

## **PROVISIONAL UNLAWFUL PRESENCE WAIVER, PART II**

**By Michael Phulwani, Esq. and David Nachman, Esq.**

This is the second and concluding part of the series of articles pertaining to the provisional unlawful presence waiver.

### **Will I have to be fingerprinted or appear for an interview as part of the provisional unlawful presence waiver process?**

All provisional unlawful presence waiver applicants will be required to appear at a USCIS Application Support Center (ASC) for biometrics collection. Generally, USCIS will not require provisional unlawful presence waiver applicants to appear for an interview but may schedule an interview for an applicant if the facts in a particular case warrant further inquiry and review.

### **If I have a pending or approved request for a provisional unlawful presence waiver can I receive interim benefits?**

The filing or approval of a provisional unlawful presence waiver will not affect an individual's current immigration status in the United States. A pending or approved provisional waiver also will **NOT**:

1. Provide interim benefits such as employment authorization or advance parole;
2. Provide lawful status;
3. Stop the accrual of unlawful presence;
4. Provide protection from removal;
5. Remove the requirement to depart the United States to seek an immigrant visa; or
6. Guarantee immigrant visa issuance or admission to the United States.

### **What should I do once my provisional unlawful presence waiver is approved?**

After your provisional unlawful presence waiver is approved, you will need to depart the United States and attend your immigrant visa interview at the designated U.S. Embassy or consulate abroad. If you fail to depart and attend your immigrant visa interview, the provisional unlawful presence waiver will not take effect and the approval may no longer be valid.

### **If USCIS denies my request for a provisional unlawful presence waiver, can I file an appeal or a motion to reopen or reconsider?**

No. If USCIS denies your request for a provisional unlawful presence waiver, you cannot file an appeal or a motion to reopen or reconsider the denial. USCIS reserves the right to reopen and reconsider, on its own motion, an approval or a denial of a provisional unlawful presence waiver at any time.

**What can I do if USCIS denies my request for a provisional unlawful presence waiver or if I withdraw my provisional unlawful presence waiver application?**

If USCIS denies your request for a provisional unlawful presence waiver, or if you withdraw your provisional unlawful presence waiver application before USCIS makes a decision, you may file a new Form I-601A, in accordance with the form instructions, with the required fees and any additional documentation that you believe establishes your eligibility for the provisional unlawful presence waiver. You can only file a new provisional unlawful presence waiver application if your immigrant visa case is still pending with DOS. You should notify DOS that you intend to file a new I-601A. See the DOS website – [www.state.gov](http://www.state.gov) – for more information on how to notify DOS and to find out if your immigrant visa case is still pending with DOS.

Alternatively, you can file a **Form I-601**, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after you attend your immigrant visa interview and after the DOS consular officer determines that you are inadmissible to the United States.

**If USCIS denies my request for a provisional unlawful presence waiver will I be placed in removal proceedings?**

USCIS does not envision initiating removal proceedings or referring provisional unlawful presence waiver applicants to ICE when USCIS approves or denies their waiver requests, or the applicant withdraws his or her application for a provisional unlawful presence waiver.

Pursuant to its existing policy governing issuance of Notices to Appear (NTAs) and referrals to ICE, an individual whose request for a provisional unlawful presence waiver is approved or denied or who withdraws the Form I-601A prior to final adjudication will typically be referred to ICE only if he or she is considered a DHS enforcement priority – that is, if the individual has a criminal history, has committed fraud, or otherwise poses a threat to national security or public safety.

USCIS will follow the DHS NTA issuance policy in effect at the time of the adjudication to determine if removal proceedings should be initiated against a provisional unlawful presence waiver applicant. Furthermore, if USCIS discovers acts, omissions, or post-approval activity that would meet the criteria for NTA issuance or determines that the provisional unlawful presence waiver was granted in error, USCIS may issue an NTA, consistent with DHS's NTA issuance policy, as well as reopen the provisional unlawful presence waiver approval and deny the waiver request.

We wish to remind the readers that the provisional unlawful presence waiver is presently available only to the Immediate Relatives (Spouse, Parent, or Unmarried Child Under 21) of a U.S. citizen. The waiver is only for the unlawful presence in the

U.S. and not any other type of ineligibility, such as fraud, misrepresentation, smuggling, etc.

We hope that, going forward, the waiver may be available to individuals, other than immediate relatives. It is also possible that in the future, the provisional waiver program may be extended to waivers for grounds of ineligibility, other than unlawful presence.

It should be noted that if an individual who obtains an approval of provisional waiver of unlawful presence, travels abroad, and appears for the Immigrant interview, and the Consular official makes the determination that he/she is ineligible on some other ground of ineligibility, such as fraud, misrepresentation, crime, etc., the Consul will deny the immigrant visa and require the applicant to obtain a waiver for the new ground of ineligibility. It would then require filing of a new I-601 Application for Waiver of Grounds of Inadmissibility to be filed with the USCIS in the U.S. This may require the applicant to remain abroad for several months until the new waiver application is approved.

It is therefore, strongly recommended that the applicant should carefully review all the facts about his background and consult an experienced Immigration lawyer to seek advice with regard to travelling abroad to apply for immigrant visas, based upon provisional waiver.

We wish to advise our readers that Attorneys Michael Phulwani and David Nachman will be visiting India and available for meetings in January/February 2013.

For more information, please feel free to contact the Immigration and Nationality Lawyers at the NPZ Law Group at 201-670-0006 or by e-mailing us at [info@visaserve.com](mailto:info@visaserve.com).