

## Some Unlawful Presence Waivers to Be Decided Inside the US Before Consulate Interview

*Announcement by Attorney Heather L. Poole ©2012*

The recent announcement from USCIS of its intent to propose a new rule regarding the processing of unlawful presence waivers has sparked a lot of questions. This issue is all over the media this week as well and many are confused. USCIS has announced a proposal to create a new rule allowing for those who are having to consular process and are subject to the 3 or 10 year bars for unlawful presence to file their waivers with USCIS in the U.S. before attending their consulate interview. This will eliminate long separation periods, especially in Ciudad Juarez, Mexico, between filing of the waiver and a final decision on the waiver (at which point, only with an approval can the immigrant reenter the US). Important things to know about this proposal so far:

- The provision is not in effect yet. We have no idea how long the rule will take to be implemented, although this is a positive step in that direction. According to today's teleconference with USCIS, the agency plans to introduce the final rule by the end of the year and the draft rule by spring 2012. No cases can be submitted under the provisional waiver process at this time.
- Only applies to those married to US citizens or have US citizen parents as qualified relatives for the waiver. It does not apply to those with Lawful Permanent Resident spouses or LPR parents for purposes of the qualifying relative for the waiver. It applies to those under the age of 21 who have US citizen parents - i.e., immediate relatives. An immigrant parent who is being sponsored by their USC child over the age of 21 but who has either a qualifying USC parent of their own (petitioner's grandparent) or USC wife of the parent for qualifying relative for purposes of the waiver qualifies under the provisional program. Those married to lawful permanent residents or are qualifying for the waiver through LPR parents do not qualify for this special provision. These individuals would still have to consular process first, have the consulate conclude that unlawful presence exists and then file the waiver abroad.
- Only applies to 3 and 10 year bar waivers. If the immigrant has any other ground of inadmissibility (misrepresentation, crimes, etc.), the immigrant must process the waivers (including the unlawful presence waiver) by traveling abroad for the Immigrant Visa interview, receive a determination from the consulate and then file the waivers with the consulate.
- Under this proposal, if the waiver is approved in the US, the immigrant will still have to travel to the consulate abroad for their Immigrant Visa interview but there will be no need to stick around to file the waiver as it will be considered in effect the minute the immigrant departs the U.S. if it has already been approved by CIS in the U.S.
- If you are already abroad and waiting to file your waiver or waiting for your waiver to be decided, currently this provision does not apply to you.

What this means for those who may be impacted: You will have weigh the pros and cons of traveling abroad under the current system or wait indefinitely in the US until this new provision is in place. *There are pros to processing as usual* (going to the consulate abroad to file the waiver):

1. You have an idea of how long it could take. At the consulate, typical processing times are available so you have an idea of how long it would take for your case to be decided. There is no indication of how long the case will take to be decided once the proposal becomes effective.
2. If some of your arguments will be weaker or unable to be documented in a year

or more, it may be better to file now with the consulate while you have updated and stronger proof.

3. You don't want to wait anymore; you want the process over with. The waiver process can be emotionally draining and clients have often put their lives on hold awaiting the outcome of whether they will be separated a long time from each other depending on the outcome of the waiver.
4. There is no guidance on what happens if a waiver is denied in the US under the provisional program. There is great concern that all denials will receive a Notice to Appear for immigration court and applicants will be placed in removal proceedings where cases are usually much more difficult to be approved.

## What now?

We expect more explanation on the new process once the rule making procedure ends for this provision which could take months before this procedure is put in place and utilized. Currently, CIS is expecting the final rule to be in place by the end of 2012.

## What is the 3 & 10 year bar?

The 1996 Illegal Immigration Reform and Responsibility Act (IIRAIRA) created three year, ten year, and permanent bars on admission to the U.S. for a variety of immigration status violations. These bars apply widely and affect immigrants who have family in the U.S., have worked and paid taxes in the U.S., and in many cases are otherwise eligible for permanent resident status.

The three year bar to re-entry into the U.S.: The three year bar applies to individuals who have been unlawfully present in the United States for a continuous period of more than 180 days (6 months), but less than one year, and who voluntarily depart the U.S. The bar is triggered by the act of departing the U.S., even if to consular process to obtain an immigrant visa. Yes, this may apply to you even if you are married to a U.S. citizen.

The ten year bar to re-entry into the U.S.: The ten year bar applies to individuals unlawfully present in the U.S. for an aggregate period of one year or more who depart voluntarily (aggregate = CIS adds up all time in US without lawful presence, even if from different periods of time and different stays). Unlawful presence begins to accrue when the period of authorized stay expires or after an entry to the U.S. without inspection. Again, the bar is triggered by the act of departing the U.S., even if to consular process to obtain an immigrant visa. Yes, this may apply to you even if you are married to a U.S. citizen.

## The Waiver Option

If the immigrant is married to a U.S. citizen or lawful permanent resident, or has a U.S. citizen or LPR parent, a WAIVER MAY BE AVAILABLE for 3 & 10 year bars but not for the permanent bar. To qualify for this waiver, which if approved, allows the immigrant to lawfully re-enter with the immigrant visa and not wait outside the US for 3 or 10 years, the immigrant must prove that his or her USC or LPR spouse or parent will suffer EXTREME HARDSHIP if the waiver is not approved.

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For more information about Attorney Heather L. Poole, a national immigration attorney trainer and published author and officer in the American Immigration Lawyers Association, visit our website, [www.humanrightsattorney.com](http://www.humanrightsattorney.com). For a free initial consultation, call 877.486.2678.