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EXPANSION OF THE PROVISIONAL WAIVER: GOOD NEWS, BUT COULD BE BETTER

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On July 29, 2016, USCIS published in the Federal Register the final version of a previously-proposed rule expanding the provisional waiver program. The new rule, Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50,244, was effective August 29, 2016, so the newly expanded program is now available.

The provisional waiver program, which first began in 2013 as discussed in a previous post by this author, pertains to certain applicants for an immigrant visa who will be inadmissible under INA §212(a)(9)(B) for three or ten years following their departure from the United States due to their previous unlawful presence in the United States of more than 180 days or at least one year—who face the so-called three-year bar or ten-year bar. These applicants, under the provisional waiver program, can use Form I-601A to apply for and (provisionally) receive a waiver of inadmissibility under INA §212(a)(9)(B)(v), based on a showing of extreme hardship to a qualifying relative, before departing the United States to apply for an immigrant visa. This is in contrast to the usual system of applying for a waiver on Form I-601, which in the immigrant-visa context is only possible after already leaving the United States and having one's immigrant visa interview.

The most notable change effected by the new provisional waiver rule is a significant expansion of the set of those eligible to use the provisional waiver process. Previously, the provisional waiver was only available to beneficiaries of a visa petition filed by an immediate relative, that is, a petition filed by a U.S. citizen spouse, son or daughter over age 21, or parent in the case of a beneficiary under 21. It was also only available if the qualifying relative for the §212(a)(9)(B)(v) waiver was a U.S. citizen, even though the statute allows a

§212(a)(9)(B)(v) waiver to be granted based on a showing of extreme hardship to a spouse or parent who is either a U.S. citizen or a Lawful Permanent Resident.

Under the new rule, on the other hand, the provisional waiver can be sought be anyone with a U.S. citizen or Lawful Permanent Resident spouse or parent to whom extreme hardship is sought to be shown, and this is so independent of the basis that qualifies the applicant to apply for an immigrant visa in the first place. For applicants who meet the other requirements for a provisional waiver, the new rule only requires that the applicant

> *Has a case pending with the Department of State, based on:*
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> *(A) An approved immigrant visa petition, for which the Department of State immigrant visa processing fee has been paid; or*
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> *(B) Selection by the Department of State to participate in the Diversity Visa Program under section 203(c) of the Act for the fiscal year for which the alien registered.*

8 C.F.R. §212.7(e)(3)(iv) (2016). It no longer matters whether the petition is an immediate-relative petition, a family-based preference petition, or an employment-based preference petition, and even winners of the diversity-visa lottery can make use of the provisional waiver program if they have a qualifying relative.

While the main text of the new rule arguably does not make clear whether this expansion includes derivative beneficiaries of preference petitions (who have a case based on accompanying or following-to-join a petition beneficiary rather than based on their own petition), several clues in the preamble to the rule strongly imply that it does. The preamble to the new rule describes the proposed rule as having "proposed to expand the class of individuals who may be eligible for provisional waivers beyond certain immediate relatives of U.S. citizens to all statutorily eligible individuals regardless of their immigrant visa classification." 81 Fed. Reg. at 50,245. The preamble also describes "inclusion of derivative spouses and children" as a topic on which DHS received no comments. *Id. at 50,248*. Finally, and most clearly, the preamble says of a redesign of the Form I-601A that "DHS agrees with the need to collect additional information, as suggested by the commenters, in light of this final

rule's extension of eligibility for the provisional waiver to spouses and children who accompany or follow to join principal immigrants." *Id. at 50,272*. Thus, it strongly appears that the rule's reference to having a "case pending with the Department of State, based on . . . An approved immigrant visa petition," 8 C.F.R. §212.7(e)(3)(iv)(A), is not restricted to instances in which the case pending with the Department of State is based on an approved immigrant visa petition for the applicant him- or herself. The pending case may, rather, be based on an approved immigrant visa petition for the applicant's spouse or parent, as well. (Children will relatively rarely need to make use of a provisional waiver, since they are exempt from accruing unlawful presence for §212(a)(9)(B) purposes until age 18 pursuant to INA §212(a)(9)(B)(iii)(I), but there will be some cases of unmarried derivative beneficiaries over the age of 18-and-a-half whose actual age or adjusted age under the Child Status Protection Act is under 21 and who therefore still qualify as children for purposes of accompanying or following-to-join their parent.)

Another expansion of the program relates to applicants who might conceivably face some other ground of inadmissibility. The "reason to believe" standard regarding other potential grounds of inadmissibility, which had caused much confusion in the past, has been eliminated. 81 Fed. Reg. at 50,253-50,254, 50,262. DHS will no longer deny a provisional waiver based on mere "reason to believe" that some other ground of inadmissibility besides INA §212(a)(9)(B) might apply. However, 8 C.F.R. §212.7(e)(14)(i) will continue to provide that if some other ground of inadmissibility is found by DOS to exist at the time of the visa interview, the provisional waiver will automatically be revoked, and the applicant will need to seek a regular waiver of the unlawful-presence inadmissibility along a waiver of the other ground of inadmissibility (if a waiver of the other ground of inadmissibility is even available). Thus, it will be crucial for applicants and their attorneys to ensure as best they can, before a provisional waiver applicant departs the United States for a visa interview, that no other grounds of inadmissibility will be found to exist.

Another expansion of the program relates to removal orders. The bar on applications for provisional waiver by individuals in active removal proceedings that have not been administratively closed remains, but the bar on applications for those facing final removal, deportation, or exclusion orders has been modified. 81 Fed Reg. at 50,262. Pursuant to new 8 C.F.R. §212.7(e)(4)(iv), such individuals with a final order can seek a provisional waiver if they have

previously obtained permission to reapply for admission through an approved Form I-212 under 8 C.F.R. §212.2(j). They cannot file the I-601A and I-212 concurrently, as DHS believes this would introduce procedural complications, related principally to the appealability of a denied I-212, that would undermine the efficiency gains sought from the provisional waiver. Rather, individuals subject to a final order can only proceed with the I-601A application for provisional waiver after the Form I-212 has already been approved. 81 Fed. Reg. at 50,256, 50,259, 50,262.

Individuals subject to a voluntary departure period, however, still cannot apply for a provisional waiver while that voluntary departure period is in effect. 81 Fed Reg. at 50,256-50,257. These individuals are considered by DHS as analogous to those still in removal proceedings, and then become ineligible at the conclusion of their voluntary departure period based on the alternative removal order which has taken effect. However, it appears that one who overstays a voluntary departure period (and thus activates the alternative removal order) could theoretically apply for advance permission to reapply for admission under 8 C.F.R. §212.2(j), and then seek a provisional waiver if advance permission to reapply were granted—although there would be a significant risk that either or both of these applications would be denied in the exercise of discretion. Strictly speaking, neither permission to reapply under INA §212(a)(9)(A)(iii) nor a waiver of inadmissibility under INA §212(a)(9)(B)(v) are covered by the ten-year bar on many discretionary benefits that results pursuant to INA §240B(d)(1)(B) when one fails to timely depart in compliance with a voluntary departure order, but it is unlikely that DHS would look favorably upon an overstay of voluntary departure followed soon thereafter by such applications.

The new rule also clarifies the circumstances under which reinstatement of a removal order will prevent application for a provisional waiver. Mere eligibility for reinstatement is not sufficient. Rather, a provisional waiver will be barred only if "CBP or ICE, after service of notice under 8 CFR 241.8, has reinstated a prior order of removal under section 241(a)(5) of the , either before the filing of the provisional unlawful presence waiver application or while the provisional unlawful presence waiver application is pending." 8 C.F.R. §212.7(e)(4)(v) (2016). Of course, the fact that the bar extends to reinstatement while a provisional waiver application is pending does make it quite risky for one subject to reinstatement to file such an application.

Another way in which the new rule expands the pool of those eligible for a provisional waiver is by eliminating the previous prohibition on grants of provisional waivers to anyone for whom DOS had acted before January 2013 to schedule a visa interview. 81 Fed. Reg. at 50,254. A pending immigrant visa case can qualify for a provisional waiver application regardless of when it commenced, so long as registration under the approved petition has not been terminated under INA 203(g).

DHS has not, however, expanded the provisional-waiver program in all of the ways that one might have hoped. One notable omission is the refusal to expand the program to encompass other grounds of inadmissibility for which a waiver can be sought on Form I-601, such as inadmissibility due to past fraud under INA §212(a)(6)(C)(i) that can be waived under INA §212(i), or inadmissibility due to past smuggling under INA §212(a)(6)(E) that can be waived under INA §212(d)(11) when only one's spouse, parent, son or daughter was smuggled. No matter how sympathetic the case, a visa applicant who smuggled his or her own child across the border, or came to the United States years ago on a false passport, will not be eligible for a provisional waiver. The provisional waiver remains available only to one who "Upon departure, would be inadmissible only under section 212(a)(9)(B)(i) of the Act at the time of the immigrant visa interview." 8 C.F.R. §212.7(e)(3)(iii) (2016).

The preamble to the final rule explains DHS's reasons for refusing this sort of expansion with the following cryptic language:

> *Expanding the provisional waiver process to other grounds of inadmissibility would introduce additional complexity and inefficiencies into the immigrant visa process, create potential backlogs, and likely delay and adversely affect the processing of immigrant visas by DOS. Furthermore, USCIS generally assesses waiver applications for inadmissibility due to fraud, misrepresentation, or criminal history through an in-person interview at a USCIS field office. Because DOS already conducts a thorough in-person interview as part of the immigrant visa process, DHS believes that this type of review would be unnecessarily duplicative of DOS's efforts.*

81 Fed Reg. at 50,253. At least in cases where inadmissibility is conceded and is straightforwardly subject to waiver – say, where a past entry had been with a

photo-substituted foreign passport, or where one's own child had been smuggled into the United States – it is not clear why waiving such inadmissibility would necessarily be more complex or duplicative than waiving inadmissibility due to past unlawful presence.

The genius of the provisional waiver, in its original form and its expanded form, is that it helps ensure family unity and avoid the perverse scenario in which U.S. citizens and LPRs must be separated from their relatives for an extended period of time and suffer the precise extreme hardship that an ultimately-granted waiver is designed to prevent. This scenario is just as perverse when the inadmissibility being waived results from having smuggled one's own spouse or child into the United States, or previously entered by fraud (but not in a provable way enabling adjustment of status as an immediate relative), as when it results from prior unlawful presence.

Unnecessary separation leading to extreme hardship could be reduced even further if consular officials of the Department of State, in connection with an approved provisional waiver, were willing to provide an indication of their views on any other potential grounds of inadmissibility before an applicant departed from the United States. This is not consistent with current Department of State practice, but there seems no statutory bar to it if the governing regulations were amended appropriately. Under the "pre-examination" procedure that was in place prior to the creation of adjustment of status, pursuant for example to 8 C.F.R. §142.9(b) (1943), consuls did provide written assurances regarding the sufficiency of an applicant's documents, though a personal interview was still ultimately required. The same sort of procedure could be put into place for provisional waivers: an applicant could submit a written record of conviction for a crime or written account of past actions thought to potentially constitute fraud or smuggling, and be advised in advance whether, if found to be credible, he or she would be denied a visa due to inadmissibility based on such a ground. Any legal argument regarding the applicant's potential inadmissibility on these bases could thus take place while the applicant was still in the United States, again avoiding the necessity of prolonged separation from qualifying relatives.

While the recent expansion of the provisional waiver is to be commended, including other waiveable grounds of inadmissibility, and allowing for definitive determinations regarding other grounds of inadmissibility before an applicant's departure from the United States, would have made the program still better.

Perhaps these issues can be revisited in a future round of rulemaking.