is a national security threat, or an individual who has a final order of removal.[170] As there is no guarantee that USCIS will not initiate removal proceedings upon the denial of an I-601A, all provisional waiver applicants should be advised of the risk of removal proceedings prior to filing their applications.

CONCLUSION

The new provisional waiver process is certain to make a positive impact on thousands of families, honoring the importance of family unity by eliminating their risk of a decade of separation as well as the uncertainty involved in the process. While the procedures for seeking a provisional waiver are seemingly quite complicated, this *Briefing* provides practitioners the tools they need to advocate for their eligible clients and to help them emerge from the shadows to gain legal status in the United States without fear of separation from their loved ones.

ENDNOTES:

[1]See Aleinikoff et al., Immigration and Citizenship: Process and Policy 319 (4th Ed. 1998) (asserting that U.S. immigration law prioritizes keeping families together). See also INA § 201(b)(2) [8 U.S.C.A. § 1151(b)(2)] (exempting "immediate relatives" from visa quotas, stating that children, spouses, and parents of U.S. citizens are "not subject to direct numerical limitations" for family-sponsored, employment-based, and diversity immigrants); INA § 203(a), (d) [8 U.S.C.A. § 1153(a), (d)] (codifying the preference to

allocate visas to family-sponsored immigrants and allowing derivative status for spouses and children of applicants who are not otherwise eligible); H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7, as reprinted in 1957 U.S.C.C.A.N. 2016, 2020 (indicating that Congress intended to provide for the liberal treatment of children); and *Cerrillo-Perez v. I.N.S.*, 809 F.2d 1419, 1423 (9th Cir. 1987) ("The importance and centrality of the family in American life is firmly established both in our traditions and in our jurisprudence. . . . [T]he preservation of family unity is recognized as a critical factor . . . . [I]t is universally recognized that 'the family is the natural and fundamental group unity of society and is entitled to protection by society and the state.' ").

[2]78 Fed. Reg. 536 (Jan. 3, 2013).

[3]See INA § 212(a) [8 U.S.C.A. § 1182(a)].

[4]See INA § 212(a) [8 U.S.C.A. § 1182(a)].

[5]See INA § 212(a)(9)(B)(ii) [8 U.S.C.A. § 1182(a)(9)(B)(ii)], stating that a person is unlawfully present in the United States "after the expiration of the period of stay authorized by the Secretary of the Department of Homeland Security or is present in the United States without being admitted or paroled."

[6]See infra notes 70-73 and accompanying text; see also INA § 212(a)(9)(B) [8 U.S.C.A. § 1182(a)(9)(B)].

[7]See INA § 245(c) [8 U.S.C.A. § 1255(c)]; 8 C.F.R. §§ 245.1(b)(5) to (6), 1245.1(b)(5) to (6) (restricting individuals who are unlawfully present at the time of applying for adjustment of status, as well as other individuals, from adjusting status to permanent residency while in the United States unless they are immediate relatives of U.S. citizens).

[8]INA § 245(a) [8 U.S.C.A. § 1255(a)].

[9]INA § 245(a) [8 U.S.C.A. § 1255(a)]. But see INA § 245(i) [8 U.S.C.A. § 1255(i)] (allowing certain persons to apply for adjustment of status notwithstanding the fact that they entered without inspection, overstayed, or worked without authorization as long as they could show that they were a beneficiary of a labor certification or visa petition that was filed on their behalf on or before April 30, 2001, paid a $1,000 fine, and, for some, were physically present in the United States on December 21, 2000). The "245(i)" exception allowed thousands of individuals to regularize their immigration status while remaining in the United States with their families. See id. However, this exception was eliminated in 1998, revived briefly between December 2000 and April 2001, and has been gone ever since. Now, only individuals who are "grandfathered" under INA § 245(i) may benefit from this exception and adjust status in the United States despite their entry without inspection.

[10]See INA § 212(a)(9)(B)(i) [8 U.S.C.A. § 1182(a)(9)(B)(i)].

[11]INA § 212(a)(9)(B)(i)(I) [8 U.S.C.A. § 1182(a)(9)(B)(i)(I)] (finding inadmissible "[a]ny alien . . . who (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal").

[12]INA § 212(a)(9)(B)(i)(II) [8 U.S.C.A. § 1182(a)(9)(i)(II)] (finding inadmissible "[a]ny alien . . . who (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States").

[13]See INA § 212(a)(9)(B)(i) [8 U.S.C.A. § 1182(a)(9)(B)(i)].

[14]INA § 212(a)(9)(B)(v) [8 U.S.C.A. § 1182(a)(9)(B)(v)] provides a waiver of the unlawful presence inadmissibility grounds in the case of an individual who "is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien."

[15]INA § 212(a)(9)(B)(v) [8 U.S.C.A. § 1182(a)(9)(B)(v)].

[16]See 77 Fed. Reg. 1040, 1041 (Jan. 9, 2012).

[17]See 77 Fed. Reg. 1040, 1041 (Jan. 9, 2012).

[18]See 77 Fed. Reg. 1040, 1041 (Jan. 9, 2012).

[19]See infra notes 89-99 and accompanying text and notes 120-124 and accompanying text (discussing the legal standards for demonstrating extreme hardship).

[20]See INA §§ 212(a)(9)(B)(i), (v) [8 U.S.C.A. § 1182(a)(9)(B)(i), (v)].

[21]See INA § 212(a)(9)(B)(i) [8 U.S.C.A. § 1182(a)(9)(B)(i)].

[22]See generally 77 Fed. Reg. 1040 (Jan. 9, 2012).

[23]See generally 77 Fed. Reg. 1040 (Jan. 9, 2012).

[24]See 77 Fed. Reg. 19902 (Apr. 2, 2012), available at http://www.federalregister.gov/articles/2012/04/02/2012-7698/provisional-unlawful-presence-waivers-of-

inadmissibility-for-certain-immediate-relatives#h-30 (last visited May 14, 2013).

[25]See 78 Fed. Reg. 536 (Jan. 3, 2013).

[26]DHS Press Release, "Secretary Napolitano Announces Final Rule to Support Family Unity During Waiver Process" (Jan. 2, 2013), available at http://www.dhs.gov/news/2013/01/02/secretary-napolitano-announces-final-rule-support-family-unity-during-waiver-process (last visited May 14, 2013).

[27]See 78 Fed. Reg. 536 (Jan. 3, 2013).

[28]See supra notes 3-21 and accompanying text (describing the previously-established I-601 waiver process).

[29]See infra notes 147-156 and accompanying text (explaining the procedures for applying for a provisional waiver).

[30]See infra notes 147-156 and accompanying text (explaining the procedures for applying for a provisional waiver).

[31]See 8 C.F.R. § 212.7(e)(3)(i).

[32]See 8 C.F.R. § 212.7(e)(3)(ii).

[33]See 8 C.F.R. § 212.7(e)(3)(iii).

[34]See 8 C.F.R. § 212.7(e)(3)(iv).

[35]See 8 C.F.R. § 212.7(e)(3)(v).

[36]See 8 C.F.R. § 212.7(e)(3)(vi).

[37]See 8 C.F.R. § 212.7(e)(3)(vii).

[38]See 8 C.F.R. § 212.7(e)(4)(i).

[39]See 8 C.F.R. § 212.7(e)(4)(ii).

[40]See 8 C.F.R. § 212.7(e)(4)(iii).

[41]See 8 C.F.R. § 212.7(e)(4)(iv).

[42]See 8 C.F.R. § 212.7(e)(4)(v).

[43]See 8 C.F.R. § 212.7(e)(4)(vi).

[44]See 8 C.F.R. § 212.7(e)(4)(vii).

[45]See 8 C.F.R. § 212.7(e)(4)(viii).

[46]See 8 C.F.R. § 212.7(e)(3)(iii).

[47]Recall that an applicant must be at least 17 years old in order to apply for a provisional waiver. See 8 C.F.R. § 212.7(e)(4)(ii). Thus, the only immediate relative minor children eligible to apply for a provisional waiver will be children who are at least 17 years old but not yet 21 years old. Also, note that minor children who are in the United States unlawfully do not begin to accrue unlawful presence for purposes of INA § 212(a)(9)(B)(i) [8 U.S.C.A. § 1182(a)(9)(B)(i)] inadmissibility until they have reached the age of 18. See INA § 212(a)(9)(B)(iii)(I) [8 U.S.C.A. § 1182(a)(9)(B)(iii)(I)] (stating that "[n]o period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States"). Thus, some minor children may not even need to seek provisional waivers for unlawful presence.

[48]INA § 201(b)(2)(A)(i) [8 U.S.C.A. § 1151(b)(2)(A)(i)] (defining "immediate relative" as "the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age").

[49]See INA § 201(f) [8 U.S.C.A. § 1151(f)]. The Child Status Protect Act, Pub. L. No. 107-208, 116 Stat. 927 (Aug. 6, 2002), amended the INA to provide "age-out" protection to certain adult children of U.S. citizen and lawful permanent resident (LPR) parents. For detailed discussion of the CSPA, see Dizon, "Office Memos or Opinions? Take-Home Lessons from Agency Guidance and Federal Court Jurisprudence on the Child Status Protection Act," 09-10 Immigration Briefings 1 (Oct. 2009).

[50]See INA § 201(b)(2)(A)(i) [8 U.S.C.A. § 1151(b)(2)(A)(i)] (stating, "In the case of an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries.").

[51]See INA § 201(b)(2)(A)(i) [8 U.S.C.A. § 1151(b)(2)(A)(i)].

[52]See INA § 201(b)(2)(A)(i) [8 U.S.C.A. § 1151(b)(2)(A)(i)].

[53]See 78 Fed. Reg. 536, 537 (Jan. 3, 2013).

[54]See 78 Fed. Reg. 536, 537 (Jan. 3, 2013).

[55]See 8 C.F.R. § 212.7(e)(3)(iv).

[56]See infra notes 100-107 and accompanying text (explaining the procedures for applying for a provisional waiver).

[57]See 8 C.F.R. §§ 212.7(e)(3)(v), 212.7(e)(4)(iii).

[58]See 8 C.F.R. §§ 212.7(e)(3)(v), 212.7(e)(4)(iii).

[59]See 8 C.F.R. § 212.7(e)(4)(iii).

[60]See Department of State advisory, "Provisional Unlawful Presence Waiver - Notifying the National

Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3 and infra notes100-119 and accompanying text (explaining the procedures for applying for a provisional waiver).

[61]See 8 C.F.R. § 212.7(e)(4)(iv).

[62]See 8 C.F.R. § 212.7(e)(4)(iv).

[63]See 78 Fed. Reg. 536, 562 (Jan. 3, 2013).

[64]See Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3.

[65]See id.

[66]See 8 C.F.R. § 212.7(e)(4)(iv).

[67]See 8 C.F.R. § 212.7(e)(4)(iv); see also infra notes 100-170 and accompanying text (explaining the procedures for applying for a provisional waiver).

[68]78 Fed. Reg. 536, 562 (Jan. 3, 2013).

[69]78 Fed. Reg. 536, 562 (Jan. 3, 2013).

[70]See 8 C.F.R. § 212.7(e)(3)(ii).

[71]See 8 C.F.R. § 212.7(e)(3)(ii).

[72]See 8 C.F.R. § 212.7(e)(4)(i); 78 Fed. Reg. 536, 546-47 (Jan. 3, 2013).

[73]However, it should be noted that a finding of "reason to believe" would not be treated as a conclusive determination of inadmissibility. Additionally, such a finding would not preclude the applicant from seeking a waiver through the previously existing I-601 waiver process to overcome any grounds of inadmissibility. 78 Fed. Reg. 536, 546-47 (Jan. 3, 2013).

[74]See 8 C.F.R. § 212.7(e)(4)(v).

[75]See 8 C.F.R. § 212.7(e)(4)(v).

[76]See 78 Fed. Reg. 536, 538, 544, 553-54 (Jan. 3, 2013); 8 C.F.R. § 212.7(e)(13).

[77]See 8 C.F.R. §§ 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).

[78]*Matter of Avetisyan*, 25 I. & N. Dec. 688, 694, 2012 WL 390562 (B.I.A. 2012) (holding that immigration judges have the authority, in the exercise of their independent judgment and discretion, to administratively close removal proceedings under appropriate circumstances even where one party opposes or does not consent to administrative closure) (overruling *In re Gutierrez-Lopez*, 21 I. & N. Dec. 479, 1996 WL 413581 (B.I.A. 1996)).

[79]See 8 C.F.R. § 212.7(e)(4)(v).

[80]See 78 Fed. Reg. 536, 538, 544 (Jan. 3, 2013).

[81]See 78 Fed. Reg. 536, 538, 544 (Jan. 3, 2013).

[82]See 78 Fed. Reg. 536, 553-54 (Jan. 3, 2013); 8 C.F.R. § 212.7(e)(13); see also infra notes 147-156 and accompanying text (explaining the procedures for applying for a provisional waiver).

[83]See 8 C.F.R. § 212.7(e)(4)(vi).

[84]See 8 C.F.R. § 212.7(e)(4)(vii). Noncitizens who have reentered the United States illegally after having been removed or departing voluntarily under an order of removal are subject to reinstatement of that prior order of removal. See INA § 241(a)(5) [8 U.S.C.A. § 1231(a)(5)].

[85]See supra notes74-82 and accompanying text (explaining the procedures and reasons for seeking administrative closure and termination of proceedings).

[86]See 8 C.F.R. § 212.7(e)(4)(v) to (vii).

[87]See 8 C.F.R. § 212.7(e)(3)(ii).

[88]See supra notes 3-21 and accompanying text. Such an individual would need to prepare and file both an I-212 and an I-601 application with the U.S. consulate abroad in order to seek waiver of both inadmissibility grounds under INA § 212(a)(9)(A) [8 USCA § 1182(a)(9)(A)] and INA § 212(a)(9)(B) [8 USCA § 1182(a)(9)(B)].

[89]See 8 C.F.R. § 212.7(e)(3)(vii); see also INA § 212(a)(9)(B)(v) [8 USCA § 1182(a)(9)(B)(v)].

[90]See 8 C.F.R. § 212.7(e)(3)(vii).

[91]See INA § 212(h) [8 USCA § 1182(h)].

[92]See INA § 212(a)(9)(B)(v) [8 USCA § 1182(a)(9)(B)(v)]; see also 8 C.F.R. § 212.7(e)(3)(vii).

[93]See INA § 212(a)(9)(B)(v) [8 USCA § 1182(a)(9)(B)(v)]; see also 8 C.F.R. § 212.7(e)(3)(vii).

[94]See 8 C.F.R. § 212.7(e)(3)(vii).

[95]See *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 566, 1999 WL 332842 (B.I.A. 1999).

[96]*Cervantes-Gonzales*, 22 I. & N. at 583; see also *Matter of Anderson*, 16 I. & N. Dec. 596, 1978 WL 36475 (B.I.A. 1978) (weighing factors relevant to "extreme hardship" for purposes of suspension of deportation); *Cerrillo-Perez v. I.N.S.*, 809 F.2d 1419 (9th Cir. 1987); *Villena v. Immigration & Naturalization Service*, 622 F.2d 1352 (9th Cir. 1980).

[97]*In re O-J-O-*, 21 I. & N. Dec. 381, 383, 1996 WL 393504 (B.I.A. 1996) ("Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." (quoting *Matter of Ige*, 20 I. & N. Dec. 880, 1994 WL 520996 (B.I.A. 1994))). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation" or inadmissibility. Id.

[98]*In re O-J-O-*, 21 I. & N. Dec. 381, 383, 1996 WL 393504 (B.I.A. 1996).

[99]See infra notes 120-124 and accompanying text (explaining the procedures for applying for a provisional waiver). For more on extreme hardship waivers, see Scott, "Evidence for an Extreme Hardship Waiver of Inadmissibility: Boldly Going Where No Case Law Has Gone Before," 09-01 Immigration Briefings 1 (Jan. 2009) and Wiebe and Brenes, "Mental Health Professionals and Affirmative Applications for Immigration Benefits: A Critical Review of Administrative Appeals Office Cases Involving Extreme Hardship And Mental Harm," 11-04 Immigration Briefings 1 (Apr. 2011).

[100]See 8 C.F.R. § 212.7(e)(3)(iv).

[101]See INA § 201(b)(2)(A)(i) [8 USCA § 1151(b)(2)(A)(i)] (stating, "In the case of an alien who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries.").

[102]At the time when this article was written, the I-130 filing fee was $420, and the I-360 filing fee for a self-petitioning widow or widower was $405.

[103]A Form G-325A must be included for both the beneficiary and the petitioner. Additionally, if an attorney is filing the petition on behalf of the petitioner and beneficiary, Forms G-28 must be included for both the beneficiary and the petitioner.

[104]See *Matter of Brantigan*, 11 I. & N. Dec. 493, 1966 WL 14282 (B.I.A. 1966) ("In visa petition proceedings, the burden of proof to establish eligibility for the benefit sought rests with the petitioner."); see also *Matter of Pazandeh*, 19 I. & N. Dec. 884, 887, 1989 WL 247531 (B.I.A. 1989) ("The petitioner bears the burden of proving by a preponderance of the evidence that she and the beneficiary intended to establish a life together at the time of their marriage." (citing *Matter of McKee*, 17 I. & N. Dec. 332, 1980 WL 121883 (B.I.A. 1980))).

[105]Any documents that are not in English must be accompanied by certified English translations. Note that this is a list of documentation that is typically useful in establishing the bona fide nature of the family relationship before USCIS. USCIS may or may not require this documentation as well as any additional documentation.

[106]See infra notes 108-119 and accompanying text (explaining the procedures for applying for a provisional waiver).

[107]See http://www.uscis.gov for a list of current estimated processing times.

[108]Note that processing times frequently change.

[109]At the time when this *Briefing* was written, the immigrant visa application fee was $230, and the I-864 affidavit of support fee was $88.

[110]See 8 C.F.R. §§ 212.7(e)(3)(v), 212.7(e)(4)(iii); see also supra notes 57-60 and accompanying text.

[111]See Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3.

[112]See id.

[113]See id.

[114]See id.

[115]See infra notes 120-128 and accompanying text (explaining the procedures for applying for a provisional waiver).

[116]Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3.

[117]National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*.

[118]Any documents that are not in English must be accompanied by certified English translations. Note that this is a list of the typical documentation requested by the NVC. The NVC may or may not require this documentation as well as any additional documenta-

tion.

[119]Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3.

[120]See *In re Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 1999 WL 332842 (B.I.A. 1999); see also supra notes 89-99 and accompanying text.

[121]See *In re O-J-O-*, 21 I. & N. Dec. 381, 1996 WL 393504 (B.I.A. 1996); see also supra notes 89-99 and accompanying text.

[122]Note that the description of extreme hardship evidence included in this section is attributed to the author's blog post on Benach Ragland LLP's blog, "Lifted Lamp," which is available at http://www.liftedlamp.com. The description has been updated and modified for this *Briefing*. The full, original blog post entitled "What is Extreme Hardship?" is available at http://liftedlamp.com/2013/01/28/what-is-extreme-hardship/ (last visited May 14, 2013).

[123]See INA § 212(a)(9)(B)(v) [8 U.S.C.A. § 1182(a)(9)(B)(v)]; 8 C.F.R. § 212.7(e)(3)(vii).

[124]The hardship factors and types of evidence discussed herein are not exhaustive. Practitioners should spend a significant amount of time with their clients identifying all possible hardship factors and all possible evidence to document that hardship for USCIS.

[125]National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*. This list is not exhaustive.

[126]See 8 C.F.R. § 103.7(b)(1)(i)(AA).

[127]See 78 Fed. Reg. 536, 549 (Jan. 3, 2013); 8 C.F.R. § 103.7(c)(3)(i).

[128]See 78 Fed. Reg. 536, 562 (Jan. 3, 2013).

[129]See 78 Fed. Reg. 536, 562 (Jan. 3, 2013); see also USCIS Instructions for Form I-601A, available at http://www.uscis.gov/files/form/i-601ainstr.pdf (last visited May 14, 2013).

[130]National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*.

[131]See 8 C.F.R. § 212.7(e)(5)(ii).

[132]See 8 C.F.R. § 212.7(e)(5)(ii)(A).

[133]See 8 C.F.R. § 103.17(b).

[134]See 8 C.F.R. § 103.17(b).

[135]See 78 Fed. Reg. 536, 562-63 (Jan. 3, 2013); see also 8 C.F.R. § 212.7(e)(4)(iv).

[136]See 78 Fed. Reg. 536, 555 (Jan. 3, 2013); 8 C.F.R. § 212.7(e)(12).

[137]See supra notes 108-119 and accompanying text.

[138]See 8 C.F.R. § 212.7(e)(8).

[139]See 78 Fed. Reg. 536, 552 (Jan. 3, 2013).

[140]See 8 C.F.R. § 212.7(e)(8).

[141]See 78 Fed. Reg. 536, 553 (Jan. 3, 2013).

[142]See 78 Fed. Reg. 536, 553 (Jan. 3, 2013).

[143]See 78 Fed. Reg. 536, 550 (Jan. 3, 2013).

[144]See 8 C.F.R. § 212.7(e)(10).

[145]See 8 C.F.R. § 212.7(e)(10); see also Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3.

[146]National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*.

[147]See id.

[148]See Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3.

[149]See supra notes 108-119 and accompanying text.

[150]See 78 Fed. Reg. 536, 552 (Jan. 3, 2013).

[151]See Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013), see also http://1.usa.gov/131t5g3.

[152]See 78 Fed. Reg. 536, 555 (Jan. 3, 2013); 8 C.F.R. § 212.7(e)(12).

[153]See 78 Fed. Reg. 536, 553-55; 8 C.F.R. § 212.7(3)(13).

[154]See 78 Fed. Reg. 536, 553-55; 8 C.F.R. § 212.7(3)(13). Before reopening an approved provisional waiver, however, USCIS will notify the applicant of its intent, provide the applicant with the derogatory information, and give the applicant the opportunity to respond. See 8 C.F.R. §§ 103.2(b)(16), 103.5(a)(5).

[155]See 8 C.F.R. § 212.7(e)(14). A provisional waiver may also be revoked if the underlying im-

migrant visa petition associated with the provisional waiver is revoked, withdrawn, or rendered invalid, if the immigrant visa registration is terminated and not reinstated in accordance with INA § 203(g) [8 U.S.C.A. § 1153(g)], and if the individual, at any time before or after approval of the provisional waiver or before the immigrant visa is issued, reenters or attempts to reenter the United States without inspection or parole. Id.

[156]See 78 Fed. Reg. 536, 556 (Jan. 3, 2013).

[157]National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*.

[158]See id.

[159]See supra notes 3-21 and accompanying text; 8 C.F.R. § 212.7(e)(9). If USCIS denies the I-601A application and the applicant decides not to proceed abroad to apply for the immigrant visa, he or she should contact the National Visa Center at nvcinquiry@state.gov to request that his or her original documents be returned. See National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*.

[160]See supra notes 3-21 and accompanying text; 8 C.F.R. § 212.7(e)(9); see also National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*.

[161]See 8 C.F.R. § 212.7(e)(11).

[162]See 8 C.F.R. § 212.7(e)(9).

[163]See 8 C.F.R. § 212.7(e)(9); 78 Fed. Reg. 536, 553 (Jan. 3, 2013); Department of State Advisory, "Provisional Unlawful Presence Waiver - Notifying the National Visa Center," available on AILA InfoNet Doc. No. 13010340 (posted Jan. 3, 2013); see also http://1.usa.gov/131t5g3.

[164]See National Stakeholder Meeting on Provisional Unlawful Presence Waivers (Feb. 26, 2013), attended by the author of this *Briefing*.

[165]See id.

[166]See id.

[167]See INA § 242(a)(2)(B)(ii) [8 U.S.C.A. § 1252(a)(2)(B)(ii)].

[168]See 78 Fed. Reg. 536, 554 (Jan 3, 2013).

[169]See USCIS memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," PM-602-0050 (Nov. 7, 2011), discussed and reproduced in 88 Interpreter Releases 2714, 2733 (Nov. 14, 2011), available on AILA InfoNet Doc. No. 11110830 (posted Nov. 8, 2011), and available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf (last visited May 14, 2013).

[170]See USCIS memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," PM-602-0050 (Nov. 7, 2011), discussed and reproduced in 88 Interpreter Releases 2714, 2733 (Nov. 14, 2011), available on AILA InfoNet Doc. No. 11110830 (posted Nov. 8, 2011), and available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf (last visited May 14, 2013); see also ICE memorandum, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," Policy No. 10072.1 (Mar. 2, 2011), discussed and reproduced in 88 Interpreter Releases 684, 714 (Mar. 7, 2011) and available on AILA InfoNet Doc. No. 11030323 (posted Mar. 3, 2011).

