



**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 103 and 212**

**CIS No. 2519-2011; DHS Docket No. USCIS-2012-0003**

**RIN 1615-AB99**

**Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives**

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Final rule.

**SUMMARY:** On April 2, 2012, U.S. Citizenship and Immigration Services (USCIS) published a proposed rule to amend its regulations to allow certain immediate relatives of U.S. citizens who are physically present in the United States to request provisional unlawful presence waivers prior to departing from the United States for consular processing of their immigrant visa applications. This final rule implements the provisional unlawful presence waiver process. It also finalizes clarifying amendments to other provisions within our regulations. The Department of Homeland Security (DHS) anticipates that these changes will significantly reduce the length of time U.S. citizens are separated from their immediate relatives who engage in consular processing abroad. DHS also believes that this new process will reduce the degree of interchange between the U.S. Department of State (DOS) and USCIS and create greater efficiencies for both the U.S. Government and most provisional unlawful presence waiver applicants.

DHS reminds the public that the filing or approval of a provisional unlawful presence waiver application will not: Confer any legal status, protect against the accrual of additional periods of unlawful presence, authorize an alien to enter the United States without securing a visa or other appropriate entry document, convey any interim benefits (e.g., employment authorization, parole,

or advance parole), or protect an alien from being placed in removal proceedings or removed from the United States in accordance with current DHS policies governing initiation of removal proceedings and the use of prosecutorial discretion.

**DATES:** This final rule is effective [**INSERT DATE 60 DAYS FROM DATE OF FEDERAL REGISTER PUBLICATION**].

**FOR FURTHER INFORMATION CONTACT:** Roselyn Brown-Frei, Office of Policy and Strategy, Residence and Naturalization Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2099, Telephone (202) 272-1470 (this is not a toll free number).

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### **SUPPLEMENTARY INFORMATION:**

#### **I. Executive Summary**

##### **A. Purpose of the Regulatory Action**

##### 1. Need for the Regulatory Action

Certain spouses, children, and parents of U.S. citizens (immediate relatives) who are in the United States are not eligible to apply for lawful permanent resident (LPR) status while in the United States. Instead, these immediate relatives must travel abroad to obtain an immigrant visa from the Department of State (DOS) to return to the United States to request admission as an LPR, and, in many cases, also must request from the Department of Homeland Security (DHS) a waiver of inadmissibility as a result of their unlawful presence in the United States. Currently, these immediate relatives cannot apply for the waiver until after their immigrant visa interviews abroad. As a result, these immediate relatives must remain outside of the United States, separated from their U.S. citizen spouses, parents, or children, while USCIS adjudicates their waiver applications. In some cases, waiver application processing can take well over one year, prolonging the separation of these immediate relatives from their U.S. citizen spouses, parents,

and children. In addition, the action required for these immediate relatives to obtain LPR status in the United States – departure from the United States to apply for an immigrant visa at a DOS consulate abroad – is the very action that triggers the unlawful presence inadmissibility grounds under section 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C.

1182(a)(9)(B)(i). As a result of the often lengthy processing times and uncertainty about whether they qualify for a waiver of the unlawful presence inadmissibility grounds, many immediate relatives who may qualify for an immigrant visa are reluctant to proceed abroad to seek an immigrant visa.

## 2. Provisional Unlawful Presence Waiver Process

Through this final rule, DHS is changing its current process for the filing and adjudication of certain waivers of inadmissibility for eligible immediate relatives of U.S. citizens, who are physically present in the United States but will proceed abroad to obtain their immigrant visas. The new waiver process will allow eligible immediate relatives to apply for a provisional unlawful presence waiver while they are still in the United States and before they leave to attend their immigrant visa interview abroad. DHS anticipates that this new provisional unlawful presence waiver process will significantly reduce the time that U.S. citizens are separated from their immediate relatives. USCIS's approval of an applicant's provisional unlawful presence waiver prior to departure also will allow the DOS consular officer to issue the immigrant visa without further delay, if there are no other grounds of inadmissibility and if the immediate relative is otherwise eligible to be issued an immigrant visa.

## 3. Legal Authority

The Homeland Security Act of 2002, Public Law 107-296 (Homeland Security Act of 2002), section 102, 116 Stat. 2135, 6 U.S.C. 112, and INA section 103, 8 U.S.C. 1103, charge

the Secretary of Homeland Security (Secretary) with the administration and enforcement of the immigration and naturalization laws. The Secretary is implementing this provisional unlawful presence waiver process under the broad authority to administer DHS and the authorities provided under the Homeland Security Act of 2002, the immigration and nationality laws, and other delegated authority. The Secretary's discretionary authority to waive the ground of inadmissibility for unlawful presence can be found in INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). The regulation governing certain inadmissibility waivers is 8 CFR 212.7. The fee schedule for provisional unlawful presence waiver applications is found at 8 CFR 103.7(b)(1)(i)(AA).

#### **B. Summary of the Major Provisions of the Regulatory Action**

On April 2, 2012, U.S. Citizenship and Immigration Services (USCIS) published a Notice of Proposed Rulemaking (NPRM), which outlined the provisional unlawful presence waiver process. See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 77 FR 19902 (April 2, 2012). After careful consideration of the public comments, DHS adopts most of the proposed regulatory amendments without change, except for the provisions noted below:

##### **1. Section 103.7(c)(3)(i)**

In the proposed rule, DHS noted in the supplementary text that applicants for a provisional unlawful presence waiver cannot seek a fee waiver for the Form I-601A filing fees or the required biometric fees. See 77 FR at 19910. DHS incorrectly referenced proposed regulatory text at 8 CFR 103.7(b)(1)(i)(C) and inadvertently omitted the correct citation to the regulatory provision being amended and the amendatory text. DHS has corrected this error and has included an amendment to 8 CFR 103.7(c)(3) in this final rule to clarify that fee waivers are

not available for the biometric or filing fees for the Form I-601A. See section 103.7(c)(3)(i).

2. Section 212.7(a)(4)(iv)

DHS proposed an amendment to 8 CFR 212.7(a)(4) to provide that termination of an alien's conditional LPR status also would result in automatic revocation of an approved waiver of inadmissibility. See 77 FR at 19912 and 19921. Several commenters noted that INA section 216(f), 8 U.S.C. 1186a(f), only allows for automatic revocation of waivers of inadmissibility approved under INA sections 212(h) and (i), 8 U.S.C. 1182(h) and (i). DHS agrees and has revised the amendment to 8 CFR 212.7(a)(4) to clarify that automatic revocation of approved waivers upon termination of conditional resident status only applies to approved waivers based on INA sections 212(h), 8 U.S.C. 1182(h) (waivers for certain criminal offenses), and INA section 212(i), 8 U.S.C. 1182(i) (waivers for fraud or willful misrepresentation of a material fact). See section 212.7(a)(4)(iv).

3. Section 212.7(e)(1)

During discussions about the proposed provisional unlawful presence waiver process and how it would affect aliens in removal proceedings, a question arose regarding the authority of Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) immigration judges (IJs) and whether IJs would adjudicate Forms I-601A for aliens in removal proceedings. DHS determined that it would be more efficient and appropriate to have Form I-601A waivers centralized and adjudicated by one agency, USCIS, especially given the intended streamlined nature of the process and the need for close coordination with DOS once a waiver is decided. DHS therefore added a new paragraph to clarify that the Application for Provisional Unlawful Presence Waiver, Form I-601A, will be filed only with USCIS, even if an alien is in removal proceedings before EOIR. See section 212.7(e)(1).

4. Section 212.7(e)(2)

DHS restructured this provision and added language to make clear that approval of the provisional unlawful presence waiver is discretionary and does not constitute a grant of any lawful immigration status or create a period of stay authorized by the Secretary for purposes of INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). See section 212.7(e)(2)(i). DHS also clarified that a pending or approved provisional unlawful presence waiver does not authorize any interim benefits such as employment authorization or advance parole. See section 212.7(e)(2)(ii).

5. Section 212.7(e)(3)

Many commenters asked DHS to expand eligibility for the provisional unlawful presence waiver process to other categories of aliens seeking to immigrate to the United States. DHS considered the commenters' suggestions but is limiting the provisional unlawful presence waiver to immediate relatives of U.S. citizens. After assessing the effectiveness of the new provisional unlawful presence waiver process and its operational impact, DHS, in consultation with DOS and other affected agencies, will consider expanding the provisional unlawful presence waiver process to other categories.

6. Former Section 212.7(e)(4)(ii)(H)

DHS initially proposed to reject a provisional unlawful presence waiver application if an alien has not indicated on the application that the qualifying relative is a U.S. citizen spouse or parent. See 77 FR at 19922. DHS has determined that this criterion is more appropriate for an adjudicative decision and that this assessment should not be made through a review during the intake process. Thus, DHS has deleted this rejection criterion in the final rule.

7. Section 212.7(e)(4)(iv)

DHS proposed excluding aliens from the provisional unlawful presence waiver process who were already scheduled for their immigrant visa interviews with DOS. See 77 FR at 19921. DHS has retained this requirement. DHS now adds language to the final rule to clarify when an alien is ineligible for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview.

USCIS will first look at whether the scheduled immigrant visa interview is based on the approved immediate relative petition (I-130 or I-360) that accompanies the Form I-601A. If it is, USCIS will then look at the Department of State's Consular Consolidated Database (CCD) to determine the date on which the Department of State initially acted to schedule the applicant for his or her immigrant visa interview (i.e., the date of scheduling itself and not the date and time the applicant must appear for the interview).

If the date that the Department of State initially acted to schedule the immigrant visa interview is prior to the date of publication of this final rule, [INSERT FEDERAL REGISTER PUBLICATION DATE], then the alien is ineligible to apply for a provisional unlawful presence waiver. If the date that the Department of State initially acted to schedule the immigrant visa interview is on or after the publication date of this final rule, the alien is eligible to apply for a provisional unlawful presence waiver. The actual date and time that the alien is scheduled to appear for the interview is not relevant for the eligibility determination. This rule applies even if the alien failed to appear for his or her interview, cancelled the interview, or requested that the interview be rescheduled. Therefore, USCIS may reject or deny any Form I-601A filed by an alien who USCIS determines that the Department of State initially acted to schedule an initial immigrant visa interview for the approved immediate relative petition upon which the Form I-601A is based, prior to the date of publication of this final rule. See section 212.7(e)(4)(iv).



An alien who is ineligible to apply for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview may still qualify for a provisional unlawful presence waiver if he or she has a new DOS immigrant visa case because 1) DOS terminated the immigrant visa registration associated with the previously scheduled interview, and they have a new immediate relative petition; or 2) the alien has a new immediate relative petition filed on his or her behalf by a different petitioner.

8. Section 212.7(e)(4)(v)

DHS initially proposed excluding all aliens who were in removal proceedings from the provisional unlawful presence waiver process, except those whose: (1) removal proceedings had been terminated or dismissed; (2) Notices to Appear (NTAs) had been cancelled; or (3) removal proceedings had been administratively closed but subsequently were reopened to grant voluntary departure. See 77 FR at 19922. In this final rule, DHS has not used the initial proposed categories of aliens above. Rather, DHS has decided to allow aliens in removal proceedings to participate in this new provisional unlawful presence waiver process if their removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A. See section 212.7(e)(4)(v). Aliens whose removal proceedings are terminated or dismissed are covered in the general population of aliens who are eligible to apply for a provisional unlawful presence waiver. Aliens who have had their NTAs cancelled by ICE are also covered in the general population of aliens who are eligible to apply for a provisional unlawful presence waiver, since their removal proceedings were never initiated through filing of an NTA with EOIR.

Through this final rule, the Form I-601A and its accompanying instructions, and additional information published on the USCIS website, DHS also will notify such applicants that, if granted the provisional unlawful presence waiver, applicants should seek termination or

dismissal of their removal proceedings. The request for termination or dismissal should be granted before they depart for their immigrant visa interviews to avoid possible delays in their immigrant visa processing or risk becoming ineligible for the immigrant visa based on another ground of inadmissibility. See section 212.7(e)(2). Finally, DHS has made conforming changes to the filing requirements in section 212.7(e)(5)(i) to include aliens who are in removal proceedings that are administratively closed and have not been recalendared at the time of filing the Form I-601A.<sup>1</sup>

9. Section 212.7(e)(4)(ix)

For operational reasons, DHS initially proposed rejecting applications filed by aliens who previously filed a Form I-601A with USCIS. DHS designed the provisional unlawful presence waiver process to streamline waiver and immigrant visa processing by closely tying adjudication of the Form I-601A to the National Visa Center (NVC) immigrant visa processing schedule. DHS considered the potential impact of multiple filings on this schedule, the possible delays to the immigrant visa process, and the potential for agency backlogs.

Many commenters, however, expressed concern that limiting the program to one-time filings could potentially exclude individuals who otherwise would qualify for the provisional unlawful presence waiver.

Upon consideration of these comments, DHS agrees that an alien could have compelling

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<sup>1</sup> DHS recognizes that this is a departure from the long-standing principle in immigration law and policy that aliens must establish eligibility not only at the time of filing but also up until the time USCIS adjudicates the case. See, e.g., Matter of Isidro-Zamorano, 25 I&N Dec. 829, 830-31 (BIA 2012) (explaining the “well established” principle that application for an immigration benefit is “continuing” and that eligibility is determined at the time of adjudication, not at the time of application). However, DHS believes that a departure from this general principle is permissible and warranted in this limited context, especially since the provisional unlawful presence waiver process is purely discretionary. Furthermore, the provisional unlawful presence waiver is not valid while the alien remains in the United States. It only takes effect after the alien departs from the United States, appears for his or her immigrant visa interview, and is determined by DOS to be otherwise eligible for an immigrant visa, in light of the approved I-601A provisional unlawful presence waiver.

reasons for filing another provisional unlawful presence application, especially in cases where an alien's circumstances have changed or the alien was a victim of individuals or entities not authorized to practice immigration law. DHS agrees that a one-time filing limitation is too restrictive and is removing the single filing limitation. If an individual's provisional unlawful presence waiver request is denied or withdrawn, the individual may file a new Form I-601A, in accordance with the form instructions and with the required fees. The applicant's case must still be pending with DOS. In the case of a withdrawn Form I-601A, USCIS will not refund the filing fees because USCIS has already undertaken steps to adjudicate the case.

Alternatively, an individual who withdraws his or her Form I-601A filing prior to final adjudication, or whose Form I-601A is denied, can apply for a traditional waiver by filing Form I-601, Application for Waiver of Grounds of Inadmissibility, with the USCIS Lockbox, after he or she attends the immigrant visa interview abroad and after DOS conclusively determines that the individual is inadmissible on a ground(s) that is waivable. DHS, therefore, has removed this provision from the final rule.

10. Section 212.7(e)(5)(ii)

DHS corrected a typographical error in the prefatory language to this section, removing the term "application" the second time it appears in the paragraph. See section 212.7(e)(5)(ii).

11. Section 212.7(e)(5)(ii)(A)

DHS proposed a list of rejection criteria for Forms I-601A filed at the Lockbox, including the criterion to reject for failure to pay the required or correct fee for the waiver application. See 77 FR at 19922. DHS inadvertently referenced the biometric fee as a basis for rejection in the supplementary information. See 77 FR at 19911. DHS has modified the regulatory text to make clear that a Form I-601A will only be rejected for failure to pay the required or correct

application filing fee and not the biometric fee. See section 212.7(e)(5)(ii)(A).

12. Section 212.7(e)(5)(ii)(G)

DHS proposed rejecting provisional unlawful presence waiver applications filed by aliens who were already scheduled for their immigrant visa interviews with DOS. See 77 FR at 19921. DHS has retained this requirement. DHS now adds language to the final rule to clarify when an alien is ineligible for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview.

USCIS will first look at whether the scheduled immigrant visa interview is based on the approved immediate relative petition (I-130 or I-360) that accompanies the Form I-601A. If it is, USCIS will then look at the Department of State's Consular Consolidated Database (CCD) to determine the date on which the Department of State initially acted to schedule the applicant for his or her immigrant visa interview (i.e., the date of scheduling itself and not the date and time the applicant must appear for the interview).

If the date that the Department of State initially acted to schedule the immigrant visa interview is prior to the date of publication of this final rule, [INSERT FEDERAL REGISTER PUBLICATION DATE], then the alien is ineligible to apply for a provisional unlawful presence waiver. If the date that Department of State initially acted to schedule the immigrant visa interview is on or after the publication date of this final rule, the alien is eligible to apply for a provisional unlawful presence waiver. The actual date and time that the alien is scheduled to appear for the interview is not relevant for the eligibility determination. This rule applies even if the alien failed to appear for his or her immigrant visa interview, cancelled the interview, or requested that the interview be rescheduled. Therefore, USCIS may reject or deny any Form I-601A filed by an alien if USCIS determines that the Department of State, prior to the date of

publication of this final rule, initially acted to schedule an immigrant visa interview for the approved immediate relative petition upon which the Form I-601A is based. See section 212.7(e)(4)(iv).

An alien who is ineligible to apply for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview may still qualify for a provisional unlawful presence waiver if he or she has a new DOS immigrant visa case because 1) DOS terminated the immigrant visa registration associated with the previously scheduled interview, and they have a new immediate relative petition; or 2) the alien has a new immediate relative petition filed on his or her behalf by a different petitioner. See section 212.7(e)(5)(ii)(G).

### 13. Section 212.7(e)(9)

DHS initially proposed that aliens who were denied a provisional unlawful presence waiver could not file a new Form I-601A. Instead, such aliens would have to leave the United States for their immigrant visa interviews and file a Form I-601, Application for Waiver of Grounds of Inadmissibility, after the Department of State determined they were inadmissible. Some commenters were concerned that limiting aliens to a single filing of an I-601A would potentially bar aliens from qualifying for a provisional unlawful presence waiver, especially when they may have experienced changed circumstances that would result in extreme hardship to the U.S. citizen spouse or parent. In light of these concerns, DHS has amended this final rule to allow aliens who are denied a provisional unlawful presence waiver to file another Form I-601A, based on the original approved immigrant visa petition. Denial of an application for a provisional unlawful presence waiver is without prejudice to the alien filing another Form I-601A under paragraph (e) provided the alien meets all of the requirements. The alien's case must be pending with the Department of State, and the alien must notify the Department of State

that he or she intends to file a new Form I-601A.

14. Section 212.7(e)(10)

DHS has amended this provision to allow an applicant to withdraw a previously-filed provisional unlawful presence waiver application before final adjudication and file another Form I-601A, in accordance with the form instructions and with the required filing and biometric services fees. See section 212.7(e)(10).

15. Section 212.7(e)(14)(iv)

DHS clarified the language in section 212.7(e)(14)(v) to specify that a provisional unlawful presence waiver is automatically revoked if the alien, at any time before or after the approval of the provisional unlawful presence waiver, or before the immigrant visa is issued, reenters or attempts to reenter the United States without being admitted or paroled. See section 212.7(e)(14)(iv).

**C. Costs and Benefits**

This final rule is expected to result in a reduction of the time that U.S. citizens are separated from their immediate relatives, thus reducing the financial and emotional hardship for these families. In addition, the Federal Government should achieve increased efficiencies in processing immigrant visas for individuals subject to the unlawful presence inadmissibility bars under INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). We expect costs to the Federal government of the provisional unlawful presence waiver process to be offset by the additional fee revenue collected for form processing.

DHS estimates the discounted total ten-year cost of this rule will range from approximately \$196 million to approximately \$538.1 million at a seven percent discount rate. Compared to the current waiver process, this rule requires that provisional unlawful presence

waiver applicants submit biometric information. Included in the total cost estimate is the cost of collecting biometrics, which DHS estimates will range from approximately \$32.9 million to approximately \$56.6 million discounted at seven percent over ten years. Also included in the total cost estimate are the costs faced by those who choose to file new provisional unlawful presence waiver applications based on the same approved immediate relative petition if their original Form I-601A is denied or withdrawn, which DHS decided to allow in response to public comments to the proposed rule. Individuals that file a new Form I-601A will still face the biometric and Form I-601A filing fees and opportunity costs, which we estimate will range from approximately \$56.2 million to approximately \$96.7 million discounted at seven percent over ten years. In addition, as this rule significantly streamlines the current process, DHS expects that additional applicants will apply for the provisional unlawful presence waiver. To the extent that this rule induces new demand for immediate relative immigrant visas, additional immigration benefit forms, such as the Petition for Alien Relative, Form I-130, will be filed compared to the pre-rule baseline. These additional forms will involve fees being paid by applicants to the Federal Government for form processing and additional opportunity costs of time being incurred by applicants to provide the information required by the forms. The cost estimate for this rule also includes the impact of this induced demand, which DHS estimates will range from approximately \$106.9 million to approximately \$384.8 million discounted at seven percent over ten years.

Estimates for the costs of the rule were developed assuming that current demand for requesting waivers of grounds of inadmissibility based only on unlawful presence is constrained because of concerns that families may endure lengthy separations under the current system. Due to uncertainties as to the degree of the current constraint of demand, DHS used a range of

constraint levels with corresponding increases in demand to estimate the costs. The costs for each increase in demand are summarized below.

| <b>Estimated Increase in Costs with an Increase in Demand of:</b>                    |               |               |               |               |
|--|---------------|---------------|---------------|---------------|
|  | <b>25 %</b>   | <b>50 %</b>   | <b>75 %</b>   | <b>90 %</b>   |
| <b>Cost of Biometrics Collection and Processing</b>                                  |               |               |               |               |
| 10 year Costs Undiscounted   | \$46,803,460  | \$59,088,534  | \$71,373,907  | \$78,746,295  |
| Total 10 year Costs Discounted at 7%   | 32,907,683    | 42,030,423    | 51,153,460    | 56,628,050    |
| Total 10 year Costs Discounted at 3%   | 39,926,220    | 50,653,297    | 61,380,675    | 67,818,069    |
| <b>Cost of Biometrics Collection and Processing and Form I-601A for Re-filers</b>    |               |               |               |               |
| 10 year Costs Undiscounted   | \$79,942,420  | \$100,924,521 | \$121,908,872 | \$134,499,783 |
| Total 10 year Costs Discounted at 7%   | 56,207,656    | 71,788,866    | 87,371,675    | 96,721,450    |
| Total 10 year Costs Discounted at 3%   | 68,195,707    | 86,516,943    | 104,840,098   | 115,834,193   |
| <b>Costs of Applications for the Additional (Induced) Demand for Immigrant Visas</b> |               |               |               |               |
| 10 year Costs Undiscounted   | \$143,931,692 | \$287,854,640 | \$431,775,838 | \$518,143,249 |
| Total 10 year Costs Discounted at 7%   | 106,881,772   | 213,757,395   | 320,631,489   | 384,766,730   |
| Total 10 year Costs Discounted at 3%   | 125,678,197   | 251,348,945   | 377,018,045   | 452,432,274   |
| <b>Total Costs to New Applicants</b>   |               |               |               |               |
| 10 year Costs Undiscounted   | \$270,677,572 | \$447,867,695 | \$625,058,617 | \$731,389,326 |
| Total 10 year Costs Discounted at 7%   | 195,997,110   | 327,576,683   | 459,156,625   | 538,116,229   |
| Total 10 year Costs Discounted at 3%   | 233,800,123   | 388,519,186   | 543,238,818   | 636,084,535   |

## **II. Legal Authority**

The Homeland Security Act of 2002, Public Law 107-296 (Homeland Security Act of 2002), section 102, 116 Stat. 2135, 6 U.S.C. 112, and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with administration and enforcement of the immigration and naturalization laws. The Secretary is implementing this provisional unlawful presence waiver process under the broad authority to administer DHS and the authorities provided under the Homeland Security



Act of 2002, the immigration and nationality laws, and other delegated authority. The Secretary's discretionary authority to waive the ground of inadmissibility for unlawful presence can be found in INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). The regulation governing certain inadmissibility waivers is 8 CFR 212.7. The fee schedule for provisional unlawful presence waiver applications is found at 8 CFR 103.7(b)(1)(i)(AA).

### **III. Background**

#### **A. Notice of Intent**

On January 9, 2012, DHS published a notice in the Federal Register – Provisional Waivers of Inadmissibility for Certain Immediate Relatives of U.S. Citizens, 77 FR 19902 (Jan. 9, 2012) – announcing its intent to change the current process for certain applications for waivers of inadmissibility filed in connection with an immediate relative immigrant visa application. The notice explained the proposed process that DHS was considering and that DHS would further develop a proposal, which it would ultimately finalize through the rulemaking process.

On January 10, 2012, USCIS conducted a stakeholder engagement to discuss the Notice of Intent. More than 900 people participated via telephone and in person. USCIS provided an overview of how the proposed process changes may affect filing and adjudication. USCIS also addressed questions from stakeholders. Topics covered included eligibility, procedures, and consequences of an approval or denial of a provisional unlawful presence waiver.

#### **B. Proposed Rule**

On April 2, 2012, DHS published a proposed rule in the Federal Register, proposing to amend the regulations to revise the process for applying for waivers of inadmissibility. See 77 FR 19902. DHS received over 4,000 public comments to the proposed rule. Comments were submitted by individuals, immigrant advocacy groups, attorneys, accredited representatives,

religious organizations and leaders, individuals in academia, Members of Congress, and members of the media. Some comments also were submitted through mass mailing campaigns or petitions, expressing support for, or opposition to, the provisional unlawful presence waiver process. DHS counted each petition or mass mailing as one comment, but acknowledged the number of signatures associated with each comment.

Opinions on the proposed rule varied. A large number of comments (3,442) were favorable and supported the implementation of the new provisional unlawful presence waiver process. A few hundred commenters (430) opposed the proposed rule, in many instances because of a misperception that the provisional unlawful presence waiver process would grant legal status to aliens not lawfully present in the United States and allow them to remain in the United States permanently. DHS also received 310 comments, some of which did not address any aspect of the proposed rule or reflect a commenter's support or opposition to the proposed rule. These 310 commenters also did not make any specific suggestions that related to the proposed rule. Finally, DHS received a comment in the form of a petition signed by 118,593 individuals who opposed the proposed rule; the signed petition, however, reflected the same misperception<sup>2</sup> about the provisional unlawful presence waiver process as seen in some of the comments from others who opposed the rule.

In preparing this final rule, DHS considered these public comments and other relevant materials contained in the docket. All comments may be reviewed at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2012-0003.

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<sup>2</sup> The petition incorrectly summarized the substance and nature of the proposed rule. The petition also erroneously concluded that the provisional unlawful presence waiver process granted aliens not lawfully present in the United States a temporary legal status in the United States and put them on the "fast track" to permanent legal status – neither of which can occur under this final rule.

### **C. Final Rule**

This final rule adopts most of the regulatory amendments set forth in the proposed rule without change. The rationale for the proposed rule and the reasoning provided in its preamble remain valid with respect to these regulatory amendments. DHS also has made several clarifying changes to the regulatory text, based on suggestions from commenters and on policy decisions made after publication of the proposed rule. The changes to the regulatory text are summarized in Section V below. This final rule also adopts, without change, the regulatory amendment clarifying 8 CFR 212.7(a)(1) and (3). This final rule does not address comments seeking changes in U.S. laws, regulations, or agency policies that are unrelated to the provisional unlawful presence waiver process or the clarifying amendments to 8 CFR 212.7(a). This final rule also does not change the procedures or policies of other DHS components or federal agencies, or resolve issues outside the scope of this rulemaking. After assessing the effectiveness of the provisional unlawful presence waiver process and its operational impact, DHS, in consultation with DOS and other affected agencies, will consider expanding the provisional unlawful presence waiver process in the future.

## **IV. Public Comments on the Proposed Rule<sup>3</sup>**

### **A. Summary of Public Comments**

The 60-day public comment period for the proposed rule ended on June 1, 2012. Commenters included individuals, immigrant advocacy groups, attorneys, and accredited representatives, as well as religious organizations and leaders, individuals in academia, Members of Congress, and members of the media. Some comments also were submitted through mass

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<sup>3</sup> USCIS received some comments prior to the official comment period, including two letters signed by over 200 immigrant advocate organizations. Most of the concerns or suggestions made by the pre-publication commenters were captured through other public comments submitted during the official period.

mailing campaigns or petitions, expressing support for, or opposition to, the provisional unlawful presence waiver process. The majority of comments came from supporters of the proposed rule who agreed that it would promote family unity and reduce the length of time immediate relatives (spouses, children, and parents of a U.S. citizen over the age of 21 years) would be separated from the U.S. citizen petitioner. Many also agreed that it would relieve the financial burdens that the current process places on American families, encourage individuals to obtain a lawful status, and benefit the United States generally. Numerous commenters shared their personal stories about the hardships they experienced after being separated from their loved ones, and applauded DHS for taking a step to reduce such scenarios in the future.

Several commenters strongly disagreed with the proposed provisional unlawful presence waiver process, arguing that the Executive Branch did not have the legal authority to make the proposed changes without approval from Congress. Other commenters argued that the proposed rule was unconstitutional. Many commenters who opposed the change believed that the current immigration laws are not properly enforced and that DHS favors illegal aliens over legal immigrants. Some commenters also believed that DHS was rewarding illegal behavior by publishing this rule. These commenters stated that this rule would only encourage illegal immigration and fraud, would be harmful to the American economy, and that the Federal Government's money would be better invested in assisting U.S. citizens and legal immigrants, rather than illegal aliens and their U.S. citizen families. A few commenters opposed the proposed rule because they believed that it is unfair to exclude individuals outside the United States from eligibility for the proposed provisional unlawful presence waiver process or because the requirements articulated in the rule (for example, the lack of protection from removal) were too stringent or not helpful.

DHS has reviewed all of the public comments received in response to the proposed rule and addresses them in this final rule. DHS's responses are grouped by subject area, with a focus on the most common issues and suggestions raised by the commenters. DHS received few or no comments on the following topics: (1) the rejection criteria, (2) withdrawals, and (3) the validity of an approved provisional unlawful presence waiver.

## **B. Legal Authority to Implement the Provisional Unlawful Presence Waiver**

### **Process**

Several commenters questioned DHS's legal authority to implement the provisional unlawful presence waiver process. Commenters argued that the proposed rule was unconstitutional and that it was the role of Congress, not the Executive Branch, to create immigration laws and policy. DHS disagrees with the view that this rule exceeds the Secretary's legal authority.

Congress has plenary authority over immigration and naturalization and, through its legislative power, may enact legislation establishing immigration law and policy. See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' U.S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.") (citations omitted); see also Fiallo v. Bell, 430 U.S. 787, 792 (1977). The Executive Branch, which includes DHS, is charged with implementing the laws passed by Congress. Through section 102 of the Homeland Security Act of 2002, 106 Stat. 2135, 6 U.S.C. 112, and INA section 103, 8 U.S.C. 1103, Congress has specifically charged the Secretary with the administration and enforcement of the immigration

and naturalization laws. The Secretary is authorized to promulgate rules and “perform such other acts as he deems necessary for carrying out his authority” based upon considerations rationally related to the immigration laws. INA section 103(a)(3), 8 U.S.C. 1103(a)(3). The Secretary has broad discretion to determine the most effective way to administer the laws. See, e.g., Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (observing that the INA “need not specifically authorize each and every action taken by the Attorney General [(now Secretary of Homeland Security)], so long as his action is reasonably related to the duties imposed upon him”); see also Arizona, 132 S. Ct. at 2499 (noting “broad discretion exercised by immigration officials” under the immigration laws).

The provisional unlawful presence waiver process is not a substantive change to the immigration laws but a procedural change in the way that a specific type of waiver application can be filed with USCIS. Generally, individuals who are required by law to obtain a waiver of inadmissibility must apply for the waiver through the procedures prescribed by the Secretary, as permitted under the Homeland Security Act and the INA. Current waiver filing procedures for an individual processing an immigrant visa application abroad at a consular post require the individual to apply for a waiver of grounds of inadmissibility while outside the United States and after his or her immigrant visa interview. Under this final rule, DHS is permitting a category of aliens – certain immediate relatives of U.S. citizens who will be pursuing an immigrant visa application at a consular post abroad – to file an application for a provisional unlawful presence waiver of inadmissibility due to unlawful presence under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i), while still in the United States. By creating these new filing procedures, DHS anticipates that the immigrant visa waiver process will become more efficient for the U.S. Government and for U.S. citizens and their immediate relatives. It will reduce the length of time

American families are separated while the immigrant visa applicant is going through the immigrant visa process. The applicant may remain in the United States with his or her family until the time the applicant must depart from the United States to attend his or her immigrant visa interview.

### **C. Eligibility for the Provisional Unlawful Presence Waiver**

#### **1. Preference Categories**

A large number of commenters focused on who is eligible to participate in the provisional unlawful presence waiver process. Some commenters believed the proposed rule was too restrictive and excluded many individuals who also could benefit from the new process. Others asked why DHS was not expanding eligibility to all families and their close immediate or distant relatives such as in-laws, grandparents, aunts and uncles. The commenters also asked why DHS did not include all family-sponsored or employment-based immigrants, especially if aliens in a particular immigrant visa category had current visa availability. The commenters argued that there was no discernible difference between immediate relatives and preference aliens who have current visa availability. The commenters also indicated that the hardships of lengthy family separation are just as compelling for LPR families as they are for U.S. citizen families. The commenters also asked that, if DHS will not expand the provisional unlawful presence waiver process to all LPR families, DHS should at least consider expanding the provisional unlawful presence waiver process to LPRs who have U.S. citizen children.

Several Congressional commenters argued that there was no compelling, legal, operational or other rationale that would justify DHS's decision to limit the provisional unlawful presence waiver process to immediate relatives. The Congressional commenters stated that it was unambiguous that Congress intended the unlawful presence waiver under section

212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), to be available to immediate relatives and certain preference aliens, including unmarried adult children of U.S. citizens and LPR spouses and children. The Congressional commenters thought that DHS's distinction could not be justified based on DHS's reading of congressional intent. Instead, the Congressional commenters argued that DHS would be ignoring clear congressional intent and cause the provisional unlawful presence waiver process to be underutilized by entire categories of persons for whom the waiver is now available. Finally, many commenters believed that expanding the provisional unlawful presence waiver process to preference categories would offer more measurable benefits to USCIS and DOS and would facilitate legal immigration by encouraging a more sizeable population to seek to adjust their status.

Suggestions for additional eligibility criteria or categories of eligible aliens varied but most commenters asked DHS to consider expanding eligibility to: (1) all preference categories generally; (2) unmarried sons and daughters of U.S. citizens who are over the age of 21 years; (3) married sons and daughters or siblings of U.S. citizens; (4) spouses and minor children of LPRs; (5) parents of minor U.S. citizen children; (6) children who were brought to the United States when young, such as those aliens who would qualify under the proposed Development, Relief and Education for Alien Minors (DREAM) Act<sup>4</sup>; (7) preference aliens who have lived in the United States for more than 10 years; (8) family members of personnel in the U.S. Armed Forces, including the National Guard, reserves, and veterans; and (9) any preference category with current visa availability.

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<sup>4</sup> The DREAM Act, a bill that aims to permit children of undocumented immigrants, who were brought to the United States at a young age, to obtain a legal status if they meet certain criteria. Versions of the DREAM Act have been introduced and reintroduced on several occasions, including most recently in May 2011, but none has passed Congress to date. See, e.g., Development, Relief and Education for Alien Minors Act of 2011, S. 952, 112<sup>th</sup> Cong.



The focus of the provisional unlawful presence waiver process is to reduce the impact of the current waiver process on U.S. citizens by reducing the time U.S. citizens are separated from their immediate relatives. DHS chose to limit eligibility to immediate relatives of U.S. citizens not only because the immigrant visas for this category are always available, but also because it is consistent with Congress' policy choice to prioritize family reunification of immediate relatives of U.S. citizens over other categories of aliens. For example, family-sponsored and employment-based categories have annual numerical limits, whereas there are no numerical limits on the availability of immigrant visas to immediate relatives. Compare INA section 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i), with INA section 203(a), (b), 8 U.S.C. 1153(a), (b). Focusing on U.S. citizens as part of this discretionary process also is consistent with permissible distinctions that may be drawn between U.S. citizens and aliens and between classes of aliens in immigration laws and policies. See, e.g., Fiallo, 430 U.S. at 792; Mathews v. Diaz, 426 U.S. 67, 81 (1976).

DHS also believes that focusing the provisional unlawful presence waiver process on immediate relatives of U.S. citizens is consistent with recognized government interests in encouraging eligible long-time LPRs to naturalize so that their spouses, parents, and children under the age of 21 years can become immediate relatives and also benefit from this new process. See, e.g., City of Chicago v. Shalala, 189 F.3d 598, 608 (7th Cir. 1999).

Family-sponsored and employment-based preference categories have annual numerical limits. Therefore, preference categories carry an inherent risk that they may become oversubscribed; if an individual's immigrant visa is based upon a preference category, his or her immigrant visa may become unavailable at any given time upon oversubscription of the preference category. Retrogression of visa availability can have a direct, adverse impact on

agency backlogs and processing.

DHS appreciates the comments from the public on these issues and has given them serious consideration. DHS will consider future expansion of the program after DHS and DOS have assessed the effectiveness of the provisional unlawful presence waiver process and the operational impact it may have on existing agency processes and resources. See *Beach Commc'ns v. FCC*, 508 U.S. 307, 316 (1993) (observing that policymakers “must be allowed leeway to approach a perceived problem incrementally”). For these reasons, DHS has not adopted the commenters’ suggestions. At this time, the provisional unlawful presence waiver process will remain available only to individuals who are immediate relatives of U.S. citizens (i.e., spouses, children, and parents (if the U.S. citizen is at least 21 years of age)), as defined in INA section 201(b), 8 U.S.C. 1151(b).

## 2. Aliens Outside the United States

Numerous commenters asked DHS to extend eligibility to individuals who are currently outside the United States. Commenters argued that immediate relatives who had already departed from the United States to consular process or who voluntarily left the United States to avoid the consequences of removal should not be punished for their actions. Some commenters also felt that it was unfair to speed up the process for individuals residing illegally in the United States, while not doing anything for those individuals who departed the United States voluntarily to comply with the rules. Many commenters shared their personal stories about the difficulties of long-term separation from their spouses and the impact it had on them and their children. Most commenters wanted their family members abroad to have the opportunity to participate in a faster, more effective process or for DHS to at least provide some other form of relief to overcome the effects of the 3-year and 10-year bars for these individuals.

DHS recognizes that there are many difficulties faced by U.S. citizens when their immediate relatives must obtain waivers while outside the United States. DHS, however, believes that creating a provisional unlawful presence waiver process abroad would be duplicative of DOS's current immigrant visa processes and USCIS's current Form I-601, Application for Waiver of Grounds of Inadmissibility waiver process, which would not be an efficient use of agency resources.

To alleviate some of the delays in overseas waiver processing, USCIS recently centralized Form I-601 filings such that individuals located outside the United States now file the Form I-601 in the United States where USCIS has sufficient resources at its service centers to accommodate filing surges.<sup>5</sup> Applicants who need waivers are no longer required to schedule a "waiver filing" appointment with the U.S. Embassy or consulate, which in some cases required applicants to wait up to two months just for these waiver filing appointments. Centralization of Form I-601 filings from abroad should significantly reduce the time individuals must spend abroad, waiting to receive immigrant visas so they can return to the United States. Centralizing Form I-601 filings in this manner also will significantly reduce the current backlog that exists at USCIS international offices. In addition, as of June 4, 2012, when USCIS began to implement centralized filing of Forms I-601 for individuals outside of the United States, USCIS had approximately 10,200 cases pending. USCIS has dedicated additional resources on a temporary basis to expeditiously process the cases filed prior to centralization, as well as those that individuals continue to file at the USCIS Field Office in Ciudad Juarez, Mexico through

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<sup>5</sup>As of June 4, 2012, most individuals abroad, who have applied for certain visas and have been found inadmissible by a DOS consular officer, must mail Forms I-601 directly to a USCIS Lockbox facility. For more information, please visit the USCIS website at [www.uscis.gov](http://www.uscis.gov).

December 4, 2012.<sup>6</sup> USCIS anticipates that it will complete processing of all cases pending in USCIS offices abroad within approximately six months of the effective date of this rule.

For these reasons, DHS did not adopt the commenters' suggestions, and individuals who are already outside of the United States must pursue a waiver of inadmissibility through the current Form I-601 process. The provisional unlawful presence waiver process will remain available only to those individuals who are currently in the United States and will be departing for consular processing abroad.

3. Aliens Who Cannot Establish Extreme Hardship to a U.S. Citizen Spouse or Parent

Several commenters objected to the exclusion from the provisional unlawful presence waiver process of immediate relatives of U.S. citizens who could establish extreme hardship only to an LPR spouse or parent. Commenters argued that this restriction limited the number of individuals who could benefit from the provisional unlawful presence waiver process and that there was no rational basis for the limitation. Some also believed that applicants will submit "weak" extreme hardship claims relating to a qualifying U.S. citizen relative when the real hardship would be to an LPR spouse or parent. Commenters also asked that DHS allow individuals to make a showing of extreme hardship to their U.S. citizen children.

DHS has carefully considered these comments and the recommended changes. However, DHS will not adopt the suggested changes at this time. As stated in the proposed rule, a primary purpose for creating the provisional unlawful presence waiver process is to reduce the amount of time U.S. citizens are separated from their immediate relatives. Focusing on hardship to U.S. citizens is consistent with permissible distinctions that may be drawn between U.S. citizens and

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<sup>6</sup> USCIS provided a transition period during which individuals who are processing their immigrant visa applications through the U.S. consulate in Ciudad Juarez, Mexico, could file their I-601 applications either with the Lockbox facility or at the USCIS Ciudad Juarez Field Office. This transition period ended on December 4, 2012.

aliens. It also is consistent with the Secretary's authority to administer the immigration laws and determine the most efficient means for effectuating the provisional unlawful presence waiver process. See 77 FR at 19908. Finally, DHS cannot include children as qualifying relatives for purposes of the extreme hardship determination because the statute only permits a showing of extreme hardship to a spouse or parent as a basis for granting the waiver. See INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). Only Congress has the power to amend the immigration laws to add other individuals who can be qualifying relatives for purposes of the extreme hardship determination.

DHS is open to considering expanding the provisional unlawful presence waiver process to include lawful permanent residents as qualifying relatives after DHS has a better understanding of the impact of the provisional unlawful presence waiver process on agency resources and operations.

#### 4. Aliens in Removal Proceedings

Numerous commenters asked DHS to expand eligibility for the provisional unlawful presence waiver to include aliens in removal proceedings. Some commenters suggested that DHS include anyone who is in removal proceedings, without further qualifications. Others suggested that DHS include aliens in removal proceedings if they: (1) were granted prosecutorial discretion; (2) were the primary caretakers for U.S. citizens; (3) were previously granted voluntary departure; or (4) had their cases administratively closed. Commenters also believed that the provisional unlawful presence waiver process undermines DHS's ongoing prosecutorial discretion initiative. A few commenters also said DHS should eliminate the requirement that aliens with administratively closed cases pursue voluntary departure because it was too complicated and could result in separation from a U.S. citizen spouse, parent, or child if the alien

fails to comply with the terms and conditions of voluntary departure. Several commenters criticized the use of voluntary departure, arguing that the time frames for voluntary departure in many instances would be too short (60 or 120 days) to cover the time needed for the adjudication of the Form I-601A and the time the applicant needs to prepare for departure after approval of the provisional unlawful presence waiver request. Other commenters suggested that DHS include any alien who has been issued a Notice to Appear (NTA). They reasoned that, if the purpose of the provisional unlawful presence waiver is to avoid hardship to U.S. citizens, it should make no difference whether or not an NTA has been issued. One commenter also requested that DHS allow individuals who have a fear of returning to their home countries to participate in the provisional unlawful presence waiver process.

Several immigrant advocacy groups asked DHS to allow individuals to file the provisional unlawful presence waiver application before termination of removal proceedings or a grant of voluntary departure. The commenters argued that allowing individuals to apply for the provisional unlawful presence waiver while still in proceedings would ensure that USCIS, and not U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP), is the first agency to determine if an applicant qualifies for the waiver. If the applicant's provisional unlawful presence waiver is approved, then the applicant could seek termination or dismissal of his or her case. The advocacy groups stated that many individuals subject to removal, whether detained or non-detained, were unrepresented and could be confused by the various barriers to filing the provisional unlawful presence waiver application. They also argued that allowing an individual to file the provisional unlawful presence waiver application while proceedings are pending would ensure that unrepresented aliens are not left with having to choose between seeking avenues of relief in removal proceedings and pursuing an immigrant

visa abroad.

Finally, one commenter asked DHS to clarify the three options noted in the proposed rule at 8 CFR 212.7(e)(3)(v) through 212.7(e)(3)(vii) (i.e., termination/dismissal, cancellation of NTA, administrative closure with voluntary departure) for aliens in removal proceedings. The commenter noted that two of the provisions, 8 CFR 212.7(e)(3)(v) (termination/dismissal) and 212.7(e)(3)(vii) (administrative closure with voluntary departure) in the proposed rule, conflicted because aliens who chose to pursue voluntary departure would need to have their cases recalendared before an IJ. Recalendaring of the alien's case would result in the alien being barred under 8 CFR 212.7(e)(3)(v), because the removal proceedings would still be pending and not "terminated or dismissed." The commenter also recommended that the final rule make clear that USCIS can only accept a provisional unlawful presence waiver once DHS, through ICE's Office of Chief Counsel, affirmatively consents to it in the removal proceedings.

After careful consideration of all comments on this issue, DHS has decided to limit eligibility for the provisional unlawful presence waiver process to individuals whose removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A. Under its prosecutorial discretion (PD) policies, ICE has been reviewing cases pending before EOIR and all incoming cases to ensure that they are aligned with the agency's civil enforcement priorities and that ICE is effectively using its finite resources. For cases that ICE determines are not enforcement priorities, it exercises its discretion where appropriate, typically by moving for administrative closure. See Memorandum by ICE Director John T. Morton in his June 17, 2011 memorandum and the subsequent November 17, 2011 directive from Peter S. Vincent, Principal Legal Advisor to all attorneys at the ICE Office of Chief Counsel. DHS, however, is not limiting eligibility solely to cases administratively closed under

the ICE case-by-case review initiative, but also is allowing any alien whose case is administratively closed and has not been recalendered at the time of filing the Form I-601A to participate in the provisional unlawful presence waiver process. In addition, individuals in removal proceedings whose cases are deferred pursuant to the Deferred Action for Childhood Arrivals (DACA)<sup>7</sup> process may also request that ICE seek administrative closure once USCIS defers action in their cases.

If the Form I-601A is approved for an alien whose proceedings have been administratively closed, the alien should seek termination or dismissal of the proceedings, without prejudice, by EOIR. The request for termination or dismissal should be granted before the alien departs for his or her immigrant visa interview abroad. Applicants who leave the United States before their removal proceedings are terminated or dismissed may experience delays in their immigrant visa processing or risk becoming ineligible for the immigrant visa based on another ground of inadmissibility, such as INA section 212(a)(6)(B), 8 U.S.C. 1182(a)(6)(B) (failure to attend a removal proceeding without reasonable cause), or INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A) (aliens who have been ordered removed or who depart from the United States while an order of removal is outstanding). See Matter of Sanchez-Herbert, 26 I&N Dec. 43 (BIA 2012) (holding that an IJ is required to issue an in absentia removal order (rather than terminating proceedings) even though the alien previously had departed from the United States, if the alien had proper notice of the hearing and DHS establishes the alien's removability). ICE intends to work with individuals to facilitate the timely termination or dismissal of an individual's removal proceedings once he or she obtains a

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<sup>7</sup> On June 15, 2012, the Secretary of Homeland Security issued a memorandum to USCIS, CBP, and ICE, regarding the exercise of prosecutorial discretion with respect to certain individuals who came to the United States as children. See the USCIS website – [www.uscis.gov](http://www.uscis.gov) – for more information about the DACA process.



provisional unlawful presence waiver.

Focusing on this subset of aliens in removal proceedings is consistent with the Department's established enforcement priorities. Individuals who received administrative closure are likely individuals whom ICE or EOIR has determined, on a case-by-case basis or as a matter of policy, to be non-enforcement priorities. This includes individuals whose cases are deferred through the DACA process. Given that these individuals have been determined to not be enforcement priorities because of their compelling equities (e.g., their long-term presence in the United States or their connection to U.S. citizen relatives), DHS determined that they should be able to participate in the provisional unlawful presence waiver process. DHS may consider expanding eligibility for the provisional unlawful presence waiver process to other subsets of aliens in removal proceedings in the future and after implementation of this final rule.

Aliens whose cases are deferred, whether authorized by ICE or by USCIS through approval of a Form I-821D, Consideration of Deferred Action for Childhood Arrivals, must meet all requirements under 8 CFR 212.7(e) to receive a provisional unlawful presence waiver. Deferred action does not override or modify the eligibility requirements specified in this final rule. Thus, aliens whose cases have been deferred but have final orders of removal or other grounds of inadmissibility beyond unlawful presence will remain ineligible for a provisional unlawful presence waiver.

##### 5. Aliens with Final Orders of Removal and Previously Removed

Numerous commenters requested that DHS allow aliens with final orders of removal to participate in the provisional unlawful presence waiver process. The commenters offered a variety of suggestions, many of which came out of their own personal circumstances. For example, some commenters suggested that DHS include aliens with final removal orders who:

(1) are currently detained pending removal; (2) had their removal orders temporarily suspended; (3) are still in the United States and had final orders of removal issued within the last five to 10 years or, alternatively, issued more than 10 years ago; (4) were determined by DHS to warrant a favorable exercise of prosecutorial discretion; (5) were previously granted voluntary departure; (6) were granted voluntary departure but overstayed by 10 years; (7) are subject to in absentia final orders of removal due to ineffective assistance of counsel; (8) have been removed for a noncriminal ground of inadmissibility; (9) have obtained advanced consent to reapply for admission to the United States; or (10) were previously removed, regardless of whether the alien is abroad or still inside the United States. A few commenters indicated that those with final orders of removal should be included if they are married to U.S. citizens and have children. Most commenters stated that U.S. citizen family members of aliens with final orders of removal face the same hardships as those with relatives subject to inadmissibility based on unlawful presence in the United States.

DHS considered these suggestions and has concluded that it will not expand the provisional unlawful presence waiver process to include aliens with final removal orders. Generally, aliens who have outstanding final orders of removal may be inadmissible on a variety of grounds other than unlawful presence, such as criminal offenses (INA section 212(a)(2), 8 U.S.C. 1182(a)(2)) and fraud and misrepresentation (INA section 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C)). In addition, any alien who is subject to a final order of removal, decides to leave the United States, and subsequently seeks admission, is inadmissible as an alien with a prior removal under INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A). Similarly, any alien who has been ordered removed or who has been unlawfully present in the United States for an aggregate period of a year or more and subsequently attempts to enter or reenter the United States without

being admitted is inadmissible under INA section 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C), and may have his or her final order of removal reinstated under INA section 241(a)(5), 8 U.S.C.

1231(a)(5). The provisional unlawful presence waiver is only available to an alien who, upon departure from the United States, would be inadmissible only due to accrual of unlawful presence under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). Thus, a large percentage of aliens in removal proceedings will not be eligible for a provisional unlawful presence waiver. As a result, DHS has concluded that, because the success of this new provisional unlawful presence waiver process relies on its efficient, streamlined approach and close coordination with the NVC, the provisional unlawful presence waiver process will not be expanded to include aliens with final removal orders.

#### 6. Aliens with Scheduled Immigrant Visa Interviews

Several commenters asked DHS to include aliens in the provisional unlawful presence waiver process regardless of whether they had an immigrant visa interview scheduled in the past. Several commenters objected to this ground of ineligibility, arguing that it was irrational and served no purpose or was arbitrary, capricious and cruel. Several commenters stated that many individuals already had cancelled their immigrant visa interviews after publication of the Notice of Intent on January 9, 2012 (77 FR 19902). An immigrant advocacy group asked DHS to include applicants with previously scheduled interviews. The group acknowledged that allowing such applicants to reschedule immigrant visa interviews would create an additional administrative burden on DOS, but believed that it would ensure equity among those immediate relatives seeking to legalize their status while minimizing the length of time they are separated from their families. The advocacy group also believed that failure to include this group would only create confusion and ultimately ineligibility for the very individuals who the rule is

supposed to help.

Several commenters suggested that DOS return the immigrant visa application packet to the NVC once an alien files a provisional unlawful presence waiver. Another commenter suggested that the petitioner should be allowed to fly to the consulate abroad, retrieve the immigrant visa application packet, and return it to the NVC so DHS could adjudicate the waiver and the NVC could match the immigrant visa application packet to the approved provisional unlawful presence waiver. One commenter suggested that aliens should be allowed to resubmit the immigrant visa application package to the NVC so that they could file the provisional unlawful presence waiver application. Some commenters also asked DHS to give individuals still in the United States the option to either postpone their immigrant visa interviews so they could file the provisional unlawful presence waiver or proceed with consular processing.

Several commenters were concerned that the time periods for filing and adjudication of a provisional unlawful presence waiver application, filing of the immigrant visa application, and DOS scheduling of the immigrant visa interview were too short. The commenters believed that it created timing issues for immigration law practitioners in terms of advising their clients on filing the Form I-601A and paying the immigrant visa fee. The commenters stated that once the immigrant visa fee was paid, DOS would schedule the immigrant visa interview potentially before USCIS adjudicated the Form I-601A and, as a result, the applicant would be ineligible for the provisional unlawful presence waiver. Finally, one commenter requested that DHS implement a grace period of at least one year after publication of the final rule during which applicants who had scheduled immigrant visa interviews could participate in the provisional unlawful presence waiver process.

DHS disagrees that limiting eligibility to aliens who have not had their immigrant visa

interviews scheduled has no rational basis. DHS considered a number of criteria and restrictions to make the process operationally manageable without creating delays in processing of other petitions or applications filed with USCIS or in the DOS immigrant visa process. By including aliens who were scheduled for an interview prior to the date of publication of this final rule, the projected volume of cases could significantly increase and would create backlogs not only in the provisional unlawful presence waiver process, but also in adjudication of other USCIS benefits. The increased volume would also adversely impact DOS and their immigrant visa process.

For these reasons, DHS will not expand the provisional unlawful presence waiver to include individuals whose immigrant visa interviews were scheduled before the date of publication of this final rule [INSERT DATE OF FEDERAL REGISTER PUBLICATION]. DHS now adds language to the final rule to clarify when an alien is ineligible for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview.

USCIS will first look at whether the scheduled immigrant visa interview is based on the approved immediate relative petition (I-130 or I-360) that accompanies the Form I-601A. If it is, USCIS will then look at the Department of State's Consular Consolidated Database (CCD) to determine the date on which the Department of State initially acted to schedule the applicant for his or her immigrant visa interview (i.e., the date of scheduling itself and not the date and time the applicant must appear for the interview).

If the date that the Department of State initially acted to schedule the immigrant visa interview is prior to the date of publication of this final rule, [INSERT FEDERAL REGISTER PUBLICATION DATE], then the alien is ineligible to apply for a provisional unlawful presence waiver. If the date that Department of State initially acted to schedule the immigrant visa interview is on or after the publication date of this final rule, the alien is eligible to apply for a

provisional unlawful presence waiver. The actual date and time that the alien is scheduled to appear for the interview is not relevant for the eligibility determination. This rule applies even if the alien failed to appear for his or her interview, cancelled the interview, or requested that the interview be rescheduled. Therefore, USCIS may reject or deny any Form I-601A filed by an alien who USCIS determines that the Department of State, prior to the date of publication of this final rule, initially acted to schedule the alien's immigrant visa interview for the approved immediate relative petition upon which the Form I-601A is based. See section 212.7(e)(4)(iv).

An alien who is ineligible to apply for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview may still qualify for a provisional unlawful presence waiver if he or she has a new DOS immigrant visa case because 1) DOS terminated the immigrant visa registration associated with the previously scheduled interview, and they have a new immediate relative petition; or 2) the alien has a new immediate relative petition filed on his or her behalf by a different petitioner.

DHS has clarified the regulatory text at 8 CFR 212.7(e)(4) and (5)(ii) so that aliens clearly understand that if the Department of State scheduled the alien for his or her initial immigrant visa interview prior to the date of publication of this final rule, the Form I-601A will be rejected and returned to the applicant with the associated filing and biometric fees or denied. The Form I-601A will be rejected even if the applicant's interview is rescheduled after the date of publication of this final rule. USCIS will verify with DOS whether the applicant's immigrant visa interview was scheduled before the date of publication of this final rule.

#### 7. Aliens with Other Grounds of Inadmissibility

Several commenters asked DHS to consider expanding the provisional unlawful presence

waiver process to include additional grounds of inadmissibility and the waivers associated with such grounds. These commenters specifically referenced waivers such as the waiver for certain criminal grounds of inadmissibility under INA section 212(h), 8 U.S.C. 1182(h), for fraud and misrepresentation under INA section 212(i), 8 U.S.C. 1182(i), and for alien smuggling under INA section 212(d)(11), 8 U.S.C. 1182(d)(11). Some commenters suggested that DHS include any waiver that has the same extreme hardship standard into the provisional unlawful presence waiver process. Other commenters believed that it would be more efficient to resolve all grounds of inadmissibility at the same time. They suggested that DHS include all grounds of inadmissibility that can be waived and currently appear on the Form I-601. The commenters believed this change would alleviate the need for aliens to file multiple waiver requests at the time of their immigrant visa interviews.

Several commenters stated that an individual should not be precluded from filing a provisional unlawful presence waiver application if the individual: (1) was previously arrested, especially if there was no conviction or the conviction was for a crime involving moral turpitude (CIMT) that meets the petty offense exception under INA section 212(a)(2)(A)(ii), 8 U.S.C. 1182(a)(2)(A)(ii); (2) violated his or her status; (3) worked without authorization; or (4) made a false claim to U.S. citizenship under INA section 212(a)(6)(C)(ii), 8 U.S.C. 1182(a)(6)(C)(ii). A few commenters also requested that USCIS make an affirmative finding that a specific ground of inadmissibility does not apply to an applicant. The commenters requested that such a finding be either persuasive or binding on DOS consular officers.

Finally, some commenters were confused about the effect of the provision that allows USCIS to deny a provisional unlawful presence waiver application if USCIS has a “reason to believe” that the alien will be inadmissible on grounds other than unlawful presence. The

commenters argued that DHS should not deny a provisional unlawful presence waiver simply because DHS has reason to believe that the applicant was convicted of a crime, especially since some crimes are not automatic bars to admission to the United States in a lawful immigration status and, upon further review, would not be considered convictions or criminal offenses for immigration purposes.

DHS has considered these comments but will not adopt the suggested changes. The goal of the provisional unlawful presence waiver process is to facilitate immigrant visa issuance for immediate relatives of U.S. citizens who are otherwise admissible<sup>8</sup> to the United States except for the 3-year and 10-year unlawful presence bars, which are triggered upon departure from the United States. DOS, not USCIS, determines if an immigrant visa applicant is eligible for an immigrant visa and whether there are any grounds of inadmissibility that may bar issuance of the immigrant visa. If USCIS were to consider other grounds of inadmissibility beyond unlawful presence, it would create backlogs in the adjudication of the provisional unlawful presence waivers and, in turn, adversely impact DOS's immigrant visa process. In particular, to assess an application for a waiver of inadmissibility based on fraud, misrepresentation, or criminal history, an individual generally must undergo vetting through an in-person interview at a USCIS Field Office. Since DOS already conducts an in-depth in-person interview as part of the immigrant visa process, DHS believes that such a full review by USCIS would be duplicative of DOS's efforts.

DHS, however, intends to uphold its responsibility to protect the integrity and security of the immigration process by conducting full background and security checks to assess whether an

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<sup>8</sup>An alien will not be inadmissible for being present in the United States without admission or parole under INA section 212(a)(6)(A)(i), 8 U.S.C. 1182(a)(6)(A)(i), or for lacking proper immigrant entry documents under INA section 212(a)(7)(A), 8 U.S.C. 1182(a)(7)(A), once he or she leaves the United States to attend a consular interview.



individual may be a threat to national security or public safety. To maintain a streamlined process, USCIS will, however, only conduct a limited review of the waiver application to determine if: (1) the individual has self-reported a ground of inadmissibility that would render him or her ineligible for the provisional unlawful presence waiver; (2) the results of the background checks reveal conduct or actions that potentially would make an individual ineligible for an immigrant visa; or (3) the individual has engaged in activities that could impact the discretionary determination regarding whether he or she warrants a favorable exercise of discretion. If USCIS determines that there is reason to believe that the alien may be inadmissible to the United States at the time of his or her immigrant visa interview based on another ground of inadmissibility other than unlawful presence, USCIS will deny the request for the provisional unlawful presence waiver. USCIS's determination on the provisional unlawful presence waiver is not a conclusive finding of inadmissibility. It also is not an assessment of whether a particular crime or pattern of conduct would ultimately bar an individual from obtaining a legal status under the immigration laws.

Aliens who may have other grounds of inadmissibility are not precluded from obtaining a waiver of such grounds (if permitted by law) and ultimately an immigrant visa. The individual can file a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after he or she attends the immigrant visa interview and after DOS conclusively determines that the individual is inadmissible. If the ground(s) of inadmissibility identified by the DOS consular officer can be waived, the individual can file a Form I-601 along with any supporting documentation or evidence needed to demonstrate eligibility for the waiver and ultimately the immigrant visa.

#### 8. Aliens in Temporary Protected Status

Several commenters asked DHS to clarify how the provisional unlawful presence waiver process affects aliens in Temporary Protected Status (TPS) and to ensure that such aliens are included in the provisional unlawful presence waiver process. DHS does not believe these additions to the eligibility criteria are necessary.

Any alien who meets the requirements of the provisional unlawful presence waiver process and who is consular processing abroad can obtain a provisional unlawful presence waiver regardless of the alien's current status in the United States.<sup>9</sup> An alien currently registered for TPS under INA section 244, 8 U.S.C. 1254a, is considered to be maintaining lawful nonimmigrant status<sup>10</sup> for purposes of adjustment of status or change of status. See INA section 244(f)(4), 8 U.S.C. 1254a(f)(4). A grant of TPS, however, does not cure an unlawful entry prior to the alien's grant of TPS or any unlawful presence the alien may have accrued prior to being granted TPS. See Serrano v. U.S. Att'y Gen., 655 F.3d 1260 (11th Cir. 2011). If the TPS beneficiary needs a waiver of inadmissibility for unlawful presence, that alien is in the same position as any other alien who needs a waiver of inadmissibility under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), at the time of the immigrant visa processing abroad. As a result, TPS applicants who are immediate relatives of U.S. citizens can participate in the provisional unlawful presence waiver process if they are pursuing consular processing of an immigrant visa abroad.

## 9. Additional Eligibility Criteria

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<sup>9</sup> USCIS also received two comments asking whether alien crewman could apply for a provisional unlawful presence waiver. As stated above, any alien in the United States who qualifies as an immediate relative and has an approved Form I-130 or Form I-360 may apply for the provisional unlawful presence waiver, irrespective of his or her current immigration status, if otherwise eligible.

<sup>10</sup> INA section 244(f)(4), 8 U.S.C. 1254a(f)(4), provides that, during the period that an alien is granted temporary protected status, the alien is considered as being in or maintaining lawful status as a nonimmigrant for purposes of adjustment or change of status.

A few commenters suggested that DHS consider limiting or adding eligibility criteria to better prioritize aliens who may be eligible for the provisional unlawful presence waiver process. Two commenters suggested that DHS require an individual to have a minimum amount of time in the United States unlawfully (e.g., two, three, or five years) before he or she could file a provisional unlawful presence waiver. Another commenter suggested that DHS limit eligibility to aliens who were married to a U.S. citizen prior to the effective date of this final rule. One commenter suggested limiting the eligibility criteria solely to aliens physically present in the United States, who are immediate relatives with an approved Form I-130, and who are at least 17 years of age. Several commenters suggested that DHS give priority to aliens who are minors and aliens who show good moral character, have no criminal record, and demonstrate that they have been productive and responsible as evidenced by paying taxes, mortgages, and self-sufficiency. Finally, several commenters requested that DHS base approval of the provisional unlawful presence waiver on factors such as: (1) having good moral character; (2) having no criminal record; (3) not having abused government benefits; (4) putting children through school; (5) paying taxes; (6) being married to a U.S. citizen or having U.S. citizen children; or (7) owning a home.

DHS considered a number of criteria and restrictions to make the process operationally manageable without creating delays in processing of other petitions or applications filed with USCIS or in the DOS/NVC immigrant visa process. DHS, however, did not adopt these limitations or restrictions. The commenters' suggestions are already part of the overall analysis of whether an individual warrants the grant of the provisional unlawful presence waiver as a matter of discretion. The factors that play into the discretionary analysis are not limited to one particular set of factors, see, e.g., Matter of Cervantes-Gonzalez, 22 I. & N. Dec. 560, 566 (BIA

1999); as part of the application for provisional unlawful presence waiver, an applicant should set forth any favorable discretionary factor he or she considers relevant to the adjudication. By setting restrictions on the number of years of unlawful presence or the date when an individual married the U.S. citizen, DHS would exclude a subset of immediate relatives of U.S. citizens who are or would be otherwise eligible. DHS, therefore, has not adopted these suggestions and retains the eligibility criteria listed in 8 CFR 212.7(e)(3).

#### **D. Filing Requirements and Fees**

##### **1. Concurrent Filing**

Many commenters asked DHS to allow concurrent filing of the Form I-130 or Form I-360, Form I-601A, and, if needed, the Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal. Several commenters noted that USCIS does adjudicate some Form I-212s in the United States pursuant to the regulations at 8 CFR 212.2(j) and in certain cases may grant the Form I-212 conditionally in anticipation of the individual's departure. Other commenters argued that applicants should be allowed to file the provisional unlawful presence waiver at any stage of immigrant petition or visa process. Several commenters said that DHS could avoid duplicating efforts by processing multiple applications at the same time. The commenters believed it was inefficient for DHS not to allow concurrent filing and an injustice to waiver applicants to maintain separate processes for the Form I-601A and Form I-212, especially when the separate processes have the effect of increasing the time applicants must spend outside the United States and away from their families. The commenters asked DHS to at least examine the feasibility of concurrently processing these applications before the alien has to leave for his or her immigrant visa interview. Finally, one commenter suggested that USCIS should allow applicants to submit the Form I-601A and Form I-212 prior

to the filing of the Form I-130.

DHS has considered these comments but believes that concurrent filing, or allowing filing of the Form I-601A before the immediate relative petition, would undercut the efficiencies USCIS and DOS will gain through the streamlined provisional unlawful presence waiver process. Currently, Form I-130 denials are appealable to the DOJ, EOIR Board of Immigration Appeals (BIA), and if the alien challenges the denial, USCIS would either have to hold the provisional unlawful presence waivers until the Form I-130 was decided on appeal or deny the Form I-601A but reopen it if the appeal is decided favorably for the alien. Both scenarios are inefficient and could cause USCIS to incur additional costs for storing the provisional unlawful presence waiver applications and transferring any A-files or receipt files between offices until the administrative appeal process is complete. DHS developed this provisional unlawful presence waiver process in close coordination with DOS to ensure that both agencies could efficiently complete the waiver and immigrant visa process concurrently within a short timeframe. Allowing the filing of the Form I-601A after the Form I-130 or Form I-360 is approved is more efficient for USCIS and often is more efficient for the applicant as well. Therefore, DHS will not accept concurrently filed Forms I-130 and I-601A, or allow for the filing of the Form I-601A before approval of the immediate relative petition.

Moreover, DHS will not permit concurrent filing of Forms I-601A and I-212. While an individual can obtain advance, conditional consent to reapply for inadmissibility under INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A) (prior removal or departure under order of removal), while still in the United States, DHS will not incorporate the Form I-212 in the provisional unlawful presence waiver presence process at this time for the following reasons.

First, most applicants seeking a provisional unlawful presence waiver will not have A-

files. However, every I-212 applicant with a prior removal order has an A-file because he or she was in removal proceedings. If concurrent filing of Forms I-601A and I-212 is permitted, USCIS in each case would have to request and review the applicant's A-file – a process that can cause significant delay. This extra procedural step in turn would create significant delays in USCIS processing of provisional unlawful presence waiver applications.

Second, individuals currently may file an administrative appeal with the Administrative Appeals Office (AAO) of a decision denying their Form I-212. Consequently, if concurrent filing of Forms I-601A and I-212 is permitted, and the Form I-212 is denied and an appeal taken, USCIS would have to hold the applicant's Form I-601A until the I-212 appeal is decided and, if the applicant seeks review in federal court, until the litigation is resolved. The streamlined Form I-601A process is designed to avoid these extra procedural steps, which would create backlogs in USCIS adjudication of the provisional unlawful presence waiver.

Form I-212 also is used to seek consent to reapply to overcome inadmissibility for unlawful reentry after a prior immigration violation under INA section 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C).<sup>11</sup> Aliens who are subject to this ground of inadmissibility cannot seek consent to reapply until they have been outside of the United States continuously for 10 years. Therefore, allowing the Form I-212 to be filed concurrently with the Form I-601A might mistakenly imply that those inadmissible under INA section 212(a)(9)(C) can file in the United States and at an earlier time.

## 2. Filing Fees

One commenter stated that applying the current Form I-601 filing fee to the Form I-601A

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<sup>11</sup> The regulations governing the processing of advance, conditional consent to reapply in the United States at 8 CFR 212.2(j) do not apply to aliens who are subject to this ground of inadmissibility. See Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006).

was fiscally irresponsible. The commenter argued that DHS does not know how many provisional unlawful presence waivers it will receive or adjudicate and, therefore, cannot accurately determine the case workload or what resources it will need to cover the actual costs for adjudicating the Form I-601A. The commenter suggested that DHS increase the filing fee to \$650 plus \$85 for the biometric fee to avoid a fiscal shortfall. Several commenters stated that DHS should require provisional unlawful presence waiver applicants to pay a fine or fee (\$5,000 to \$20,000) to remain in the United States and obtain LPR status through an immigrant visa if eligible for the provisional unlawful presence waiver; some of these commenters believed that this fine or fee would help reduce the national debt.

Many opponents of the provisional unlawful presence waiver process indicated that the costs of implementation are too expensive and that the U.S. Government should not spend money on illegal aliens. The commenters believed that DHS was using tax money to support the new process. Additionally, two commenters recommended that DHS establish a premium processing fee to expedite processing of the provisional unlawful presence waiver. The commenters also suggested that DHS give special consideration to federal employees and those currently serving in active duty, reserve personnel, and veterans of the U.S. Armed Forces. Some commenters believed that individuals who did not commit any felonies should not have to pay a fee. Several commenters stated that the filing fee was either too high or too low. Some commenters stated that DHS should permit fee waivers because the fees were too high; others said that DHS should double the fee to offset the costs for implementing the new process because the Form I-601A fee was too low. Some commenters also indicated that fee waivers would be appropriate for aliens seeking the provisional unlawful presence waiver because most of them have low incomes, and that this is especially true for aliens who work in the agricultural and

similar service sectors and cannot afford to cover the filing costs required by USCIS. Another commenter argued that the elimination of a fee waiver violated the Due Process Clause of the U.S. Constitution's Fifth Amendment because it was not legislated by Congress as was done in the context of INA section 245(i), 8 U.S.C. 1255(i). Finally, two commenters said that the provisional unlawful presence waiver process was too expensive and as a result would be at risk for underuse.

With regard to the immigrant visa fee that must be paid to DOS, several commenters mentioned that the DOS immigrant visa (IV) fee is only valid for one year. They were concerned that the period for adjudication of the provisional unlawful presence waiver might last longer than USCIS expects. The commenters asked DHS to state in the regulation that pending provisional unlawful presence waiver applications maintain the validity of the IV fees, so that applicants would not forfeit the IV fees and have to repay them in the future. Some commenters also indicated that the requirement to pay the immigrant visa fee before filing the provisional unlawful presence waiver was confusing. DHS's responses to these views are divided into the four categories below.

(i) Authority to Charge Immigration Fees

Congress has given the Secretary broad authority to administer and enforce the immigration and naturalization laws of the United States. As part of this broad authority, the Secretary has discretion to set filing fees for immigration benefits at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other immigrant applicants. INA section 286(m), 8 U.S.C. 1356(m). The Secretary also has authority to set fees needed to recover administrative costs. The fee revenue collected under INA section 286(m), 8 U.S.C.



1356(m), remains available to DHS to provide immigration and naturalization benefits and ensures the collection, safeguarding, and accounting of fees by DHS. INA section 286(n), 8 U.S.C. 1356(n).

The Secretary has discretion to waive filing fees or exempt certain types of benefit requests from the fee requirements. The Secretary also has broad discretion to waive any fee when an individual's circumstances warrant such a waiver. Aliens who request a fee waiver are not entitled to the waiver as a matter of law,<sup>12</sup> nor do they have a cognizable due process interest in a discretionary fee waiver. The denial of a fee waiver request is a matter of discretion. The agency also has not provided for administrative appeals of such discretionary decisions.

None of the money used for USCIS adjudication of the provisional unlawful presence waiver comes from appropriated funds. As a fee-based agency, USCIS is primarily funded by applicants seeking immigration benefits. Applicants are required to pay their own fees. USCIS uses these fees to process applicants benefit requests and to cover its administrative costs. USCIS, however, will not, as a matter of discretion, grant fee waivers for the provisional unlawful presence waiver or associated biometric fee.

(ii) Premium Processing of the Provisional Unlawful Presence Waiver

The Secretary has established a premium processing fee for certain employment-based immigration benefit requests under INA section 286(u), 8 U.S.C. 1356(u). USCIS provides premium processing for certain benefit types if an authorized applicant or petitioner pays a

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<sup>12</sup> One commenter referred to INA section 245(i) as an example in which Congress authorized fee waivers and asserted that USCIS cannot exclude fee waivers in the provisional unlawful presence waiver process. Congress has legislated when certain categories of aliens are exempt from paying certain immigration fees. The authority, however, to waive the provisional unlawful presence waiver application fee lies with the Secretary through her authorities under INA sections 103 and 286(m), 8 U.S.C. 1103 and 1356(m), among others. The fact that Congress has provided for fee waivers in different situations does not preclude the Secretary from exercising her discretionary authority not to provide for fee waivers in the context of this rule.

surcharge of \$1,225 for the service. The surcharge is paid in addition to the filing fees for the immigration benefit requested. USCIS's Premium Processing Service (PPS) generally provides faster processing times and adjudication. USCIS guarantees 15-calendar-day processing to those who choose to use the PPS. In general, if USCIS cannot make a final decision on the applicant's benefit request within this period, USCIS will refund the PPS fee. See 8 CFR 103.7(e)(2). Even if the PPS fee is refunded, USCIS will endeavor to continue expedited processing of the underlying benefit request.

DHS, however, cannot extend premium processing to family-based applications or to waivers of inadmissibility that accompany such applications because INA section 286(u), 8 U.S.C. 1356(u), only allows premium processing for employment-based petitions and applications. Therefore, DHS is not adopting this suggestion. DHS, however, reminds applicants that they can request expedited adjudication of a provisional unlawful presence waiver in accordance with current USCIS expedite guidance.<sup>13</sup>

(iii) Fee Level for the Provisional Unlawful Presence Waiver

DHS has adopted the current cost for adjudicating an Application for Waiver of Ground of Inadmissibility, Form I-601(\$585), as the initial filing fee that will be required for the Form I-601A. DHS decided to set the fee for the provisional unlawful presence waiver process to be the same as the current Form I-601 waiver application fee because the population that will be eligible for the provisional unlawful presence waiver is a subset of those individuals who would otherwise have to file under the current Form I-601 process. Also, the adjudication of the Form I-601A will be comparable to the adjudication of a Form I-601 requesting waiver of inadmissibility pursuant to INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v).

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<sup>13</sup> For guidance on USCIS expedite procedures, please visit [www.uscis.gov](http://www.uscis.gov).

Costs to the Federal Government include the possible costs of additional adjudication personnel associated with increased volume and the associated equipment (computers, telephones) and occupancy costs (if additional space is required). However, we expect these costs to be offset by the additional fee revenue collected for form processing. DHS will consider the impact of the provisional unlawful presence waiver process workflow and resource requirements as a normal part of its biennial fee review. The biennial fee review determines if fees for immigration benefits are sufficient in light of resource needs and filing trends.

(iv) DOS Immigrant Visa Fee

DOS is the agency in charge of NVC procedures. The NVC procedures are outlined in the information materials that applicants receive from the NVC. As long as the applicant follows NVC procedures, and has informed the NVC of the filing of the provisional unlawful presence waiver, as outlined in the NVC procedures, the fact that a Form I-601A is pending will not result in the invalidation of the NVC processes. A pending I-601A also will not affect the validity of DOS immigrant visa fee and applicants will not be required to resubmit the DOS immigrant visa fee solely due to the Form I-601A processing, provided the applicant complies with all DOS processing requirements.

3. Limitations on Filing of Provisional Unlawful Presence Waivers

Many commenters questioned why DHS would limit the number of provisional unlawful presence waiver applications that could be filed by an individual applicant. Some commenters stated that many applicants will be unrepresented, and, as a result of their lack of knowledge or understanding of the immigration process, could be denied solely for technical reasons, such as failure to present the proper documents. Commenters also stated that some pro se aliens may obtain inadequate, erroneous, or unscrupulous legal assistance, which could result in their cases

being denied. The commenters argued that precluding these individuals from filing another Form I-601A would be unduly harsh and that DHS's duty of fairness to applicants should trump the agency's interest in administrative efficiency and finality. Several commenters also disagreed with the limitation on filing, especially when an applicant withdraws his or her initial filing.

One commenter requested that USCIS return the fee if the waiver application is withdrawn. Some commenters also found it a cumbersome and costly approach to require individuals whose waivers are denied or withdrawn to file another waiver through the regular process after the consular interview. A few commenters requested that USCIS assign another officer to adjudicate a new Form I-601A, if the prior provisional unlawful presence waiver request was denied or withdrawn. Finally, some commenters believed that it was unjust to exclude applicants from the provisional unlawful presence waiver process if they had pending adjustment of status applications.

DHS appreciates the valid concerns of these commenters and recognizes that if it implemented the regulatory text as published in the NPRM, aliens with compelling circumstances could be precluded from obtaining a provisional unlawful presence waiver. For these reasons, DHS is removing the single-filing limitation. If an individual's provisional unlawful presence waiver request is denied or withdrawn, the individual may file a new Form I-601A, in accordance with the form instructions and with the required fees. The applicant's case must still be pending with DOS, and the applicant must notify DOS that he or she intends to file a new Form I-601A. In the case of a withdrawn Form I-601A, USCIS will not refund the filing fees because USCIS has already undertaken steps to adjudicate the case.

Alternatively, an individual who withdraws his or her Form I-601A filing or whose Form

I-601A is denied can apply for a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after he or she attends the immigrant visa interview and after DOS conclusively determines that the individual is inadmissible. If the ground(s) of inadmissibility identified by the DOS consular officer can be waived, the individual can file a Form I-601 along with any supporting documentation or evidence needed to demonstrate eligibility for the waiver and ultimately the immigrant visa. Since USCIS has now centralized adjudication of Forms I-601 filed by aliens abroad, USCIS anticipates that the processing time in the traditional Form I-601 waiver process will be reduced.

Applicants and their attorneys or accredited representatives also are reminded that they may address or correct mistakes by supplementing a pending Form I-601A waiver request with additional evidence or correcting the request before USCIS makes a final decision in the case. USCIS will take into consideration any evidence received when making the decision.

#### 4. Biometrics

Several commenters were concerned about the biometrics requirement and the potential harm to applicants, especially if they were denied a provisional unlawful presence waiver. One commenter believed that the biometrics requirement should be eliminated because it would make applicants hesitant to apply for the provisional unlawful presence waiver because of a perceived inherent danger for undocumented persons to work so closely with the U.S. Government. One commenter stated that, when DHS collects biometrics from applicants, it demands a great amount of personal information that could put applicants at risk. The commenter believed that the information collected from biometrics could be incriminating and used to initiate investigations. The commenter also noted that the proposed rule failed to offer applicants any protection from being placed in removal proceedings. One commenter claimed that the

collection of biometrics was another way for DHS to “find fault” with the applicant and bar waiver approval. Finally, several commenters believed that DHS should allow all individuals to provide biometrics at a U.S. Embassy or consulate and, therefore, should include aliens outside the United States.

After consideration of these comments, DHS is not modifying the biometrics requirement. Requiring collection of biometrics helps USCIS determine if an alien is potentially subject to another ground of inadmissibility or if there are negative factors or conduct that may affect whether the individual warrants a favorable exercise of discretion. DHS only collects the biographic information needed to run such checks and to adjudicate any requested immigration benefit. Requiring biometrics also is consistent with the agency’s enforcement priorities and necessary to ensure that an individual granted a Form I-601A is not a national security risk or public safety threat. USCIS will continue to follow its existing Notice to Appear (NTA) policies to determine whether the agency will initiate removal proceedings against a particular individual or refer them to ICE. Finally, DHS will not permit capture of biometrics abroad because the Form I-601A process is a domestic process that applies only to aliens who are present in the United States at the time of filing, and DOS already collects an applicant’s biometrics at the U.S. Embassy or consulate abroad as part of the immigrant visa application process.

#### 5. The Minimum Age (17 Years) Requirement

Several commenters objected to the requirement that applicants must be 17 years of age or older to file a provisional unlawful presence waiver. The commenters argued that the requirement is confusing and suggested eliminating it altogether. One commenter suggested changing the minimum age from 17 to 18 years old. The commenters asked DHS to provide clear instructions to the public that individuals do not begin to accrue unlawful presence until

they are 18 years old and stated that it would be best if applicants judged on their own whether and when they should file the provisional unlawful presence waiver application.

It is important for DHS to maintain the flexibility to reject applications filed by applicants under the age of 17 so these applicants are not precluded from filing another waiver application in the future. This approach would allow an applicant to save the cost for filing an unnecessary waiver application until the waiver is actually needed. This approach of allowing individuals who are 17 years or older request a provisional unlawful presence waiver also enables more efficient processing of the immigrant visa application for immediate relative children who are under the age of 18 years and therefore have not yet accrued unlawful presence, but who very possibly will turn 18 years old before the DOS consular interview, accrue unlawful presence subsequent to such time, and potentially trigger the bars under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i), upon a departure. If these children must wait until they have turned 18 years old and thereafter accrued at least 180 days of unlawful presence to file a Form I-601A, it may be the case that by that time DOS will have already scheduled a consular interview, thereby precluding the alien from eligibility for this process and leading to the hardship to U.S. citizen parents that this rulemaking intends to avoid.

#### 6. Effect of the Child Status Protection Act (CSPA)

Several commenters asked DHS to clarify that the Child Status Protection Act (CSPA) provisions, which protects certain children from aging-out of eligibility for certain immigration benefits, be applied to the agency's definition of "immediate relative" for purposes of access to the provisional unlawful presence waiver process. DHS clarifies in the Form I-601A instructions that an applicant will remain eligible for a provisional unlawful presence waiver so long as he or she remains an "immediate relative" as defined in the INA, as amended by the CSPA. Thus, an

aged-out child may still qualify as an “immediate relative” for purposes of access to the provisional unlawful presence waiver process as long as the child is classified as an immediate relative under the INA. See INA section 201(f), 8 U.S.C. 1151(f).

## **E. Adjudication**

### **1. Extreme Hardship – Standards and Training**

Numerous commenters questioned DHS’s policy on extreme hardship. Many urged DHS to issue more detailed guidance on extreme hardship, arguing that the term is unclear and potentially subjects applicants to arbitrary decision-making by USCIS officers. Other commenters indicated that clear guidance would allow individuals to better assess their chances for an approval. One commenter even provided DHS with a list of suggestions for consideration when creating new policy guidance on extreme hardship determinations. A number of commenters requested that DHS ensure, through training, that the extreme hardship standard is applied evenly and consistently, and that extreme hardship assessments include consideration of the financial and emotional effects of separation. Many commenters thought that the current extreme hardship standard applied by USCIS is too rigid and should be relaxed. Several commenters also asked DHS to conduct extensive training for domestic USCIS officers, specifically on country conditions, which are critical to making an extreme hardship determination. The commenters stated that USCIS personnel who adjudicate waivers abroad already are highly trained, have intimate familiarity with specific country conditions, and are knowledgeable about conditions in the applicant’s home country. The commenters were concerned that, without extensive training, USCIS officers in the United States may adopt a more restrictive approach. The commenters wanted USCIS to ensure that country-specific knowledge is not lost once waiver processing is moved stateside. Several commenters also mentioned that



USCIS should use the adjudicator's manual and standard operating procedures created by the Refugee, Asylum, and International Operations Directorate (RAIO) because they explain the entire process, standard of review, and other requirements. The commenters stated that this manual is an invaluable resource and that USCIS should create a similar one for the provisional unlawful presence waiver process and make it publicly available.

Extreme hardship is a statutory requirement that an applicant must meet to qualify for an unlawful presence waiver under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). The INA does not define the term, and federal courts have not specifically defined extreme hardship through case law. The BIA has stated that extreme hardship is not a definable term of fixed and inflexible meaning, but that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. See Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565 (BIA 1999). When USCIS assesses whether an applicant has established extreme hardship, USCIS looks at the totality of the applicant's circumstances and any supporting evidence to determine whether the qualifying relative will experience extreme hardship.

In this final rule, USCIS is not modifying how it makes extreme hardship determinations or how it defines extreme hardship. Consistent with how USCIS currently makes extreme hardship determinations, USCIS will consider all factors and supporting evidence that an applicant submits with his or her provisional unlawful presence waiver application. USCIS also has included in the Form I-601A instructions examples of factors to help provisional unlawful presence waiver applicants understand what can be provided to establish the required extreme hardship to a U.S. citizen spouse or parent. USCIS will thoroughly train officers to adjudicate provisional unlawful presence waivers, create standard operating procedures specific to the Form I-601A process, and monitor implementation and conduct further training if necessary.

## 2. Presumption of Extreme Hardship

Several commenters asked DHS to apply a presumption of extreme hardship if the applicant has to file a new Form I-601 waiver application because the DOS consular officer determined that the applicant was inadmissible on other grounds that can be waived. The commenters argued that the extreme hardship would already be established as part of the provisional unlawful presence waiver application and USCIS should not have to re-adjudicate that aspect of the waiver.

Many commenters believed that USCIS should automatically find extreme hardship exists in certain circumstances. The commenters argued that extreme hardship should be found based solely on: (1) separation of the U.S. citizen from his or her immediate relative; (2) dangerous conditions in the applicant's home country; (3) the fact that the U.S. citizen and undocumented alien have a U.S. citizen child; (4) the fact that the applicant would be separated from his or her children for three or 10 years; (5) being a student in the United States; or (6) the fact that the applicant was brought into the United States at a young age and that he or she could qualify under the DREAM Act if enacted. Some commenters also suggested that DHS publish clear criteria for extreme hardship and include factors such as the length of time an alien has been married, the existence of children, the payment of taxes, strong ties to the United States and life-long assets, lack of eligibility for adjustment of status, and the loss of a business. The commenters believed that setting out clear criteria would help applicants better understand how to meet the extreme hardship standard.

Several Congressional commenters stated that DHS has already established a precedent in its regulations that includes a presumption of extreme hardship for certain Salvadorans and Guatemalans under the Nicaraguan Adjustment and Central American Relief Act (NACARA),

Pub. L. 105-100, as amended, citing 8 CFR 1240.64(d)(1). These Congressional commenters believed that DHS could include similar regulations and even create a rebuttable presumption that an extreme hardship requirement has been satisfied when applicants would be required to remain for prolonged periods of time in dangerous locations. The Congressional commenters further argued that DHS could determine if a location was dangerous by whether DOS awards danger pay to its employees serving in such locations, citing 5 U.S.C. 5928 (awarding danger pay when there is a “civil insurrection, civil war, terrorism, or wartime conditions”). Many commenters also stated that the rule should, at a minimum, consider the dangerousness of a location as a highly-relevant factor during the adjudication. One commenter also suggested that extreme hardship should be found if the U.S. citizen has to relocate to a country where Peace Corps does not send its personnel because it is too dangerous.

DHS is not modifying how it makes extreme hardship determinations or defining extreme hardship for purposes of the provisional unlawful presence waiver process. DHS also is not creating presumptions of extreme hardship. As indicated previously, extreme hardship is not a definable term and elements to establish extreme hardship are dependent upon the facts and circumstances of each case. Consistent with existing practice, USCIS will continue to consider all factors and supporting evidence that an applicant submits with his or her provisional unlawful presence waiver application in assessing if the applicant has established the requisite extreme hardship. DHS also has included in the Form I-601A instructions examples of factors to help provisional unlawful presence waiver applicants understand what types of documents can be provided to establish the required extreme hardship to a U.S. citizen spouse or parent.

In terms of re-adjudicating prior extreme hardship and discretionary determinations, DHS will not alter its position on this point. Every extreme hardship determination and discretionary

determination is based on a careful consideration of the evidence of record at the time the determination is made. If the DOS consular officer determines that a new ground of inadmissibility applies in the applicant's case, USCIS may consider that as a new, material factor when assessing whether the applicant continues to warrant a favorable exercise of discretion. As such, USCIS reserves the authority to reopen and reconsider, on its own motion, an approval or a denial of a provisional unlawful presence waiver application at any time, including when new factors come to light after the provisional unlawful presence waiver applicant's immigrant visa interview.

### 3. Eliminating the Extreme Hardship Requirement

Several commenters suggested that DHS completely eliminate the extreme hardship requirement for purposes of the provisional unlawful presence waiver, rather than try to define it. Others argued that immediate relatives should not have to prove extreme hardship at all, especially if married to a U.S. citizen.

Congress enacted the provisions of the INA that describe the statutory requirements for obtaining a waiver of inadmissibility under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). See INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). DHS, as part of the Executive Branch, does not have the authority to dispense with any statutory requirement. As a result, DHS cannot eliminate extreme hardship as a requirement or approve a provisional unlawful presence waiver for an individual who has not established that he or she meets all the statutory requirements set by Congress. Only Congress can change the minimum statutory requirements individuals must meet to qualify for a waiver of inadmissibility. USCIS, therefore, cannot adopt these suggestions.

### 4. Timelines for Adjudication; Interviews

Several commenters urged DHS to establish clear timeframes for adjudication of the provisional unlawful presence waiver and for immigrant visa issuance. The commenters stated that without a clear pronouncement, the uncertainties about the duration of the adjudication process would discourage applicants from taking advantage of the provisional unlawful presence waiver process. Some commenters believed that it would be beneficial if provisional unlawful presence waiver applicants could be interviewed to establish extreme hardship and the bona fides of the marriage and recommended that USCIS interview applicants electronically or through a remote interview process. The commenters also suggested combining the interview for Form I-130 with the interview for Form I-601A. One commenter believed that allowing applicants to be interviewed for the provisional unlawful presence waiver would result in what the commenter called “more humane adjudications.”

DHS declines to adopt these suggestions. In terms of processing times, DHS generally publishes the estimated processing times for particular immigration benefits and for the local offices where an applicant’s case would be adjudicated. See <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (USCIS case processing times). For the provisional unlawful presence waiver application, USCIS and DOS are coordinating closely to make sure that the timing of the approval of a provisional unlawful presence waiver application is close to the time of the scheduled immigrant visa interview abroad. DOS estimates that it will schedule the applicant for an immigrant visa interview within two to three months after approval of the provisional unlawful presence waiver and the applicant’s submission of the required immigrant visa processing documents to DOS. This timeframe allows the immediate relative the opportunity to remain united with his or her U.S. citizen spouse or parent until shortly before his or her immigrant visa interview and will allow DOS to adjudicate an immigrant visa shortly after

the applicant appears for his or her interview. DHS also believes that this streamlined process will significantly shorten the length of time immediate relatives must remain outside the United States before they can rejoin their U.S. citizen relatives.

In most instances, the provisional unlawful presence waiver application will be adjudicated at the USCIS National Benefits Center (NBC). USCIS will adjudicate the applications based on the applicant's responses in the Form I-601A, any supporting documentation, and any results from background and security checks. The NBC does not conduct on-site interviews. In cases where an interview would be required, USCIS would have to transfer the applicant's information and A-File/Receipt File to the local district office and schedule the applicant for an interview, which could take several months. Thus, a requirement to interview all provisional unlawful presence waiver applicants would undermine the goal of this new streamlined process. Through the streamlined provisional unlawful presence waiver process, DHS hopes to reduce the time it takes for an applicant to receive a decision from USCIS and complete the immigrant visa process abroad. DHS, however, has reserved its authority to request that a provisional unlawful presence waiver applicant appear for an interview.

#### 5. Requests for Evidence and Notices of Intent to Deny

Several commenters believed that DHS should generously use Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) to clarify any weaknesses or deficiencies in an alien's provisional unlawful presence waiver application before USCIS renders a decision. Otherwise, some eligible applicants might be unnecessarily excluded from the process. Several commenters asked DHS to expand the use of RFEs to any aspect of the provisional unlawful presence waiver application and not just limit it to the extreme hardship determination. The commenters believed that this change would allow applicants to submit all evidence necessary to

establish eligibility for the waiver and give USCIS more information about an applicant's admissibility rather than automatically issuing a denial. With respect to NOIDs, several commenters argued that USCIS should issue a NOID instead of a denial, especially if other grounds of inadmissibility were detected. The commenters also stated that USCIS should issue a NOID to at least let the applicant know which grounds of inadmissibility USCIS believes may come up at the immigrant visa interview.

As stated in the proposed rule, DHS is committed to issuing RFEs to address applications it receives that are missing critical information related to extreme hardship or if applications are missing critical information related to whether the alien merits a favorable exercise of discretion. USCIS officers also retain the discretion to issue an RFE on any issue or subject matter, if the adjudicator believes that additional evidence will aid in the adjudication. DHS anticipates that most RFEs will focus on the substantive determination on extreme hardship and any factors that may establish that the applicant warrants a favorable exercise of discretion.

USCIS will not issue NOIDs in this provisional unlawful presence waiver process, notwithstanding the provisions of 8 CFR 103.2(b)(16). A NOID provides an applicant or petitioner with an opportunity to review and rebut derogatory information of which he or she is unaware. In the provisional unlawful presence waiver process, USCIS will not be conducting a full admissibility assessment and, as a result, will not be issuing a NOID describing all possible grounds of inadmissibility. USCIS, instead, will be deciding an individual's eligibility based on his or her responses to the Form I-601A questions and the results from the applicant's background and security checks. Most applicants would be aware of their prior criminal or immigration history and the potential that these offenses might make them ineligible for the requested benefit. If an individual's provisional unlawful presence waiver application is

ultimately denied, the individual may file a new Form I-601A, in accordance with the form instructions, with the required fees and any additional documentation that he or she believes might establish his or her eligibility for the waiver. The applicant's case must still be pending with DOS and the applicant must notify DOS that he or she intends to file a new I-601A.

Alternatively, the individual can file a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after he or she attends the immigrant visa interview and after DOS conclusively determines that the individual is inadmissible. At that time, the applicant can make his or her case about whether a particular criminal offense or immigration violation renders the applicant ineligible for the immigrant visa. If needed, the applicant will have an opportunity to file all required waivers and appeal any denial of the Form I-601 application to the AAO.

## **F. Denials, Motions to Reopen or Reconsider, and Appeals**

### **1. Denials and Motions to Reopen/Reconsider**

Several commenters stated that USCIS should not deny a provisional unlawful presence waiver solely because there are other grounds of inadmissibility. The commenters suggested that USCIS approve the provisional unlawful presence waiver and then inform the applicant of any other potential grounds of inadmissibility or ineligibility discovered during adjudication of the provisional unlawful presence waiver application. Some commenters recommended that DHS allow an applicant to file a motion to reopen or reconsider if the provisional unlawful presence waiver application is denied, giving the applicant a chance to rebut DHS's findings. Several commenters and immigrant advocacy groups urged DHS to loosen restrictions on filing of motions to reopen or reconsider. The commenters argued that these are due process protections that are "integral parts of our legal system." The commenters urged DHS to allow such motions



especially in cases of changed circumstances, erroneous denials, deficient applications filed by pro se applicants, and deficient or improper filings by “notarios” and individuals not authorized to practice immigration law in the United States. The commenters recommended that DHS do significant public outreach to familiarize potential applicants with the new provisional unlawful presence waiver process and ensure that immigrants are aware of notario practices. The commenters also asked DHS to place warnings in the instructions to the provisional unlawful presence waiver application and post them on the USCIS webpage to help applicants to avoid scams. The commenters suggested that DHS provide applicants with links to all 50 State Bar Associations so that applicants may contact the state bars to ensure that the person assisting them is a licensed attorney or accredited representative who is authorized to practice immigration law.

With regard to DHS’s concern with substantial delays in immigrant visa processing if motions to reopen or multiple filings were permitted, the commenters stated that DHS would still expend additional resources on cases where an applicant is denied a provisional unlawful presence waiver and must go abroad to apply again with USCIS for a waiver of inadmissibility. The commenters also noted that USCIS and DOS would have to coordinate processes anyway if the waiver application is denied or when the agency elects to reopen and deny the waiver on its own motion. Finally, several commenters said that DHS should give the applicant a chance to file a new provisional unlawful presence waiver application if the first request is denied. The commenters noted that most applicants have been in the United States for extended periods of time and have not traveled abroad because of the uncertainty in the process, the hardships, and potential dangers in their home countries. According to these commenters, if USCIS denied waiver applications for this group and did not permit a second filing in the United States, most of these applicants would simply choose to remain in the United States unlawfully and without

status.

DHS understands the concerns of the commenters but nonetheless believes that allowing motions to reopen or reconsider would undercut the efficiencies USCIS and DOS will gain through the streamlined provisional unlawful presence waiver process. DHS also has determined that allowing motions to reopen or reconsider could significantly interfere with the operational agreements between USCIS and DOS and could substantially delay waiver and immigrant visa processing. To alleviate some of the commenters' concerns, however, USCIS has eliminated the filing limitation initially proposed in the NPRM. Consequently, if an individual's provisional unlawful presence waiver request is ultimately denied, the individual may file a new Form I-601A, in accordance with the form instructions, with the required fees and any additional documentation that he or she believes might establish his or her eligibility for the waiver. The applicant's case must still be pending with DOS and the applicant must notify DOS that he or she intends on filing a new I-601A.

Alternatively, the individual can file a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after he or she attends the immigrant visa interview and after DOS conclusively determines that the individual is inadmissible.

As indicated in the proposed rule, DHS is retaining its authority and discretion to reopen or reconsider a decision on its own motion. For the provisional unlawful presence waiver process, USCIS may reopen the decision and deny or approve the provisional unlawful presence waiver at any time if USCIS finds that the decision was issued in error or approval is no longer warranted. USCIS will follow the requirements of 8 CFR 103.5(a)(5) before reopening a case and denying a waiver application.

DHS agrees with the need for public outreach and materials specific to the provisional

unlawful presence waiver process to help potential applicants avoid being the victims of scams by individuals who are not authorized to practice immigration law. USCIS has already begun an initiative, the Unauthorized Practice of Immigration Law (UPIIL) initiative, to inform the public about individuals who are not authorized to practice immigration laws and has held several stakeholders outreach engagements on the topic. For more details about this initiative, please visit the USCIS website at [www.uscis.gov/avoidscams](http://www.uscis.gov/avoidscams).

## 2. Denials and Initiation of Removal Proceedings

Several commenters questioned the usefulness of the proposed rule, especially because it did not contain any confidentiality provisions or make clear what would happen to an individual if a provisional unlawful presence waiver is denied. Many thought that undocumented individuals will be hesitant or deterred from filing the provisional unlawful presence waiver as it would expose their status in the United States and cause their families even more stress.

Numerous commenters asked DHS to implement a confidentiality provision so that the denial of the provisional unlawful presence waiver request does not automatically trigger removal proceedings or notice to ICE that the individual's case was denied; others requested that DHS include a "nonremovability" clause in the regulatory text. Some commenters also urged USCIS to work closely with CBP to ensure that CBP will not initiate removal proceedings against an alien who is departing from the United States to attend the immigrant visa interview.

DHS is committed to focusing its finite enforcement resources on its enforcement priorities, including individuals who pose a threat to public safety or national security. As indicated in the proposed rule, DHS will follow current agency policy for issuance of Notices to Appear (NTAs). See [www.uscis.gov/NTA](http://www.uscis.gov/NTA). However, consistent with its civil enforcement priorities, DHS does not envision initiating removal proceedings against aliens or referring aliens

to ICE whose provisional unlawful presence waiver applications have been approved. Similarly, consistent with its civil enforcement priorities, DHS also does not envision initiating removal proceedings against aliens whose Form I-601As are denied or withdrawn prior to final adjudication. Pursuant to its existing policy governing issuance of NTAs and referrals to ICE,<sup>14</sup> an individual whose request for a provisional unlawful presence waiver is 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. Given USCIS’s existing NTA policy, which appropriately focuses USCIS’s referrals to ICE on individuals who are considered DHS enforcement priorities, DHS will not create a “nonremovability” clause or confidentiality provision to preclude automatic initiation of removal proceedings. DHS will follow the NTA issuance policy in effect at the time of the adjudication to determine if it will initiate removal proceedings against an applicant whose Form I-601A provisional unlawful presence waiver application is denied. Furthermore, if DHS 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, DHS 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.

### 3. Appeals

Several commenters argued that DHS should permit appeals of denials while the applicant is in the United States. The commenters claimed that denial of a provisional unlawful

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<sup>14</sup> See USCIS Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011), available at: [http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/NTA%20PM%20\(Approved%20as%20final%2011-7-11\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Approved%20as%20final%2011-7-11).pdf).

presence waiver was equivalent to a final waiver denial and should be subject to appeal rights similar to those allowed for the current Form I-601 denials that are filed with the AAO. One commenter argued that not allowing aliens to appeal essentially meant that DHS would adjudicate all waivers favorably. The commenter also stated that denying appeals would not meet the due process requirements. A few commenters urged DHS to allow appeals at least in cases in which there were questions of law, errors, or changed circumstances. Finally, several commenters stated that DHS, by relegating certain questions of inadmissibility to either DOS or federal court, was abdicating its authority to interpret the law for grounds of inadmissibility where no waiver is available.

DHS disagrees with these positions. There is no cognizable due process interest in access to or eligibility for a discretionary, provisional unlawful presence waiver of inadmissibility. See, e.g., *Champion v. Holder*, 626 F.3d 952, 957 (7th Cir. 2010) (“To articulate a due process claim, [the individual] must demonstrate that she has a protected liberty or property interest under the Fifth Amendment. Aliens have a Fifth Amendment right to due process in some immigration proceedings, but not in those that are discretionary.”) (citations omitted). The provisional unlawful presence waiver process is purely discretionary and no alien has a right to obtain a waiver from the Secretary of Homeland Security.<sup>15</sup>

Even assuming that such an interest exists, none of the commenters cite any case or statute that supports the claim that the Due Process Clause of the Fifth Amendment requires an

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<sup>15</sup> Even with respect to ordinary Form I-601 waivers, Congress specifically gave the Secretary discretion to decide who should or should not be granted an unlawful presence waiver under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). This discretion is not diminished by the fact that one element of that determination rests on a legal requirement – satisfying the extreme hardship standard. Even if an applicant establishes extreme hardship, the Secretary is not required to favorably exercise her discretion in the adjudication of the waiver. See *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996) (“Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered.”).

Executive agency to provide for administrative appeal of an agency decision. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, does permit an agency to provide an administrative appeal and if the agency chooses to do so, the agency can also, by regulation, make the filing of an administrative appeal a necessary prerequisite to judicial review. See Darby v. Cisneros, 509 U.S. 137 (1993). But nothing in section 10(c) or the Darby decision mandates that an agency must provide for an administrative appeal.<sup>16</sup> In upholding the BIAs' practice of "affirmance without opinion" of immigration judge decisions, for example, several courts of appeals have recognized that Due Process does not require an agency to provide for administrative appeal of its decisions. See, e.g., Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 157 (2d Cir. 2004); Loulou v. Ashcroft, 354 F.3d 706, 709 (8th Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 850 (9th Cir. 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1289 (11th Cir. 2003); Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003); Guentchev v. INS, 77 F.3d 1036, 1037-38 (7th Cir. 1996).

Finally, if USCIS denies an alien's Form I-601A, the alien has two alternate avenues for obtaining a waiver of inadmissibility: (1) filing a new Form I-601A, in accordance with the form instructions, with the required fees and any additional documentation that he or she believes might establish his or her eligibility for the waiver or (2) filing a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after he or she attends the immigrant visa interview and after DOS conclusively determines that the individual is inadmissible. The Form I-601 is appealable to the AAO.

Appeals should be reserved for actions that are based on a comprehensive assessment of

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<sup>16</sup> To the contrary, the Court's conclusion in Darby that pursuing an administrative appeal is a prerequisite to judicial review only if required by statute or the agency chooses to provide for such an administrative appeal and also chooses to make it mandatory strongly suggests that an agency is not required to allow for administrative appeal at all, in the absence of a statutory mandate.

the applicant's admissibility. Jurisdiction over the final admissibility determination in the context of the Form I-601 lies with the AAO and with DOS in the context of the immigrant visa eligibility determination. It would be an inefficient use of resources for DHS to allow an administrative appeal of a decision that does not take into consideration the full inadmissibility determination or any other factors that may be discovered during the course of the immigrant visa interview abroad. DHS, therefore, is retaining its policy of not affording an administrative appeal of the denial of a provisional unlawful presence waiver application.

#### **G. Effect of Pending or Approved Provisional Unlawful Presence Waivers**

Many commenters asked USCIS to consider allowing aliens with pending provisional unlawful presence waiver applications to travel and work while waiting for a decision from USCIS to travel abroad for their immigrant visa interview. Several commenters also suggested that individuals with pending provisional unlawful presence waiver applications be given Social Security numbers and driver's licenses. Some commenters requested that aliens not accrue unlawful presence during the pendency of Form I-601A or while waiting for their immigrant visa interview. The commenters believed that a pending provisional unlawful presence waiver application should "stop the clock" on any immigration violation. Another commenter stated that the final rule should clearly specify that the pendency of a Form I-601A protects an individual from further accrual of unlawful presence and places the individual in a period of stay authorized by the Secretary described in INA section 212(a)(9)(B)(ii), 8 U.S.C. 1182(a)(9)(B)(ii). Finally, several commenters stated that approval of the provisional unlawful presence waiver should guarantee immigrant visa issuance and the right to return to the United States.

A waiver of inadmissibility is an ancillary benefit to a primary application that would

give an alien legal immigrant status; the waiver, by itself, does not convey a legal status. In the provisional unlawful presence waiver process, the primary application is the immigrant visa over which DOS, not USCIS, has jurisdiction. The waiver only addresses grounds of inadmissibility (in this instance, unlawful presence) that may preclude DOS from issuing the immigrant visa at the time of the applicant's interview abroad. If DOS approves the immigrant visa, the alien can be admitted to the United States as a LPR, assuming CBP determines that he or she is otherwise admissible and entitled to the immigrant visa classification. See INA sections 204(e), 211(a), and 221(h); 8 U.S.C. 1154(e), 1181(a), and 1201(h). Interim benefits provided on the basis of something pending with DHS or DOJ are granted only in connection with a pending application for an immigration status within the United States. DHS does not have authority to issue Social Security numbers; the Social Security Administration has sole jurisdiction over the issuance of Social Security numbers. Finally, DHS has no authority to issue driver's licenses; the issuance of these types of documents are governed by the laws and regulations of the individual U.S. states, which prescribe the conditions for obtaining and issuance of identification cards and drivers' licenses.

As stated in the proposed rule, the approval of a provisional unlawful presence waiver does not create a lawful immigration status, extend any authorized period of stay, protect aliens from removal or law enforcement action, or grant any other immigration benefits, including temporary work authorization and advance parole. DHS is not altering its position on interim benefits as initially stated in the proposed rule. Finally, the grant of a provisional unlawful presence waiver does not guarantee that an individual with an approved immigrant visa will be admitted to the United States by CBP.

Operationally, USCIS and DOS have coordinated closely on this streamlined process and



the close timeframe between processing of the Form I-601A approval and the immigrant visa application will encourage individuals to speed up the consular process and to depart from the United States as quickly as possible. Any issuance of interim benefits or specific authorized periods of stay will hinder this goal and the integrity of the program. DHS added language to the final rule to make clear that applicants are not eligible for interim benefits and that a pending or approved application for provisional unlawful presence waiver does not authorize any interim benefits. See section 212.7(e)(2).

DHS reminds the public that the filing or approval of a provisional unlawful presence waiver application will not: (1) confer any legal status; (2) protect against the accrual of additional unlawful presence; (3) authorize an alien to enter the United States without securing a visa or other appropriate entry document; (4) convey any interim benefits (e.g., employment authorization, advance parole, or eligibility to be paroled based solely on a pending or approved Form I-601A); or (5) protect an alien from being placed in removal proceedings or removed from the United States, in accordance with current DHS policies governing initiation of removal proceedings and use of prosecutorial discretion.

#### **H. Automatic Revocation**

Several commenters questioned the regulatory text in proposed 8 CFR 212.7(a)(4)(iv), which provides for automatic termination of the validity of an approved waiver under INA section 216(f), 8 U.S.C. 1186a(f), when the conditional resident status of an alien admitted under INA section 216, 8 U.S.C. 1186a, is terminated. The commenters argued that this provision was contrary to the INA and should be removed from the final rule. The commenters noted that under INA section 216(f), 8 U.S.C. 1186a(f), waivers under INA section 212(h), 8 U.S.C. 1182(h)(for certain criminal grounds of inadmissibility), and INA section 212(i) 8 U.S.C.

1182(h) (for fraud or misrepresentation), are the only types of waivers that are automatically terminated upon termination of conditional resident status. As a result, they assert, DHS lacks the authority to implement this regulatory change when Congress has already clearly spoken on the matter.

A few commenters also argued that DHS should eliminate automatic revocation or adjudicate revocations separate and apart from the provisional unlawful presence waiver process. The commenters believed that it would be more efficient for DHS to reserve the right to review an approved provisional unlawful presence waiver rather than automatically revoke it, especially when DOS determines that the applicant is subject to another ground of inadmissibility or there are other negative discretionary factors that were not considered at the time of the Form I-601A adjudication. The commenters also opined that DHS would not need to re-adjudicate any portion of the waiver that has the same or lesser standard needed for waiving the newly discovered ground of inadmissibility (e.g., if the new ground of inadmissibility required a showing of extreme hardship, DHS could simply adopt the provisional unlawful presence waiver determination on extreme hardship, when adjudicating the waiver request for the new ground of inadmissibility).

DHS agrees that the statute at INA section 216(f), 8 U.S.C. 1186a(f), only addresses automatic revocation of approved waivers under INA sections 212(h) or (i). As a result, it has clarified that the amendment to 8 CFR 212.7(a)(4), regarding treatment of certain waivers upon the termination of conditional resident status under INA section 216(f), 8 U.S.C. 1186a(f), and automatic revocation of approved waivers of inadmissibility, only applies to approved waivers based on INA sections 212(h) and (i), 8 U.S.C. 1182(h) and (i), and is revising 8 CFR 212.7(a)(4) accordingly.

As to revocations, DHS has not adopted the commenters' suggestions. DHS believes that revocation of an approved case requires an assessment of the facts and circumstances as they existed at the time the case was approved as well as any newly discovered information that may have affected the officer's decision or discretion at the time of adjudication. When USCIS reviews a case for possible revocation, USCIS looks at the facts and law at the time the case was approved to determine if the applicant was in fact eligible for the benefit requested. USCIS also reviews any newly discovered information to see if it is relevant and could have potentially affected the officer's discretionary assessment in the case. Since the provisional unlawful presence waiver is a discretionary process, DHS will retain its authority on revocations and its position on automatic revocations. Consistent with 8 CFR 103.2(b)(16), if USCIS discovers derogatory information that was unknown to the applicant, USCIS will provide notice of such information and give the applicant an opportunity to respond prior to any decision to deny the application. DHS, however, will not allow aliens to appeal a decision to revoke a provisional unlawful presence waiver.

**I. Comments on Form I-601A, Application for Provisional Unlawful Presence Waiver, and the Form Instructions**

DHS invited the public to comment on the proposed rule and the Form I-601A and the instructions to accompany the form. DHS has considered the comments to the Form I-601A and the form instructions. While DHS has not adopted all suggestions made by comments, below is a list of changes to the form and instructions that DHS incorporated as a result of these comments.

**1. Comments on Form**

- a. Part 1, Information About Applicant – Immigration or Criminal History Records

Several commenters suggested that USCIS allow individuals in removal proceedings to apply for provisional unlawful presence waivers if their removal proceedings had been administratively closed pursuant to ICE's Prosecutorial Discretion (PD) initiative. Several commenters also stated that this section of the form was confusing and/or inaccurate. Specifically, the commenters believed this section was inaccurate because it indicates that an applicant will be ineligible for a provisional unlawful presence waiver if the applicant answers "Yes" to certain questions relating to other possible grounds of inadmissibility. The commenters also believed the questions were too broad to lead to a firm finding of inadmissibility and should be amended to say that the applicant "may" not be eligible and that USCIS "may" deny the application if the applicant answers "Yes" to those questions. These commenters also identified specific inaccuracies and provided suggested edits to revise this section.

DHS has amended the final rule to indicate that an individual in removal proceedings may apply for a provisional unlawful presence waiver if the individual's removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A. DHS is not limiting eligibility solely to individuals whose cases were closed pursuant to the ICE Prosecutorial Discretion (PD) initiative. Any alien whose removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A, can apply for a provisional unlawful presence waiver. If USCIS approves the provisional unlawful presence waiver for an individual whose removal proceedings are administratively closed, the individual should seek termination or dismissal of his or her removal proceedings before departing the United States to appear at the immigrant visa interview to avoid possible delays in his or her immigrant visa processing or risk becoming ineligible for the immigrant visa based on another ground of inadmissibility. DHS has updated the form and its instructions

accordingly.

DHS has incorporated many of the commenters' suggested edits while rewriting this part of the form to clarify ambiguities and to correct inaccuracies. DHS also has revised the form and instructions to clarify that USCIS "may" find an applicant ineligible for a provisional unlawful presence waiver if USCIS determines that there is reason to believe the Department of State may find the applicant ineligible for a ground of inadmissibility other than unlawful presence.

Regardless of whether USCIS approves or denies the provisional unlawful presence waiver, an immigrant visa applicant should present evidence of eligibility and any documents needed to establish admissibility to the consular officer at the time of his or her immigrant visa interview. The approval of a provisional unlawful presence waiver does not guarantee that the consular officer will find the applicant eligible for an immigrant visa. Also, the denial of a provisional unlawful presence waiver does not preclude the applicant from filing a new Form I-601A, in accordance with the form instructions, with the required fees and any additional documentation that he or she believes might establish his or her eligibility for the waiver. The applicant's case must still be pending with DOS, and the applicant must notify DOS that he or she intends to file a new Form I-601A.

Alternatively, the applicant can file a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after his or her immigrant visa interview at the U.S. Embassy or consulate abroad. The purpose of these eligibility questions is not for USCIS to pre-adjudicate immigrant visa eligibility, but to limit the provisional unlawful presence waiver process to individuals whose only potential ground of inadmissibility is based on prior unlawful presence in the United States. All other potential grounds of inadmissibility and/or ineligibility need to be addressed with the consular officer during the immigrant visa interview.

Finally, one commenter suggested that the form be enhanced by incorporating a detailed questionnaire, similar to that of Form I-601, aimed at uncovering other potential grounds of inadmissibility.

DHS did not include a detailed questionnaire covering every potential ground of inadmissibility because the Form I-601A may only be used to waive unlawful presence. The purpose of the section entitled “Immigration or Criminal History Records” is to give applicants an opportunity to explain any possible immigration or criminal history records which USCIS may uncover during routine system and background checks. DHS will not make any changes to the form based on this comment.

b. Part 2, Information About Immediate Relative Petitions and Consular Processing

Many commenters suggested that DHS allow individuals to cancel or reschedule their immigrant visa interviews in order to seek a provisional unlawful presence waiver.

In response to these suggestions, DHS considered a number of criteria and restrictions to make the process operationally manageable without creating delays in processing of other petitions or applications filed with USCIS or in the DOS immigrant visa process. By including aliens who were scheduled for an interview prior to the publication of this final rule, the projected volume of cases could significantly increase and would create backlogs not only in the provisional unlawful presence waiver process, but also in adjudication of other USCIS benefits. The increased volume would also adversely impact DOS and its immigrant visa process.

For these reasons, DHS will not expand the provisional unlawful presence waiver to include individuals whose immigrant visa interviews were scheduled before the date of publication of this final rule [INSERT DATE OF FEDERAL REGISTER PUBLICATION], even if the consulate or individual cancelled or rescheduled the immigrant visa interview after

the date of publication of this final rule. DHS adds language to the final rule to clarify when an alien is ineligible for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview.

USCIS will first look at whether the scheduled immigrant visa interview is based on the approved immediate relative petition (I-130 or I-360) that accompanies the Form I-601A. If it is, USCIS will then look at the Department of State's Consular Consolidated Database (CCD) to determine the date on which the Department of State initially acted to schedule the applicant for his or her immigrant visa interview (i.e., the date of scheduling itself and not the date and time the applicant must appear for the interview).

If the date that the Department of State initially acted to schedule the immigrant visa interview is prior to the date of publication of this final rule, [INSERT FEDERAL REGISTER PUBLICATION DATE], then the alien is ineligible to apply for a provisional unlawful presence waiver. If the date that Department of State initially acted to schedule the immigrant visa interview is on or after the publication date of this final rule, the alien is eligible to apply for a provisional unlawful presence waiver. The actual date and time that the alien is scheduled to appear for the interview is not relevant for the eligibility determination. This rule applies even if the alien failed to appear for his or her interview, cancelled the interview, or requested that the interview be rescheduled. Therefore, USCIS may reject or deny any Form I-601A filed by an alien who USCIS determines that the Department of State, prior to the date of publication of this final rule, initially acted to schedule the alien's immigrant visa interview for the approved immediate relative petition upon which the Form I-601A is based,. See section 212.7(e)(4)(iv).

An alien who is ineligible to apply for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview may still qualify for a provisional unlawful

presence waiver if he or she has a new DOS immigrant visa case because 1) DOS terminated the immigrant visa registration associated with the previously scheduled interview, and they have a new immediate relative petition; or 2) the alien has a new immediate relative petition filed on his or her behalf by a different petitioner.

USCIS will reject or deny any Form I-601A filed by an alien who was scheduled for an interview prior to the date of publication of this final rule, even if the alien's interview is rescheduled after the date of publication of this final rule. DHS has updated the form and its instructions accordingly.

c. Part 3, Information About Qualifying Relative

Many commenters asked DHS to allow eligible applicants to show extreme hardship to a LPR spouse or parent, if applicable, since the statute authorizes a waiver of unlawful presence based on a showing of extreme hardship to a spouse or parent who is either a U.S. citizen or LPR.

DHS has considered these comments but is not adopting the suggested change. As stated in the proposed rule, a primary purpose for creating the provisional unlawful presence waiver process is to reduce the separation of U.S. citizens and their immediate relatives. Focusing on hardship to U.S. citizens is consistent with permissible distinctions that may be drawn between U.S. citizens and aliens. It also is consistent with the Secretary's authority to administer the immigration laws and determine the most efficient means for effectuating the waiver process. See 77 FR at 19908.

d. Interviews

One commenter suggested that when USCIS requires an interview for a provisional unlawful presence waiver, USCIS should allow the applicant to choose to either appear at a local



USCIS field office for an in-person interview or have a video-conferenced interview with an adjudicator at a USCIS service center using appropriate technology (e.g., Skype).

DHS reviewed these comments but did not adopt the suggestions. DHS does not anticipate that many provisional unlawful presence waiver applicants will require an in-person interview. Also, USCIS does not conduct interviews at the NBC, namely because of its remote location and the type of benefit requests adjudicated by that center, which are generally paper-based decisions. USCIS also will not conduct video interviews in lieu of in-person interviews when such interviews are required. Therefore, DHS will not make the suggested change to the form.

## **2. Comments on Instructions**

### **a. Eligibility Criteria - Pending Adjustment Applications**

Several commenters were confused about what it means to have a pending application for adjustment of status and did not understand why this would affect eligibility for a provisional unlawful presence waiver.

DHS will not remove the restriction for individuals who have an application for adjustment of status pending with USCIS. Individuals who are eligible to obtain LPR status while inside the United States through the adjustment of status process and intend to pursue LPR status through that process do not need the provisional unlawful presence waiver. The provisional unlawful presence waiver is only valid for the purpose of seeking an immigrant visa outside the United States. To avoid confusion, DHS has updated the form instructions to clarify that this restriction only applies to individuals with a pending Form I-485, Application to Register Permanent Residence or Adjust Status.

### **b. Limitations on Filing of Provisional Unlawful Presence Waivers**

Many commenters suggested that DHS remove the restriction to the number of times an individual may seek a provisional unlawful presence waiver or modify it to allow re-filing of the provisional unlawful presence waiver application.

DHS considered these comments and has changed the final rule to reflect that if an individual's provisional unlawful presence waiver request is denied or withdrawn prior to final adjudication, the individual may file a new Form I-601A, in accordance with the form instructions, with the required fees and any additional documentation that he or she believes might establish his or her eligibility for the waiver. The applicant's case must still be pending with DOS and the applicant must notify DOS of his or her intent to file a new Form I-601A.

Alternatively, the individual can file a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after he or she attends the immigrant visa interview and after DOS conclusively determines that the individual is inadmissible. DHS has updated the form and instructions accordingly.

c. Qualifying Relatives

One commenter suggested adding "child" as a qualifying relative for establishing extreme hardship. DHS cannot adopt this suggestion because Congress limited the qualifying relationship for purposes of establishing extreme hardship to spouses or parents. DHS cannot change this statutory requirement.

d. Child Status Protection Act

One commenter asked DHS to clarify in the Form I-601A instructions how the provisional unlawful presence waiver relates to children who benefit from the CSPA. DHS has added language to the Form I-601A instructions to make clear applicants will remain eligible for a provisional unlawful presence waiver as long as the applicants remain "immediate relatives" as

defined in the INA, as amended by the CSPA. Thus, an aged-out child may still qualify as an “immediate relative” for purposes of access to the provisional unlawful presence waiver process as long as the child is classified as an immediate relative under the INA.

e. Statement from Applicant

One commenter suggested adding a sentence in Part 5 of the instructions to explain that applicants may supplement their statements on extreme hardship and factors warranting a favorable exercise of discretion with an attached letter. DHS added the information as requested to the Form I-601A instructions.

f. Penalties

One commenter suggested adding a reminder in the instructions that applicants read the section entitled “Penalties” before the applicant signs the application. DHS added the reminder on the form and in the form instructions, as requested.

g. Required Documents – Check List

One commenter suggested adding a checklist to assist applicants with information on the types of documents and statements that should be submitted with the provisional unlawful presence waiver application. DHS added a separate section with a checklist as requested.

h. Unauthorized Practice of Immigration Law

One commenter suggested adding a warning regarding the unauthorized practice of immigration law.

DHS agrees with this suggestion. In 2011, USCIS started an initiative – the Unauthorized Practice of Immigration Law (UPIIL) initiative – to educate the public about potential fraud and scams in the immigration context. USCIS has posted information about the UPIIL initiative on its website. DHS encourages applicants to review the information at

[www.uscis.gov/avoidscams](http://www.uscis.gov/avoidscams). DHS also has added a link to this website on the form instructions.

## **J. Miscellaneous Comments**

### **1. Statutory Changes**

A large number of supporters of the rule indicated that the proposed rule did not go far enough. The commenters asked DHS to allow individuals who were eligible for the provisional unlawful presence waiver but ineligible for adjustment of status to remain in the United States and adjust their status to a LPR. Several commenters asked DHS to reinstate INA section 245(i), 8 U.S.C. 1255(i). Others asked if DHS could reduce the number of years an alien must remain outside the United States because of unlawful presence under INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). A few commenters also asked if DHS could include a waiver of INA section 212(a)(6)(C)(ii), 8 U.S.C. 1182(a)(6)(C)(i) (false claim to U.S. citizenship). Some commenters asked DHS to grant waivers even if the applicants did not meet all statutory requirements. One commenter said that DHS should eliminate the discretionary portion of the waiver in its entirety. Others wanted DHS to simply grant legal status to individuals married to U.S. citizens, irrespective of whether they had an approved petition or needed a provisional unlawful presence waiver. They argued that if an individual is the spouse of a U.S. citizen then such an individual should simply be able to become a LPR of the United States.

Congress has prescribed the statutory requirements for obtaining LPR status through adjustment of status in the United States. Congress also established the current grounds of inadmissibility and the conditions for any waivers associated with such grounds. DHS does not have the authority to change or dispense with those statutory requirements. DHS cannot reinstate INA section 245(i), 8 U.S.C. 1225(i), or take any action that would grant permanent resident status to individuals who do not meet the statutory requirements for that status. Only

Congress can amend the statutory requirements that individuals must meet to qualify for adjustment of status. DHS, therefore, cannot adopt these recommendations. However, DHS supports comprehensive immigration reform, and DHS will implement any legislation that may be enacted by Congress, including any authorized extension of INA section 245(i), 8 U.S.C. 1225(i).

## 2. Fraud Detection and Prevention; National Security

Some commenters argued that the Federal Government's focus should be on enforcement and deterring illegal entry and marriage fraud. Others opined that the provisional unlawful presence waiver process was a "back door" through which illegal immigrants who pose a threat to national security could be granted a waiver and LPR status.

A core mission of DHS is to protect national security, public safety, and the integrity of the immigration process. DHS has a number of preventative measures in place, as provided by law and through agency policy, to address matters relating to national security and fraud. DHS incorporates these measures through regulations and standard operating procedures that bolster the adjudications process. USCIS's Fraud Detection and National Security (FDNS) Directorate focuses on its fraud and national security mission. FDNS investigates fraud and national security issues relating to the immigration benefit process and makes appropriate referrals to ICE, DOJ, and other law enforcement agencies. USCIS has established standard operating procedures in field offices for referrals to FDNS on potential fraud cases that may require additional review. USCIS's Office of Policy and Strategy is responsible for developing future benefit fraud assessments. For fraud prevention, FDNS has initiated fraud training for Immigration Services Officers (ISOs) to detect any patterns or increase in fraudulent practices in a particular application type or area of the United States. Additionally, USCIS already has processes in

place, including requiring additional interviews and home site visits, conducted by specially trained immigration officers throughout the United States, to assess whether a marriage was entered into to evade immigration laws. These processes provide strong tools for combating potential fraud.

Congress provided several measures aimed at preventing marriage fraud, focusing especially on the potential for fraud in marriages of less than two years' duration. For instance, Congress mandated that aliens married less than two years generally are subject to conditional resident status for two years after admission as an immigrant. See INA section 216, 8 U.S.C. 1186a; 8 CFR part 216; 8 CFR 235.11. Once USCIS approves an immediate relative petition for an alien married to a U.S. citizen, and DOS determines that the alien is admissible and eligible for an immigrant visa, the alien can seek admission to the United States as an LPR. If, however, the alien married the U.S. citizen less than two years before the date of admission, the alien is admitted conditionally for a two-year period.

In general, the U.S. citizen petitioner and the conditional permanent resident must jointly seek to remove the conditions within the 90-day period immediately preceding the second anniversary of the date the alien obtained conditional permanent residence status. If the U.S. citizen petitioner and the conditional permanent resident fail to do so, the alien's conditional permanent resident status is terminated automatically, and any waiver granted in connection with the status under INA sections 212(h) or (i), 8 U.S.C. 1182(h) or (i), is automatically terminated. Furthermore, if USCIS determines that the marriage was entered into to evade the immigration laws, USCIS cannot approve future petitions for that alien. See INA section 204(c), 8 U.S.C. 1154(c). USCIS also reserves the authority, as it does generally for other benefit requests, to interview the alien and the U.S. citizen spouse in connection with the provisional unlawful

presence waiver application in the exercise of discretion.

Another preventive measure is the provisional unlawful presence waiver requirement that the applicant appear for biometrics capture at a USCIS Application Support Center (ASC). The biometrics requirement allows USCIS to run thorough background and security checks on individuals seeking an immigration benefit to determine if an alien is not only potentially subject to other grounds of inadmissibility or not eligible for a favorable exercise of discretion, but also whether the alien poses a national security or public safety risk.

### 3. Backlog Reduction

One commenter suggested that DHS first clear all application backlogs abroad and at the AAO before implementing any new process. Commenters also indicated that DHS should give special consideration to individuals who have a pending waiver application that was filed abroad.

USCIS has already undertaken several efforts to reduce the backlogs in adjudication, both abroad and at the AAO. As of June 4, 2012, USCIS has implemented centralization of certain Form I-601 filings in the United States. USCIS has dedicated additional resources on a temporary basis to expeditiously process the cases filed prior to centralization. USCIS anticipates that the residual cases filed prior to centralization and during the transition period that recently ended on December 4, 2012, will be completed within about six months of the effective date of this final rule. By moving most of the adjudication case load to the United States for these cases, USCIS expects to reduce the filing and processing times for overseas filers of Form I-601.

The AAO has also undertaken various backlog reduction efforts in the context of administrative appeals. Since July 2011, the waiver adjudication branch of the AAO has reduced processing time from 27 to 19 months, and reduced the number of cases in the backlog by more

than 1,400. USCIS anticipates this rate of reduction to continue and plans on reducing processing time for waivers to 6 months by June 2013. These various efforts demonstrate the Department's continued commitment to timely adjudication of waivers and customer service with the resources available.

#### 4. Other Immigrant Visa Requirements

A few commenters suggested that individuals who are eligible for the provisional unlawful presence waiver should have the option to complete the medical examination required for immigrant visa issuance in either the United States or abroad. DHS did not adopt this suggestion.

DOS has jurisdiction for health-related inadmissibility determinations in the overseas immigrant visa application context; DOS, therefore, requires immigrant visa applicants to have the required medical examination performed by a DOS-designated panel physician abroad. See 22 CFR 42.66. DOS and the Centers for Disease Control and Prevention within the Department of Health and Human Services set the criteria and parameters for these medical exams depending on country conditions. While USCIS has designated civil surgeons for certifications in other contexts, these civil surgeons are not recognized by DOS and therefore cannot complete the required medical examination for purposes of the visa issuance abroad. Operationally, allowing provisional unlawful presence waiver applicants to complete the medical examination in the United States could cause delays and backlogs at DOS. DHS, therefore, will not adopt this suggestion.

#### 5. Departure Requirement and Third-Country Processing

Several commenters asked why approved provisional unlawful presence waiver applicants are required to return to their home country to complete the immigrant visa



requirement. The commenters suggested that these applicants should not have to travel to a dangerous place like Ciudad Juarez, Mexico, but instead complete their process in a safe third country like Canada. Many commenters said that requiring individuals to depart would have a significant impact on U.S. citizen family members, especially if the individual is the primary financial provider for the family. The commenters also said that departure would cause U.S. citizen family members to become dependent on the U.S. Government if the immediate relative had to remain outside of the United States for a prolonged period of time. Several other commenters suggested that DHS eliminate the departure requirement altogether or at least allow provisional unlawful presence waiver applicants to be interviewed in the United States or pick up their immigrant visa at their country's embassy in the United States. Finally, several Congressional commenters urged DHS to coordinate with DOS so that provisional unlawful presence waiver applicants do not have to return home. The commenters stated that the departure requirement should be eliminated entirely or, alternatively, that DOS should identify additional consulates for processing of the provisional unlawful presence waiver and immigrant visa issuance. The commenters also suggested that DOS's NVC could assign immigrant visa petitions and provisional unlawful presence waiver applications to designated consular posts in safe and convenient locations, citing the authority as part 9 of the Foreign Affairs Manual (FAM) section 42.61, Note 2.1. Finally, the commenters said that DHS should consider using its parole authority broadly to eliminate the need for immediate family members to travel abroad to obtain an immigrant visa to which they are entitled under current law.

DOS has jurisdiction over consular processing and setting the location for immigrant visa application filing and interviews. See 22 CFR 42.61. DHS, therefore, will not alter this requirement and, as stated above, cannot change the statutory requirements for adjustment of

status in the United States. In response to the request for DHS to broadly use its parole authority for provisional unlawful presence waiver applicants, DHS will continue to exercise its authority to parole applicants for admission into the United States on a case-by-case basis, reviewing the unique circumstances and facts that relate to each individual's case to determine whether the individual's circumstances warrant a discretionary grant of parole based on urgent humanitarian factors or as a significant public benefit. INA section 212(d)(5), 8 U.S.C. 1182(d)(5). With this rule, DHS is not changing its current policy on the use of its parole authority.

#### 6. Comprehensive Immigration Reform

Many commenters, including numerous individuals who signed group petitions, said that the focus should be on comprehensive immigration reform (CIR) rather than a "patchwork" of small initiatives that do not fix the current broken immigration system as a whole. While the commenters generally supported some type of CIR, their views on what should be included in a CIR bill varied significantly.

Some commenters stated that CIR is needed to legalize the current immigrant population in the United States and to create guest worker programs that will benefit the U.S. economy. The commenters argued that legalization will result in significant economic benefits to the United States and help solve many of our current immigration problems. These commenters supported the idea of reuniting U.S. citizen families and stated that the Administration should focus on legal immigration and naturalization to ensure that immigrants are fully aware of the rights and opportunities available to them.

Many commenters opposed the provisional unlawful presence waiver process because they believed it would encourage illegal immigration and that it was a form of "backdoor amnesty." Some commenters believed that Congress should enact stronger penalties against

those who enter illegally and enforce the current laws against those who deliberately violated U.S. immigration law. The commenters also believed that the focus should be on border security and legal immigration, not on aliens who made the choice to come to the United States illegally. One commenter noted that the current immigration policy was not working and that the United States needs a “comprehensive top down rewrite” of all the immigration laws. A few commenters were opposed to the provisional unlawful presence waiver process because they believed it was politically motivated and not designed to fix the current immigration system.

Fixing the current immigration system is a top priority for DHS, and the Administration is committed to comprehensive immigration reform. Congress has the power to amend the immigration laws to create a workable system that unites families, improves the U.S. economy, and preserves national security and public safety. USCIS will do everything possible to prepare for successful implementation of any comprehensive immigration reform legislation and ensure that the integrity of the U.S. immigration system is maintained.

#### 7. Transformation

Several commenters urged DHS to convert the provisional unlawful presence waiver process and immigrant visa process to an electronic process. The commenters believed that if applicants and attorneys could file online, they would save money, time, paper, and the mailing costs that currently accompany paper filings. The commenters stated that E-filing is consistent with USCIS’s current Transformation Initiative.

DHS agrees with the commenters that it should move toward electronic filing of immigration benefits. In fact, USCIS already is transforming its immigration benefit process and recently launched its new electronic filing and adjudication system known as USCIS Electronic Immigration System (USCIS ELIS). USCIS ELIS allows individuals to establish a USCIS ELIS

online account and, currently, to apply online for an extension or change of their nonimmigrant status for certain visa types. USCIS ELIS also enables USCIS officers to review and adjudicate online filings from multiple agency locations across the country. USCIS believes that the Transformation Initiative is an important step forward for the agency and is working to expand system features and functionality in additional releases this calendar year and beyond. In future releases of USCIS ELIS, USCIS will add form types and functions, including waivers of inadmissibility, gradually expanding the system to cover filing and adjudication of all USCIS immigration benefits. USCIS will notify the public when such expansions and additions of form types occur.

#### **K. Comments on the EO 12866/13563 Analysis**

DHS received several comments on the volume projection included in the analysis, especially as it relates to the DHS projection of additional demand. Many commenters believed that application volume is understated. One commenter stated that the Federal Government stands to earn over one billion dollars from the change. Another commenter suggested that DHS examine rates of use of health care and public education as points for comparison in determining demand for the provisional unlawful presence waiver. This commenter suggested that using undocumented immigrant access to health care and public education as models will reveal that the provisional unlawful presence waiver is at risk for underuse. Many commenters noted that the costs of obtaining an immigrant visa limit those who can afford to apply for the provisional unlawful presence waiver and that increasing the cost with required biometric submission is another barrier to participation. A commenter was concerned the cost of this rule would add to the national debt. Another commenter argued that current immigration laws and the provisional unlawful presence waiver rule disproportionately impact children of immigrant families who

have a greater likelihood to be either low-income or living under the poverty line and are not as likely to have resources needed to make use of the waiver option.

As stated repeatedly throughout the analysis, DHS was unable to precisely project application volumes for the provisional unlawful presence waiver due to unavailability of data on those who are unlawfully present. Historical estimates show only aliens who have taken the steps to obtain an immigrant visa. DHS did conduct a reasonable methodological approach based on those who have made use of inadmissibility waivers under the current process.

DHS does not believe that using public health and education records would better refine our estimates. As the commenter noted, these services are underutilized by undocumented immigrants. Furthermore, neither these models nor the others that were examined differentiate undocumented immigrants with U.S. citizen immediate relatives from those undocumented immigrants with other immigrant/citizen family compositions. Since only immediate relatives of U.S. citizens may apply for provisional unlawful presence waivers, DHS does not believe that using the suggested models will offer a more reliable means of estimating the additional demand.

While DHS acknowledges that the costs of obtaining an immigrant visa may be a constraint on demand, and agree these costs will have more impact on low-income immigrant families, the only additional cost of the provisional unlawful presence waiver process beyond the existing waiver process is the costs incurred for submitting biometrics. Relative to the other costs, biometric costs represent approximately eight percent of the total cost of obtaining an immediate relative immigrant visa. The costs of obtaining an immigrant visa are not costs of this rule. Finally, this final rule will not add to the national debt. As explained in the proposed rule at 77 FR 19919, this final rule is not expected to impose additional costs on the federal government since the fee revenues collected should offset the form processing cost.

## V. Regulatory Amendments

DHS adopted most of the proposed regulatory amendments without change, except for the following provisions noted below:

1. Section 103.7(c)(3)(i)

In the proposed rule, DHS noted in the supplementary text that applicants for a provisional unlawful presence waiver cannot seek a fee waiver for the Form I-601A filing fees or the required biometric fees. See 77 FR at 19910. DHS incorrectly referenced proposed regulatory text at 8 CFR 103.7(b)(1)(i)(C) and inadvertently omitted the correct citation to the regulatory provision being amended and the amendatory text. DHS has corrected this error and has included an amendment to 8 CFR 103.7(c)(3)(i) in this final rule to clarify that fee waivers are not available for the biometric fee or filing fees for the Form I-601A. See section 103.7(c)(3)(i).

2. Section 212.7(a)(4)(iv)

DHS proposed an amendment to 8 CFR 212.7(a)(4) to provide that termination of an alien's conditional LPR status also would result in automatic revocation of an approved waiver of inadmissibility. See 77 FR at 19912 and 19921. Several commenters noted that INA section 216(f), 8 U.S.C. 1186a(f), only allows for automatic revocation of waivers of inadmissibility approved under INA sections 212(h) and (i), 8 U.S.C. 1182(h) and (i). DHS agrees and has revised the amendment to 8 CFR 212.7(a)(4) to clarify that automatic revocation of approved waivers upon termination of conditional resident status only applies to approved waivers based on INA section 212(h), 8 U.S.C. 1182(h) (waivers for certain criminal offenses) and INA section 212(i), 8 U.S.C. 1182(i) (waivers for fraud or willful misrepresentation of a material fact). See section 212.7(a)(4)(iv).

3. Section 212.7(e)(1)

During discussions about the proposed provisional unlawful presence waiver process and how it would affect aliens in removal proceedings, a question arose regarding the authority of DOJ IJs and whether IJs would adjudicate Forms I-601A for aliens in removal proceedings. DHS determined that it would be more efficient and appropriate to have Form I-601A waivers centralized and adjudicated by one agency, USCIS, especially given the streamlined nature of the process and the need for close coordination with DOS once a waiver is decided. DHS, therefore, added a new paragraph to clarify that the Application for Provisional Unlawful Presence Waiver, Form I-601A, will be filed only with USCIS even if an alien is in removal proceedings before EOIR. See section 212.7(e)(1).<sup>17</sup>

4. Section 212.7(e)(2)

DHS restructured this provision and added language to make clear that approval of the provisional unlawful presence waiver is discretionary and does not constitute a grant of any lawful immigration status or create a period of stay authorized by the Secretary for purposes of INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). See section 212.7(e)(2)(i). DHS also clarified that a pending or approved provisional unlawful presence waiver does not authorize any interim benefits such as employment authorization or advance parole. See section 212.7(e)(2)(ii).

5. Section 212.7(e)(3)

Many commenters asked DHS to expand eligibility for the provisional unlawful presence waiver process to other categories of aliens seeking to immigrate to the United States.

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<sup>17</sup> Under 8 CFR 1240.1(a)(1)(ii), immigration judges (IJs) have authority to adjudicate certain waiver applications made by aliens in removal proceedings. However, IJs will not be adjudicating provisional unlawful presence waiver applications under this rule because all aliens who are in removal proceedings—including those whose cases were administratively closed and have been recalendared or who are subject to an administratively final order of removal are ineligible for the provisional unlawful presence waiver by operation of this final rule. See 8 CFR 212.7(e)(4).

DHS considered the commenters' suggestions but is limiting the provisional unlawful presence waiver to immediate relatives of U.S. citizens. After assessing the effectiveness of the provisional unlawful presence waiver process and its operational impact, DHS, in consultation with DOS and other affected agencies, will consider expanding the provisional unlawful presence waiver process to other categories.

6. Former Section 212.7(e)(4)(ii)(H)

DHS initially proposed to reject a provisional unlawful presence waiver application if an alien has not indicated on the application that the qualifying relative is a U.S. citizen spouse or parent. See 77 FR at 19922. DHS has determined that this criterion is more appropriate for an adjudicative decision and that this assessment should not be made through a review during the intake process. Thus, DHS has deleted this rejection criterion in the final rule.

7. Section 212.7(e)(4)(iv)

DHS proposed excluding aliens from the provisional unlawful presence waiver process who were already scheduled for their immigrant visa interviews with DOS. See 77 FR at 19921. DHS has retained this requirement. DHS now adds language to the final rule to clarify when an alien is ineligible for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview.

USCIS will first look at whether the scheduled immigrant visa interview is based on the approved immediate relative petition (I-130 or I-360) that accompanies the Form I-601A. If it is, USCIS will then look at the Department of State's Consular Consolidated Database (CCD) to determine the date on which the Department of State initially acted to schedule the applicant for his or her immigrant visa interview (i.e., the date of scheduling itself and not the date and time the applicant must appear for the interview).



If the date that the Department of State initially acted to schedule the immigrant visa interview is prior to the date of publication of this final rule, [INSERT FEDERAL REGISTER PUBLICATION DATE], then the alien is ineligible to apply for a provisional unlawful presence waiver. If the date that Department of State initially acted to schedule the immigrant visa interview is on or after the publication date of this final rule, the alien is eligible to apply for a provisional unlawful presence waiver. The actual date and time that the alien is scheduled to appear for the interview is not relevant for the eligibility determination. This rule applies even if the alien failed to appear for his or her interview, cancelled the interview, or requested that the interview be rescheduled. Therefore, USCIS may reject or deny any Form I-601A filed by an alien who USCIS determines that the Department of State, prior to the date of publication of this final rule, initially acted to schedule the alien's immigrant visa interview for the approved immediate relative petition upon which the Form I-601A is based. See section 212.7(e)(4)(iv).

An alien who is ineligible to apply for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview may still qualify for a provisional unlawful presence waiver if he or she has a new DOS immigrant visa case because 1) DOS terminated the immigrant visa registration associated with the previously scheduled interview, and they have a new immediate relative petition; or 2) the alien has a new immediate relative petition filed on his or her behalf by a different petitioner.

8. Section 212.7(e)(4)(v)

DHS initially proposed excluding all aliens who were in removal proceedings from the provisional unlawful presence waiver process, except those whose: (1) removal proceedings had been terminated or dismissed; (2) Notices to Appear (NTAs) had been cancelled; and (3) cases had been administratively closed but subsequently were reopened to grant voluntary departure.

See 77 FR at 19922. In this final rule, DHS allows aliens in removal proceedings to participate in this new provisional unlawful presence waiver process but only if their removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A. See section 212.7(e)(4)(v). Through this final rule, the Form I-601A and its accompanying instructions, and additional information published on the USCIS website, DHS also will notify such applicants that, if granted a provisional unlawful presence waiver, applicants should seek termination or dismissal of their removal proceedings. The request for termination or dismissal should be granted before they depart for their immigrant visa interviews to avoid possible delays in their immigrant visa processing or risk becoming ineligible for the immigrant visa based on another ground of inadmissibility. See section 212.7(e)(2). Finally, DHS made conforming changes to the filing requirements in section 212.7(e)(5)(i) to include aliens who are in removal proceedings that are administratively closed and have not been recalendared at the time of filing the Form I-601A.

9. Section 212.7(e)(4)(ix)

For operational reasons, DHS initially proposed rejecting applications filed by aliens who had previously filed a Form I-601A provisional unlawful presence waiver application with USCIS. DHS designed the provisional unlawful presence waiver process to streamline waiver and immigrant visa processing by closely tying adjudication of the Form I-601A to the NVC's immigrant visa processing schedule. DHS considered the potential impact of multiple filings on this schedule, the possible delays to the immigrant visa process, and the potential for agency backlogs.

Many commenters, however, expressed concern that limiting the program to one-time filings could potentially exclude individuals who otherwise would qualify for the provisional

unlawful presence waiver.

Upon consideration of these comments, DHS agrees that an alien could have compelling reasons for filing another provisional unlawful presence application, especially in cases where an alien's circumstances have changed or the alien was a victim of individuals or entities not authorized to practice immigration law. For these reasons, DHS agrees that a one-time filing limitation is too restrictive and is removing the single-filing limitation in this final rule. If an individual's provisional unlawful presence waiver request is denied or withdrawn, the individual may file a new Form I-601A, in accordance with the form instructions and with the required fees. The applicant's case must still be pending with DOS, and the applicant must notify DOS that he or she intends to file a new Form I-601A. In the case of a withdrawn Form I-601A, USCIS will not refund the filing fees because USCIS has already undertaken steps to adjudicate the case.

Alternatively, an individual who withdraws his or her Form I-601A filing prior to final adjudication, or whose Form I-601A is denied, can apply for a Form I-601, Application for Waiver of Grounds of Inadmissibility with the USCIS Lockbox, after he or she attends the immigrant visa interview and after DOS conclusively determines that the individual is inadmissible. DHS, therefore, has removed this provision from the final rule.

10. Section 212.7(e)(5)(ii)

DHS corrected a typographical error in the prefatory language to this section, removing the term "application" the second time it appears in the paragraph. See section 212.7(e)(5)(ii).

11. Section 212.7(e)(5)(ii)(A)

DHS proposed a list of rejection criteria for Forms I-601A filed at the Lockbox, including the criterion to reject for failure to pay the required or correct fee for the waiver application. See 77 FR 19922. DHS inadvertently referenced the biometric fee as a basis for rejection in the

supplementary information. See 77 FR 19911. DHS has modified the regulatory text to make clear that a Form I-601A will only be rejected for failure to pay the required or correct filing fee and not the biometric fee. See section 212.7(e)(5)(ii)(A). Individuals who have failed to pay the required or correct biometric fee will be notified of that failure. 8 CFR 103.17(b). USCIS will not process or adjudicate applications filed by individuals who do not pay the required or correct biometric fee.

12. Section 212.7(e)(5)(ii)(G)

DHS proposed rejecting provisional unlawful presence waiver applications filed by aliens who were already scheduled for their immigrant visa interviews with DOS. See 77 FR at 19921. DHS has retained this requirement. DHS now adds language to the final rule to clarify when an alien is ineligible for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview.

USCIS will first look at whether the scheduled immigrant visa interview is based on the approved immediate relative petition (I-130 or I-360) that accompanies the Form I-601A. If it is, USCIS will then look at the Department of State's Consular Consolidated Database (CCD to determine the date on which the Department of State initially acted to schedule the applicant for his or her immigrant visa interview (i.e., the date of scheduling itself and not the date and time the applicant must appear for the interview).

If the date that the Department of State initially acted to schedule the immigrant visa interview is prior to the date of publication of this final rule, [INSERT FEDERAL REGISTER PUBLICATION DATE], then the alien is ineligible to apply for a provisional unlawful presence waiver. If the date that Department of State initially acted to schedule the immigrant visa interview is on or after the publication date of this final rule, the alien is eligible to apply for a

provisional unlawful presence waiver. The actual date and time that the alien is scheduled to appear for the interview is not relevant for the eligibility determination. This rule applies even if the alien failed to appear for his or her immigrant visa interview, cancelled the interview, or requested that the interview be rescheduled. Therefore, USCIS may reject or deny any Form I-601A filed by an alien if USCIS determines that the Department of State, prior to the date of publication of this final rule, initially acted to schedule an initial immigrant visa interview for the approved immediate relative petition upon which the Form I-601A is based. See section 212.7(e)(4)(iv).

An alien who is ineligible to apply for a provisional unlawful presence waiver because of a previously scheduled immigrant visa interview may still qualify for a provisional unlawful presence waiver if he or she has a new DOS immigrant visa case because 1) DOS terminated the immigrant visa registration associated with the previously scheduled interview, and they have a new immediate relative petition; or 2) the alien has a new immediate relative petition filed on his or her behalf by a different petitioner. See section 212.7(e)(5)(ii)(G).

### 13. Section 212.7(e)(9)

DHS initially proposed that aliens who were denied a provisional unlawful presence waiver could not file a new Form I-601A. Instead, such aliens would have to leave the United States for their immigrant visa interviews and file a Form I-601, Application for Waiver of Grounds of Inadmissibility, after the Department of State determined they were inadmissible. Some commenters were concerned that limiting aliens to a single filing of an I-601A would potentially bar aliens from qualifying for a provisional unlawful presence waiver, especially when they may have experienced changed circumstances that would result in extreme hardship to the U.S. citizen spouse or parent. In light of these concerns, DHS has amended this final rule

to allow aliens who are denied a provisional unlawful presence waiver to file another Form I-601A, based on the original approved immigrant visa petition. Denial of an application for a provisional unlawful presence waiver is without prejudice to the alien filing another provisional unlawful presence waiver application under paragraph (e) provided the alien meets all of the requirements. The alien's case must be pending with the Department of State and the alien must notify the Department of State that he or she intends to file a new Form I-601A.

14. Section 212.7(e)(10)

DHS has amended this provision to allow an applicant to withdraw a previously-filed provisional unlawful presence waiver application prior to final adjudication and file another Form I-601A. See section 212.7(e)(10).

15. Section 212.7(e)(14)(iv)

DHS clarified the language in section 212.7(e)(14)(v) to specify that a provisional unlawful presence waiver is automatically revoked if the alien, at any time before or after the approval of the provisional unlawful presence waiver, or before the immigrant visa is issued, reenters or attempts to reenter the United States without being admitted or paroled. See section 212.7(e)(14)(iv).

## **VI. Statutory and Regulatory Requirements**

### **A. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State,

local, and tribal governments, in the aggregate, or by the private sector.

Although this rule does exceed the \$100 million expenditure threshold (adjusted for inflation), this rulemaking does not contain such a mandate. The provisional unlawful presence waiver process is a voluntary program for aliens that are immediate relatives of U.S. citizens intending to become legal permanent residents. The requirements of Title II of the Act, therefore, do not apply and DHS has not prepared a statement under the Act.

### **B. Small Business Regulatory Enforcement Fairness Act of 1996**

DHS considers this rule a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. DHS was not able to estimate with precision the increase in demand due to this rule; therefore, we estimated costs using range scenario analysis. The final rule expanded eligibility for the provisional unlawful presence waiver process to aliens in removal proceedings whose cases have been or will be administratively closed, provided that the case has not been recalendared at the time of Form I-601A filing and that the alien is otherwise eligible. Due directly to this expansion, there is a possibility that the rule will have an impact on the economy of \$100 million or more in the first year of implementation. If demand for the provisional unlawful presence waiver increases by 50 percent, 75 percent, or 90 percent, then the total impact on the economy would be approximately \$107.8 million (undiscounted), \$157.8 million (undiscounted), or \$187.7 million (undiscounted), respectively, in the first year. By year 2, the total impact to the economy if demand for the provisional unlawful presence waiver increases by 50 percent, 75 percent, or 90 percent, is \$33.2 million (undiscounted), \$45.7 million (undiscounted), or \$53.1 million (undiscounted), respectively. The impact of the rule is directly associated with the increased demand in legalizing immigration status by applying for

legal permanent resident status via consular processing and participating in the provisional unlawful presence waiver process. The impact includes filing fees, time, and travel costs of complying with this final rule. The costs of this final rule will fall exclusively on alien immediate relatives of U.S. citizens that reside in the United States and must request a waiver for unlawful presence. This rule will not result in a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**C. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a “significant regulatory action” that is economically significant under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget has reviewed this regulation. This effort is consistent with Executive Order 13563’s call for agencies to “consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”

1. Summary

The final rule will allow certain immediate relatives of U.S. citizens who are physically



present in the United States to apply for a provisional unlawful presence waiver of the 3-year or 10-year bar for accrual of unlawful presence prior to departing for consular processing of their immigrant visa. This new provisional unlawful presence waiver process will be available to an alien whose only ground of inadmissibility is, or would be, the 3-year or 10-year unlawful presence bar. DHS anticipates that the changes made in this final rule will result in a reduction in the time that U.S. citizens are separated from their alien immediate relatives, thus reducing the financial and emotional hardship for these families. In addition, the Federal Government will achieve increased efficiencies in processing immediate relative visas for individuals subject to the unlawful presence inadmissibility bar.

Since publication of the proposed provisional unlawful presence waiver rule, DOS published an updated fee schedule for consular services which did the following with respect to this rule: (1) reduced the immediate relative visa fee from \$330 to \$230; (2) increased the immigrant visa security surcharge fee from \$74 to \$75; and (3) discontinued charging a separate fee for the immigrant visa surcharge and instead embedded the fee in the immigrant visa application fees.<sup>18</sup> DHS has incorporated these changes and updated data into our final analysis.

DHS estimates the discounted total ten-year cost of this rule will range from approximately \$196 million to approximately \$538.1 million at a seven percent discount rate. Compared with the current waiver process, this rule requires that provisional unlawful presence waiver applicants submit biometric information. Included in the total cost estimate is the cost of collecting biometrics, which we estimate will range from approximately \$32.9 million to approximately \$56.6 million discounted at seven percent over ten years. Also included in the total cost estimate are the costs faced by those who choose to file a new provisional unlawful

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<sup>18</sup> See 77 FR 18907.

presence waiver application based on the same approved immediate relative petition if their original Form I-601A is denied or withdrawn, which DHS decided to allow in response to public comments to the proposed rule. Aliens that file a new Form I-601A will still face the biometric and Form I-601A filing fees and opportunity costs, which we estimate will range from approximately \$56.2 million to approximately \$96.7 million discounted at seven percent over ten years. In addition, as this rule significantly streamlines the current process, DHS expects that additional applicants will apply for the provisional unlawful presence waiver compared to the current waiver process. To the extent that this rule induces new demand for immediate relative visas, additional immigration benefit forms, such as the Petitions for Alien Relative, Form I-130, will be filed compared to the pre-rule baseline. These additional forms will involve fees being paid by applicants to the Federal Government for form processing and additional opportunity costs of time being incurred by applicants to provide the information required by the forms. The cost estimate for this rule also includes the impact of this induced demand, which we estimate will range from approximately \$106.9 million to approximately \$384.8 million discounted at seven percent over ten years.

A key uncertainty that impacts any cost estimate of this rule is the uncertainty involving the actual number of people that will avail themselves of this streamlined provisional unlawful presence waiver process. DHS is not aware of any data that will allow us to estimate with precision the increase in demand due to this rule. In this final rule DHS has made the careful determination to expand eligible participation to aliens in removal proceedings whose cases are administratively closed and have not been recalendared at the time of filing the Form I-601A, and who are otherwise eligible for the provisional unlawful presence waiver. DHS has accounted for any potential additions to the volume estimate as a result of these changes in the

final analysis. Statistics compiled by the Department of Justice (DOJ) Executive Office of Immigration Review (EOIR) indicate there have been a total of 70,276 cases that were administratively closed at the immigration courts or the Board of Immigration Appeals (BIA) where the sole charge is INA 212(a)(6)(A)(i).<sup>19</sup> DHS has no way of knowing precisely how many of the 70,276 cases are immediate relatives of U.S. citizens and are otherwise eligible for the provisional unlawful presence waiver, so we have applied similar range analysis to estimate the additional population surge resulting from the influx of cases previously administratively closed. In addition to this static influx that could occur with previously administratively closed cases, permitting aliens in removal proceedings whose cases are administratively closed when this rule becomes effective or administratively closed but not recalendared at the time of filing the Form I-601A could add approximately 700 to 2,500, annually, to our volume estimate. Lastly, allowing applicants the ability to re-file a Form I-601A if the initial application was denied or withdrawn will result in an increase to our volume estimates. A review of USCIS Form I-601 processing statistics indicated a denial rate of 34%. A review of USCIS completion statistics for the current I-601 waiver process did not indicate a statistical trend for withdrawals. DHS has assumed in this final analysis that the same denial rate of 34% will apply for the provisional waiver for unlawful presence application, and in an effort to present the maximum projected impact, has calculated cost impacts based on the assumption that every applicant with a denied or withdrawn Form I-601A will file a new Form I-601A. For cost estimating purposes, DHS has analyzed the cost of an increase in demand of 25%, 50%, 75% and 90% compared to the existing waiver process.

Table 1 provides an estimate of the annualized cost of this rule, in 2012 dollars, at three

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<sup>19</sup> Source: Department of Justice, EOIR, Office of Planning, Analysis, and Technology; statistics include cases completed from January 1, 1992 – December 5, 2012. Data compiled on December 5, 2012.

percent and seven percent discount rates, over the range of demand increases of 25%, 50%, 75%, and 90% compared to the existing waiver process and also qualitative benefits. The annualized cost of this rule will range from approximately \$27.9 million annualized to \$76.6 million (7 percent discount rate) and approximately \$27.4 million to \$74.6 million (3 percent discount rate).

| <b>Table 1: Annualized Costs and Benefits<br/>(2013-2022, dollar amounts expressed in millions)</b> |  |        |        |        |  |        |        |        |
|---|--|--------|--------|--------|--|--------|--------|--------|
|   | 3% discount rate   |        |        |        | 7% discount rate   |        |        |        |
|   | Range Analysis for Demand Increases by:  |        |        |        | Range Analysis for Demand Increases by:  |        |        |        |
|   | 25%  | 50%    | 75%    | 90%    | 25%  | 50%    | 75%    | 90%    |
| <b>COSTS</b>  |  |        |        |        |  |        |        |        |
| Annualized monetized costs  | \$27.4   | \$45.5 | \$63.7 | \$74.6 | \$27.9   | \$46.6 | \$65.4 | \$76.6 |
| Annualized quantified, but un-monetized costs   | None   |        |        |        | None   |        |        |        |
| Qualitative (un-quantified) costs   | None   |        |        |        | None   |        |        |        |
| <b>BENEFITS</b>   |  |        |        |        |  |        |        |        |
| Annualized monetized benefits   | None   |        |        |        | None   |        |        |        |
| Annualized quantified, but un-monetized benefits  | This rule will reduce the amount of time that U.S. citizens are separated from their alien immediate relatives, thus reducing the financial and emotional hardship for these families. |        |        |        | This rule will reduce the amount of time that U.S. citizens are separated from their alien immediate relatives, thus reducing the financial and emotional hardship for these families. |        |        |        |
| Qualitative (un-quantified) benefits  | Federal Government will achieve increased efficiencies by streamlining the processing immediate relative visas for individuals subject to the unlawful presence inadmissibility bar.   |        |        |        | Federal Government will achieve increased efficiencies by streamlining the processing immediate relative visas for individuals subject to the unlawful presence inadmissibility bar.   |        |        |        |

## 2. Problems Addressed by the Rule

Currently, aliens undergoing consular processing of their immediate relative visas cannot apply for an unlawful presence waiver until the consular officer determines that they are inadmissible during their immigrant visa interviews. The current unlawful presence waiver process requires these immediate relatives to remain abroad until USCIS adjudicates the waiver. DOS can only issue the immigrant visa upon notification from USCIS that the waiver has been approved. As previously mentioned, the processing time under the current waiver process can

take over one year. Because of these lengthy processing times, U.S. citizens may be separated from their immediate relative family members for prolonged periods resulting in financial, emotional, and humanitarian hardships. Promoting family unification is an important objective of the immigration laws. See Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2019 (2012).

The final rule will permit certain immediate relatives to apply for a provisional unlawful presence waiver prior to departing from the United States. USCIS will adjudicate the provisional unlawful presence waiver and, if approved, provide notification to DOS so that it is available to the consular officer at the immigrant visa interview. If the consular officer determines there are no other impediments to admissibility and that the alien is otherwise eligible for issuance of the immigrant visa, the visa can be immediately issued. DHS anticipates that this process change will significantly reduce the amount of time U.S. citizens are separated from their immediate alien relatives. In addition, the changes will streamline the immigrant visa waiver process, thereby increasing efficiencies for both USCIS and DOS in the issuance of immediate relative immigrant visas.

### 3. The Population Affected by the Rule

As explained above, only certain immediate relatives undergoing consular processing for an immigrant visa who would be inadmissible based on accrual of unlawful presence at the time of the immigrant visa interview will be eligible to apply under the proposed waiver process. Immediate relatives of U.S. citizens who are seeking adjustment of status in the United States are not affected. Immediate relatives who are eligible for adjustment of status in the United States generally include those who were admitted to the United States on nonimmigrant visas (student, tourist, etc.) or who were paroled, including those who are present in the United States after the expiration of their authorized periods of stay. In addition, immediate relatives that self-petition, using USCIS Form I-360, as battered spouses and/or children of U.S. citizens or LPRs are able to

seek adjustment of status in the United States. While all immediate relative aliens can choose to pursue consular processing if they wish, due to the financial strain and family separation inherently involved in consular processing, we have chosen to exclude aliens that are eligible to adjust status in the United States from this economic analysis.

In most instances, aliens present in the United States without having been admitted or paroled are not eligible to adjust their status and must leave the United States for immigrant visa processing at a U.S. Embassy or consulate abroad. Because these aliens are present in the United States without having been admitted or paroled, many already have accrued more than 180 days of unlawful presence and, if so, would become inadmissible under the unlawful presence bars upon their departure from the United States to attend their immigrant visa interviews. While there may be limited exceptions, the affected population would consist almost exclusively of alien immediate relatives present in the United States without having been admitted or paroled. In addition, the final rule expands eligibility to aliens in removal proceedings whose cases are administratively closed and have not been recalendared at the time of filing the Form I-601A and to aliens who are in receipt of a charging document, Notice to Appear, that has not yet been filed with the immigration courts. In both of these instances the aliens must still meet all other eligibility requirements in order to apply for the provisional unlawful presence waiver. Finally, the final rule removes the one-time filing restriction and allows aliens to file a new provisional unlawful presence waiver application on the same approved immediate relative petition if the initial Form I-601A is denied or withdrawn prior to final adjudication.

DHS does not maintain data on the number of immediate relatives present in the United States who would qualify under the unlawful presence waiver process. The DHS Office of Immigration Statistics (DHS OIS) estimates that the population of unauthorized immigrants

(those present without admission or parole) residing in the United States is approximately 11.6 million as of January 2010.<sup>20</sup> While all persons affected by the rule are within the estimated population of 11.6 million, it is estimated that only a portion are immediate relatives of U.S. citizens who meet the criteria required for the new process.

Other estimates are equally inconclusive on the number of immediate relatives of U.S. citizens who are subject to the unlawful presence bars. For example, the Pew Hispanic Trust estimates that there are 9.0 million persons<sup>21</sup> living in mixed status families in the United States that include at least one unauthorized adult alien and at least one U.S.-born child. This, and associated information from the Pew Hispanic Trust, does not provide a reliable means for the calculation of how many of the individuals in these families are U.S. citizens rather than alien immediate relatives, or the proportion of persons with unlawful presence who are the relatives of LPRs rather than U.S. citizens.<sup>22</sup> Nor do these data indicate how many persons within these families are under the age of 18<sup>23</sup> or have alternative methods of normalizing their immigration status without having to leave the United States and, consequently, are unlikely to be affected by the provisional unlawful presence waiver process.

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<sup>20</sup> Department of Homeland Security, Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf). *Note:* The OIS estimate of the unauthorized population residing in the United States in January 2010 was revised from a previous OIS estimate of 10.8 million. The revised 2010 estimate of 11.6 million is derived from the 2010 American Community Survey which uses population estimates based on the 2010 Census, whereas the previously released 2010 estimate was derived from the 2000 Census. The OIS estimate of the unauthorized population residing in the United States in January 2011 was 11.5 million, a decrease of 0.87% when compared to the 2010 estimate of 11.6 million.

<sup>21</sup> Pew Hispanic Trust, Unauthorized Immigrants: Length of Residency, Patterns of Parenthood 6 (Dec. 2011), available at <http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf>.

<sup>22</sup> The provisional unlawful presence waiver process will only be available to alien immediate relatives of U.S. citizens, not to alien relatives of lawful permanent residents.

<sup>23</sup> In the Pew Hispanic Trust report, Unauthorized Immigrants: Length of Residency, Patterns of Parenthood, "families" are defined as adults age 18 and older who live with their minor children (i.e., younger than 18) and unmarried, dependent children younger than 25.

Data from different sources cannot be reliably combined because of differences in their total estimates for different categories, the estimation and collection methodologies used, or other reasons of incompatibility. Absent information on the number of aliens who are in the United States without having been inspected and admitted or paroled and who are immediate relatives of U.S. citizens, DHS cannot reliably estimate the affected population of the rule.

#### 4. Demand

DHS expects that the final rule will increase demand for both immigrant visa petitions for alien relatives and applications for waivers of inadmissibility. Existing demand is constrained by the current process that requires individuals to leave the United States and be separated for unpredictable and sometimes lengthy amounts of time from their immediate relatives in the United States in order to obtain an immigrant visa to become an LPR. Immediate relatives eligible for LPR status if issued a waiver of inadmissibility may be reluctant to avail themselves of the current process because of the length of time that they may be required to wait outside the United States before they can be admitted as LPRs.

The provisional unlawful presence waiver process will allow an immediate relative who meets the eligibility criteria to apply for a provisional unlawful presence waiver and receive a decision on that application before departing from the United States for a consular interview. This streamlined process may reduce the reluctance of aliens who may wish to obtain an immigrant visa to become an LPR but are deterred by the lengthy separation from family members imposed by the current process and uncertainty related to the ultimate success of obtaining an approved inadmissibility waiver.

The costs associated with normalizing a qualifying immediate relative's status also may



be a constraint to demand. These current costs include:<sup>24</sup>

1. Petition for Alien Relative, Form I-130, to establish a qualifying relationship to a U.S. citizen; cost to the petitioner of fee paid = \$420.00
2. Application for Waiver of Grounds of Inadmissibility, Form I-601, to obtain a waiver of inadmissibility for unlawful presence; cost to applicant of fee paid = \$585.00
3. Time and expense of preparing the evidence to support the “extreme hardship” requirements for a waiver of inadmissibility. The evidentiary requirements could include sworn statements from family members, friends and acquaintances, medical records, psychiatric/psychological records, school records, evidence of illness of family members, financial information and tax returns, letters from teachers, support letters from churches and community organizations, evidence of health and emotional problems that may result from the separation, and other such documentation; costs of evidentiary requirements are variable and based on the specific facts of individual cases.
4. Travel from the United States to the immediate relative’s home country or country where the visa is being processed, and any additional living expenses required to support two households while awaiting an immigrant visa; cost of travel to consular interview are variable and dependent upon the specific circumstances of individual cases.
5. Immigrant visa processing fees paid to: a) the Department of State (\$230),

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<sup>24</sup> Fees quoted are as of June 2012. Source for DOS fees: [http://travel.state.gov/visa/temp/types/types\\_1263.html#perm](http://travel.state.gov/visa/temp/types/types_1263.html#perm). Source for USCIS fees: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b1ae408b1c4b3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=b1ae408b1c4b3210VgnVCM100000b92ca60aRCRD>.

processed on the basis of a USCIS-approved I-130 petition; and b) USCIS (\$165).

Total cost to the applicant of fees paid = \$395.00

6. An Affidavit of Support Under Section 213A of the Act, Form I-864; cost to petitioner of fee paid = \$88.00
7. Other forms, affidavits, etc. as required for individual applications; cost are variable.

The costs listed above are not new to this rule; they are the current costs faced by aliens who are inadmissible for unlawful presence and must undergo consular processing for immediate relative immigrant visas.

Under the provisional unlawful presence waiver process, aliens must submit biometrics after filing the provisional unlawful presence waiver application, along with the corresponding fee (currently \$85.00). Submission of biometrics to DHS is separate from the DOS immigrant visa security surcharge that recovers costs to DOS associated with providing enhanced border security. Since publication of the proposed provisional unlawful presence waiver rule, DOS published an updated fee schedule for consular services which did the following as respects this rule: (1) reduced the immediate relative visa fee from \$330 to \$230; (2) increased the immigrant visa security surcharge fee from \$74 to \$75; and (3) discontinued charging a separate fee for the immigrant visa surcharge and instead embedded the fee in the immigrant visa application fees.<sup>25</sup> The requirement to submit biometrics to DHS in order to apply for a provisional unlawful presence waiver, with the associated fee, time, and travel costs, would be a small portion of the total costs of the immigrant visa application process.

As there are no annual limitations on the number of immediate relative visas that can be

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<sup>25</sup> See 77 FR 18907. DHS has revised the cost estimates in this final rule to reflect the updated DOS fee schedule.

issued, the increase in the annual demand for waivers would be determined by the size of the affected population and the increased propensity to apply. As previously mentioned, a potential increase in demand might be limited, as is current demand, by the costs previously noted.

With the absence of an estimate of the affected population, we have calculated an estimate for the increase in demand based on historical records and assumptions on the range of demand. Forecasts of demand based on historical volumes of immediate relatives who are seeking waivers for unlawful presence are limited, at best, due to the lack of data. Historical estimates show only those aliens who have taken the steps to obtain an immigrant visa to become LPRs. The data are silent, however, on that population of aliens who have not initiated action to become LPRs due to current uncertainties and risks. Therefore, we recognize that the estimates provided may understate what may actually occur when this rule becomes effective.

The current level of demand, shown in Table 2, is a result of the existing constraints described previously: the possibility of lengthy separation of immediate relatives and their U.S. citizen relatives; uncertainty of the ultimate success of obtaining an approved inadmissibility waiver; and the financial constraints (costs). Because of the variability in timing between when immigrant visa petitions and waiver applications are submitted and adjudicated and the time when an immigrant visa is issued, comparisons between the totals within a single year are not meaningful.

| <b>Table 2: Historical Immigration Data - Fiscal Years 2001 through 2010</b> |  |                                 |                                     |                                      |
|--|--|---------------------------------|-------------------------------------|--------------------------------------|
| Fiscal Year  | Petitions for Immediate Alien Relative, Form I-130 <sup>26</sup> | Immediate Relative Visas Issued | Ineligibility Finding <sup>27</sup> | Ineligibility Overcome <sup>28</sup> |
|  |  |                                 |                                     |                                      |

<sup>26</sup> Numbers in this column differ from the proposed rule (77 FR 19915) as the proposed rule inadvertently used data for preference aliens. We've corrected the table to account for immediate relative petitions filed using Form I-130.

|   |                       |         |        |        |
|---|-----------------------|---------|--------|--------|
| 2001  | 592,027 <sup>29</sup> | 172,087 | 5,384  | 6,157  |
| 2002  | 321,577               | 178,142 | 2,555  | 3,534  |
| 2003  | 357,081               | 154,760 | 3,301  | 1,764  |
| 2004  | 330,514               | 151,724 | 4,836  | 2,031  |
| 2005  | 290,777               | 180,432 | 7,140  | 2,148  |
| 2006  | 309,268               | 224,187 | 13,710 | 3,264  |
| 2007  | 344,950               | 219,323 | 15,312 | 7,091  |
| 2008  | 412,297               | 238,848 | 31,069 | 16,922 |
| 2009  | 455,864               | 227,517 | 24,886 | 12,584 |
| 2010  | 471,791               | 215,947 | 22,093 | 18,826 |
| 10 year average                                   | 388,615               | 196,297 | 13,029 | 7,432  |
| Ineligibility Findings overcome (10 year average) | n/a                   | n/a     | n/a    | 57.0%  |

Note: Sums may not total due to rounding.

Sources: Petitions for Alien Relative, Form I-130, query of USCIS Performance Analysis System by USCIS' Office of Performance and Quality, Data Analysis and Reporting Branch.

We note the ten year average here of 388,615 differs by less than two percent from the ten year average of 395,919 used in the proposed rule. We recognize that immediate relative petitions also can be filed by certain aliens using the Petition for Amerasian, Widow(er), or Special Immigrant, Form I-360. Immediate relative petitions filed for the Amerasian classification are filed for aliens that are already outside the United States so we do not believe these aliens would benefit from the provisional unlawful presence waiver requirements. Additionally, self-petitioning battered spouses and children covered under the Violence Against Women Act (VAWA) are able to seek adjustment of status in the United States regardless of whether they have been inspected and admitted or paroled into the United States, see INA section 245(a). Moreover, self-petitioning battered spouses and children typically are exempt from accruing unlawful presence for purposes of INA section 212(a)(9)(B)(i). See INA section 212(a)(9)(B)(iii)(IV). While beneficiaries of immediate relative petitions for a widow(er) of a U.S. citizen may avail themselves of the provisional unlawful presence waiver, in the period 2001-2010, the ten-year average for these petitions was 594. For purposes of clarity in the assumptions and the future calculations of impact, we have decided not to include this population in the immediate relative petition volumes given the relatively negligible filing volumes. Note: The current filing fee for Form I-360 is \$405 for a widow(er) of a U.S. citizen.

<sup>27</sup> Both the Ineligibility Finding and Ineligibility Overcome columns refer only to ineligibility in which the grounds of inadmissibility were the 3-year or the 10-year unlawful presence bar. This figure is not limited to immigrant petitioners who are immediate relatives of U.S. citizens; it also includes relatives of LPRs. Ineligibility findings were low between 2001 and 2005/2006 because many individuals were not seeking immigrant visas through the consular process overseas; instead, they adjusted to lawful permanent resident status stateside under INA section 245(i).

<sup>28</sup> Id. Ineligibility Findings/Ineligibility Overcome includes alien relatives who are not affected by the rule. Comparisons between the totals of Ineligibility Findings/Ineligibility Overcome within a single year are not meaningful because of the variability in timing between when an ineligibility finding is made and when (and if) it is overcome.

<sup>29</sup> The number of Petitions for Alien Relative, Form I-130, filed in 2001 is high because many filed petitions in anticipation of the INA section 245(i) sunset date, which occurred on April 30, 2001.

Immediate relative visas issued are from individual annual Report(s) of the Visa Office, Department of State Visa Statistics, accessible at [http://travel.state.gov/visa/statistics/statistics\\_1476.html](http://travel.state.gov/visa/statistics/statistics_1476.html). Ineligibility data are also from the individual annual report(s) of the Visa Office, Department of State Visa Statistics and appears in Table XX of each annual report.

As is evident, each of the data sets in Table 2 demonstrates a wide variability. The estimate of future demand under the new process would be determined by the number of ineligibility findings. The data for Ineligibility Findings and Ineligibility Overcome in Table 2 refer only to ineligibility where the grounds of inadmissibility were the 3-year or the 10-year unlawful presence bar. This data, however, also includes alien relatives of LPRs (or preference aliens) who are not affected by this rule. DHS has provided the data in Table 2 to provide historical context noting that the last three years of ineligibility findings are well above the 10-year historical average. For this reason, DHS used the estimate for the future filings for waivers of inadmissibility made by the USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch, as the basis for the estimated future filings. The current OPQ estimate for future waivers of inadmissibility is approximately 24,000 per year. Currently, 80 percent (or 19,200) of all waivers of inadmissibility are filed on the basis of inadmissibility due to the unlawful presence bars.<sup>30</sup> This estimate is further confirmed when examining the most recent 5-year period between FY 2006 – FY 2010 where the average unlawful presence ineligibility finding is approximately 21,400. In light of the recent upward trend of immediate relative visas issued and ineligibility findings presented in Table 2, OPQ's estimate of 19,200 applications for waivers of unlawful presence represents as reasonable of an approximation as possible for future demand based on available data of the current waiver process.

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<sup>30</sup> The 80 percent estimate was calculated by USCIS based on data from all Forms I-601 completed by USCIS abroad from August 2010 to October 2011 and comparing those that listed only unlawful presence as an inadmissibility ground.

DHS anticipates that the changes to create a new provisional unlawful presence waiver process will encourage immediate relatives who are unlawfully present to initiate actions to obtain an immigrant visa to become LPRs when they otherwise would be reluctant to under the current process. As confidence in the new process increases, we would expect demand to trend upward. DHS estimates were formulated based on general assumptions of the level of constraints on demand removed by the rule. DHS does not know of any available data that would enable a more precise calculation of the increases in filing propensities or an increase in the number of inadmissibility findings or the percentage of inadmissibility findings where the inadmissibility bar is overcome.

Table 3 indicates the estimate of demand under the current process. This is the baseline demand expected in the absence of the rule.

| <b>Table 3: Baseline Estimates of Growth in Petitions for Alien Relatives and Ineligibility Findings Based on Unlawful Presence under the Current Process</b> |  |   |
|---|--|---|
| <b>Fiscal Year</b>  | <b>Petitions for Alien Immediate Relative, Form I-130<sup>31</sup></b> | <b>Ineligibility Finding<sup>32</sup></b> |
| Year 1  | 402,217  | 19,709                                    |
| Year 2  | 416,294  | 20,398                                    |
| Year 3  | 430,864  | 21,112                                    |
| Year 4  | 445,945  | 21,851                                    |
| Year 5  | 461,553  | 22,616                                    |
| Year 6  | 477,707  | 23,408                                    |
| Year 7  | 494,427  | 24,227                                    |
| Year 8  | 511,732  | 25,075                                    |
| Year 9  | 529,642  | 25,952                                    |
| Year 10   | 548,180  | 26,861                                    |

<sup>31</sup> The first year estimate for the baseline demand of I-130 petitions is the 10 year average of 388,615 multiplied by the 3.5 percent compound annual growth rate for the undocumented population for the previous 10 years reported in the DHS Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011. Subsequent years are increased at the same 3.5 percent growth rate. As a comparison, the U.S. population as a whole rose at a compound annual growth rate of 0.930 percent over the same period.

<sup>32</sup> Ineligibility Findings are calculated at the USCIS estimate of 0.049 per alien immediate relative petition.

|                |           |         |
|----------------|-----------|---------|
| 10 Year Totals | 4,718,560 | 231,209 |
|----------------|-----------|---------|

Note: Sums may not total due to rounding.

Based on the data available on requests for waivers under the current process, Table 3 forecasts the number of findings of inadmissibility due to accrual of unlawful presence. The results presented in Table 3 are meant to show forecasts for future demand for waivers due to unlawful presence bars under the current process. DHS assumes that in every case where a consular officer determines inadmissibility based on unlawful presence, the alien would apply for a waiver. Thus, Table 3 represents the baseline totals we expect in the absence of the provisional unlawful presence waiver process.

In these calculations, the petitions for an alien relative made by U.S. citizens are expected to increase annually by the 3.5 percent compound annual growth rate for the undocumented population for the previous 10 years based on reports by the DHS OIS.<sup>33</sup> This is an imperfect calculation, as the undocumented population has declined since its peak in 2007,<sup>34</sup> but because of the data association problems noted previously, DHS used the 10-year (long term) compound average growth rate.

The ineligibility findings in Table 3 are calculated using the estimate of 19,200 average annual waivers filed on the basis of unlawful presence, which equates to 0.049 ineligibility findings for every alien relative petition based on the 10-year average. Again, these calculations are imperfect since ineligibility findings are based on immigrant visas granted for the alien relative population (both immediate relative and family preference).

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<sup>33</sup> DHS Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011. The 3.5 percent (rounded) compound annual growth rate is calculated from the estimated populations of unauthorized immigrants living in the United States in 2000 (8.5 million) and in 2010 (11.6 million).

<sup>34</sup> Id.

DHS does not have data available that would permit an estimation of the escalation of change in this variable. Thus, this estimate of future petitions for alien relatives and ineligibility findings is based on a range of assumptions concerning the current constraint on demand. As a result, Table 4 provides a scenario analysis utilizing estimates of various amounts of constraint on demand. For example, an assumption that demand is currently constrained by 25 percent would mean that there would be a 25 percent increase from the baseline in the number of Form I-601A applications for each year under the new provisional unlawful presence waiver process. The findings of this range analysis are presented in Table 4.

| <b>Table 4: Estimates of Inadmissibility Findings Requiring an Unlawful Presence Waiver, Form I-601A Associated with the Increased Demand of the Rule</b> |   |                   |                   |                   |
|---|---|-------------------|-------------------|-------------------|
| <b>Year</b>   | <b>Expected Demand for Form I-601A with Current Constrained Demand of</b> |                   |                   |                   |
|   | <b>25 Percent</b>   | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1  | 24,636  | 29,563            | 34,490            | 37,446            |
| Year 2  | 25,498  | 30,598            | 35,697            | 38,757            |
| Year 3  | 26,390  | 31,669            | 36,947            | 40,113            |
| Year 4  | 27,314  | 32,777            | 38,240            | 41,517            |
| Year 5  | 28,270  | 33,924            | 39,578            | 42,971            |
| Year 6  | 29,260  | 35,111            | 40,963            | 44,475            |
| Year 7  | 30,284  | 36,340            | 42,397            | 46,031            |
| Year 8  | 31,344  | 37,612            | 43,881            | 47,642            |
| Year 9  | 32,441  | 38,929            | 45,417            | 49,310            |
| Year 10   | 33,576  | 40,291            | 47,006            | 51,036            |
| 10 Year Totals  | 289,012   | 346,814           | 404,617           | 439,298           |

Note: Numbers may not total due to rounding.

In response to comments on the proposed rule, DHS has made the careful determination to expand participation in the provisional unlawful presence waiver process to immediate relative aliens in removal proceedings whose cases have been or will be administratively closed and have not been recalendared at the time of filing the Form I-601A. Aliens who are in removal



proceedings whose cases have been or will be administratively closed are likely comprised primarily of aliens who would need to seek immigration relief via DOS consular processing. Thus, we believe that such individuals are also already accounted for in the volume estimates provided above which were based on historical filings of Form I-601 to waive the unlawful presence ground. However, to not understate the volume, we examined historical case resolution statistics of immigration proceedings provided by EOIR. Historical statistics are silent on the volume of cases that have been administratively closed and later recalendared.

Based on statistics compiled by EOIR, 66,365 cases at the immigration court level and 3,911 cases at the BIA (for a total of 70,276 cases) were administratively closed since 1992 where the sole charge is INA 212(a)(6)(A)(i).<sup>35</sup> DHS has no way of knowing precisely how many of the 70,276 previously administratively closed cases would be immediate relatives of U.S. citizens and otherwise eligible for the provisional unlawful presence waiver. In an effort to be balanced in our estimate, it would be incorrect to assume that every removal proceeding case that was administratively closed in the past will also meet the requirements under the provisional unlawful presence waiver process. Therefore, we will provide a range analysis to estimate the proportion that would be eligible to participate over a similar range of assumptions as used in calculating induced demand. In this instance, however, we will assume that removal proceeding cases that are eligible to participate would range from 25 – 90 percent, where 25 percent means that 25 percent of the administratively closed cases also meet the remaining provisional unlawful presence waiver requirements. Since cases that were administratively closed in the past represent a static statistic, we only reflect this potential influx in one year of our volume projections. Thus, the addition made to the volume estimate in Year 1 to account for estimates of additional Form I-

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<sup>35</sup> Source: EOIR, Office of Planning, Analysis, and Technology; statistics include cases completed from January 1, 1992 – December 5, 2012. Data compiled on December 5, 2012.

601A filings from aliens whose removal proceedings have been be administratively closed are: 17,569 (25 percent of 70,276 cases); 35,138 (50 percent); 52,707 (75 percent); and 63,249 (90 percent).

Similarly, DHS estimated increases to the yearly volume projection in order to account for those aliens with cases that will be administratively closed and therefore eligible to apply for the provisional unlawful presence waiver, provided they meet the additional requirements. DHS examined EOIR historical case resolution statistics over the five-year period FY 2007 – FY 2011 to determine an appropriate average number of cases that are administratively closed from which to base this yearly estimate on. Those findings are presented in Table 5.

| <b>Table 5: Number of Administratively Closed Cases - Fiscal Years 2007 through 2011<sup>36</sup></b> |               |
|---|---------------|
| <b>Fiscal Year</b>  | <b>Number</b> |
| 2007  | 7,966         |
| 2008  | 8,409         |
| 2009  | 7,885         |
| 2010  | 8,939         |
| 2011  | 6,337         |
| <b>5-yr Average</b>   | <b>7,907</b>  |

In examining the data over the five-year span (presented in Table 5), there is no obvious upward or downward trend, so for the purpose of simplifying, DHS assumes no growth in this statistic. Over the 20-year period of analysis of EOIR’s statistics of administratively closed cases, DHS determined that 35% of all administratively closed cases were those where the sole charge is

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<sup>36</sup> Source: Executive Office for Immigration Review Office of Planning, Analysis, and Technology FY 2011 Statistical Year Book February 2012, available at: <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

unlawful presence.<sup>37</sup> Assuming this proportion will continue to hold, we estimate that EOIR would administratively close 2,768 cases per year where the sole charge is unlawful presence.<sup>38</sup> Again, DHS has no way of knowing precisely how many of the 2,768 estimated unlawful presence administratively closed cases will be aliens who are immediate relatives of U.S. citizens and otherwise eligible for the provisional unlawful presence waiver process. Applying the same range analysis based on participation rates, DHS has made the following yearly additions to the volume estimate of additional Form I-601A filings to account for those aliens whose removal proceedings have been or will be administratively closed: 692 (25 percent of 5-year average 2,768); 1,384 (50 percent); 2,076 (75 percent); and 2,492 (90 percent). The final estimate for future filings of the provisional unlawful presence waiver considers both induced demand relative to the current process and the participation rate of aliens in removal proceedings whose cases have been or will be administratively closed. This final estimate is presented in Table 6.

| <b>Table 6: Final Estimates of Inadmissibility Findings Requiring an Unlawful Presence Waiver, Form I-601A</b><br>(Table 4 plus an adjustment for aliens in removal proceedings whose cases have been or will be administratively closed and have not been recalendared) |   |                   |                   |                   |
|--|---|-------------------|-------------------|-------------------|
| <b>Year</b>  | <b>Expected Demand for Form I-601A with Current Constrained Demand or Participation rate of</b> |                   |                   |                   |
|  | <b>25 Percent</b>   | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1   | 42,897  | 66,085            | 89,274            | 103,188           |
| Year 2   | 26,191  | 31,982            | 37,774            | 41,249            |
| Year 3   | 27,083  | 33,053            | 39,023            | 42,606            |

<sup>37</sup> Statistic calculated by DHS based on EOIR statistics on administratively closed cases from January 1, 1992 – December 5, 2012. According to the EOIR report, there were a total of 189,566 aliens whose cases have been administratively closed at immigration court. Of those, a total of 66,365 cases were administratively closed at the immigration court where the sole charge is INA 212(a)(06)(A)(i). [Calculation:  $66,365/189,566 = 0.3501$  or 35% (rounded)] Similarly, there were a total of 11,279 aliens whose cases have been administratively closed at the BIA. Of those, a total of 3,911 cases were administratively closed at the BIA where the sole charge is INA 212(a)(06)(A)(i). [Calculation:  $3,911/11,279 = 0.3468$  or 35% (rounded)].

<sup>38</sup> Calculation: 35% of the 5-year average of administratively closed cases (7,907) = 2,768 (rounded).

|                |         |         |         |         |
|----------------|---------|---------|---------|---------|
| Year 4         | 28,007  | 34,161  | 40,316  | 44,010  |
| Year 5         | 28,963  | 35,309  | 41,655  | 45,463  |
| Year 6         | 29,952  | 36,496  | 43,040  | 46,967  |
| Year 7         | 30,976  | 37,725  | 44,474  | 48,524  |
| Year 8         | 32,036  | 38,997  | 45,957  | 50,135  |
| Year 9         | 33,133  | 40,313  | 47,493  | 51,802  |
| Year 10        | 34,269  | 41,676  | 49,083  | 53,528  |
| 10 Year Totals | 313,501 | 395,793 | 478,084 | 527,467 |

Note: Numbers may not total due to rounding.

Table 7 is the expected marginal increase in inadmissibility waiver initial applications due to the final rule implementing the provisional unlawful presence waiver process. These estimates are obtained by subtracting the baseline estimates in Table 3 (without the rule) from the estimates when the rule becomes effective in Table 6.

| <b>Table 7: Final Estimates of the Additional Ineligibility Findings Requiring an Inadmissibility Waiver Under the Rule (Induced Demand)<sup>39</sup></b><br>(Table 6 minus Table 3) |   |                   |                   |                   |
|--|---|-------------------|-------------------|-------------------|
|  | <b>Additional Ineligibility Findings Requiring an Inadmissibility Waiver with Current Constrained Demand or Participation rate of</b> |                   |                   |                   |
|  | <b>25 Percent</b>   | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1   | 23,189  | 46,377            | 69,565            | 83,479            |
| Year 2   | 5,792   | 11,584            | 17,375            | 20,851            |
| Year 3   | 5,971   | 11,941            | 17,911            | 21,494            |
| Year 4   | 6,155   | 12,310            | 18,465            | 22,159            |
| Year 5   | 6,347   | 12,693            | 19,039            | 22,847            |
| Year 6   | 6,544   | 13,088            | 19,632            | 23,559            |
| Year 7   | 6,749   | 13,498            | 20,247            | 24,297            |
| Year 8   | 6,961   | 13,922            | 20,883            | 25,060            |
| Year 9   | 7,181   | 14,361            | 21,541            | 25,850            |

<sup>39</sup> The increased ineligibility findings in Table 6 are the difference in ineligibility findings from the different assumptions of the level of constrained demand or participation rate (as respects those in removal proceedings whose cases have been administratively closed) in Table 5 and the baseline ineligibility findings shown in Table 2.

|                |        |         |         |         |
|----------------|--------|---------|---------|---------|
| Year 10        | 7,408  | 14,815  | 22,222  | 26,667  |
| 10 Year Totals | 82,292 | 164,583 | 246,875 | 296,258 |

Note: Numbers may not total due to rounding.

Lastly, in response to public comments on the proposed rule, DHS has made the decision to not reject provisional unlawful presence waiver applications from aliens who previously submitted a Form I-601A application that either was denied or withdrawn. This means that an alien can file a new provisional unlawful presence waiver application on the basis of the original approved immediate relative petition. DHS has examined USCIS I-601 processing data over the 5-year period, FY 2007-2011. The average denial rate over that 5-year period is 34%.<sup>40</sup> Internal USCIS review of I-601 historical application data indicated that withdrawals of Form I-601s were not a significant occurrence. At this time, DHS is unable to project a trend associated with the frequency of cases that are denied or withdrawn and later the alien chooses to re-file a waiver application. In an effort to present the maximum volume projection of I-601A re-filers, we have made the following assumptions: 1) the five-year denial rate of 34% calculated for Form I-601s will hold for Form I-601As; and 2) for every I-601A that is denied, we assume that the alien will file an additional I-601A. We believe that showing the maximum volume projections under those assumptions will sufficiently account for those cases that are withdrawn. The volume projection of I-601A re-filers is shown in Table 8, and is based on a 34% denial rate for all initial filings presented in Table 6. We have chosen to present the re-filing volume projections separately because re-filers would be able to base the re-filed application on the initial immediate relative petition.

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<sup>40</sup> Source: USCIS Office of Performance and Quality, Data Analysis and Reporting Branch. Query of CIS Consolidated Operational Repository for I-601 receipts, approval and denials for FY 2007 – 2011; report created December 8, 2011.

| <b>Table 8: Final Estimates of Denied or Withdrawn Provisional Unlawful Presence Waiver Applications where an alien would re-file a new Form I-601A</b> |  |                   |                   |                   |
|---|--|-------------------|-------------------|-------------------|
| <b>(Assumes that 34% of all initial applications in Table 6 will be denied or withdrawn)</b>  |  |                   |                   |                   |
| <b>Year</b>   | <b>Estimate of Denied or Withdrawn Applications Requiring a re-filed Form I-601A assuming the same demand and participation rates of</b> |                   |                   |                   |
|   | <b>25 Percent</b>  | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1  | 14,585   | 22,469            | 30,354            | 35,084            |
| Year 2  | 8,905  | 10,874            | 12,844            | 14,025            |
| Year 3  | 9,209  | 11,239            | 13,268            | 14,487            |
| Year 4  | 9,523  | 11,615            | 13,708            | 14,964            |
| Year 5  | 9,848  | 12,006            | 14,163            | 15,458            |
| Year 6  | 10,184   | 12,409            | 14,634            | 15,969            |
| Year 7  | 10,532   | 12,827            | 15,122            | 16,499            |
| Year 8  | 10,893   | 13,259            | 15,626            | 17,046            |
| Year 9  | 11,266   | 13,707            | 16,148            | 17,613            |
| Year 10   | 11,652   | 14,170            | 16,689            | 18,200            |
| 10 Year Totals  | 106,593  | 134,571           | 162,551           | 179,341           |

Note: Numbers may not total due to rounding.

## 5. Costs

The final rule will require provisional unlawful presence waiver applicants to submit biometrics to USCIS. This is the only new cost applicants will incur under the provisional unlawful presence waiver process in comparison to the current waiver process. The other costs of the rule emanate from the increase in the demand created by the provisional unlawful presence waiver process. These other costs include the fees and preparation costs for forms prepared by individuals who we believe take the initiative to normalize their immigration status where they otherwise would not due to existing constraints previously described under the current I-601 waiver process.

For the biometric collection, the immediate relative alien will incur the following costs associated with submitting biometrics with an application for the provisional unlawful presence

waiver: the required USCIS fee and the opportunity and mileage costs of traveling to a USCIS ASC to have the biometric recorded.

The current USCIS fee for collecting and processing biometrics is \$85.00. In addition, DHS estimates the opportunity costs for travel to an ASC in order to have the biometric recorded based on the cost of travel (time and mileage) plus the average wait time to have the biometric collected. While travel times and distances will vary, DHS estimates that the average round-trip distance to an ASC will be 50 miles, and that the average time for that trip will be 2.5 hours. DHS estimates that an alien will wait an average of one hour for service and to have biometrics collected.

DHS recognizes that the individuals impacted by the rule are unlawfully present and are generally not eligible to work; however, consistent with other DHS rulemakings, we use wage rates as a mechanism to estimate the opportunity or time valuation costs associated with the required biometric collection. The Federal minimum wage is currently \$7.25 per hour.<sup>41</sup> In order to anticipate the full opportunity cost of providing biometrics, DHS multiplied the minimum hourly wage rate by 1.44 to account for the full cost of employee benefits such as paid leave, insurance, and retirement, which equals \$10.44 per hour.<sup>42</sup> In addition, the cost of travel includes a mileage charge based on the estimated 50 mile round trip at the General Services Administration rate of \$0.555 per mile, which equals \$27.75 for each applicant.<sup>43</sup>

Using an opportunity cost of time of \$10.44 per hour and the 3.5 hour estimated time for

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<sup>41</sup> U.S. Dep't of Labor, Wage and Hour Division. The minimum wage in effect as of July 24, 2009, available at: <http://www.dol.gov/dol/topic/wages/minimumwage.htm>.

<sup>42</sup> U.S. Dep't of Labor, Bureau of Labor Statistics, Economic News Release, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, Dec. 2011, available at [http://www.bls.gov/news.release/archives/ecec\\_03142012.htm](http://www.bls.gov/news.release/archives/ecec_03142012.htm).

<sup>43</sup> See 77 FR 22786.

travel and service and the mileage charge of \$27.75, DHS estimates the cost per provisional unlawful presence waiver applicant to be \$64.29 for travel to and service at the ASC.<sup>44</sup> When the \$85.00 biometric fee is added, the total estimated additional cost per provisional unlawful presence waiver over the current waiver process is \$149.29. All other fees charged by USCIS and DOS to apply for immediate relative visas remain the same under the current and provisional unlawful presence waiver processes.<sup>45</sup>

The incremental costs of the biometric requirement of the rule are computed as the \$149.29 cost per provisional unlawful presence waiver multiplied by the total number of applicants for provisional unlawful presence waivers applying after the final rule is effective. This population is represented in Table 6. The incremental costs of the additional biometric requirement are shown in Table 9.

| <b>Table 9: Costs of Biometric Requirement to Immediate Relatives filing a Provisional Unlawful Presence Waiver Application (Table 6 multiplied by \$149.29)</b> |  |                   |                   |                   |
|--|--|-------------------|-------------------|-------------------|
| <b>Year</b>  | <b>Additional Inadmissibility Waiver Application Fees with Current Constrained Demand or Participation rate of</b> |                   |                   |                   |
|  | <b>25 Percent</b>  | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1   | \$6,404,093  | \$9,865,830       | \$13,327,715      | \$15,404,937      |
| Year 2   | 3,910,054  | 4,774,593         | 5,639,280         | 6,158,063         |
| Year 3   | 4,043,221  | 4,934,482         | 5,825,744         | 6,360,650         |
| Year 4   | 4,181,165  | 5,099,896         | 6,018,776         | 6,570,253         |
| Year 5   | 4,323,886  | 5,271,281         | 6,218,675         | 6,787,171         |
| Year 6   | 4,471,534  | 5,448,488         | 6,425,442         | 7,011,703         |
| Year 7   | 4,624,407  | 5,631,965         | 6,639,523         | 7,244,148         |
| Year 8   | 4,782,654  | 5,821,862         | 6,860,921         | 7,484,654         |
| Year 9   | 4,946,426  | 6,018,328         | 7,090,230         | 7,733,521         |
| Year 10  | 5,116,019  | 6,221,810         | 7,327,601         | 7,991,195         |
| 10 Year Totals Undiscounted  | \$46,803,460   | \$59,088,534      | \$71,373,907      | \$78,746,295      |

<sup>44</sup> (\$10.44 per hour X 3.5 hours) + (\$0.555 per mile X 50 miles) = \$64.29.

<sup>45</sup> The Application for a Provisional Waiver of Inadmissibility, Form I-601A, will carry the same USCIS fee as Form I-601.



|  |              |              |              |              |
|--|--------------|--------------|--------------|--------------|
| 10 Year Totals Discounted at 7.0 percent | \$32,907,683 | \$42,030,423 | \$51,153,460 | \$56,628,050 |
| 10 Year Totals Discounted at 3.0 percent | \$39,926,220 | \$50,653,297 | \$61,380,675 | \$67,818,069 |

Note: Numbers may not total due to rounding.

In addition to the costs of the biometric requirement, DHS expects that the rule will induce an increase in demand for immediate relative visas, which will generate new fees paid to the USCIS and DOS. As the only new requirement imposed by this rule on provisional unlawful presence waiver applicants compared with the current waiver process is biometrics, fees collected for filing forms that are already required (such as the Form I-130) are not costs of this rule. The new fee revenue, however, is that generated by the additional demand shown in Table 7, and from transfers made by applicants to USCIS and DOS to cover the cost of processing the forms. In addition to the fees, there are nominal preparation costs associated with completing the forms. We estimate the amount of these fees and their associated preparation costs to give a more complete estimate of the impact of this rule. We consider the fee values to be a reasonable proxy for the underlying costs of this rule. The additional fees and preparation costs are shown in Table 10.

In determining the preparation cost for the forms, different labor rates were used depending on the citizenship status of the petitioner. If the form is completed by the alien immediate relative (Form I-601A), the loaded minimum wage of \$10.44 per hour was used. If the form is completed by a U.S. citizen, we used the mean hourly wage for “all occupations” as reported by the Bureau of Labor Statistics and then adjusted that wage upward to account for the

costs of employee benefits, such as annual leave, for a fully loaded hourly wage rate of \$31.31.<sup>46</sup>

The times to complete the forms are based on the estimated burden time reported for the individual forms.

These costs and appropriate fees paid to USCIS and DOS are calculated by the formula:

1. Cost of Form I-130: Preparation cost = ( $\$31.31 \times 1.5$  hours) = \$46.97; USCIS fee to cover processing costs = \$420.00. Total cost = \$466.97
2. Cost of Form I-601A: Preparation cost = ( $\$10.44 \times 1.5$  hours) = \$15.66; USCIS fee to cover processing costs = \$585.00. Total cost = \$600.66
3. Cost of Form I-864: Preparation cost = ( $\$31.31 \times 6.0$  hours) = \$187.86; DOS fee to cover processing costs = \$88.00. Total cost = \$275.86
4. Cost of Immigrant Visa: Preparation cost of Form DS-230 = ( $\$10.44 \times 1.0$  hour) = \$10.44; Processing Fees: DOS fee to cover processing costs = \$230; USCIS fee to cover processing costs = \$165. Total cost = \$405.44.

Based on the above, the total costs per application: ( $\$466.97 + 600.66 + 275.86 + 405.44$ ) = \$1,748.93.

| <b>Table 10: Costs for Preparing and Filing USCIS and DOS Forms (Table 7 multiplied by \$1,748.93)</b> |  |                   |                   |                   |
|--|--|-------------------|-------------------|-------------------|
| <b>Year</b>  | <b>Additional Preparation Costs and Filing Fees with Current Constrained Demand or Participation rate of</b> |                   |                   |                   |
|  | <b>25 Percent</b>  | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1   | \$40,555,938   | \$81,110,127      | \$121,664,315     | \$145,998,927     |
| Year 2   | 10,129,803   | 20,259,605        | 30,387,659        | 36,466,939        |
| Year 3   | 10,442,861   | 20,883,973        | 31,325,085        | 37,591,501        |
| Year 4   | 10,764,664   | 21,529,328        | 32,293,992        | 38,754,540        |
| Year 5   | 11,100,459   | 22,199,168        | 33,297,878        | 39,957,804        |
| Year 6   | 11,444,998   | 22,889,996        | 34,334,994        | 41,203,042        |
| Year 7   | 11,803,529   | 23,607,057        | 35,410,586        | 42,493,752        |

<sup>46</sup> The \$31.31 rate is calculated by multiplying the \$21.74 average hourly wage for all occupations May 2011 (available at [http://www.bls.gov/oes/2011/may/oes\\_nat.htm](http://www.bls.gov/oes/2011/may/oes_nat.htm)) by the 1.44 fully loaded multiplier.

|  |               |               |               |               |
|--|---------------|---------------|---------------|---------------|
| Year 8   | 12,174,302    | 24,348,603    | 36,522,905    | 43,828,186    |
| Year 9   | 12,559,066    | 25,116,384    | 37,673,701    | 45,209,841    |
| Year 10  | 12,956,073    | 25,910,398    | 38,864,722    | 46,638,716    |
| 10 Year Totals<br>Undiscounted                 | \$143,931,692 | \$287,854,640 | \$431,775,838 | \$518,143,249 |
| 10 Year Totals<br>Discounted at 7.0<br>percent | \$106,881,772 | \$213,757,395 | \$320,631,489 | \$384,766,730 |
| 10 Year Totals<br>Discounted at 3.0<br>percent | \$125,678,197 | \$251,348,945 | \$377,018,045 | \$452,432,274 |

Note: Sums may not total due to rounding.

The totals in Table 10 are calculated by multiplying the induced demand shown in Table 7 by the \$1,748.93 shown above. DHS acknowledges there are additional costs to the existing process, such as travel from the United States to the immediate relative’s home country where the immigrant visa is being processed and the additional expense of supporting two households while awaiting an immigrant visa. Such costs are highly variable and depend on the circumstances of the specific petitioner. We did not estimate the impacts of these variable costs. To the extent that this rule allows immediate relatives to reduce the time spent in their home country, we expect a proportionate reduction in these costs. These cost savings represent a benefit of this rule.

In addition, the final rule has removed the limitation that allowed aliens to file only one Form I-601A on the basis of an approved immediate relative petition. In response to public comment, DHS will allow an alien to file a new Form I-601A based on the same approved immediate relative petition if the initial Form I-601A is denied or withdrawn. If an alien chooses to file a new provisional unlawful presence waiver application, the alien would face the biometric costs (including biometric fees and travel to the ASC to submit biometrics) and the fee and preparation costs associated with Form I-601A. As previously established, the biometric costs are \$149.29 and the Form I-601A costs are \$600.66 per applicant. The total costs

associated with the estimated population volume are presented in Table 11.

| <b>Table 11: Costs associated with applicants that Re-file Form I-601A after the initial Form I-601A is denied or withdrawn (Table 8 multiplied by \$749.95)</b> |  |                   |                   |                   |
|--|--|-------------------|-------------------|-------------------|
| <b>Year</b>  | <b>Additional Costs for Applications that are Denied and Re-filed over the range analysis of</b> |                   |                   |                   |
|  | <b>25 Percent</b>  | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1   | \$10,938,021   | \$16,850,627      | \$22,763,982      | \$26,311,246      |
| Year 2   | 6,678,305  | 8,154,956         | 9,632,358         | 10,518,049        |
| Year 3   | 6,906,290  | 8,428,688         | 9,950,337         | 10,864,526        |
| Year 4   | 7,141,774  | 8,710,669         | 10,280,315        | 11,222,252        |
| Year 5   | 7,385,508  | 9,003,900         | 10,621,542        | 11,592,727        |
| Year 6   | 7,637,491  | 9,306,130         | 10,974,768        | 11,975,952        |
| Year 7   | 7,898,473  | 9,619,609         | 11,340,744        | 12,373,425        |
| Year 8   | 8,169,205  | 9,943,587         | 11,718,719        | 12,783,648        |
| Year 9   | 8,448,937  | 10,279,565        | 12,110,193        | 13,208,869        |
| Year 10  | 8,738,417  | 10,626,792        | 12,515,916        | 13,649,090        |
| 10 Year Totals<br>Undiscounted   | \$79,942,420   | \$100,924,521     | \$121,908,872     | \$134,499,783     |
| 10 Year Totals<br>Discounted at 7.0<br>percent   | \$56,207,656   | \$71,788,866      | \$87,371,675      | \$96,721,450      |
| 10 Year Totals<br>Discounted at 3.0<br>percent   | \$68,195,707   | \$86,516,943      | \$104,840,098     | \$115,834,193     |

Note: Sums may not total due to rounding.

The total cost to applicants is shown in Table 12 as the sum of Table 9, Table 10, and

Table 11.

| <b>Table 12. Total Costs to Applicants of the Final Rule (Sum of Tables 9 - 11)</b> |  |                   |                   |                   |
|---|--|-------------------|-------------------|-------------------|
| <b>Year</b>   | <b>Estimated Total Cost at Current Constrained Demand or Participation rate of</b> |                   |                   |                   |
|   | <b>25 Percent</b>  | <b>50 Percent</b> | <b>75 Percent</b> | <b>90 Percent</b> |
| Year 1  | \$57,898,052   | \$107,826,583     | \$157,756,013     | \$187,715,110     |
| Year 2  | 20,718,162   | 33,189,154        | 45,659,297        | 53,143,051        |
| Year 3  | 21,392,372   | 34,247,144        | 47,101,166        | 54,816,677        |
| Year 4  | 22,087,603   | 35,339,893        | 48,593,083        | 56,547,045        |
| Year 5  | 22,809,853   | 36,474,349        | 50,138,095        | 58,337,702        |
| Year 6  | 23,554,023   | 37,644,613        | 51,735,204        | 60,190,697        |
| Year 7  | 24,326,409   | 38,858,631        | 53,390,853        | 62,111,325        |
| Year 8  | 25,126,162   | 40,114,053        | 55,102,544        | 64,096,488        |
| Year 9  | 25,954,429   | 41,414,276        | 56,874,124        | 66,152,230        |
| Year 10   | 26,810,510   | 42,758,999        | 58,708,239        | 68,279,001        |

|   |               |               |               |               |
|---|---------------|---------------|---------------|---------------|
| 10 Year<br>Totals<br>Undiscounted                 | \$270,677,572 | \$447,867,695 | \$625,058,617 | \$731,389,326 |
| 10 Year<br>Totals<br>Discounted at<br>7.0 percent | \$195,997,110 | \$327,576,683 | \$459,156,625 | \$538,116,229 |
| 10 Year<br>Totals<br>Discounted at<br>3.0 percent | \$233,800,123 | \$388,519,186 | \$543,238,818 | \$636,084,535 |

Note: Sums may not total due to rounding.

Costs to the Federal Government include the possible costs of additional adjudication personnel associated with increased volume and the associated equipment (computers, telephones) and occupancy costs (if additional space is required). However, we expect these costs to be offset by the additional fee revenue collected for form processing. As previously explained, DHS has adopted the current cost for adjudicating an Application for Waiver of Ground of Inadmissibility, Form I-601(\$585), as the initial filing fee that will be required for the Form I-601A. DHS will consider the impact of the provisional unlawful presence waiver process workflow and resource requirements as a normal part of its biennial fee review. The biennial fee review determines if fees for immigration benefits are sufficient in light of resource needs and filing trends. Consequently, we do not believe that this rule will impose additional costs on the Federal Government.

## 6. Benefits

The benefits of the rule are the result of streamlining the immigrant visa waiver process. The primary benefits of the provisional unlawful presence waiver process changes are qualitative and result from reduced separation time for U.S. citizens and their immediate relatives. In addition to the obvious humanitarian and emotional benefits derived from family reunification, we also anticipate significant financial benefits accruing to the U.S. citizen due to the shortened

period he or she would have to financially support the alien relative abroad. DHS is currently unable to estimate the average duration of time an immediate relative must spend abroad while awaiting waiver adjudication under the current process, and so cannot predict how the time spent apart would be reduced under the provisional unlawful presence waiver process. As a result of streamlining the unlawful presence waiver process, there also could be workflow efficiencies realized by both USCIS and DOS. The new process will enable USCIS to process and adjudicate the provisional unlawful presence waivers domestically. As a result, USCIS may be able to move a large part of its workload to Service Centers or field offices with resources that are less expensive than overseas staffing resources and that are flexible enough to accommodate filing surges. In addition, the new provisional unlawful presence waiver process will allow DOS to review these cases once, as opposed to the current unlawful presence process where these cases are reviewed twice, at a minimum. DHS anticipates that the new process will make the immigrant visa process more efficient.

#### **D. Executive Order 13132**

This final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **E. Executive Order 12988 Civil Justice Reform**

Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DHS has completed the required review and

determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

#### **F. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting and recordkeeping requirements inherent in a rule. See Public Law 104-13, 109 Stat. 163 (May 22, 1995). This final rule requires that an applicant requesting a provisional unlawful presence waiver complete an Application for Provisional Waiver of Unlawful Presence, Form I-601A. This form is considered new information collection and is covered under the PRA. USCIS is currently seeking approval of this newly created instrument from OMB.

DHS submitted Form I-601A to OMB for review. OMB temporarily assigned an OMB Control Number, 1615-0123, to the form and also filed comments in accordance with 5 CFR 1320.11(c). DHS has considered the comments received in response to the publication of the proposed rule and the comments submitted by OMB concerning the creation of the Form I-601A. DHS' response to the comments appears in this final rule and in an appendix to the supporting statement that accompanies this rule. USCIS has submitted the supporting statement to OMB as part of its request for approval of this new information collection instrument.

On April 2, 2012, DHS published a proposed rule, Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, in the Federal Register at 77 FR 19902. In the PRA section of that rule, DHS inadvertently indicated that USCIS would be seeking to revise a currently approved information collection instrument. DHS, however, should have indicated that it would be requesting the approval of a new information collection

instrument, Application for Provisional Unlawful Presence Waiver, Form I-601A. This final rule corrects that error.

Despite the inadvertent error in the notice inserted in the PRA portion of the proposed rule, DHS clearly communicated to the public, in other parts of the proposed rule, that it was considering the creation of a new information collection instrument, Form I-601A, to be able to collect information required from certain immediate relatives of U.S. citizens seeking a provisional unlawful presence waiver of the unlawful presence inadmissibility ground. USCIS received comments from the public on the proposed Form I-601A. Those comments have been addressed under part IV (Public Comments on Proposed Rule).

Lastly, DHS has updated the supporting statement to reflect a change in the estimate for the number of respondents that USCIS projected would submit this type of request from 38,277 respondents to 62,348 respondents. This change of the initially projected estimate is due to the final rule's expansion of the eligibility criterion initially proposed, which results in an increase of the estimated population of aliens that DHS expects could file Form I-601A. With the increase in the total number of respondents, DHS has increased the total annual burden hours to 166,469 hours. In addition, DHS has revised the originally proposed form I-601A and its instructions to include the changes as discussed in Part IV (Public Comments on the Proposed Rule) and the appendix of the supporting statement. The revised materials can be viewed at [www.regulations.gov](http://www.regulations.gov).

#### **G. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small



businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this rule directly regulates individuals who are the immediate relatives of U.S. citizens seeking to apply for an unlawful presence waiver of inadmissibility in order to be eligible to obtain an immigrant visa outside the United States. The impact is on these persons as individuals, so that they are not, for purposes of the Regulatory Flexibility Act, within the definition of small entities established by 5 U.S.C. 601(6). DHS received no public comments challenging this certification.

## **VII. Amendments**

### **List of Subjects**

#### **8 CFR Part 103**

Administrative practice and procedures, Authority delegations (government agencies), Freedom of Information; Privacy, Reporting and recordkeeping requirements, Surety bonds.

#### **8 CFR Part 212**

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

Accordingly, USCIS amends chapter I of title 8 of the Code of Federal Regulations as follows.

### **PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS**

1. The authority citation for part 103 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2.

2. Section 103.7 is amended by revising paragraphs (b)(1)(i)(AA) and (c)(3)(i) to read as follows:

**§ 103.7 Fees.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) \* \* \*

(AA) Application for Waiver of Ground of Inadmissibility (Form I–601) and Application for Provisional Unlawful Presence Waiver (I-601A). For filing an application for waiver of grounds of inadmissibility or an application for a provisional unlawful presence waiver: \$585.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(i) Biometric Fee, except for the biometric fee required for provisional unlawful presence waivers filed under 8 CFR 212.7(e).

\* \* \* \* \*

**PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS;  
ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

3. The authority citation for part 212 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458); 8 CFR part 2. Section 212.1(q) also issued under section 702, Pub. L. 110-229, 122 Stat. 754, 854.

4. Section 212.7 is amended by:

- a. Revising paragraphs (a)(1), (a)(3), and (a)(4); and
- b. Adding paragraph (e)

The revisions and addition read as follows:

**§ 212.7 Waivers of certain grounds of inadmissibility.**

(a)(1) Application. Except as provided by 8 CFR 212.7(e), an applicant for an immigrant visa, adjustment of status, or a K or V nonimmigrant visa who is inadmissible under any provision of section 212(a) of the Act for which a waiver is available under section 212 of the Act may apply for the related waiver by filing the form designated by USCIS, with the fee prescribed in 8 CFR 103.7(b)(1), and in accordance with the form instructions. Certain immigrants may apply for a provisional unlawful presence waiver of inadmissibility as specified in 8 CFR 212.7(e).

\* \* \* \* \*

(3) Decision. If the waiver application is denied, USCIS will provide a written decision and notify the applicant and his or her attorney or accredited representative and will advise the applicant of appeal procedures, if any, in accordance with 8 CFR 103.3. The denial of a provisional unlawful presence waiver is governed by 8 CFR 212.7(e).

(4) Validity. (i) A provisional unlawful presence waiver granted according to paragraph (e) of this section is valid subject to the terms and conditions as specified in paragraph (e) of this section. In any other case, approval of an immigrant waiver of inadmissibility under this section

applies only to the grounds of inadmissibility, and the related crimes, events, or incidents that are specified in the application for waiver.

(ii) Except for K-1 and K-2 nonimmigrants and aliens lawfully admitted for permanent residence on a conditional basis, an immigrant waiver of inadmissibility is valid indefinitely, even if the applicant later abandons or otherwise loses lawful permanent resident status.

(iii) For a K-1 or K-2 nonimmigrant, approval of the waiver is conditioned on the K-1 nonimmigrant marrying the petitioner; if the K-1 nonimmigrant marries the K nonimmigrant petitioner, the waiver becomes valid indefinitely, subject to paragraph (a)(4)(iv) of this section, even if the applicant later abandons or otherwise loses lawful permanent resident status. If the K-1 does not marry the K nonimmigrant petitioner, the K-1 and K-2 nonimmigrants remain inadmissible for purposes of any application for a benefit on any basis other than the proposed marriage between the K-1 and the K nonimmigrant petitioner.

(iv) For an alien lawfully admitted for permanent residence on a conditional basis under section 216 of the Act, removal of the conditions on the alien's status renders the waiver valid indefinitely, even if the applicant later abandons or otherwise loses lawful permanent resident status. Termination of the alien's status as an alien lawfully admitted for permanent residence on a conditional basis also terminates the validity of a waiver of inadmissibility based on sections 212(h) or 212(i) of the Act that was granted to the alien. Separate notification of the termination of the waiver is not required when an alien is notified of the termination of residence under section 216 of the Act, and no appeal will lie from the decision to terminate the waiver on this basis. If the alien challenges the termination in removal proceedings, and the removal proceedings end in the restoration of the alien's status, the waiver will become effective again.

(v) Nothing in this subsection precludes USCIS from reopening and reconsidering a decision if the decision is determined to have been made in error.

\* \* \* \* \*

(e) Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives. The provisions of this paragraph (e) are applicable to certain aliens who are pursuing consular immigrant visa processing as an immediate relative of a U.S. citizen.

(1) Jurisdiction. All applications for a provisional unlawful presence waiver, including an application for a provisional unlawful presence waiver made by an alien in removal proceedings before the Executive Office for Immigration Review, must be filed with USCIS, with the fees prescribed in 8 CFR 103.7(b), and in accordance with the form instructions.

(2) Provisional Unlawful Presence Waiver; In General. (i) USCIS may adjudicate applications for a provisional unlawful presence waiver of inadmissibility based on section 212(a)(9)(B)(v) of the Act filed by eligible aliens described in paragraph (e)(3) of this section. USCIS will only approve such provisional unlawful presence waiver applications in accordance with the conditions outlined in paragraph (e) of this section. Consistent with section 212(a)(9)(B)(v) of the Act, the decision whether to approve a provisional unlawful presence waiver application is discretionary and does not constitute a grant of a lawful immigration status or a period of stay authorized by the Secretary.

(ii) A pending or an approved provisional unlawful presence waiver does not authorize any interim immigration benefits such as employment authorization or advance parole. Any application for a travel document or request for employment authorization that is submitted in connection with a provisional unlawful presence waiver application will be rejected.

(3) Eligible aliens. Except as provided in paragraph (e)(4) of this section, an alien may

be eligible to apply for and receive a provisional unlawful presence waiver for the grounds of inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act if he or she meets the requirements in this paragraph. An alien may be eligible to apply for or receive a waiver if he or she:

- (i) Is present in the United States at the time of filing the application for a provisional unlawful presence waiver, and for biometrics collection at a USCIS ASC;
  - (ii) Upon departure, would be inadmissible only under section 212(a)(9)(B)(i) of the Act at the time of the immigrant visa interview;
  - (iii) Qualifies as an immediate relative under section 201(b)(2)(A)(i) of the Act;
  - (iv) Is the beneficiary of an approved immediate relative petition;
  - (v) Has a case pending with the Department of State based on the approved immediate relative petition and has paid the immigrant visa processing fee as evidenced by a State Department Visa Processing Fee Receipt;
  - (vi) Will depart from the United States to obtain the immediate relative immigrant visa;
- and
- (vii) Meets the requirements for a waiver provided in section 212(a)(9)(B)(v) of the Act, except the alien must show extreme hardship to his or her U.S. citizen spouse or parent.

(4) Ineligible Aliens. Notwithstanding paragraph (e)(3) of this section, an alien is ineligible for a provisional unlawful presence waiver under paragraph (e) of this section if:

- (i) USCIS has reason to believe that the alien may be subject to grounds of inadmissibility other than unlawful presence under section 212(a)(9)(B)(i)(I) or (II) of the Act at the time of the immigrant visa interview with the Department of State;
- (ii) The alien is under the age of 17;

(iii) The alien does not have a case pending with the Department of State, based on the approved immediate relative petition, and has not paid the immigrant visa processing fee;

(iv) The Department of State initially acted to schedule the immigrant visa interview prior to [INSERT DATE OF FEDERAL REGISTER PUBLICATION] for the approved immediate relative petition on which the provisional unlawful presence waiver is based, even if the interview has since been cancelled or rescheduled after [INSERT DATE OF FEDERAL REGISTER PUBLICATION];

(v) The alien is in removal proceedings, unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the Form I-601A;

(vi) The alien is subject to a final order of removal issued under section 217, 235, 238, or 240 of the Act or a final order of exclusion or deportation under former 236 or 242 of the Act (pre-April 1, 1997), or any other provision of law (including an in absentia removal order under section 240(b)(5) of the Act);

(vii) The alien is subject to reinstatement of a prior removal order under section 241(a)(5) of the Act; or

(viii) The alien has a pending application with USCIS for lawful permanent resident status.

(5) Filing. (i) An application for a provisional unlawful presence waiver of the unlawful presence inadmissibility bars under section 212(a)(9)(B)(i)(I) or (II) of the Act, including an application by an alien in removal proceedings that are administratively closed and have not been recalendared at the time of filing the Form I-601A, must be filed in accordance with 8 CFR part 103 and on the form designated by USCIS. The prescribed fee under 8 CFR 103.7(b)(1) and supporting documentation must be submitted in accordance with the form instructions.

(ii) An application for a provisional unlawful presence waiver will be rejected and the fee and package returned to the alien if the alien:

(A) Fails to pay the required filing fee for the provisional unlawful presence waiver application or to pay the correct filing fee;

(B) Fails to sign the provisional unlawful presence waiver application;

(C) Fails to provide his or her family name, domestic home address, and date of birth;

(D) Is under the age of 17;

(E) Does not include evidence of an approved petition that classifies the alien as an immediate relative of a U.S. citizen;

(F) Fails to include a copy of the fee receipt evidencing that the alien has paid the immigrant visa processing fee to the Department of State; or

(G) Has indicated on the provisional unlawful presence waiver application that the Department of State initially acted to schedule the immigrant visa interview prior to [INSERT DATE OF FEDERAL REGISTER PUBLICATION], even if the interview was cancelled or rescheduled after [INSERT DATE OF FEDERAL REGISTER PUBLICATION].

(6) Biometrics. (i) All aliens who apply for a provisional unlawful presence waiver under this section will be required to provide biometrics in accordance with 8 CFR 103.16 and 103.17, as specified on the form instructions.

(ii) Failure to appear for biometrics capture. If an alien fails to appear for biometrics capture, the provisional unlawful presence waiver application will be considered abandoned and denied pursuant to 8 CFR 103.2(b)(13). The alien may not appeal or file a motion to reopen or reconsider an abandonment denial under 8 CFR 103.5.

(7) Burden of proof. The alien has the burden to establish eligibility for the provisional



unlawful presence waiver as described in this paragraph of this section, and under section 212(a)(9)(B)(v) of the Act, including that the alien merits a favorable exercise of the Secretary's discretion.

(8) Adjudication. USCIS will adjudicate the provisional unlawful presence waiver application in accordance with this paragraph of this section and section 212(a)(9)(B)(v) of the Act, except the alien must show extreme hardship to his or her U.S. citizen spouse or parent. USCIS also may require the alien and the U.S. citizen petitioner to appear for an interview pursuant to 8 CFR 103.2(b)(9). If USCIS finds that the alien does not meet the eligibility requirements for the provisional unlawful presence waiver as described in paragraph (e) of this section, or if USCIS otherwise determines in its discretion that a waiver is not warranted, USCIS will deny the waiver application. Notwithstanding 8 CFR 103.2(b)(16), USCIS may deny an application for a provisional unlawful presence waiver without prior issuance of a request for evidence or notice of intent to deny.

(9) Notice of Decision. USCIS will notify the alien and the alien's attorney of record or accredited representative of the decision in accordance with 8 CFR 103.2(b)(19). USCIS also may notify the Department of State. Denial of an application for a provisional unlawful presence waiver is without prejudice to the alien filing another provisional unlawful presence waiver application under paragraph (e) of this section, provided the alien meets all of the requirements in this part, and the alien's case must be pending with the Department of State. An alien also may elect to file a Form I-601, Waiver of Grounds of Inadmissibility, pursuant to paragraph (a)(1) of this section after departing the United States, appearing for his or her immigrant visa interview at the U.S. Embassy or consulate abroad, and after the Department of State determines the alien's admissibility and eligibility for an immigrant visa. Accordingly, denial of a request

for a provisional unlawful presence waiver is not a final agency action for purposes of section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704.

(10) Withdrawal of waiver requests. An alien may withdraw his or her request for a provisional unlawful presence waiver at any time before USCIS makes a final decision. Once the case is withdrawn, USCIS will close the case and notify the alien and his or her attorney or accredited representative. The alien may file a new Form I-601A, in accordance with the form instructions and required fees. The alien's case must be pending with the Department of State and the alien must notify the Department of State that he or she intends to file a new Form I-601A.

(11) Appeals and Motions to Reopen. There is no administrative appeal from a denial of a request for a provisional unlawful presence waiver under this section. The alien may not file, pursuant to 8 CFR 103.5, a motion to reopen or reconsider a denial of a provisional unlawful presence waiver application under this section.

(12) Approval and Conditions. A provisional unlawful presence waiver granted under this section:

(i) Does not take effect unless, and until, the alien who applied for and obtained the provisional unlawful presence waiver:

(A) Departs from the United States;

(B) Appears for an immigrant visa interview at a U.S. Embassy or consulate; and

(C) Is determined to be otherwise eligible for an immigrant visa by a Department of State consular officer in light of the approved provisional unlawful presence waiver.

(ii) Waives the alien's inadmissibility under section 212(a)(9)(B) of the Act only for purposes of the application for an immigrant visa and admission to the United States as an

immediate relative of a U.S. citizen pursuant to the approved immediate relative petition (Form I-130 or I-360) upon which the provisional unlawful presence waiver application was based.

(iii) Does not waive any ground of inadmissibility other than the grounds of inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act.

(13) Validity. Until the provisional unlawful presence waiver takes full effect as provided in paragraph (e)(12) of this section, USCIS may reopen and reconsider its decision at any time. Once a provisional unlawful presence waiver takes full effect as defined in paragraph (e)(12) of this section, the period of unlawful presence for which the provisional unlawful presence waiver is granted is waived indefinitely, in accordance with and subject to paragraph (a)(4) of this section.

(14) Automatic Revocation. The approval of a provisional unlawful presence waiver is revoked automatically if:

(i) The consular officer determines at the time of the immigrant visa interview that the alien is ineligible to receive a visa under section 212(a) of the Act other than under section 212(a)(9)(B)(i)(I) or (II) of the Act;

(ii) The immigrant visa petition approval associated with the provisional unlawful presence waiver is at any time revoked, withdrawn, or rendered invalid but not otherwise reinstated for humanitarian reasons or converted to a widow or widower petition;

(iii) The immigrant visa registration is terminated in accordance with section 203(g) of the Act, and has not been reinstated in accordance with section 203(g) of the Act; or

(iv) The alien, at any time before or after approval of the provisional unlawful presence waiver or before an immigrant visa is issued, reenters or attempts to reenter the United States without being inspected and admitted or paroled.

**Janet Napolitano,**  
Secretary.

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