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USCIS ISSUES PROVISIONAL WAIVER FINAL RULE: BEGINNING IN MARCH, SOME WAIVERS OF THE 3- OR 10-YEAR BARS MAY BE SOUGHT BEFORE DEPARTING THE UNITED STATES

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One year ago, a previous post on this blog by Cyrus Mehta and this author discussed the issuance by USCIS of a proposed rule allowing certain applicants for a waiver of the 3- or 10-year bars to obtain such a waiver on a provisional basis before departing from the United States. It has been a long wait for the final rule, as USCIS needed to allow time to receive public comments (one of which was submitted by our firm) and then took a substantial amount of time to analyze the comments and determine what changes to make to the proposal, but the wait is finally over.USCIS first announced the final ruleand made an advance copy available on January 2, 2013, and the final rule was officially published in the Federal Registeron January 3. The rule will take effect on March 4, 2013, and sometime before then USCIS will publish the Form I-601A that is to be used to apply for a provisional waiver.

The provisional waiver rule does not change the substantive standard that one must satisfy in order to obtain a waiver of the 3- or 10-year bar that one incurs upon accruing more than 180 days or a year of unlawful presence respectively. In order to obtain a waiver of the 3- or 10-year bars under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), it is always necessary to show that the waiver applicant's spouse or parent, who is a U.S. citizen or Lawful Permanent Resident (LPR) of the United States, will suffer extreme hardship if the applicant is not permitted to remain in the United States. However, under the new rule, certain applicants will be able to make this showing before they depart the United States to apply for a visa, which should dramatically shorten the amount of time that they need to spend

abroad. If an applicant is seeking a waiver of the 3- or 10-year bars based extreme hardship to a U.S. citizen qualifying relative (rather than an LPR), and has an approved petition as an "immediate relative" of a U.S. citizen – that is, as the U.S. citizen's spouse, parent, or unmarried child (under the age of 21 while taking into account the Child Status Protection Act, although only applicants age 17 or older may seek provisional waivers and younger applicants would not need them because unlawful presence for these purposes does not accrue until age 18)– then the applicant may seek a provisional waiver before departing from the United States, and only go abroad to apply for an immigrant visa after the provisional waiver has already been issued. This process is subject to various restrictions, some of which are discussed further below, but that is the basic idea.

By allowing some waiver applications to be adjudicated while the applicant remains within the United States, the provisional waiver process should significantly reduce the period of time when the U.S. citizen relative of a successful waiver applicant is subject to the cruel irony that inheres in the current process. Under the current system, where the waiver application is filed while the applicant is abroad after an immigrant visa interview, and the applicant then remains abroad during the months it takes to adjudicate the waiver application, the qualifying relative must undergo months of the very same extreme hardship that the waiver is intended to avoid! At least with regard to U.S. citizen qualifying relatives of applicants who are immediate relatives of U.S. citizens, and who face no other ground of inadmissibility besides unlawful presence, this new provisional waiver process should remove much of that cruel irony. It should also encourage applications by some waiver applicants who were unwilling to travel outside the United States to apply for a waiver because of the risk of long-term separation if the waiver were denied.

One detail to keep in mind is that the U.S. citizen relative to whom extreme hardship is shown in a provisional waiver application need not necessarily be the same U.S. citizen relative who has petitioned for an applicant. Indeed, the U.S. citizen petitioner need not even be a possible qualifying relative for the 212(a)(9)(B)(v) waiver. A child is not a qualifying relative for purposes of obtaining a waiver of the 3- or 10-year bars, but an applicant who is sponsored by a U.S. citizen son or daughter over twenty-one years of age, and thus qualifies as an immediate relative, would be able to qualify for a provisional waiver if he or she could show extreme hardship to a U.S. citizen parent in the

event that the applicant were not allowed to return to the United States– even though a U.S. citizen parent cannot sponsor an adult son or daughter as an immediate relative. Or, an applicant with a U.S. citizen spouse, who cannot show that his or her spouse will suffer extreme hardship if the applicant is not allowed to return to the United States, could instead obtain a provisional waiver by showing that a U.S. citizen parent will suffer extreme hardship in the applicant's absence.

Another important detail, which has been changed from the proposed rule, is that applicants in removal proceedings will be able to seek a provisional waiver ifttheir proceedings are administratively closed and have not been recalendered. Administrative closure, most recently addressed by the Board of Immigration Appeals (BIA) in *Matter of Avetisyan*, is a process in which a case is taken off the active calendar of an Immigration Court or the BIA without actually being terminated; one might compare it to an indefinite continuance of the case. Traditionally, it has occurred with the consent of the Department of Homeland Security (DHS), although *Avetisyan* allows for it to be sought without DHS consent, a possibility which might prove useful in the provisional-waiver context. Administrative closure has often occurred recently in the contextof the DHS exercise of prosecutorial discretion in favor of those who are lower priorities for removal so that DHS can focus its efforts on removing those who are its higher priorities for removal, such as those with serious criminal convictions—the process discussed in a June 17, 2011 memorandum from U.S. Immigration and Customs Enforcement (ICE) Director John Morton.It is admirable that USCIS realized, upon reviewing comments on the proposed rule, that no purpose would be served by denying the opportunity to apply for a provisional waiver to those whom ICE is not actively seeking to remove in any event.

One interesting consequence of this new eligibility for those with administratively closed removal cases relates to the process created by the Court of Appeals for the Second Circuit in its October 16, 2012 opinion entitled *In the Matter of Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit*. The Court of Appeals for the Second Circuit, in order to avoid having to spend court time unnecessarily reviewing a removal order in cases where ICE would anyway not seek to execute the order, has created an automatic 90-day waiting period during the processing of petitions for review (although one which can be ended early by either side) to allow for

discussion of whether the exercise of prosecutorial discretion is appropriate. In cases where the Office of Immigration Litigation that is representing the government on the petition for review determines in consultation with ICE that a case is low-priority and suitable for the exercise of prosecutorial discretion, the case will be remanded to the BIA for administrative closure. Thus, at least in the Second Circuit, and perhaps in other Circuits which may come to follow the lead of the Second Circuit, some who have already received final orders of removal, but who would be eligible for a provisional waiver absent such final order and have petitioned for review of the order, should be able to return their case to an administratively closed state under the new process and then apply for a provisional waiver.

In another positive development, the final rule has retreated somewhat from the initial USCIS position that the provisional waiver process would only allow for what one might call a single bite at the apple, permitting neither appeal nor re-filing, so that an applicant who was denied a provisional waiver could only proceed with the process by departing from the United States and re-applying for a conventional waiver from abroad. Although an administrative appeal is still not available, an applicant whose application for a provisional waiver is denied will be permitted under the final rule to file a new application (with the appropriate filing fee).

Not all the news from the final rule is good news, however. Unfortunately, despite the urging of many commenters, the provisional waiver process will not be available to those who are currently in removal proceedings, unless their proceedings have been administratively closed and not recalendared. It will also not be available to those who are currently subject to a final removal or deportation or exclusion order—even though those subject to such orders have long been able to file a stand-alone I-212 application for advance permission to reapply for admission prior to departure from the United States, under 8 C.F.R. § 212.2(j). Unless those subject to a final order can get the case reopened and administratively closed (as for example could be possible on remand from a Court of Appeals), it appears they will need to follow the conventional waiver process from abroad, despite the resulting hardship to qualifying relatives.

The provisional waiver process also will not apply to those who are inadmissible for reasons other than the 3- or 10-year bar resulting from previous unlawful presence. Although the above-mentioned previous post on this blog, and our official comment submitted to USCISalong the same lines,

advocated that provisional waivers should be available in contexts such as alleged fraud for which a waiver is needed under INA section 212(i), USCIS chose not to accept that suggestion. However, USCIS has held out the possibility of perhaps extending the provisional waiver process to other contexts once it has had a chance to observe how the initial, narrower version of the provisional waiver process works in practice.

Another restriction worth noting is that the provisional waiver will not be available to those who have already been scheduled for an immigrant visa interview as of January 3, 2013. The key question is not when the interview was scheduled to take place, or whether the applicant attended the interview, but whether the Department of State's National Visa Center (NVC) had already acted to schedule a consular interview by January 3. If the NVC had scheduled a visa interview by January 3, the provisional waiver process will not be available. If the NVC had not acted to schedule an interview by January 3, then the subsequent scheduling of an interview will not remove one's eligibility for the provisional waiver, although in the interest of efficiency prospective waiver applicants with a case before the NVC are advised to notify the NVC of their intent to seek a provisional waiver before an interview is scheduled. The NVC has already begun sending emails to some prospective visa applicants advising them that they must inform the NVC of their intent to seek a provisional waiver, by sending an email to NVCI601A@state.gov, and that failure to do so would delay the visa application.

For additional background on the final provisional waiver rule, interested readers may wish to review posts about it on the "AILA Leadership Blog" of the American Immigration Lawyers' Associationand the "Lifted Lamp" blog of Benach Ragland LLP. The New York Times has also reported on the new provisional waiver rules. Despite all of its imperfections, the final provisional waiver rule is a very positive development, an important step along the road of reducing unnecessary hardship to the qualifying relatives of waiver applicants.