

The January 6, 2012, DHS Announcement about Planned Changes to Processing for Unlawful Presence Waivers - Frequently Asked Questions

What was announced on January 6?

On January 6 DHS announced, in a notice to be published in the Federal Register on January 9 that it will be issuing new regulations for how unlawful presence waivers will be processed for certain immediate relatives who are filing immigrant visa applications abroad. Specifically, the new procedure will allow these individuals to file for a provisional unlawful presence waiver and await adjudication while in the U.S. If approved, they will still have to depart the U.S. to undergo visa processing and an interview at a U.S. consulate abroad. To receive a provisional waiver, they will still need to show that a lengthy bar from the U.S. would cause their U.S. citizen spouse or parent “extreme hardship.”

What is the current process and why is the change necessary?

Currently, many relatives of U.S. citizens and lawful permanent residents face unnecessary and dangerous bureaucratic hurdles when they apply for lawful permanent residence (“green card”). In order to be granted permanent residence, these applicants are required to travel to a U.S. consulate in their home country to be interviewed and wait for the visa to be processed. But departure from the U.S. triggers a 3- or 10-year bar to re-entry for many applicants—specifically those who have been unlawfully present in the U.S. for more than 180 days.

Individuals subject to this re-entry bar may apply for a waiver (using DHS Form I-601; see 8 U.S.C. 1182(a)(9)(B)(v)) so that they do not have to face years of separation from their family. To qualify, they must demonstrate that their U.S. citizen or permanent resident spouse or parent would experience “extreme hardship” if the waiver is not granted. But under the current process, the individual can only apply for the waiver in the home country, after having had an initial interview at the consulate. The decision on the waiver, which is made by USCIS even though the family member is abroad, often takes weeks, months or even years to be completed. Meanwhile, families are separated, and the spouses and children of U.S. citizens and lawful permanent residents are forced to endure potentially dangerous situations in the home country until the waiver is granted and they can return to the U.S. as lawful permanent residents.

Immigration law provides that U.S. citizens and lawful permanent residents can apply for “green cards” for their foreign-born spouses and children. But the lengthy delays and risks in the current waiver procedure discourage many family members from completing the process of legal immigration. Family members have been assaulted or killed while waiting for waivers to be reviewed.

What will the new process be?

The new procedure will allow certain immediate relatives—spouses, children and parents of adult of U.S. citizens—to apply for waivers of the unlawful presence bars while remaining in the U.S. If the individual is found eligible, USCIS will grant a provisional waiver. He or she will still have to depart the U.S. and visit a U.S. consulate abroad to apply for an immigrant visa. During the immigrant visa interview, the consular officer will make the finding of inadmissibility based on unlawful presence and apply the provisional waiver. If other grounds of inadmissibility are found, the individual would need to submit another waiver application, if eligible, while abroad. In many cases, the provisional waiver will reduce the wait period abroad and the separation from the applicant’s family by several months or years.

Individuals will still need to meet the extreme hardship standard established in existing law to obtain a waiver. The January 6 notice states that USCIS does not intend to modify the standard.

Who will be able to use the new process?

As announced in the January 6 notice, the new regulation will change the application process only for immediate relatives whose U.S. citizen spouse or parent would suffer extreme hardship if the bar is not waived.

Who is left out of the new process?

According to the January 6 notice, the new process will not apply to family members of lawful permanent resident petitioners. It will also not include immediate relatives if their qualifying relative for the hardship waiver is not a U.S. citizen spouse or parent. These individuals will still need to apply under the existing procedure (departing the country first and applying for the waiver while abroad). There is no valid reason not to apply the same procedure to these individuals whose spouses and children face the same bureaucratic delays, obstacles and dangers when required to wait abroad for their waiver adjudications.

The new procedure will apply only to individuals who are subject to the 3- and 10-year bars for unlawful presence. Individuals who are subject to other grounds of inadmissibility are not affected under the new process and will still have to depart the U.S. before applying for any waiver.

When will the new regulations and process be implemented?

The new provisional waiver procedure has not yet taken effect. The notice issued on January 6 announces the government’s intent to issue a proposed regulation at a future date. Next, DHS will issue a Notice of Proposed Rulemaking (NPRM) that will include a proposed regulation governing the waiver process and will invite public comment. The notice states that the new waiver process will not be implemented until a final rule is issued and the change becomes effective.

What should current and prospective waiver applicants do at this time?

The January 6 announcement has not changed anything in the current waiver procedure. The notice discourages the filing of applications for provisional waivers and states that such requests will be rejected. The new procedure will not take effect until a final regulation is issued.

Once the new procedure takes effect, individuals with pending applications for unlawful presence waivers will not qualify under the new procedure.

What is the cost for applying for a waiver under the new procedure?

The January 6 announcement does not mention a change in the application fee for filing a waiver application (Form I-601). The current fee is \$585.

How will the new procedure improve government efficiency?

Under the current procedure, waiver applications are filed by individuals who have departed the U.S. and are applying at U.S. consulates abroad. However, those waiver applications are not adjudicated by the U.S. consulate. Instead, they are forwarded to USCIS. Wait times for processing waivers can be months or years. Processing these applications in the U.S. will have government resources at the consulates and reduce the costs of shifting cases back and forth between government agencies.