



I-601A PROVISIONAL WAIVER: PROCESS, UPDATES, AND PITFALLS TO AVOID

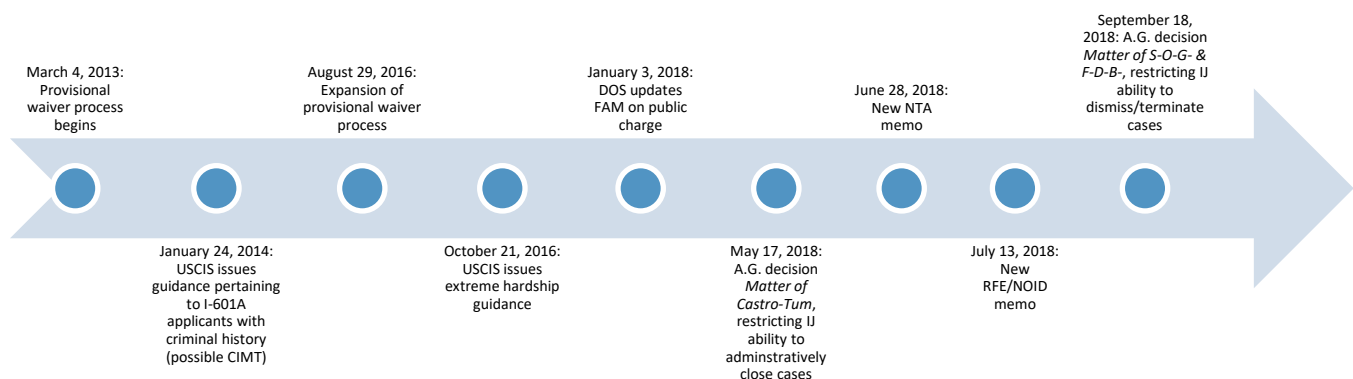
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This practice advisory is the second resource in a two-part series on unlawful presence and unlawful presence waivers. The first advisory explains unlawful presence inadmissibility and provides an overview of the main differences between the two unlawful presence waivers, the traditional Form I-601 (which can also waive other grounds, besides unlawful presence) and the provisional waiver, Form I-601A.¹ The I-601A provisional waiver is used exclusively to waive the three- or ten-year unlawful presence bars for individuals who will be leaving the United States to consular process and meet other specific requirements. In this second advisory, we describe the requirements and process for the provisional waiver, as well as updates and pitfalls to avoid in light of recent changes that have made pursuing the provisional waiver process more challenging.

The following special considerations for pursuing the provisional waiver process are discussed in this advisory:

- Foreign Affairs Manual update regarding public charge and increased findings of public charge inadmissibility at consular interviews;
- *Matter of Castro-Tum* and *Matter of S-O-G- & F-D-B-* creating challenges to administratively closing or terminating removal proceedings to pursue the provisional waiver process;
- Conditional I-212 option in light of updated enforcement priorities; and
- New RFE/NOID and NTA policy memoranda.

I. Introduction: A Look at the Provisional Waiver Process Six Years In, and in Light of Recent Challenges and Obstacles



The I-601A Provisional Unlawful Presence Waiver, often referred to simply as the “provisional waiver,” is a process by which individuals who are currently in the United States and will be applying for an immigrant visa at a U.S. consulate abroad, and whose only inadmissibility issue is unlawful presence under INA § 212(a)(9)(B), may apply for the waiver of inadmissibility before they leave the United States. Generally, the provisional waiver process helps people who have been living in the United States with their family without status, who are ineligible to adjust, and raise no other inadmissibility issues. For more information on 212(a)(9)(B) unlawful presence and when to use the I-601A provisional waiver rather than the traditional I-601 to waive unlawful presence, see our companion advisory, *Understanding Unlawful Presence Under INA § 212(a)(9)(B) and Unlawful Presence Waivers, I-601 and I-601A*.²

Before the provisional waiver process began in 2013, such individuals had to leave the United States to attend their consular interviews and could only seek a waiver after the consular officer made a formal finding of unlawful presence inadmissibility. They would have to stay outside the United States for many months, far from family, work, and community ties, while waiting for adjudication of their waiver for unlawful presence. If the waiver were ultimately denied, for example because USCIS determined that the applicant had failed to establish extreme hardship, the immigrant visa applicant would be stuck outside the country with no immediate way to return legally. Lengthy separation and uncertainty in the process meant that, for many families, this pathway to legal status was too risky to undertake.

Now, however, the provisional waiver process allows certain immigrant visa applicants to request the waiver before they leave. This means they can wait in the United States the many months it takes for a decision on the waiver application, while continuing their daily lives. And if the waiver is denied (and they do not believe they can overcome the denial by re-filing), they may choose to postpone consular processing, knowing they cannot presently overcome the unlawful presence inadmissibility ground if they depart.

Over the last six years that the provisional waiver process has existed, it has undergone various changes and developments. In 2014, U.S. Citizenship and Immigration Services (USCIS) reversed course on its initial approach of denying provisional waiver applications if it had reason to believe the applicant was inadmissible under another ground of inadmissibility besides 212(a)(9)(B) unlawful presence. Before this change, USCIS denied the provisional waiver if the applicant had a “hit” in their background check, indicating a possible criminal record. Adjudicating officers did not take into consideration whether, for example, the petty offense exception might apply. Now, the burden is on the legal representative to properly screen a provisional waiver applicant at time of filing the I-601A and again before the applicant departs the United States for their consular interview, as a provisional waiver grant is no indication whether USCIS believes the applicant has any other inadmissibility issues apart from INA § 212(a)(9)(B) unlawful presence. (If other inadmissibility issues are discovered later, an approved I-601A will be revoked. Additionally, if a new inadmissibility ground is identified at the consulate for which no waiver is available, the person has no legal way to return).

In August 2016, the provisional waiver process was expanded to more applicants, allowing any beneficiary who can show extreme hardship to a U.S. citizen or *permanent resident* spouse or parent to use the provisional waiver process (previously, only those who were the beneficiary of an immediate relative petition and who could show hardship to a U.S. citizen spouse or parent qualified). In addition, as part of the 2016 “expansion,” applicants with prior removal orders may seek a provisional waiver as long as they first apply for and are granted a conditional I-212, Consent to Reapply for Admission.³ In October 2016, USCIS issued guidance on extreme hardship for waivers, including a list of “particularly significant factors” that weigh heavily in support of a finding of extreme hardship.⁴ The guidance also clarified various issues related to extreme hardship.⁵

Recently, some significant changes in policy and practice have also affected provisional waivers, albeit indirectly. These include revisions to the State Department Foreign Affairs Manual in January 2018 pertaining to public charge inadmissibility, which have corresponded with an increase in provisional waiver revocations after an unexpected finding of public charge inadmissibility at the consular interview; former Attorney General Sessions’ May 2018 decision in *Matter of Castro-Tum*, greatly restricting an immigration judge’s ability to administratively close cases and thereby making it far

more difficult for individuals in removal proceedings to apply for a provisional waiver, and September 2018 decision in *Matter of S-O-G- & F-D-B-*, extending the holding in *Castro-Tum* to dismissals and termination of removal cases; and new USCIS policy memoranda in June and July 2018 governing issuance of Notices to Appear, and issuance of Requests for Evidence (RFEs) & Notices of Intent to Deny (NOIDs), respectively.

This advisory covers the requirements and process for the provisional waiver application, as well as updates and pitfalls to avoid when pursuing provisional waivers in light of these recent developments.

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II. Overview of Provisional Waiver Requirements

If the intending immigrant will need a waiver for unlawful presence and meets the general statutory requirements for a waiver,⁶ then they may be able to use the I-601A provisional waiver process. The I-601A process, however, also has its own specific requirements, in addition to the general statutory requirements, therefore you need to consider both criteria in evaluating whether your client qualifies for a provisional waiver. The statutory requirements for an unlawful presence waiver can be found at INA § 212(a)(9)(B)(v), and the regulatory requirements for the provisional waiver process are listed at 8 CFR § 212.7(e)(3) & (4).

To apply for an unlawful presence waiver, the applicant must (general unlawful presence waiver requirements):⁷

- Be the spouse, son, or daughter of a U.S. citizen (USC) or lawful permanent resident (LPR);
- Be able to establish extreme hardship to the USC or LPR spouse or parent; and
- Warrant a favorable exercise of discretion.

In addition to meeting the above statutory requirements for an unlawful presence waiver, to apply for a provisional unlawful presence waiver the applicant must further (additional requirements, specific to the provisional waiver process):


- Be at least 17 years old;
- Be physically present in the United States at the time of submitting the I-601A application;
- Intend to depart the United States to attend an immigrant visa interview at a U.S. consulate abroad;
- Be the beneficiary of an approved visa petition;
- Have paid the immigrant visa processing fee (sometimes referred to as the IV fee bill);
- Comply with the biometrics request (following submission of the I-601A application);
- Not be inadmissible under any other ground of inadmissibility besides § 212(a)(9)(B);*
- Have any removal proceedings administratively closed;* and
- Have been granted an I-212 consent to reapply if prior removal, deportation, or exclusion order.*

In Part III we will discuss some of the present challenges with meeting the last three requirements. Assuming the applicant meets all the requirements, Part IV covers the procedure for preparing and filing a provisional waiver application.

III. Special Considerations for Screening Provisional Waiver Applicants in Light of Recent Developments

Changes affecting USCIS, Department of State, and the Executive Office for Immigration Review (EOIR, the immigration courts) have made pursuing the provisional waiver process more challenging, posing new obstacles and pitfalls for applicants who want to apply for the provisional waiver. Below, we discuss screening questions to assist in assessing eligibility for the provisional waiver process, as well as special considerations in light of recent policy and case law changes.

A. Is the Applicant Inadmissible under Any Other Grounds of Inadmissibility Apart from § 212(a)(9)(B)?

 **Special considerations in light of FAM update regarding public charge and increased findings of § 212(a)(4) public charge inadmissibility at consular interviews**


The provisional waiver process is reserved for those whose only ground of inadmissibility is unlawful presence under § 212(a)(9)(B), for the “three- or ten-year bars.”⁸ However, approval of an I-601A is no guarantee that the applicant does not have any other inadmissibility issues aside from unlawful presence. USCIS no longer denies provisional waiver applications for reason to believe the applicant may be inadmissible under another ground, thus it is critical to adequately screen the applicant. Additional grounds of inadmissibility may be uncovered during consular processing, at which point the provisional waiver will be revoked,⁹ causing the applicant to lose the benefit of being “pre-approved” for an unlawful presence waiver prior to their departure. Further, depending on the other ground(s) of inadmissibility that arise and whether a waiver is available, the applicant could be stuck outside the United States while awaiting adjudication of a new waiver. Even if a waiver or other way to cure the additional ground of inadmissibility exists, they nonetheless must also re-apply for a waiver for unlawful presence inadmissibility, now that the provisional waiver has been revoked. If the other ground is not waivable, they will be stranded outside the country, unable to immigrate through a family-based visa application altogether.

Example: Aracely applied for and was granted a provisional waiver. In June 2018, she departed for her immigrant visa interview at the U.S. consulate in Ciudad Juarez, Mexico. She was expecting to be home in just a few weeks, as she’d heard from other friends and relatives who had also gone through consular processing with a provisional waiver that they only had to be outside the U.S. a couple weeks. At her consular interview, the officer determined that she was also inadmissible under § 212(a)(4), as someone likely to become a public charge. As a result, her I-601A was revoked. To overcome the public charge inadmissibility, she had to secure a joint sponsor. In addition, she had to submit a new waiver for unlawful presence, using Form I-601. Her attorney is optimistic her waiver will be approved soon (current processing times are a year or longer), although by this time she has been outside the U.S. far longer than she expected, which has been very difficult for her spouse and children.

Example: Laura appeared for her consular interview after approval of her provisional waiver. The consular officer found Laura inadmissible for alien smuggling under § 212(a)(6)(E), based on the officer’s determination that Laura had smuggled her niece into the U.S. There is no waiver for smuggling a family member other than a spouse, parent, son, or daughter.¹⁰ Devastatingly, Laura is now unable to legally return to the U.S. unless she has another form of relief apart from her family petition, such as a U visa or claim based on fear of remaining in her home country.

WARNING: When considering the I-601A process, carefully screen for other grounds of inadmissibility and beware the consulate. As the examples above illustrate, failing to identify or anticipate another ground of inadmissibility can have severe consequences, including resulting in the applicant being permanently exiled from their home in the United States if they are found inadmissible under another ground of inadmissibility for which no waiver is available. See ILRC, *Preparing Clients for Immigrant Visa Interviews at U.S. Consulates*,¹¹ for tips on screening for other inadmissibility issues that might come up in consular processing cases, at both the immigrant visa interview and the associated medical exam.

Note that if apart from § 212(a)(9)(B) inadmissibility your client's only other ground of inadmissibility is § 212(a)(9)(A) for seeking admission within the applicable time bar after a removal order, they may be able to seek a conditional I-212 and then file for the I-601A. See **Section C**, below.

 **Increase in public charge inadmissibility findings at immigrant visa consular interviews (and corresponding revocation of provisional waivers); importance of thinking about how evidence of hardship in support of the provisional waiver could later negatively affect public charge inadmissibility at the consulate**

Of special concern when screening for other inadmissibility with a prospective provisional waiver applicant is the relatively recent increase in public charge issues at the consulate. For a quick primer on public charge inadmissibility under INA § 212(a)(4) see ILRC, *Overview of Public Charge*.¹² Most practitioners are unaccustomed to worrying about public charge inadmissibility beyond ensuring the applicant has a qualifying affidavit of support. But in January 2018, the State Department revised the Foreign Affairs Manual (FAM) on public charge inadmissibility with little announcement or fanfare. The FAM changes altered the ways that consular officers look at public charge inadmissibility, and these changes have corresponded with an increase in public charge findings at consular interviews. In addition to routinely screening for other inadmissibility issues stemming from immigration violations or a criminal record, among other red flags, practitioners must also be screening for possible public charge inadmissibility issues under the revised FAM guidelines.

The FAM changes instruct consular officers to consider a broader range of factors in determining whether an applicant is likely to become a public charge. The revised guidance gives less weight to a sufficient affidavit of support and expands the public charge inquiry to include consideration of receipt of public benefits by family members and sponsors, not just the applicant. Prior to the new FAM guidance, a qualifying affidavit of support was generally sufficient to establish that the immigrant visa applicant was not likely to become a public charge; now it is simply one "positive" factor in the totality of the circumstances.¹³ Additionally, the revised FAM directs consular officers to look at receipt of public benefits by the applicant, sponsor, and their family members as part of the totality of circumstances analysis.¹⁴ This includes receiving non-cash benefits which do not make a person a public charge. (The revised FAM guidance reasons that use of these benefits, which are outside the current public charge definition, still shed light on a sponsor's ability to support the immigrant.) Lastly, the FAM revisions state that consular officials may evaluate the likelihood a joint sponsor will voluntarily meet their obligations under the affidavit of support.¹⁵ Under this new guidance, consular officials seem more likely to doubt a joint sponsor will follow through on their promises under the affidavit of support if the joint sponsor is unrelated to the immigrant visa applicant. For more information on these changes and how to prepare clients for possible affidavit of support and public charge issues at immigrant visa consular interviews, see ILRC, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*.¹⁶


Although public charge inadmissibility may be overcome through submission of additional documentation proving the applicant is not in danger of becoming a public charge, consular officials have been revoking provisional waivers where they perceive a possible public charge issue, even if the immigrant visa applicant later overcomes the public charge issue with additional financial documents or a new affidavit of support. The State Department bases this revocation of the provisional waiver on the regulations at 8 CFR § 212.7(e)(14)(i), which state that a provisional waiver will be automatically revoked if the consular official denies the visa application for a finding that the applicant is inadmissible under another ground of inadmissibility besides § 212(a)(9)(B)(I) or (II) (see **Part IV** for more on revocation of provisional waivers). This

is problematic in instances where the public charge issue is ultimately overcome because revocation of the provisional waiver still deprives applicants of the benefits of having already sought and been granted a waiver of unlawful presence. After a visa denial based on public charge, they need to seek a waiver of unlawful presence all over again, this time while remaining outside the United States while the new unlawful presence waiver is adjudicated. One way for consular officials to mitigate the harmful effects of perceived public charge issues in provisional waiver cases would be to refuse the visa with a request for additional documents, rather than a formal finding of 212(a)(4) inadmissibility,¹⁷ but to date the State Department seems to be continuing to issue 212(a)(4) visa denials where a potential public charge issue is identified, meaning that the applicant must overcome the public charge finding and also re-request the unlawful presence waiver, now using Form I-601.

To the extent that the State Department will not change their practice of refusing immigrant visas based on a formal public charge finding, leading to provisional waiver revocation in all cases where this issue comes up, applicants must be prepared for enhanced public charge scrutiny.¹⁸ They must also be proactive in providing evidence to establish in the totality of the circumstances that they are not likely to become a public charge, beyond simply a qualifying affidavit of support.¹⁹

Provisional waiver applicants must also consider as early as preparation of the I-601A application how the evidence they submit may hurt them later on at the consular interview. Many provisional waiver applications address economic hardship as one of the extreme hardship factors in support of their request, and such submissions may include evidence of the applicant's or a family member's receipt of public benefits. However, the same evidence that may lead to their waiver being granted could be used against the applicant in a public charge determination when they attend their consular interview. Consequently, provisional waiver applicants must be strategic with the hardship documents they submit as part of the waiver package. Advocates should also try to frame hardships in a way that avoids public charge concerns. For example, the hardship application could focus on better access to care or quality of care in the United States, rather than dependency on a state-funded program in the United States for care. Another example would be to emphasize extensive work history in the United States compared to diminished wages or lack of job opportunities for similar work in the country of origin. If the applicant has already submitted the provisional waiver application with evidence that might suggest the sponsor or other members of the applicant's family rely on governmental assistance, they should collect additional evidence for the consular interview to demonstrate that the sponsor or family members are indeed self-reliant (such as having private medical insurance for a health condition documented in the waiver application) or that there are new joint sponsors who are able to offer support. Additionally, if the applicant has new, positive financial information, such as proof of a job offer or job change with a higher salary, or new health insurance through an employer, this information should be prepared for submission at the consular interview.

B. Is the Applicant Currently in Removal Proceedings?

 **Special considerations in light of *Matter of Castro-Tum* and *Matter of S-O-G- & F-D-B*-creating challenges to administratively closing or terminating removal proceedings to pursue provisional waiver**

In order to apply for the provisional waiver, any removal proceedings must be administratively closed.²⁰ Only USCIS has jurisdiction to adjudicate the I-601A waiver.²¹ If the applicant is not in removal proceedings, or their proceedings have been administratively closed and have not been re-calendared, they are free to apply for the provisional waiver. Once the provisional waiver is approved, an applicant with administratively closed proceedings may want to re-calendar and terminate or seek voluntary departure prior to departing for their consular interview.

If the applicant is currently in removal proceedings, however, two recent decisions issued by former Attorney General Sessions have made it far more challenging to pursue the provisional waiver process. In May 2018 the Attorney General issued a decision in *Matter of Castro-Tum*,²² overruling *Matter of Avetisyan*²³ and curtailing an immigration judge's ability

to administratively close cases. In *Castro-Tum* the Attorney General held that there is “no general authority” for immigration judges and the BIA to administratively close cases.²⁴ Therefore, immigration judges and the BIA are limited to administrative closure in specific categories of cases identified in the regulations, such as individuals who want to pursue T nonimmigrant status or Nicaraguan, Cuban, or Haitian nationals pursuing adjustment of status.²⁵ Granting administrative closure to permit an I-601A application falls outside this explicit authority.

Just four months later, in September 2018, the Attorney General issued *Matter of S-O-G- & F-D-B-*, which held that immigration judges “have no inherent authority to terminate or dismiss removal proceedings” and are instead restricted to “certain defined circumstances” identified in the regulations, or where DHS does not sustain the removability charges.²⁶ One of the respondents, F-D-B-, was a provisional waiver applicant who had sought re-calendar and termination to attend her immigrant visa interview. The immigration judge terminated her proceedings, and the BIA affirmed the judge’s order on appeal, but the Attorney General concluded that the immigration judge lacked the authority to terminate a case in this context, where no specific regulatory authority applied.²⁷

Despite these new obstacles, counsel should still preserve arguments for appeal by filing motions for administrative closure and termination. Noncitizens who are currently in proceedings and want to file an I-601A may continue to try to request administrative closure, arguing that the implementing regulations for the I-601A process vest the court with authority to administratively close the case. However, advocates should expect immigration judges will find they do not have the authority to administratively close and thus should be prepared to appeal. Alternatively, those in proceedings could move to terminate. A joint motion to terminate puts the client in the strongest position. Advocates could request that Office of Chief Counsel (OCC) join in a motion to terminate. If OCC agrees, counsel can argue that the immigration judge now has authority to dismiss the case. Pursuant to a footnote in *Matter of S-O-G- & F-D-B-*, the Attorney General left open the possibility that if DHS were the one to file a motion to dismiss under 8 CFR § 1239.2(c), that would be permissible.²⁸ Even in cases where OCC does not agree to termination, counsel should still file motions requesting that the judge *sua sponte* terminate the case. Most judges will follow *Matter of S-O-G- & F-D-B-*’s ruling, and thus this issue will likely be fought on appeal. Despite these potential avenues for argument and appeal, it will be an uphill battle for a person in removal proceedings to apply for a provisional waiver now.

Individuals who were fortunate enough to have had their cases administratively closed before the Attorney General’s decisions in *Castro-Tum* and *S-O-G- & F-D-B-* still face challenges after the provisional waiver has been approved. Pursuant to *S-O-G- & F-D-B-*, the court will likely determine that they cannot terminate the case. Counsel can request OCC join in a motion to terminate and as mentioned above, if OCC agrees, counsel can argue that the immigration judge now has authority to dismiss the case.²⁹ While not ideal, applicants with approved I-601A waivers who want to re-calendar and terminate before leaving for the consular interview could instead seek voluntary departure. This is an imperfect solution, though, as timing may be challenging because they must comply with the voluntary departure period to avoid a removal order. Finally, some may choose to skip this last step and leave for the consular interview without re-calendar the removal case. If the case remains administratively closed, there is no final order. They could complete consular processing, then move to re-calendar and terminate proceedings upon return as someone in valid immigration status. Indeed, this might be the strongest legal position for those ready to consular process with administratively closed cases.

Those who are subject to reinstatement of a prior order of removal or subject to a current final order of removal or a final order of exclusion or deportation, or any other provision of law, are discussed below.

C. Does the Applicant Have a Prior Removal Order?

Special considerations for conditional I-212 option in light of updated enforcement priorities

As part of the 2016 expansion to the I-601A process, individuals with a prior order of removal are able to seek a “conditional” I-212 Application for Permission to Reapply for Admission to overcome inadmissibility associated with a prior removal order (INA § 212(a)(9)(A)),³⁰ then apply for the I-601A provisional waiver.

In practice, however, there may be some very real risks to seeking a conditional I-212, especially if it is an unexecuted order, because filing an I-212 generally requires making the applicant’s whereabouts known to ICE and putting the agency on notice that the person has remained in the United States after an order of removal. This decision may be especially fraught in light of the June 28, 2018 USCIS policy memorandum updating enforcement priorities to include virtually any noncitizen who is removable.³¹

While some practitioners have filed conditional I-212s and then I-601As without incident, there may be a great deal of variability depending on local practice, so those with outstanding removal orders should evaluate the risks of coming forward and seek information from other local practitioners about their experiences with this process.

WARNING: Beware other grounds of inadmissibility related to prior removal orders. Besides INA § 212(a)(9)(A), for which an I-212 may be available for a provisional waiver client, other grounds of inadmissibility that may involve prior removal orders are INA § 212(a)(9)(C) and § 212(a)(6)(B).

While an approved I-212 may allow someone to overcome inadmissibility based on a prior removal order under § 212(a)(9)(A), a person who is inadmissible under § 212(a)(9)(C), the “permanent bar,” for having accrued more than one year of unlawful presence in the aggregate *or having been ordered removed from the United States*, who then leaves the country and subsequently re-enters or attempts to re-enter without being admitted, cannot file an I-212 until they have remained outside the United States for a minimum of ten years. This is viewed as an “exception” to the permanent bar, rather than a “waiver,” and a person cannot qualify for this exception until they have remained outside the United States for at least ten years first.

Further, be very cautious with cases involving *in absentia* orders of removal. A person with an *in absentia* order may also be inadmissible under INA § 212(a)(6)(B), for failure to attend a removal hearing. If the applicant cannot show reasonable cause for missing the hearing, they will be inadmissible for five years from a departure, and there is no waiver available for this ground of inadmissibility.

D. Is the Applicant Otherwise Ready to Submit the Provisional Waiver?

Special considerations in light of new RFE/NOID and NTA memos

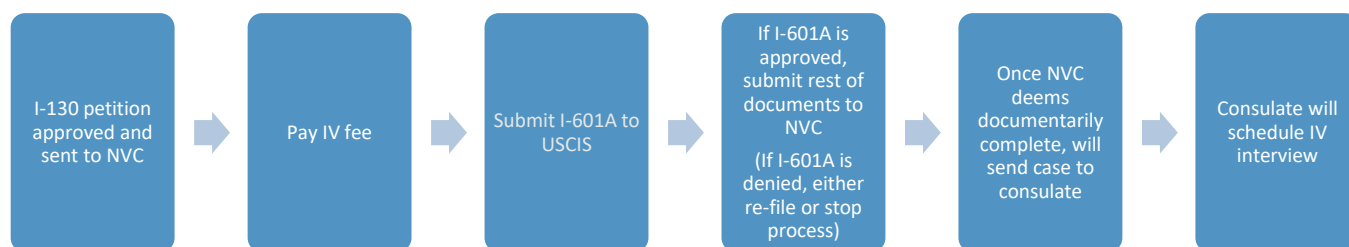
Two policy memos issued by USCIS in June and July 2018 apply to other cases, not just provisional waiver applications, however in this advisory we address how these new policy memos may affect provisional waiver cases. In July 2018 USCIS issued policy guidance “restoring discretion” to immigration officers to deny an application or petition without first issuing a Request for Evidence (RFE) or Notice of Intend to Deny (NOID), essentially meaning that applicants who fail to include required initial evidence may be denied the opportunity to supplement their application and provide the missing evidence before receiving a final decision in their case.³² This policy memo took effect September 11, 2018. One of the examples in the memo of a case that might be denied without an RFE or NOID under the new policy was a waiver application with “little to no supporting evidence.”³³ Thus, applicants should be mindful that they may not have an opportunity to supplement the record so they should make every effort to submit all evidence they want considered with

the initial filing. Further, if additional documents become available after the I-601A package is submitted, the applicant should submit them without waiting for an RFE.

The second USCIS policy memo was issued in June 2018,³⁴ before the RFE/NOID memo, but implementation was delayed until October 2018.³⁵ This memo updates guidelines for USCIS issuing Notices to Appear (NTAs) or Referrals to ICE (RTIs), and replaces the previous, 2011 NTA memo. Among other enforcement priorities including fraud, misrepresentation, and abuse of public benefits cases and naturalization cases denied on good moral character grounds because of a criminal offense, the new NTA memo directs USCIS to issue an NTA where an application is denied and the applicant is not lawfully present in the United States. This means that denial of a provisional waiver could potentially lead to referral to removal proceedings, because almost all provisional waiver applicants are not lawfully present in the United States, leading to their need for an unlawful presence waiver when they depart. Further, the new memo states that USCIS will generally wait out an appeal period before issuing an NTA in a case it has determined falls within the memo, but there is no appeal of a provisional waiver denial.³⁶ Nonetheless, an applicant whose provisional waiver is denied may re-file. Thus, it may be a good idea to re-file soon after a denial, if applicable (i.e. the applicant believes they can overcome the basis for the I-601A denial and wants to re-submit the provisional waiver), to try to forestall an NTA, and to proactively consider defenses to removal in the event the applicant is placed in removal proceedings.

In sum, given these two new policy memos raising the stakes of filing a provisional waiver, it is important to assess at the outset how strong a case it is (is clear evidence of extreme hardship available? Are there any other issues that might lead USCIS to deny the waiver as a matter of discretion?), and to consider other forms of relief in removal proceedings so the applicant will have a backup plan, should they be denied and referred.

IV. Provisional Waiver Application Process



The provisional waiver is a standalone application, meaning it should be filed separately from any other immigration applications.³⁷

A provisional waiver application package should include the following:

- Application filing fee, at the time of this writing \$630, plus \$85 biometrics fee;³⁸
- Immigrant visa processing fee receipt;
- Copy of underlying visa petition approval;
- Complete Form I-601A;³⁹
- Supporting documentation for the waiver application, showing extreme hardship to the qualifying relative(s) and that a favorable exercise of discretion is warranted. Supporting documents should include:
 - A detailed declaration from the qualifying relative(s) explaining the extreme hardship they will suffer if the provisional waiver application is denied;
 - Evidence to prove all claimed hardship;
 - Evidence of equities demonstrating the favorable factors outweigh the unfavorable factors in the applicant's case.

Some provisional waiver application packages may also include the following, as applicable:

- Proof of relationship to qualifying relative and qualifying relative’s status if the qualifying relative is not the petitioner (e.g. an adult U.S. citizen child filed the petition on behalf of their parent and the applicant is showing extreme hardship to *their* LPR parent, include a copy of the applicant’s birth certificate listing the parent’s name as well as a copy of the parent’s green card proving their LPR status);
- Copy of administrative closure order if the applicant is in removal proceedings;
- Copy of I-212 approval, if the applicant previously sought and was granted a conditional I-212.

Practice Tip: Officers adjudicating provisional waiver applications have a very limited amount of time to review a provisional waiver package that is often thick with supporting documents. Make their review as easy as possible by including an index or table of contents. It can also be a good idea to include a short cover letter that can serve as a “roadmap,” with bullet-points outlining the main hardship factors and other most important information regarding the applicant’s eligibility and the reasons why the applicant warrants a favorable exercise of discretion. Also consider including dividers and tabs so that the officer can quickly turn to specific supporting documents, and highlight key information in lengthy supporting documents so that even if they do not have time to read the entire medical report or news article, for example, they are able to glean the most important information from the document.

The I-601A application package should be mailed to the Chicago Lockbox, at:

By USPS: USCIS
P.O. Box 4599
Chicago, IL 60680

By courier: USCIS
Attn: I-601A
131 S. Dearborn, 3rd Floor
Chicago, IL 60603-5517

Once the I-601A application is received, the applicant will be mailed a receipt notice and, shortly thereafter, a biometrics appointment notice. After they complete their biometrics, they must wait for an RFE, NOID, or decision. This may take several months, as current processing times range from seven months to 10.5 months.⁴⁰

If the provisional waiver is denied, there is no appeal but applicants have the option of re-filing.

If the provisional waiver is approved, the applicant may then proceed with consular processing, paying the “Affidavit of Support” fee (the other fee besides the “Immigrant Visa Fee” that had to be paid prior to filing the I-601A), if not yet paid; gathering civil documents; submitting the DS-260 electronic immigrant visa application; and finally preparing for the consular interview. USCIS will notify the State Department of the provisional waiver approval, but applicants should bring the I-601A approval with them to their consular interview.

Note: Keep in mind that an approved provisional waiver can be revoked. Even if your client’s provisional waiver is approved, you cannot assume that means they (and you) have nothing more to worry about. As explained in this advisory, even after applying for and being granted a provisional waiver, if the consular official determines the applicant is inadmissible under another ground of inadmissibility, the provisional waiver will be revoked.

The provisional waiver can be revoked in the following situations after approval:⁴¹

- The consular officer at the immigrant visa interview determines that the applicant is inadmissible under another ground of inadmissibility besides § 212(a)(9)(B) unlawful presence;
- The underlying visa petition is revoked, withdrawn, or otherwise rendered invalid;
- The applicant enters or attempts to re-enter the United States without inspection and admission or parole while the provisional waiver is pending, after the provisional waiver is approved, or before the immigrant visa is issued; or
- The immigrant visa registration is terminated under INA § 203(g).

Note: Making sure that immigrant visa registration is not terminated for lack of action while waiting for the provisional waiver process. Section 203(g) of the INA provides that an immigrant visa registration will be terminated if the applicant fails to apply for an immigrant visa within one year following notification that a visa is available. Longstanding practice, however, is that as long as the applicant or attorney calls, writes, or emails the NVC at least once per year, that contact will keep the visa registration open even if the applicant is not ready to proceed. If the NVC does not hear from the applicant (or their legal representative) within one year of visa availability, they will initiate termination proceedings, usually involving a series of letters warning the immigrant visa applicant of upcoming termination if they do not take action. If the visa registration is ultimately terminated, the applicant must start all over by filing a new visa petition and repaying the visa fees. Section 203(g) also provides for reinstatement within two years, if the visa applicant can establish that their failure to apply was due to circumstances beyond their control.

Filing the provisional waiver counts as “contact” for purposes of avoiding a 203(g) visa registration termination. USCIS notifies the NVC when an applicant files a provisional waiver, and the NVC considers provisional waiver processing as a valid form of “contact.”⁴² Nonetheless, it is still a good idea to calendar reminders each year so that more than a year does not lapse without the NVC hearing anything from the applicant or their advocate, while compiling and filing the provisional waiver or while the provisional waiver is pending. Keep copies of all correspondence with the NVC, to refute any alleged failure to contact the NVC for more than a year.

End Notes

- ¹ ILRC, *Understanding Unlawful Presence Under INA § 212(a)(9)(B) and Unlawful Presence Waivers, I-601 and I-601A*, (Mar. 28, 2019) [hereinafter *ILRC Unlawful Presence Advisory*], <https://www.ilrc.org/understanding-unlawful-presence-under-%C2%A7-212a9b-and-unlawful-presence-waivers-i-601-and-i-601a>.
- ² See *id.*
- ³ For more on I-212s, see forthcoming ILRC practice advisory on this topic, available soon at <https://www.ilrc.org>.
- ⁴ USCIS Policy Manual, 9 USCIS-PM B.5(E), available at <https://www.uscis.gov/policy-manual/volume-9-part-b>.
- ⁵ See *id.*
- ⁶ INA § 212(a)(9)(B)(v). See also *ILRC Unlawful Presence Advisory*, *supra* note 1.
- ⁷ For more information on the general, statutory unlawful presence waiver requirements, see *ILRC Unlawful Presence Advisory*, *supra* note 1.
- ⁸ 8 CFR § 212.7(e)(3)(iii).
- ⁹ 8 CFR § 212.7(e)(14).
- ¹⁰ See INA § 212(d)(11).
- ¹¹ Available at <https://www.ilrc.org/preparing-clients-immigrant-visa-interviews-us-consulates>.
- ¹² Available at <https://www.ilrc.org/public-charge>.
- ¹³ 9 FAM § 302.8-2(B)(2)(a)(3).
- ¹⁴ 9 FAM § 302.8-2(B)(2)(f).
- ¹⁵ 9 FAM § 302.8-2(B)(3)(b)(1)(b).
- ¹⁶ Available at <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.
- ¹⁷ See 9 FAM § 302.8-2(B)(5).
- ¹⁸ See ILRC, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*, (July 2, 2018), available at <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.
- ¹⁹ See *id.*
- ²⁰ 8 CFR § 212.7(e)(4)(iii).
- ²¹ 8 CFR § 212.7(e)(8).
- ²² See *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
- ²³ 25 I&N Dec. 688 (BIA 2012).
- ²⁴ *Matter of Castro-Tum*, 27 I&N Dec. at 274.
- ²⁵ *Id.* at 276-78.
- ²⁶ *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 463 (A.G. 2018).
- ²⁷ *Id.* at 468.
- ²⁸ *Id.* at fn 4.
- ²⁹ *Id.*
- ³⁰ For more on I-212s, see forthcoming ILRC practice advisory on this topic, available soon at <https://www.ilrc.org>.
- ³¹ See USCIS, *Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, (June 28, 2018), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.
- ³² USCIS, *Policy Memorandum: Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)*, (July 13, 2018), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.
- ³³ *Id.* at 3.
- ³⁴ USCIS, *Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, (June 28, 2018), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.
- ³⁵ Implementation of this memo was “incremental.” On October 1, 2018, the NTA memo took effect for I-485 adjustment of status and I-539 extension or change of nonimmigrant status cases, and then on November 19, 2018 it took effect for humanitarian cases including I-914 T nonimmigrant and I-918 U nonimmigrant petitions, I-360 self-petitions, I-730 asylee relative petitions, and I-929 U nonimmigrant relative petitions, in addition to I-485 adjustment applications relating to these underlying humanitarian applications.
- ³⁶ See 8 CFR § 212.7(e)(11).
- ³⁷ With the exception of Form G-1145, E-Notification of Application/Petition Acceptance, which allows the applicant to get an email or text message once USCIS receives their I-601A or other application. The G-1145 may be filed with the I-601A.
- ³⁸ All provisional waiver applicants under age 79 must pay a biometrics fee. No fee waiver is available for the provisional waiver, not even for the biometrics fee.
- ³⁹ Note the Form I-601A and form instructions were recently revised. Beginning June 14, 2019, USCIS will only accept the updated form, which has a February 13, 2019 revision date. See <https://www.uscis.gov/i-601a>.
- ⁴⁰ See <https://egov.uscis.gov/processing-times/> for current case processing times.
- ⁴¹ See 8 CFR § 212.7(e)(14).
- ⁴² See AILA, “Practice Alert: NVC Letters Indicating Possible Termination of Immigrant Visa Applications,” (Sept. 9, 2015), AILA Doc. No. 15073009, available at <https://www.aila.org/>.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.