

# “Stateside” Waiver Available to Many More People Seeking Permanent Residence

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**T**he U.S. Department of Homeland Security (DHS) issued a rule in 2013 allowing certain people who have U.S. citizen family members, but who must leave the U.S. as part of the process of becoming eligible for lawful permanent residence, to complete a critical part of the application process before they leave the U.S.<sup>1</sup> U.S. Citizenship and Immigration Services (USCIS) issued additional rulings in 2016 allowing more people to be eligible for this process and providing clarification on the “extreme hardship” standard.<sup>2</sup> The new rules lower the risk that some people will be denied reentry into the U.S. and reduce the time they must spend abroad apart from their families.

## Background

People who enter the U.S. without being “inspected” and “admitted” by a U.S. immigration officer are generally not able to obtain permanent residence—green cards—while in the U.S. People who enter without permission or “documents” have not been inspected. Instead, they must leave the U.S. and complete the processing of their green card applications at a U.S. consulate abroad.

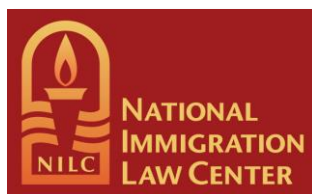
After a 1996 change in immigration law created what are known as the “unlawful presence bars,” leaving the U.S. so their green card applications could be processed at a consulate was no longer a viable option for most people who had entered the U.S. without inspection. This is because, under the unlawful presence bars, people who have been in the U.S. without permission for six months are barred from reentering the U.S. for three years once they leave. In addition, anyone who has been in the U.S. without permission for one year or more is barred from reentering the country for ten years, unless the person is granted a waiver.

<sup>1</sup> See *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103 and 212).

<sup>2</sup> See *Expansion of Provisional Unlawful Presence Waivers of Inadmissibility*, 81 Fed. Reg. 50243–277 (July 29, 2016) (effective Aug. 29, 2016), <https://www.federalregister.gov/documents/2016/07/29/2016-17934/expansion-of-provisional-unlawful-presence-waivers-of-inadmissibility>; *U.S. Citizenship & Immigration Services, Policy Manual*, 9 USCIS-PM B (effective Dec. 5, 2016), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html>; see also *Policy Alert on Determining Extreme Hardship* (U.S. Citizenship & Immigration Services, Oct. 21, 2016), <https://www.uscis.gov/policymanual/Updates/20161021-ExtremeHardship.pdf>. How “extreme hardship” is defined is discussed below.

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Waivers of the 3- or 10-year unlawful presence bars are available only to people who can show that certain members of their family would suffer “extreme hardship” should they be separated. Prior to 2013, a person could apply for this waiver only at the consulate abroad after the unlawful presence bar is triggered—that is, only after the person leaves the U.S. As a result of this process, thousands of people with strong family ties in the U.S. have been unable to move forward with the process of obtaining their permanent residence, because they don’t want to risk a decade-long separation from their loved ones should they leave the country and their waiver application is denied.

### What is a provisional “stateside” waiver?

The DHS rule announced in 2013 reduces the risk of family separation for certain people with U.S. citizen family members. The rule allows qualifying people to apply for a “provisional waiver” before departing the U.S. People whose provisional waiver applications are approved are then able to travel abroad for consular processing knowing that a waiver has been granted for the “unlawful presence bar,” reducing the risk that they would be denied reentry. Being granted the waiver also reduces the time that such people spend abroad apart from their families, since a time-consuming part of the green card process will already have been completed before they leave the U.S.

### Who may apply for the waiver?

Before August 29, 2016, to qualify for a provisional waiver, an applicant, *first*, had to be the beneficiary of an immigrant visa petition as an *immediate relative* of a U.S. citizen. An immediate relative is either (1) a spouse; (2) a parent, if the applicant is under age 21 and unmarried; or (3) a son or daughter, if the son or daughter is over age 21. *Second*, the applicant had to show that a U.S. citizen spouse or parent would experience extreme hardship if the applicant was not able to return to the U.S. for three or ten years. *Third*, the applicant was disqualified from receiving the waiver if they were previously scheduled for a visa interview.

Beginning August 29, 2016, applicants in *all* immigrant visa classifications may apply for a provisional waiver, including beneficiaries of other types of family-sponsored visa petitions, diversity visa applicants, and employment-based applicants adjusting status to become permanent residents. For example, the spouse of a lawful permanent resident applying for a family-sponsored visa can now apply for the waiver.

Second, as of August 29, 2016, USCIS permits consideration of the extreme hardship suffered not only to U.S. citizen qualifying relatives (spouses and parents), but also to lawful permanent resident qualifying family members.

Third, the August 29 guidance provides that an applicant is no longer disqualified if the applicant was previously scheduled for a visa interview.

After the immigrant visa petition is approved in the U.S., the applicant should then begin “consular processing.” The applicant can seek the provisional waiver by filing Form I-601A with USCIS.<sup>3</sup> To obtain approval of the waiver, the applicant must demonstrate that their U.S. citizen or lawful permanent resident spouse or parent would suffer extreme hardship if the applicant were denied reentry into the U.S. Note that while the family member who

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<sup>3</sup> Form I-601A can be accessed at <https://www.uscis.gov/i-601a>.

suffers this hardship can be the sponsor of the applicant's immediate relative petition, they don't have to be.<sup>4</sup>

### How is “extreme hardship” defined?

USCIS's new policy manual guidance on the extreme hardship standard, published in October 2016, explains what it consists of. Extreme hardship, as a threshold matter, is more severe than the normal hardship one would suffer from being deported and, as a result, either being separated from family or the family having to relocate to the country of deportation. The policy manual clarifies that it is possible for an applicant to show extreme hardship either if the applicant's spouse intends to relocate with them or if the spouse intends to remain in the U.S., thus causing separation.

The guidance also clarifies that extreme hardship can result from the cumulative effect of the harm to multiple qualifying family members, even if the hardship to each family member alone would not constitute extreme hardship. And the guidance lays out “particularly significant factors” that weigh heavily in support of a finding of extreme hardship. These factors include if the qualifying family member has a disability, is an asylee or refugee, is in the military or the Select Reserve of the Ready Reserves, or if their qualifying relative would be forced to become the only or primary caregiver of their child(ren). Another particularly significant factor is if the U.S. State Department has issued a travel warning for the country of origin.

The guidance also gives examples of what would constitute extreme hardship, through a series of eight scenarios.<sup>5</sup> For example, one scenario describes a woman who is the primary care-provider for her two U.S.-citizen children, while her U.S.-citizen husband is the primary income-provider. If the woman were deported, her husband would stay in the U.S. with their children and would find it extremely difficult to work full time while providing full-time childcare, especially because he would not be able to afford to pay for childcare on his own and the woman wouldn't be able to send any money back to the U.S. from her home country. In such a situation, USCIS would likely find extreme hardship.<sup>6</sup>

In another scenario, a same-sex married couple would be separated if the waiver applicant were denied. The home country does not recognize same-sex marriage, and the deported applicant may be ostracized, discriminated against, and possibly persecuted due to her sexual orientation. This would cause her spouse in the U.S. great stress and fear. In addition, the spouse in the U.S. runs her own business, for which the deported spouse was a key employee. Under this scenario, USCIS would be likely to find extreme hardship.<sup>7</sup>

After the I-601A is approved, the applicant completes and files a series of forms and is scheduled for a consular interview abroad.

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<sup>4</sup> In fact, for individuals who qualify as *immediate relatives* because they have an adult son or daughter who is a U.S. citizen, the family member who suffers the hardship may not be the petitioning family member because hardship is considered only if it is suffered by a U.S. citizen or lawful permanent resident spouse or parent.

<sup>5</sup> For the complete descriptions and analyses of eight scenarios, see *Policy Manual* (U.S. Citizenship & Immigration Services, 9 USCIS-PM B), “F: Hypothetical Case Examples” (effective Dec. 5, 2016), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB-Chapter5.html#S-F>.

<sup>6</sup> *Id.*, scenario 8.

<sup>7</sup> *Id.*, scenario 6.

## Who is *not* eligible for this waiver?

A person is not eligible for the waiver if the person:

- was convicted of a crime, or engaged in conduct, that make the person *inadmissible* to the U.S.;
- committed fraud, misrepresentation, or made a false claim of U.S. citizenship;
- is under age 17 at the time of application;
- is in removal proceedings (unless the proceedings are administratively closed); or
- unlawfully reentered the U.S. after being removed from the U.S.

**NOTE:** People with final orders of removal, deportation, or exclusion may apply for a provisional waiver. First, the person must apply for a “212 waiver” (Application for Permission to Reapply for Admission into the United States After Deportation or Removal).<sup>8</sup> Once their “212 waiver” application is approved, then the person can apply for a provisional “stateside” waiver.

## What happens if a waiver application is denied?

People whose applications for a provisional “stateside” waiver are denied do not need to depart the U.S. to complete consular processing. DHS has said it does not envision initiating removal proceedings against people whose applications are denied, unless they have a criminal history, committed fraud, or pose a public safety threat. Some applicants have chosen to depart the U.S. for consular processing anyway, even though they face the 3- or 10-year bar, and others have opted to postpone doing so because of the prospect of prolonged separation from their family.

## Does an applicant need an attorney to help apply for the waiver?

Applying for a green card through this process will require the person to submit forms and paperwork at three different stages: (1) filing the immigration petition; (2) filing the waiver application; and (3) consular processing abroad, which includes an interview. While each case is different, the waiver application will be the most complicated part of the process for most applicants. Proving that a family member will suffer extreme hardship is a challenging task that involves a thorough review of that family’s financial, medical, and mental-health states and histories. An attorney can help provide suggestions for how to prove extreme hardship and assess whether there are any other issues that might prevent an applicant from being able to return to the U.S.

*If you need legal assistance, we urge you to consult only either a qualified immigration attorney or a Board of Immigration Appeals–accredited representative.* An online directory of nonprofit organizations that provide help in immigration matters is available at <https://www.immigrationlawhelp.org/>.

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<sup>8</sup> I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, <https://www.uscis.gov/i-212>.