



9111-97

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103 and 212

[CIS No. 2557-14; DHS Docket No. USCIS-2012-0003]

RIN 1615-AC03

Expansion of Provisional Unlawful Presence Waivers of Inadmissibility

AGENCY: Department of Homeland Security, U.S. Citizenship and Immigration Services.

ACTION: Proposed rule.

SUMMARY: The Department of Homeland Security (DHS) proposes to expand eligibility for provisional waivers of certain grounds of inadmissibility based on the accrual of unlawful presence to all aliens who are statutorily eligible for a waiver of such grounds, are seeking such a waiver in connection with an immigrant visa application, and meet other conditions. The provisional waiver process currently allows certain aliens who are present in the United States to request from U.S. Citizenship and Immigration Services (USCIS) a provisional waiver of certain unlawful presence grounds of inadmissibility prior to departing from the United States for consular processing of their immigrant visas—rather than applying for a waiver abroad after the immigrant visa interview using the Form I-601, Waiver of Grounds of Inadmissibility (hereinafter “Form I-601 waiver process”). DHS proposes to expand its current provisional waiver process in two principal ways. First, DHS would eliminate current limitations on the provisional waiver process that restrict eligibility to certain immediate relatives of U.S. citizens. Under this proposed rule, the provisional waiver process would be made available to all aliens

who are statutorily eligible for waivers of inadmissibility based on unlawful presence and meet certain other conditions. Second, in relation to the statutory requirement that the waiver applicant demonstrate that denial of the waiver would result in “extreme hardship” to certain family members, DHS proposes to expand the provisional waiver process by eliminating the current restriction that limits extreme hardship determinations only to aliens who can establish extreme hardship to U.S. citizen spouses or parents. Under this proposed rule, an applicant for a provisional waiver would be permitted to establish the eligibility requirement of showing extreme hardship to any qualifying relative (namely, U.S. citizen or lawful permanent resident spouses or parents). DHS is proposing to expand the provisional waiver process in the interests of encouraging eligible aliens to complete the visa process abroad, promoting family unity, and improving administrative efficiency.

DATES: Submit written comments on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER]. Comments on the information collection revisions in this rule, as described in the Paperwork Reduction Act section, will also be accepted until [Insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS-2012-0003, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow this site’s instructions for submitting comments.
- Email: You may email comments directly to USCIS at uscisfrcomment@dhs.gov. Include DHS Docket No. USCIS-2012-0003 in the subject line of the message.
- Mail: Laura Dawkins, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland

Security, 20 Massachusetts Avenue, NW, Washington, DC 20529-2020. To ensure proper handling, please reference DHS Docket No. USCIS-2012-0003 on your correspondence. This mailing address may be used for paper, disk, or CD-ROM submissions.

- Hand Delivery/Courier: Laura Dawkins, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW, Washington, DC 20529-2020. Contact Telephone Number is (202) 272-8377.

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).

SUPPLEMENTARY INFORMATION:

Table of Contents:

I. Executive Summary

II. Public Participation

III. Background

A. Legal Authority

B. Immigrant Visa Categories

1. Immediate Relatives, Family-Sponsored Immigrants, Employment-Based Immigrants, and Certain Special Immigrants

2. Diversity Visa Program

C. Grounds of Inadmissibility

D. Unlawful Presence

E. Form I-601 Waiver Process

1. Form I-601 Waiver Process for Immigrant Visa Applicants Abroad

2. Difficulties with the Form I-601 Waiver Process

F. Provisional Waiver Process

1. Creation of Provisional Waiver

2. Impact of Provisional Waiver Process

IV. Proposed Changes

A. Immediate Relative, Family-Sponsored, Employment-Based, and Certain Special Immigrants

- B. Diversity Immigrants
- C. Qualifying Relatives
- D. Aliens with Scheduled Immigrant Visa Interviews
- E. Miscellaneous Changes
- F. Benefits of the Proposed Changes

V. Public Input

VI. Statutory and Regulatory Requirements

- A. Unfunded Mandates Reform Act of 1995
- B. Small Business Regulatory Enforcement Fairness Act of 1996
- C. Executive Orders 12866 and 13563
 - 1. Summary
 - 2. Background
 - 3. Purpose of Rule
 - 4. Current Provisional Unlawful Presence Waiver Program
 - 5. Population Affected by this Rule
 - 6. Costs and Benefits
- D. Regulatory Flexibility Act
- E. Executive Order 13132
- F. Executive Order 12988 Civil Justice Reform
- G. Paperwork Reduction Act

II. Public Participation

DHS invites all interested parties to submit written data, views, or arguments on all aspects of this proposed rule. DHS also invites comments about how the proposed rule might affect the economy, environment, or federalism. The most helpful comments will:

- (1) Refer to a specific portion of this proposed rule;
- (2) Explain the reason for any recommended change; and
- (3) Include data, information, or references to authority that support the recommended change.

Instructions: All submissions must include the agency name and DHS Docket No. USCIS-2012-0003 assigned to this rulemaking. Regardless of the method you used to submit comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Your entire submission will be available for the public to view. Therefore, you

may wish to consider limiting the amount of personal information that you provide. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is deemed to be inappropriate or offensive. For additional information, please read the Privacy Act notice that is available on the link in the footer of <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and enter this proposed rule's DHS Docket No. USCIS-2012-0003.

III. Background

A. Legal Authority

Section 102 of the Homeland Security Act of 2002 (Public Law 107-296, 116 Stat. 2135), 6 U.S.C. 112, and section 103 of the Immigration and Nationality Act (INA), 8 U.S.C. 1103, charge the Secretary of Homeland Security (Secretary) with the administration and enforcement of the immigration and naturalization laws of the United States. The Secretary proposes the changes in this rule under the broad authority to administer the authorities provided under the Homeland Security Act of 2002, the immigration and nationality laws, and other delegated authorities. The Secretary's discretionary authority to waive the unlawful presence grounds of inadmissibility is provided in INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). See also Homeland Security Act of 2002, sec. 451(b), 6 U.S.C. 271(b) (transferring to the Director of USCIS the immigration benefits adjudication functions of the Commissioner of the former Immigration and Naturalization Service).

B. Immigrant Visa Categories

U.S. immigration laws provide avenues for U.S. citizens, LPRs, and U.S. employers to bring their families or employees permanently to the United States. Certain other categories of aliens are eligible for immigrant visas through special processes. See, e.g., INA section 201(b), 8 U.S.C. 1151(b) (describing aliens who are not subject to numerical limitations on immigration levels); INA section 203(a)-(d); 8 U.S.C. 1153(a)-(d) (providing for the allocation of immigrant visas to family-sponsored immigrants, employment-based immigrants, certain special immigrants, and diversity immigrants, as well as the derivative spouses and children of such immigrants).

1. Immediate Relatives, Family-Sponsored Immigrants, Employment-Based Immigrants, and Certain Special Immigrants

Generally, if a U.S. citizen or LPR seeks to sponsor a relative for lawful permanent residence in the United States, the U.S. citizen or LPR must first file an immigrant visa petition for the relative with USCIS.¹ See INA sections 201(b)(2)(A)(i), 203(a), 204; 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), 1154; 8 CFR part 204. The same is generally true with respect to a U.S. employer that wishes to petition on behalf of a noncitizen worker. See INA sections 203(b), 204; 8 U.S.C. 1153(b), 1154; 8 CFR part 204. Certain other categories of immigrants, such as “special immigrants,” are eligible for permanent residence through special processes. See INA sections 101(a)(27), 203(b)(4), 204(a)(1)(I); 8 U.S.C. 1101(a)(27), 1153(b)(4), 1154(a)(1)(I); 8 CFR part 204; 22 CFR 42.32(d).

The purpose of the immigrant visa petition is to classify the alien as an intending

¹ Certain immediate relatives (e.g., widows or widowers of U.S. citizens and their children) and special immigrants can self-petition for classification as an immediate relative of a U.S. citizen by filing a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. Similarly, certain employment-based categories (e.g., aliens with extraordinary ability) allow an alien to self-petition for classification as an employment-based immigrant. See INA sections 201 and 203(b)(1)(A) & (2)(B); 8 U.S.C. 1151, 1153(b)(1)(A) & (2)(B); 8 CFR 204.5(h) and (k)(4)(ii).

immigrant who is either an immediate relative of a U.S. citizen (i.e., the spouse, parent, or unmarried child of a U.S. citizen) or an alien described under the family-sponsored preference, employment-based preference, or special immigrant categories. Except with respect to immediate relatives of U.S. citizens, immigrant visa petitions may also serve to classify derivatives (i.e., spouses and unmarried children) of principal beneficiaries as immigrants. See INA 203(d); 8 U.S.C. 1153(d). USCIS determines, among other things, whether an alien has the necessary familial relationship to the U.S. citizen or the LPR, has the necessary professional qualifications or skills and expertise for the position offered by the U.S. employer, or meets the requirements for the specific special immigrant category, before approving an immigrant visa petition. Approval of an immigrant visa petition does not give the beneficiary any lawful immigration status in the United States. If the beneficiary is without lawful status when the immigrant visa petition is filed, the beneficiary remains without such status even after it is approved. Once approved, the relative, employee, or special immigrant who is the beneficiary of the approved immigrant visa petition may seek to adjust status to lawful permanent residence in the United States or obtain an immigrant visa abroad at a U.S. embassy or consulate, if eligible. See INA section 204, 8 U.S.C. 1154; see also 8 CFR part 204.

Many aliens present in the United States who are the beneficiaries of approved immigrant visa petitions are eligible to adjust to LPR status while remaining in the United States. See, e.g., INA section 245, 8 U.S.C. 1255; 8 CFR part 245. Other aliens, however, are ineligible to adjust status in the United States. For example, aliens who entered the United States without inspection and admission or parole, or who are not in a lawful immigration status, are generally ineligible to adjust status in the United States. See INA section 245(a), (c); 8 U.S.C. 1255(a), (c); see also 8 CFR 245.1(b)-(c) (describing aliens who are ineligible to apply for adjustment of status or who

are restricted from applying unless they meet certain conditions). An alien who is unable to adjust status in the United States must obtain an immigrant visa at a U.S. Embassy or consulate abroad before he or she can be lawfully admitted to the United States as an immigrant. An alien who is eligible to apply for adjustment of status to lawful permanent residence in the United States can also choose to apply for an immigrant visa and obtain that visa at a U.S. embassy or consulate abroad through consular processing.

If an alien seeks an immigrant visa abroad through consular processing, USCIS forwards the approved immigrant visa petition to the DOS National Visa Center (NVC), which completes initial processing of petition-based immigrant visa applications. The NVC notifies the alien when he or she can start the immigrant visa process and will request, among other things, that the alien pay the immigrant visa processing fee and submit the necessary documents. After receiving the fee and necessary documents, the NVC schedules the alien for an immigrant visa interview with a DOS consular officer at a U.S. Embassy or consulate abroad. During the interview, the DOS consular officer determines whether the alien is admissible to the United States and eligible for an immigrant visa.

2. Diversity Visa Program

An alien may also immigrate to the United States through the Diversity Visa program administered by DOS. See INA section 203(c), 8 U.S.C. 1153(c); 22 CFR 42.33. Under the Diversity Visa program, up to 55,000 immigrant visas and adjustment of status applications can be approved annually for aliens who are from countries with low immigration rates to the United States.² See INA section 201(e), 8 U.S.C. 1151(e). An alien seeking to immigrate as a diversity

² INA section 203(c) authorizes up to 55,000 immigrant visas each fiscal year for aliens from countries with low admissions during the previous five years. However, this number is reduced by up to 5,000 for applicants seeking adjustment of status under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-

immigrant submits an entry with the Diversity Visa program during the designated registration period. After the registration period closes, DOS randomly selects aliens from the pool of registrants to continue the Diversity Visa process. Being selected to participate in the Diversity Visa program does not afford the selectee any lawful immigration status.

If selected and eligible, an alien may be authorized to seek LPR status either through adjustment of status in the United States or through consular processing abroad with DOS. If the alien chooses to use the consular process, he or she must submit an immigrant visa application (Form DS-260, Immigrant Visa Electronic Application) to the DOS Kentucky Consular Center (KCC), which completes initial processing of the immigrant visa applications from Diversity Visa program selectees and derivatives. If the immigrant visa application is complete and an immigrant visa is available, the KCC schedules the alien for an immigrant visa interview abroad. The DOS consular officer determines whether the alien is admissible to the United States and eligible for the immigrant visa. A program selectee or derivative (such as the spouse or minor child of a program selectee), however, can obtain an immigrant visa only in the fiscal year for which he or she was selected, provided the numerical limits have not been reached. See 22 CFR 42.33(c)-(f).

Diversity Visa program processing is different from the petition-based immigrant visa process, as Diversity Visa program selectees and their derivatives are not beneficiaries of approved immigrant visa petitions. DOS completes initial processing of program selectees and derivatives at the KCC instead of at the NVC. The Diversity Visa program pre-processing steps aim to ensure that DOS can issue as many visas to program selectees and derivatives as possible

100, title II, secs. 201-204, 111 Stat. 2160, 2193-201 (Nov. 19, 1997), amended by Pub. L. 105-139, 111 Stat. 2644 (Dec. 2, 1997) (8 U.S.C. 1255 note).

during the particular fiscal year. For example, Diversity Visa program selectees and their derivatives submit their immigrant visa applications to the KCC without the additional documents required for immigrant visa processing. Program selectees and derivatives submit the additional required documents to the DOS consular officer as part of the immigrant visa interview and process. In addition, unlike immediate-relative, family-sponsored, employment-based, and special-immigrant visa applicants, Diversity Visa program selectees and their derivatives pay their immigrant visa processing fees at their immigrant visa interviews rather than before DOS schedules the interviews.

C. Grounds of Inadmissibility

U.S. immigration laws specify acts, conditions, and conduct that bar aliens from being admitted to the United States or from obtaining visas, including immigrant visas. See INA section 212(a), 8 U.S.C. 1182(a) (listing the grounds of inadmissibility). The Secretary has the discretion to waive certain inadmissibility grounds if an alien applies for a waiver and meets the relevant statutory and regulatory requirements. See, e.g., INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v); 8 CFR 212.7. If the Secretary grants a waiver of inadmissibility, the waived inadmissibility ground no longer bars the alien's admission, readmission, or immigrant visa eligibility. See 8 CFR 212.7(a)(4).

D. Unlawful Presence

The inadmissibility ground based on the accrual of unlawful presence in the United States is found at INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). Under that provision, an alien who was unlawfully present in the United States for more than 180 days but less than one year and who then departs voluntarily from the United States before removal proceedings begin is inadmissible to the United States for 3 years from the date of departure. See INA section

212(a)(9)(B)(i)(I), 8 U.S.C. 1182(a)(9)(B)(i)(I). An alien who was unlawfully present in the United States for one year or more and who then departs the United States before, during, or after removal proceedings is inadmissible for 10 years from the date of departure. See INA section 212(a)(9)(B)(i)(II), 8 U.S.C. 1182(a)(9)(B)(i)(II).

These 3- and 10-year unlawful presence bars do not take effect unless and until the alien departs from the United States.³ See, e.g., Matter of Rodarte-Roman, 23 I. & N. Dec. 905 (BIA 2006); 22 CFR 40.92(a)-(b). Once the 3- or 10-year unlawful presence bar is triggered, the alien must apply for and be granted a waiver of inadmissibility before he or she can be issued an immigrant visa and be admitted to the United States for permanent residence. The Secretary has the discretion to waive the 3- and 10-year unlawful presence bars for an alien seeking admission to the United States as an immigrant, if he or she demonstrates that the refusal of his or her admission to the United States would cause extreme hardship to the alien's U.S. citizen or LPR spouse or parent. See INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v).

Because approval of the waiver is discretionary, the alien also must establish that he or she merits a favorable exercise of discretion. See INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). Accordingly, USCIS may deny a waiver application as a matter of discretion, even if the applicant meets all of the other regulatory requirements.

E. Form I-601 Waiver Process

1. Form I-601 Waiver Process for Immigrant Visa Applicants Abroad

The 3- and 10-year unlawful presence bars to admissibility under INA section

³ By statute, certain aliens do not accrue unlawful presence for purposes of INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). For example, aliens under the age of 18 do not accrue unlawful presence. See INA section 212(a)(9)(B)(iii)(I), 8 U.S.C. 1182(a)(9)(B)(iii)(I). Similarly, aliens with pending asylum claims generally do not accrue unlawful presence while their asylum applications are pending. See INA section 212(a)(9)(B)(iii)(II), 8 U.S.C. 1182(a)(9)(B)(iii)(II). See INA sections 212(a)(9)(B)(iii)(III), (IV), and (V), 8 U.S.C. 1182(a)(9)(B)(iii)(III), (IV), and (V) for additional exceptions to the accrual of unlawful presence.

212(a)(9)(B) do not apply unless and until an alien who accrued sufficient unlawful presence departs from the United States. Many aliens who would trigger these bars upon departure from the United States are ineligible to adjust status in the United States and must travel abroad to obtain an immigrant visa from DOS. DOS cannot issue an immigrant visa to an inadmissible alien unless he or she applies for, and USCIS approves, a waiver of inadmissibility, if a waiver is authorized under the INA for the specific ground of inadmissibility. See 22 CFR 40.6, 40.9, 40.92(c).

Under the Form I-601 waiver process, an immigrant visa applicant may file an Application for Waiver of Grounds of Inadmissibility, Form I-601, with USCIS after the DOS consular officer makes the inadmissibility determination during the immigrant visa interview abroad.⁴ Once the alien files the Form I-601 waiver application, he or she must remain abroad while USCIS adjudicates the waiver application. Currently, USCIS adjudicates these Form I-601 waiver applications at the Nebraska Service Center (NSC) in the United States.⁵

Upon approving the Form I-601 waiver application, USCIS notifies DOS so that DOS may issue the immigrant visa if the alien is otherwise eligible. If USCIS denies the Form I-601 waiver application, the alien remains inadmissible and, therefore, ineligible for an immigrant visa and is generally unable to lawfully return to the United States. If the alien is inadmissible based on the 3- or 10-year unlawful presence bar, he or she must remain outside of the United States for the relevant 3- or 10-year period before he or she can reapply for an immigrant visa

⁴ To be eligible for the waiver, the alien must meet all requirements described in INA section 212(a)(9)(B)(v), including the requirement to demonstrate that refusing the alien's admission to the United States would result in extreme hardship to the alien's U.S. citizen or LPR spouse or parent. This same requirement applies to the Form I-601A provisional waiver process. The fundamental distinction between the Form I-601 and Form I-601A processes is the manner in which the applicant applies for the waiver.

⁵ The alien files the waiver application from abroad by sending it to a USCIS "lockbox" facility in the United States. In limited circumstances, as outlined in the Form I-601 instructions, an alien may file a waiver application at a USCIS international office.

without having to obtain a waiver. An alien may appeal the denial of a Form I-601 waiver application with the USCIS Administrative Appeals Office (AAO). Alternatively, the alien can file another Form I-601 waiver application.

2. Difficulties with the Form I-601 Waiver Process

Immigrant visa applicants typically encounter difficulties when seeking waivers of the 3- and 10-year unlawful presence bars through the Form I-601 waiver process abroad. After attending the immigrant visa interview with DOS, these applicants must gather the necessary information and supporting documents, file their Form I-601 waiver applications with USCIS, and typically wait abroad for at least several months for a decision on their applications based on the average adjudication time for Form I-601 waiver applications.⁶ During this period, the applicant must endure separation from U.S. citizen and LPR family members in the United States. Such separation may cause some U.S. citizens, LPRs, and their families to experience emotional and financial hardships while the alien relative waits abroad for a decision on his or her application. If the waiver is approved, and the alien is otherwise eligible for the immigrant visa, the alien must then return to DOS to pick up the immigrant visa. Due to these difficulties and uncertainties, many alien relatives of U.S. citizens and LPRs are reluctant to leave the United States to obtain an immigrant visa.

Inefficiencies in the Form I-601 waiver process also create costs for the Federal Government. If a DOS officer at a U.S. Embassy or consulate determines that the applicant is inadmissible based on a ground that can be waived, the DOS officer informs the applicant about the option to file a waiver application with USCIS. After the interview, DOS puts the immigrant

⁶ The average adjudication time of Form I-601 waivers is currently five months based on information gathered from USCIS's Nebraska Service Center on March 3, 2015. Updated processing times for Form I-601 are also posted on the USCIS website at: <https://egov.uscis.gov/cris/processTimesDisplayInit.do>.

visa process on hold while waiting for the applicant to submit the Form I-601 waiver application and for USCIS's decision on the waiver. If a waiver is approved, DOS must reschedule the applicant for additional visa processing at a U.S. Embassy or consulate, which uses valuable DOS consular officer resources that could be used for processing other visa applications.

F. Provisional Waiver Process

1. Creation of the Provisional Waiver Process

In 2013, DHS sought to partially address the difficulties and inefficiencies of the Form I-601 waiver process through rulemaking. DHS published a rule establishing a provisional waiver process, which streamlines certain aspects of the Form I-601 waiver process, facilitates immigrant visa issuance, and promotes family unity. See 78 FR 536 (Jan. 3, 2013); see also 77 FR 19902 (Apr. 2, 2012) (proposed rule). The goal of the provisional waiver process is to reduce the adverse impact of the Form I-601 waiver process on families in the United States.⁷ In particular, the current provisional waiver process permits certain immediate relatives of U.S. citizens who are physically present in the United States to apply for a provisional waiver of the 3- and 10-year unlawful presence bars before departing for their immigrant visa interviews abroad. The provisional waiver is available to only those aliens who will be inadmissible on account of the 3-year or 10-year unlawful presence bar at the time of the immigrant visa interview. Aliens who, at the time of the immigrant visa interview, may be inadmissible based on another ground of inadmissibility or multiple grounds of inadmissibility, are not eligible for provisional waivers. USCIS's approval of a provisional waiver allows DOS to issue the immigrant visa without the further delay associated with the Form I-601 waiver process, if the

⁷ Promoting family unity has always played a significant role in the development of U.S. immigration laws. See, e.g., Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2019 (2012); INS v. Errico, 385 U.S. 214, 219-20 (1966).

applicant is otherwise eligible. See 8 CFR 212.7(e).

DHS initially limited eligibility for provisional waivers to immediate relatives of U.S. citizens (spouses, parents and children (under the age of 21) of U.S. citizens). The intention was to prioritize the family reunification of immediate relatives of U.S. citizens over other categories of aliens. Limiting the program also allowed DHS to assess the initial effectiveness of a provisional waiver process. Accordingly, DHS restricted eligibility for provisional waivers to immediate relatives of U.S. citizens who could demonstrate that their U.S. citizen spouses or parents would suffer extreme hardship if the immediate relatives were refused admission to the United States. See 78 FR at 542. Although other aliens are eligible for waivers of the 3- and 10-year unlawful presence bars under the Form I-601 waiver process, the provisional waiver process was not made available to them. DHS limited eligibility to immediate relatives able to demonstrate extreme hardship to a U.S. citizen spouse or parent. See 78 FR at 543 (describing rationale for eligibility limitations). Immediate relatives who can show extreme hardship to only their LPR spouses or parents, and other categories of immigrant visa applicants, are ineligible to obtain a provisional waiver under the current regulation.⁸

2. Impact of Provisional Waiver Process

In the 2013 final rule, DHS noted that it would consider expanding provisional waiver eligibility after DHS and DOS assessed the effectiveness of the provisional waiver process and the operational impact it may have on existing agency processes and resources. See 78 FR at 542-543 (citing Beach Commc'ns v. FCC, 508 U.S. 307, 316 (1993) (observing that policymakers “must be allowed leeway to approach a perceived problem incrementally”)).

⁸ In the 2012 proposed rule, DHS explained that the provisional waiver process would not be extended to non-immediate relatives of U.S. citizens or immediate relatives who can only show extreme hardship to their LPR spouses or parents. See 77 FR 19907. Commenters to the proposed provisional waiver rule from April 2, 2012 objected to both limitations. See 78 FR at 542-543.

Preliminary review of the provisional waiver process has shown that it can reduce the time that relatives are separated from their U.S. citizen families, reduce the processing costs incurred by DOS and DHS, limit the number of exchanges between DOS and DHS, and reduce the number of immigrant visa cases DOS has to either reschedule or place on hold under the Form I-601 waiver process. DHS initially anticipated receiving as many as 62,348 provisional waiver applications per year and allocated resources accordingly. USCIS, however, received only about 39,000 applications in fiscal year 2014. As a result, both DHS and DOS have determined that there would not be a significant operational impact if DHS expanded eligibility for provisional waivers to include other statutorily eligible aliens who are beneficiaries of approved immigrant visa petitions and can establish extreme hardship to their U.S. citizen or LPR spouses or parents.

IV. Proposed Changes

DHS proposes to expand the class of aliens who may be eligible for a provisional waiver beyond immediate relatives of U.S. citizens to aliens in all statutorily eligible immigrant visa categories. Such aliens include family-sponsored immigrants, employment-based immigrants, certain special immigrants, and Diversity Visa program selectees, together with their derivative spouses and children. See proposed 8 CFR 212.7(e)(3)(iv). DHS also proposes to expand who may be considered a qualifying relative for purposes of the extreme hardship determination to include LPR spouses and parents.

This proposed expansion will permit any alien seeking an immigrant visa who would be eligible to apply for a Form I-601 waiver of unlawful presence abroad to now apply for a provisional waiver before leaving the United States to attend his or her immigrant visa interview abroad. Aliens who will become eligible for a provisional waiver, including derivative spouses and children, would still need to meet all other requirements of proposed 8 CFR 212.7(e) to

obtain the waiver.⁹ Under this proposed rule, any alien who meets the eligibility requirements for a provisional waiver and who is pursuing consular processing abroad can apply for the waiver irrespective of his or her current immigration status in the United States.¹⁰

DHS does not propose to change any eligibility requirements for a provisional waiver other than those described in this rulemaking.

A. Immediate Relatives, Family-Sponsored Immigrants, Employment-Based Immigrants, and Certain Special Immigrants

Under the proposed rule, an alien would be eligible for a provisional waiver if, among other criteria, he or she has an immigrant visa case pending with DOS based on an approved immigrant visa petition and has paid the immigrant visa processing fee. Aliens with an approved immigrant visa petition include:¹¹

- A beneficiary of an approved Petition for Alien Relative, Form I-130, or Petition for Amerasian, Widow(er), and Special Immigrant, Form I-360 (classifying the alien as immigrant visa applicant under INA section 201(b)(2), 8 U.S.C. 1151(b)(2), or INA section 203(a) or (b), 8 U.S.C. 1153(a) or (b));
- A beneficiary of an approved Immigrant Petition for Alien Worker, Form I-140 (classifying the alien as immigrant visa applicant under INA section 203(b), 8 U.S.C. 1153(b)); and
- A spouse or child, as defined in subparagraph (A), (B), (C), (D) or (E) of INA section

⁹ Although derivative spouses and children apply for an immigrant visa based on their relationship to a principal beneficiary, the admissibility determination is made individually for each immigrant visa applicant. See INA 212, 221(g), 291, 8 U.S.C. 1182, 1201(g), 1361; 22 CFR 40.6, 40.92. If the derivative is inadmissible, he or she must apply for a provisional waiver and meet the eligibility requirements independent of the principal.

¹⁰ As stated in the 2013 rule, an alien's current immigration status is not relevant for purposes of seeking a provisional waiver of an unlawful presence ground of inadmissibility. See 78 FR at 547. No alien, including one who is in Temporary Protected Status, has received deferred action, or is currently in a lawful nonimmigrant status, is barred from seeking a provisional waiver as long as the alien meets the eligibility requirements stated in the rule.

¹¹ A Refugee/Asylee Relative Petition, Form I-730, is not an immigrant visa petition and is therefore not a basis for filing a provisional waiver application.

101(b)(1), 8 U.S.C. 1101(b)(1), if accompanying or following-to-join an alien spouse or parent seeking to immigrate under INA section 203(a) or (b), 8 U.S.C. 1153(a) or (b), or under INA section 203(d), 8 U.S.C. 1153(d).

B. Diversity Immigrants

Under the proposed rule, an alien would also be eligible for a provisional waiver based on selection by DOS to participate in the Diversity Visa program under INA section 203(c), 8 U.S.C. 1153(c) for the fiscal year for which the alien registered. Expanding the provisional waiver process to Diversity Visa program selectees and their derivatives requires USCIS to develop procedures that apply only to these applicants because such applicants do not have approved immigrant visa petitions. DOS's selection of an alien for the Diversity Visa program is for these purposes being considered the functional equivalent of having an approved immigrant visa petition. See proposed 8 CFR 212.7(e)(3)(iv). Additionally, Diversity Visa program processing must be completed by the end of the fiscal year for the program year for which the alien registered. See INA section 204(a)(1)(I)(ii)(II), 8 U.S.C. 1154(a)(1)(I)(ii)(II). To meet the time constraints of the Diversity Visa program, USCIS would consider an immigrant visa case pending as soon as DOS selects the alien for the program. See proposed 8 CFR 212.7(e)(3)(iv) and 8 CFR 212.7(e)(5)(ii)(F). Because Diversity Visa program selectees and derivatives do not have to pay the immigrant visa processing fee until the immigrant visa interview, DHS proposes that such aliens would not have to provide proof of payment of the immigrant visa processing fee when they apply for a provisional waiver. See proposed 8 CFR 212.7(e)(3)(iv) and 8 CFR 212.7(e)(5)(ii)(F).

C. Qualifying Relatives

DHS proposes to expand eligibility for provisional waivers to include aliens who can establish extreme hardship to an LPR spouse or parent. This proposed expansion would allow immigrant visa applicants, including diversity visa applicants, to seek provisional waivers based on extreme hardship to all categories of qualifying relatives authorized by statute. See proposed 8 CFR 212.7(e)(3)(vi) and 8 CFR 212.7(e)(8). Although the benefits of this rule largely would accrue to the expanded group of aliens newly eligible to apply for provisional waivers under the rule, certain immediate relatives of U.S. citizens will also experience benefits from this rule. For example, an alien who is the beneficiary of an immediate relative petition filed by his or her U.S. citizen son or daughter—who is not a qualifying relative for purposes of the waiver—could seek a provisional waiver based on extreme hardship that would be suffered by the alien’s LPR spouse.

D. Aliens with Scheduled Immigrant Visa Interviews

DHS proposes to limit eligibility for provisional waivers under this rulemaking to aliens, other than immediate relatives of U.S. citizens, who have not had their immigrant visa interviews scheduled before the effective date of a final rule. DHS also proposes that immediate relatives of U.S. citizens will be eligible to file for provisional waivers if they have not had their immigrant visa interviews scheduled before January 3, 2013, even if they may not have been previously eligible to apply for provisional waivers under the current rule.¹² For these purposes, DHS will use the date that DOS initially acted to schedule the immigrant visa interview, not the date that the alien is scheduled to appear for the immigrant visa interview.

¹² Aliens who are immediate relatives of U.S. citizens but who can only demonstrate that the denial of admission would cause extreme hardship to an LPR spouse or parent (rather than a U.S. citizen spouse or parent) are currently ineligible for provisional waivers.

As reflected in the 2013 rulemaking, these restrictions are necessary to make the process operationally manageable without creating delays in the processing of other petitions or applications filed with USCIS or in the DOS immigrant visa process. If the proposed rule included aliens who were scheduled for an interview prior to the effective date of a final rule, the projected volume of cases could increase and create backlogs not only in the provisional waiver process, but also in adjudication of other USCIS benefits. The increased volume could also adversely impact DOS and its immigrant visa process.¹³

E. Miscellaneous Changes

This rule also proposes to remove from the affected regulations all unnecessary procedural instructions regarding office names and locations, position titles and responsibilities, and form numbers. Prescribing an office name, such as “Application Support Center,” is unnecessary and restricts USCIS’ ability to vary work locations as necessary to address its workload needs, better utilize its resources, and serve its customers. See, e.g., proposed 8 CFR 212.7(e)(3)(ii) (replacing the term “USCIS ASC” with “location in the United States designated by USCIS”). Likewise, requiring a specific form to be filed for a certain benefit in the Code of Federal Regulations (CFR) is generally unnecessary, and enumerating specific form numbers reduces the agency’s ability to modify or modernize its business processes to address changing needs. See, e.g., proposed 8 CFR 212.7(e)(5)(i) (replacing “Form I-601A” with “application for a provisional unlawful presence waiver”). Finally, listing specific officer titles for consideration of provisional waiver applications restricts USCIS’ flexibility in the adjudication of immigration benefits. See, e.g., proposed 8 CFR 212.7(e)(12)(i)(C) (removing “consular officer”).

¹³ Focusing on U.S. citizens and their immediate relative family members in the expansion of this discretionary procedure 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 v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 81 (1976).

Authorities and functions of DHS to administer and enforce the immigration laws are appropriately delegated to DHS employees and others in accordance with section 102(b)(1) of the Homeland Security Act of 2002, 6 U.S.C. 112(b)(1); section 103(a) of the INA, 8 USC 1103(a); and 8 CFR 2.1.

In addition, USCIS is proposing to revise 8 CFR 212.7(e)(8) by removing the superfluous sentence that states USCIS may require the alien and the U.S. citizen petitioner to appear for an interview pursuant to 8 CFR 103.2(b)(9). USCIS already has the authority to require an applicant or petitioner to appear for an interview under 8 CFR 103.2(b)(9). USCIS thus retains the authority to require an interview regardless of the inclusion of such authority in § 212.7(e)(8). The cross reference at 8 CFR 212.7(e)(8) was unnecessarily redundant.

Finally, DHS is correcting two errors. First, in 8 CFR 103.2(b), DHS is replacing the article “an” with the article “a,” wherever the article appears before the term “benefit request” in paragraphs (b)(6), (b)(9), (b)(10), and (b)(12). Second, in 8 CFR 212.7(a), DHS is removing the title to effectuate the change that was intended to be made in the 2013 rule.

F. Benefits of the Proposed Changes

By making the provisional waiver process available to all aliens who are statutorily eligible for the waiver of unlawful presence under section 212(a)(9)(B)(v) and meet certain other conditions, DHS would be expanding the population of aliens who could benefit from a streamlined immigrant visa process. DHS believes that expanding availability of the provisional waiver process would likely reduce the overall immigrant visa processing time for eligible immigrant visa applicants, thereby saving DHS, DOS, and applicants both the time and resources currently devoted to the Form I-601 waiver process. DHS also believes that the proposed expansion would reduce the hardship that U.S. citizen and LPR families experience as a result of

separation from their alien relatives. Some immediate relatives of U.S. citizens may also benefit from the proposal to broaden the group of individuals who can serve as qualifying relatives for the provisional waiver's extreme hardship determination.

V. Public Input

DHS invites comments from all interested parties, including advocacy groups, nongovernmental organizations, community-based organizations, and legal representatives who specialize in immigration law, on any and all aspects of this proposed rule. DHS is specifically seeking comments on:

a. The proposal to expand eligibility for provisional waivers to include the following aliens not covered by the current rule:

- Immediate relatives of U.S. citizens under INA section 201(b)(2), 8 U.S.C. 1151(b)(2), who can establish extreme hardship to an LPR spouse or parent as provided under INA section 212(a)(9)(B)(v);
- Family-sponsored immigrant visa applicants under INA section 203(a), 8 U.S.C. 1153(a);
- Employment-based immigrant visa applicants and certain special immigrants under INA section 203(b), 8 U.S.C. 1153(b);
- Diversity immigrants under INA section 203(c), 8 U.S.C. 1153(c); and
- Derivative family members of the above mentioned immigrant visa applicants, in accordance with INA section 203(d), 8 U.S.C. 1153(d).

b. The proposal to limit eligibility for provisional waivers to aliens as follows: (1) for immediate relatives of U.S. citizens, to those for whom DOS initially acted to schedule their immigrant visa interviews on or after January 3, 2013; and (2) for all other immigrant visa

applicants, on or after the effective date of the final rule.

c. Any alternatives to this proposed rule that may be more effective than the current provisional waiver process or the amended process described in the proposed rule.

VI. Statutory and Regulatory Requirements

A. Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

B. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; 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 and 13563

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,” although not an

economically significant regulatory action, under section 3(f) 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 proposed expansion of the provisional waiver process would create costs and benefits to provisional waiver (Form I-601A) applicants, their U.S. citizen or lawful permanent resident (LPR) family members, and the Federal Government (namely, U.S. Citizenship and Immigration Services (USCIS) and the Department of State (DOS)), as summarized in Table 1. This rule would impose fee, time, and travel costs on aliens who choose to complete and submit provisional waiver applications and biometrics (namely, fingerprints, photograph, and signature) to USCIS for consideration. These costs would be \$58.5 million at a 7 percent discount rate and \$71.6 million at a 3 percent discount rate in present value across the 10-year period of analysis. On an annualized basis, the costs are \$8.3 million and \$8.4 million at 7 percent and 3 percent, respectively (see Table 1).

Newly eligible provisional waiver applicants and their U.S. citizen or LPR family members would benefit from this rule. Beneficiaries of provisional waivers may experience shortened periods of separation from their family members living in the United States while they pursue an immigrant visa abroad, thus reducing any related financial and emotional strain on the family. If finalized, some immediate relatives of U.S. citizens may also benefit from the rule's broadened group of individuals who can be qualifying relatives for the provisional waiver's extreme hardship determination. Additionally, USCIS and DOS would continue to benefit from

the operational efficiencies gained from the provisional waiver’s role in streamlining immigrant visa application processing, though on a larger scale than currently in place.

In the absence of this rule, DHS assumes that the majority of aliens newly eligible for provisional waivers under this rule would pursue an immigrant visa through consular processing abroad and apply for waivers of unlawful presence through the Form I-601 process. Aliens who would otherwise apply for unlawful presence waivers through the Form I-601 process would incur fee, time, and travel costs similar to aliens applying for waivers through the provisional waiver process. But in the absence of this rule, Form I-601 applicants would face longer separation times from their family in the United States and less certainty regarding their application for the waiver.

Table 1. Total Costs and Benefits of This Rule, Year 1-Year 10

	10-Year Present Values		Annualized Values	
	3% Discount Rate	7% Discount Rate	3% Discount Rate	7% Discount Rate
<i>Total Costs</i>				
Quantitative	\$71,622,948	\$58,520,192	\$8,396,394	\$8,331,959
<i>Total Benefits</i>				
Qualitative	Decreased amount of time that U.S. citizens or LPRs are separated from their alien family members, leading to reduced financial and emotional hardship for these families.		Decreased amount of time that U.S. citizens or LPRs are separated from their alien family members, leading to reduced financial and emotional hardship for these families.	

Federal Government would achieve increased efficiencies by streamlining immigrant visa processing for aliens seeking inadmissibility waivers of unlawful presence.

Aliens, and their family members, would receive advance notice of USCIS's decision on their waiver application prior to leaving the United States for their immigrant visa interview abroad, offering many the certainty of knowing they have been provisionally approved for a waiver.

Certain previously ineligible immediate relatives may now qualify for provisional waivers due to the broadened group of individuals who can be qualifying relatives for the waiver's extreme hardship determination.

Federal Government would achieve increased efficiencies by streamlining immigrant visa processing for aliens seeking inadmissibility waivers of unlawful presence.

Aliens, and their family members, would receive advance notice of USCIS's decision on their waiver application prior to leaving the United States for their immigrant visa interview abroad, offering many the certainty of knowing they have been provisionally approved for a waiver.

Certain previously ineligible immediate relatives may now qualify for provisional waivers due to the broadened group of individuals who can be qualifying relatives for the waiver's extreme hardship determination.

Note: The cost estimates in this table are contingent upon Form I-601A filing (or receipt) projections as well as the discount rates applied for monetized values.

2. Background

Aliens who are in the United States and seeking LPR status must either obtain an immigrant visa abroad through consular processing with DOS or apply to adjust status in the United States, if eligible. Aliens present in the United States without having been inspected and admitted or paroled are typically ineligible to adjust their status in the United States. To obtain LPR status, such aliens 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 inspected and admitted or paroled, many have already accrued enough unlawful presence (more than 180 days) to trigger the 3- or 10-year unlawful presence grounds of inadmissibility upon departure from the United States. Indeed, in most cases, the action these aliens must take to obtain their immigrant visa – departing the United States to attend a consular

interview – is the very action that triggers the 3- or 10-year bar to admissibility due to the accrual of unlawful presence. See INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). While there may be limited exceptions, the population affected by this rule would consist almost exclusively of aliens who are eligible for immigrant visas but are unlawfully present in the United States without having been inspected and admitted or paroled.

Historically, aliens seeking an immigrant visa through consular processing were only able to apply for a waiver of a ground of inadmissibility, like a waiver of inadmissibility for unlawful presence, after attending their immigrant visa interview abroad. If a consular officer identified a ground or grounds of inadmissibility during an immigrant visa interview, the immigrant visa applicant was tentatively denied an immigrant visa and allowed to complete a waiver of the applicable ground(s) of inadmissibility, if a waiver was available. The immigrant visa applicant could apply for such a waiver by filing an Application for Waiver of Grounds of Inadmissibility, Form I-601, with USCIS. Applicants who applied for such waivers were required to remain abroad while USCIS adjudicated their Form I-601, which currently takes an average of five months to complete.¹⁴ If USCIS granted a waiver of the inadmissibility ground(s), DOS subsequently scheduled a follow-up consular interview. Provided there were no other concerns raised by the consular officer, DOS generally issued the immigrant visa during the follow-up consular interview. For some aliens, the Form I-601 waiver process has led to lengthy separations of immigrant visa applicants and their U.S. citizen or LPR spouses, parents, and children, causing both financial and emotional harm. The Form I-601 waiver process has also created processing inefficiencies for both USCIS and DOS through repeated interagency

¹⁴ This figure is based on Form I-601 average adjudication times gathered from USCIS's Nebraska Service Center on March 3, 2015.

communication and through multiple consular appointments or interviews.

With the goals of streamlining the inadmissibility waiver process, facilitating efficient immigrant visa issuance, and promoting family unity, DHS promulgated a rule that established an alternative inadmissibility waiver process on January 3, 2013 (“2013 rule”).¹⁵ The 2013 rule created a provisional waiver process for certain immediate relatives of U.S. citizens (namely, spouses, children, and parents of U.S. citizens) who are in the United States, are seeking immigrant visas, can demonstrate extreme hardship to a U.S. citizen spouse or parent, and would be inadmissible upon departure from the United States due to only the accrual of unlawful presence. That process allowed such aliens to apply for a provisional waiver prior to departing for DOS consular processing of their immigrant visa applications. Instead of requiring them to wait abroad while USCIS adjudicates their application for a waiver of inadmissibility through the Form I-601 waiver process, the provisional waiver process established in 2013 allowed those applicants to remain in the United States with their U.S. citizen relative(s) while awaiting notification of USCIS’s decision on their provisional waiver application. Following approval of a provisional waiver, applicants are scheduled for their immigrant visa interviews abroad.

Since the provisional waiver process’s inception, USCIS has approved more than 44,000 provisional waiver applications (through Form I-601A filings) for certain immediate relatives of U.S. citizens,¹⁶ allowing these individuals to enjoy the benefits incident to such waivers. Illustrating the demand for provisional waivers, Table 2 displays the historical numbers of Form I-601A receipts, approvals, and denials recorded for March of fiscal year (FY) 2013 through January of FY 2015.

¹⁵ See 78 FR 536 (Jan. 3, 2013).

¹⁶ This figure is based on Form I-601A approvals data through January 2015. Please note that USCIS began accepting provisional waiver applications on March 4, 2013. Source: Data gathered from USCIS’s Office of Performance and Quality on February 20, 2015.

Table 2. Historical Numbers of Form I-601A Receipts, Approvals, and Denials

Fiscal Year	Month	Receipts	Approvals	Denials
2013	Mar.	1,306	746	421
	Apr.	2,737	5	2
	May	3,267	52	19
	Jun.	3,119	226	345
	Jul.	3,425	1006	763
	Aug.	3,075	1435	937
	Sep.	2,798	1,749	458
FY 2013 Total		19,727	4,473	2,524
2014	Oct.	2,886	1,465	612
	Nov.	2,697	1,456	577
	Dec.	2,641	1,708	541
	Jan.	2,256	1,616	793
	Feb.	2,483	1,282	574
	Mar.	2,989	1,216	987
	Apr.	3,265	1,363	675
	May	3,650	2,052	640
	Jun.	4,184	3,152	1,057
	Jul.	3,778	4,211	1,451
Aug.	3,907	3,914	1,808	
Sep.	4,237	4,076	1,493	
FY 2014 Total		38,973	27,511	11,208
2015	Oct.	4,540	4,196	1,465
	Nov.	3,726	2,168	948
	Dec.	4,103	2,838	1,185
	Jan.	3,370	3,012	1,443
FY 2015 Total		15,739	12,214	5,041
Cumulative FY 2013 – FY 2015 Total		74,439	44,198	18,773

Note: Approvals and denials reflect actual cases adjudicated, which do not directly correspond to filing receipts for the month.

Source: Data gathered from USCIS's Office of Performance and Quality on March 5, 2015.

3. Purpose of Rule

Despite the provisional waiver process's benefits to certain immediate relatives of U.S.

citizens, thousands of non-immediate relatives of U.S. citizens and LPRs¹⁷ seeking immigrant visas who are inadmissible to the United States due to only unlawful presence still face the financial and emotional burdens of pursuing a Form I-601 waiver while outside of the country and away from their family in the United States. In addition to promoting the goal of family unity between eligible non-immediate relatives and their U.S. citizen or LPR family members, this rule would increase USCIS and DOS efficiencies by streamlining the waiver process for unlawful presence for this expanded group of aliens.

To assess the initial effectiveness of the provisional waiver process, DHS decided to offer this process to a limited group of aliens in the 2013 rule.¹⁸ Based on the Form I-601 waiver process's financial and emotional burdens to families and the efficiencies realized for both USCIS and DOS through the provisional waiver process, the Secretary directed USCIS to expand eligibility for the provisional waiver process beyond certain immediate relatives of U.S. citizens to all statutorily eligible relatives of U.S. citizens and LPRs.¹⁹ Consistent with that directive, USCIS (through DHS authority) now proposes to extend the provisional waiver process to include all other aliens seeking an immigrant visa (hereafter, "all other immigrant visa applicants") who are statutorily eligible to apply for a waiver of the 3- or 10-year unlawful presence bar, are present in the United States, and otherwise meet the requirements of the provisional waiver process.²⁰ USCIS also proposes to allow LPR spouses and parents, in

¹⁷ Examples of family relationships that fall into the "non-immediate" category include, but are not limited to, adult sons and daughters of U.S. citizens; brothers and sisters of U.S. citizens; and spouses and children of LPRs.

¹⁸ See 78 FR at 542 (Jan. 3, 2013).

¹⁹ See Memorandum from Jeh Charles Johnson, Secretary, for León Rodríguez, Director, U.S. Citizenship and Immigration Services, Expansion of the Provisional Waiver Program, Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf.

²⁰ The phrase "all other immigrant visa applicants" encompasses the following immigrant visa categories: family-sponsored immigrants, employment-based immigrants, diversity immigrants, and certain special immigrants.

addition to currently eligible U.S. citizen spouses and parents, to serve as qualifying relatives for the provisional waiver's extreme hardship determination. Under this proposal, provisional waiver applicants could show that their denial of admission would cause extreme hardship to their U.S. citizen or LPR spouses or parents.

This rule's proposed changes would provide more aliens and their U.S. citizen or LPR family members with the provisional waiver's main benefit of shortened family separation periods, while increasing USCIS and DOS efficiencies by streamlining the immigrant visa process for such aliens. Additionally, the proposed changes may allow more immediate relatives of U.S. citizens to qualify for provisional waivers by broadening the group of individuals who could serve as qualifying relatives for the waiver's extreme hardship determination. Other than the changes proposed in this rulemaking, DHS would maintain all other eligibility requirements for the provisional waiver as currently outlined in 8 CFR 212.7(e), including the requirements to submit biometrics, pay a \$585 application fee and \$85 biometric services fee, and be currently present in the United States at the time of the provisional waiver application filing and biometrics appointment.

4. Current Provisional Waiver Process

In this analysis, DHS draws on relevant DOS inadmissibility statistics and historical provisional waiver application data to estimate the demand for provisional waivers occurring in the absence of this rule (for certain immediate relatives of U.S. citizens), as well as directly resulting from this rule (for the expanded population of eligible immigrant visa beneficiaries). Table 3 shows DOS's historical immigrant visa inadmissibility findings due to only unlawful presence. Between FYs 2010 and 2014, DOS recorded inadmissibility due to only unlawful

presence for almost 241,000 immediate relative visas and for nearly 60,000 all other immigrant visas.²¹

Table 3. Number of Immigrant Visa Inadmissibility Findings Due to Only Unlawful Presence

Fiscal Year	Visa Category Type		Total
	Immediate Relatives ²²	All Other Immigrants ²³	
2010	44,497	4,955	49,452
2011	45,961	13,162	59,123
2012	46,520	13,568	60,088
2013	45,602	14,354	59,956
2014	58,058	13,946	72,004
Total	240,638	59,985	300,623

Source: Data gathered from the U.S. Department of State's Bureau of Consular Affairs on March 25, 2015.

With the implementation of the 2013 rule, immediate relatives of U.S. citizens seeking immigrant visas who were present in the United States, demonstrated extreme hardship to their U.S. citizen spouse or parent, and were inadmissible only for unlawful presence became eligible to apply for provisional waivers. See 8 CFR 212.7(e). Table 4 compares the number of DOS immediate relative visa inadmissibility findings due to only unlawful presence and provisional waiver applications filed with USCIS for FYs 2013 and 2014. Because the provisional waiver process went into effect in March 2013, immediate relatives could file provisional waiver applications only during the last seven months of FY 2013.²⁴ Thus, for comparison purposes, USCIS adjusted DOS's FY 2013 immediate relative visa inadmissibility counts to reflect only a partial year (specifically, 7/12 of a year). During FYs 2013 and 2014, USCIS received a total of

²¹ Of the inadmissibility figures recorded for all other immigrant visa categories, nearly 98 percent corresponded to family-sponsored (other than immediate relatives of U.S. citizens) immigrant visa applications, 1 percent corresponded to employment-based immigrant visa applications, 1 percent corresponded to Diversity Visa immigrant applications, and a fraction of 1 percent corresponded to certain special immigrant visa applications.

²² Population addressed in the 2013 rule (immediate relatives of U.S. citizens).

²³ Population impacted by this rule.

²⁴ FY 2013 is October 1, 2012 to September 30, 2013.

58,700 provisional waiver applications, which represented approximately 70 percent²⁵ of the population of certain immediate relatives found inadmissible for unlawful presence during that same time period.²⁶

Table 4. Number of Immediate Relative Immigrant Visa Inadmissibility Findings Due to Only Unlawful Presence Compared to Historical Form I-601A Receipts

Fiscal Year	<u>Immediate Relative Immigrant Visa Inadmissibility</u>		<u>Immediate Relative Form I-601A Receipts</u>	
	Inadmissibility Findings	Inadmissibility Findings Adjusted for Partial Year	Actual Form I-601A Receipts	Ratio of Form I-601A Receipts to Inadmissibility Findings
Year 1 (2013)	45,602	26,601	19,727	74%
Year 2 (2014)	58,058	58,058	38,973	67%
2-Year Total/Avg.	103,660	84,659	58,700	70%

Notes: The provisional waiver process’s implementation date was March 4, 2013. DHS adjusted the full year of immediate relative immigrant visa inadmissibility counts due to only unlawful presence in 2013 to account for only the portion of the year in which the provisional waiver process existed. The data listed in this table was rounded.

The actual Form I-601A filing demands, illustrated in Table 2 and Table 4, differ from the estimates in the 2013 rule’s economic impact analysis. When DHS conducted the 2013 rule’s economic impact analysis, DHS did not have statistics on unlawful presence inadmissibility findings for immediate relatives that would allow for a precise calculation of the rule’s impact. Due to such limitations, DHS instead estimated the rule’s impact based on various demand scenarios. In this rule’s analysis, DHS retrospectively examined DOS data on unlawful presence inadmissibility findings for immediate relatives and compared this information against USCIS receipts for provisional waiver applications (through Form I-601A filings) to determine the future demand for provisional waivers.

²⁵ Calculated as 58,700 2-year total Form I-601A receipts divided by 84,659 total immediate relative inadmissibility count for March 2013 through FY 2014, which equals 0.693, or 0.70 when rounded to the first decimal place.

²⁶ Data gathered from USCIS’s Office of Performance and Quality Reporting on March 5, 2015.

When determining a figure upon which to base future inadmissibility estimates and subsequent Form I-601A demand, DHS chose to use the actual FY 2014 inadmissibility count for unlawful presence rather than a multi-year average of historical values as the averages did not seem to fully capture the general rise in inadmissibility findings occurring between FYs 2010 and 2014 (see Table 3).²⁷ Consistent with the ratio of provisional waiver application filings to immediate relative visa inadmissibility counts based solely on unlawful presence during FYs 2013 and 2014 listed in Table 4, DHS assumes that 70 percent of the population of immediate relatives found inadmissible only for unlawful presence would file a Form I-601A provisional waiver application. In the absence of this rule, DHS projects that the number of immediate relative visa inadmissibility findings due to only unlawful presence would continue to increase from the FY 2014 count shown in Table 4 (58,058) by 2.5 percent per year based on the compound annual growth rate of the unauthorized immigrant population living in the United States between 2000 and 2012.²⁸ To calculate future Form I-601A filing (or receipt) volumes, DHS multiplies the 70 percent provisional waiver filing rate by the annual numbers of immediate relative immigrant visa inadmissibility findings due to only unlawful presence. Note that when applying this filing rate to yearly inadmissibility figures, the numbers may not match those listed

²⁷ Both the three-year FY 2012 – FY 2014 average (50,060) and five-year FY 2010 – FY 2014 average (48,128) of immediate relative inadmissibility finding counts differed significantly from the FY 2014 total immediate relative inadmissibility finding count of 58,058 (see Table 3).

²⁸ Calculated by comparing the estimated unauthorized immigrant population living in the United States in 2000 (8,500,000) and the estimated unauthorized immigrant population living in the United States in 2012 (11,400,000). In recent years, the estimated unauthorized immigrant population has decreased. DHS uses the historical growth rate in the unauthorized immigrant population from 2000 to 2012 because it most likely reflects the population impacted by this rule. This population includes those who have likely been unlawfully present in the United States for an extended period and who have already started the immigrant visa process by having an approved petition. Source: U.S. Department of Homeland Security's Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012, Figure 1, Unauthorized Immigrant Population: 2000-2012, Mar. 2013, available at http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

in Table 5 due to rounding.²⁹ DHS originally calculated the estimates in Table 5 using unrounded figures. Thereafter, all estimates were simultaneously rounded for tabular presentation. In the absence of this rule, USCIS would receive a projected 467,000 provisional waiver applications across 10 years of analysis, as Table 5 illustrates. These provisional waiver applications may ultimately result in waiver approvals or denials.

Table 5. Projected Numbers of Immediate Relative Immigrant Visa Inadmissibility Findings Due to Only Unlawful Presence and Form I-601A Applications in the Absence of This Rule (Population Addressed in 2013 Rule)

Fiscal Year	Inadmissibility Findings Due to Only Unlawful Presence- Immediate Relatives³⁰	Form I-601A Receipts- Immediate Relatives³¹
Year 1	59,509	41,657
Year 2	60,997	42,698
Year 3	62,522	43,765
Year 4	64,085	44,860
Year 5	65,687	45,981
Year 6	67,329	47,131
Year 7	69,013	48,309
Year 8	70,738	49,517
Year 9	72,506	50,755
Year 10	74,319	52,023
Total	666,705	466,696

Notes: The estimates in this table were originally calculated using unrounded figures. Thereafter, all estimates were simultaneously rounded for tabular presentation. Estimates may not sum to total due to rounding.

5. The Population Affected by This Rule

²⁹ For example, using the figures in Table 5, the Year 1 immediate relative immigrant visa inadmissibility findings count due to only unlawful presence equals 59,509. Calculation: 59,909 multiplied by 0.70 (the Form I-601A filing rate) equals 41,656.3. The calculated result differs slightly from the 41,657 Year 1 Form I-601A receipts figure in the table.

³⁰ Population of immediate relatives potentially eligible for provisional waivers.

³¹ Estimated number of provisional waiver applications from the eligible population of immediate relatives. These applications do not necessarily correspond to waiver approvals.

With this rule's implementation, the number of provisional waiver applications would increase from the figures listed in Table 5 as the waiver eligibility criteria expands from only certain immediate relatives of U.S. citizens to include all other immigrant visa applicants who are present in the United States and who otherwise meet the requirements of the provisional waiver process.³² DHS does not believe that this proposed rule would induce any new demand above the status quo for petitions or immigrant visa applications for this expanded group of aliens. DHS bases this assumption on the fact that the immigrant visa categories to which this rule would now apply (namely, family-sponsored, employment-based, diversity, and certain special immigrant visa categories) are generally subject to statutory visa issuance limits and lengthy visa availability waits due to oversubscription,³³ unlike the immediate relative category currently eligible for provisional waivers. Furthermore, there is no evidence that the Secretary's November 2014 memorandum³⁴ on the expansion of the provisional waiver process spurred a significant increase in filings of the Petition for Alien Relative, Form I-130, or the Immigrant Petition for Alien Worker, Form I-140.³⁵ Thus, DHS does not believe that this rule would increase the demand for the immigrant visa categories to which it applies.

³² As previously mentioned, the phrase "all other immigrant visa applicants" encompasses the following immigrant visa categories: family-sponsored immigrants, employment-based immigrants, Diversity Visa immigrants, and certain special immigrants.

³³ Family-sponsored immigrant visa applicants, who represent nearly 98 percent of the "all other immigrant visa applicant" population found inadmissible due to only unlawful presence, currently face visa oversubscription. This means that any new family-sponsored visa applicants must wait in line for available visas. Depending upon the applicant's country of chargeability and preference category, this wait could be many years. Source: U.S. Department of State, Visa Bulletin for April 2015, IX (79), Mar. 2015, *available at* <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-april-2015.html>.

³⁴ See Memorandum from Jeh Charles Johnson, Secretary, for León Rodríguez, Director, U.S. Citizenship and Immigration Services, Expansion of the Provisional Waiver Program, Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf.

³⁵ Based on a DHS comparison of Form I-130 and Form I-140 filings during the fiscal years before and after the Secretary's 2014 memorandum on the expansion of the provisional waiver program.

To determine the impact of this rule, DHS employs the same projection method used to estimate future volumes of unlawful presence inadmissibility findings and provisional waiver applications occurring in the absence of this rule. By applying the previously discussed historical 2.5 percent compound annual growth rate of unauthorized immigrants from 2000 to 2012, to the FY 2014 count of all other immigrant visa inadmissibility findings due to only unlawful presence (13,946, as listed in Table 3), DHS projects that non-immediate relative immigrant visa inadmissibility findings due to only unlawful presence would measure approximately 14,295 during this rule's first year of implementation (see Table 6).³⁶ Based on the current demand for provisional waivers, DHS assumes that 70 percent of the "all other immigrant visa applicant" population found inadmissible due to only unlawful presence each year would apply for a provisional waiver annually (see Table 6). Note that when applying this 70 percent filing rate to the inadmissible population estimates in Table 6, the numbers may not match those in the table due to rounding. The estimates in Table 6 were originally calculated using unrounded figures. Thereafter, all estimates were simultaneously rounded for tabular presentation.

Table 6 outlines the population of all other immigrant visa applicants impacted by this rule. During this rule's first year of implementation, DHS projects that USCIS could receive approximately 10,006 provisional waiver applications from newly eligible non-immediate relatives.³⁷ Across a 10-year period of analysis, DHS estimates that inadmissibility findings based solely on unlawful presence for non-immediate relatives would total about 160,000, while

³⁶ FY 2014 "all other immigrant visa applicants" count found inadmissible due to only unlawful presence of 13,946 multiplied by 2.5 percent growth rate (that is, 1.025), which equals 14,295 non-immediate relative immigrant visa applicants found inadmissible due to only unlawful presence (rounded).

³⁷ Year 1's 14,295 non-immediate relative immigrant visa applicant count found inadmissible due to only unlawful presence multiplied by a 70 percent filing rate (0.70), which equals 10,006 Form I-601A receipts.

provisional waiver applications from this population of inadmissible non-immediate relative immigrants would measure nearly 112,000. These provisional waiver applications may ultimately result in waiver approvals or denials. Note that Table 6 presents only the additional Form I-601A filings that would occur as a result of this rule; it does not account for the provisional waiver applications that DHS anticipates would be filed in the absence of this rule by certain immediate relatives of U.S. citizens (listed in Table 5).

Table 6. Projected Numbers of All Other Immigrant Visa Inadmissibility Findings Due to Only Unlawful Presence and Form I-601A Applications Resulting From This Rule

Fiscal Year	Inadmissibility Findings Due to Only Unlawful Presence- All Other Immigrants³⁸	Total Form I-601A Receipts- All Other Immigrants³⁹
Year 1	14,295	10,006
Year 2	14,652	10,256
Year 3	15,018	10,513
Year 4	15,394	10,776
Year 5	15,779	11,045
Year 6	16,173	11,321
Year 7	16,577	11,604
Year 8	16,992	11,894
Year 9	17,417	12,192
Year 10	17,852	12,496
Total	160,149	112,103

Notes: The estimates in this table were originally calculated using unrounded figures. Thereafter, all estimates were simultaneously rounded for tabular presentation. Estimates may not sum to total due to rounding.

In addition to the non-immediate relative population affected by this rule illustrated in Table 6, this rule’s broadened group of qualifying relatives for the provisional waiver’s extreme hardship determination may impact some immediate relatives of U.S. citizens. Yet, the exact

³⁸ Population of immigrants newly eligible under this rule for provisional waivers.

³⁹ Estimated number of provisional waiver applications from the eligible population of all other immigrants. These applications do not necessarily correspond to waiver approvals.

number of such immediate relatives is unknown. DHS welcomes any public comments on the population projections used in this analysis.

6. Costs and Benefits

To summarize, aliens who are immediate relatives of U.S. citizens and who are currently eligible for provisional waivers would continue to apply for such waivers in the absence of this rule. At the time of the 2013 rule, DHS was unable to predict the likely application volumes of Form I-601A with precision. With additional information from DOS and the experience since the provisional waiver's inception, DHS can reasonably project the provisional waiver application rate from currently eligible immediate relatives who trigger unlawful presence bars. In fact, DHS estimates that USCIS would receive 467,000 provisional waiver applications from currently eligible immediate relatives of U.S. citizens across 10 years of analysis (see Table 5). Table 5 represents the baseline of immediate relatives of U.S. citizens that would trigger unlawful presence bars, and those that would likely apply for a provisional waiver based on recent application rates. This proposed rule would expand eligibility for the provisional waiver process to include individuals who fall within all other immigrant visa classifications, are statutorily eligible to apply for a waiver of the 3- or 10-year unlawful presence bar, are present in the United States, and otherwise meet the requirements of the provisional waiver process.⁴⁰ As illustrated in Table 6, DHS estimates that provisional waiver applications from the population of newly eligible non-immediate relative immigrants would measure nearly 112,000 across a 10-year period of analysis. As previously mentioned, this proposed rule could also impact some immediate relatives of U.S. citizens by amending the definition of qualifying relatives for

⁴⁰ "All other immigrant visa applicants" encompass the following immigrant visa categories: family-sponsored, employment-based, diversity, and certain special immigrants.

purposes of extreme hardship determinations, but the exact number is unknown. Accordingly, DHS analyzes the costs and benefits of this rule to the population of newly eligible non-immediate relatives expected to apply for provisional waivers (see Table 6, “Total Form I-601A Receipts-All Other Immigrants” column), while qualitatively discussing the rule’s potential impact on immediate relatives of U.S. citizens who would now qualify for provisional waivers under this proposed rule.

Costs

Applicants from the expanded population of aliens who are newly eligible to apply for a provisional waiver under this proposed rule would bear the costs of this regulation. Certain immediate relatives of U.S. citizens already eligible to apply for a provisional waiver would not incur costs from this rule.⁴¹ Although the waiver expansion may require USCIS to expend resources on additional adjudication personnel, associated equipment (e.g., computers and telephones), and related occupancy demands, USCIS expects these costs to be offset by the additional fee revenue collected from the \$585 Form I-601A filing fee and the \$85 biometric services fee.⁴² Accordingly, DHS does not believe that this rule would impose additional net costs on the agency.

To receive a provisional waiver under this rule, eligible aliens must first complete a Form I-601A and submit it to USCIS with its \$585 filing fee and \$85 biometric services fee. DHS estimates the time burden of completing Form I-601A to be 1.5 hours, which translates to a time,

⁴¹ See 78 FR 536 (Jan. 3, 2013).

⁴² Fee information gathered from USCIS, “I-601A, Application for Provisional Unlawful Presence Waiver,” available at <http://www.uscis.gov/i-601a> (last updated Mar. 3, 2015). The \$585 Form I-601A filing fee and the \$85 biometric services fee are subject to change through the normal fee review cycle and any subsequent rulemaking issued by USCIS. USCIS will consider the impact of the provisional waiver and biometrics process workflows 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. See INA section 286(m), 8 U.S.C. 1356(m).

or opportunity, cost of \$15.89 per application.⁴³ DHS calculates the Form I-601A application's opportunity cost to aliens by first multiplying the current Federal minimum wage of \$7.25 per hour by 1.46 to account for the full cost of employee benefits (such as paid leave, insurance, and retirement), which results in a time value of \$10.59 per hour.⁴⁴ Then, DHS multiplies the \$10.59 hourly time value by the current 1.5-hour Form I-601A completion time burden to determine the opportunity cost for aliens to complete Form I-601A (\$15.89). DHS recognizes that the aliens impacted by the rule are generally unlawfully present and not eligible to work; however, consistent with other DHS rulemakings, DHS uses wage rates as a mechanism to estimate the opportunity costs to aliens associated with completing this rule's required application and biometrics collection. The cost for aliens to initially file a Form I-601A, including only the \$585 filing fee and opportunity cost, equals \$600.89.

After USCIS receives an alien's completed Form I-601A and its filing and biometric services fees, the agency sends the alien a notice scheduling him or her to visit a USCIS Application Support Center (ASC) for biometrics collection. Along with an \$85 biometric services fee, the applicant would incur the following costs to comply with the provisional waiver's biometrics submission requirement: the opportunity cost of traveling to an ASC, the opportunity cost of submitting his or her biometrics, and the mileage cost of traveling to an ASC. While travel times and distances vary, DHS estimates that an applicant's average roundtrip distance to an ASC is 50 miles, and that the average time for that trip is 2.5 hours. DHS

⁴³ See 79 FR 36543 (June 27, 2014) for the estimated Form I-601A completion time burden.

⁴⁴ Federal minimum wage information gathered from the U.S. Department of Labor, Wage and Hour Division, available at <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last accessed Mar. 5, 2015). Employer benefits adjustment information gathered from the U.S. Department 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, September 2014." Dec. 10, 2015, available at <http://www.bls.gov/news.release/ecec.htm>.

estimates that an alien waits an average of 1.17 hours for service and to have his or her biometrics collected at an ASC, adding up to a total biometrics-related time burden of 3.67 hours.⁴⁵ By applying the \$10.59 hourly time value for aliens to the total biometrics-related time burden, DHS finds that the opportunity cost for a provisional waiver applicant to travel to and from an ASC, and to submit biometrics, would total \$38.87.⁴⁶ In addition to the opportunity cost of providing biometrics, provisional waiver applicants would experience travel costs related to biometrics collection. The cost of such travel would equal \$28.75 per trip, based on the 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of \$0.575 per mile.⁴⁷ DHS assumes that each alien would travel independently to an ASC to submit his or her biometrics, meaning that this rule would impose a time cost on each of these applicants. Adding the fee, opportunity, and travel costs of biometrics collection together, DHS estimates that the provisional waiver's requirement to submit biometrics would cost a total of \$152.62 per Form I-601A filing.

Once all of the aforementioned fee, time, and travel costs to comply with the provisional waiver's requirements are accounted for, DHS finds that each Form I-601A filing would cost an alien \$753.51. Table 7 shows that the overall cost of this rule to the expanded population of provisional waiver applicants (namely, non-immediate relatives of U.S. citizens and LPRs) would measure \$84.5 million (undiscounted) over the 10-year period of analysis. DHS calculates this rule's total cost to applicants by multiplying the individual cost of completing the provisional waiver application requirements (\$753.51) by the number of newly eligible aliens projected to apply for provisional waivers each year following the implementation of this rule

⁴⁵ See 79 FR 36543 (June 27, 2014) for Form I-601A biometrics collection time burden.

⁴⁶ 3.67 hours multiplied by \$10.59 per hour equals \$38.87.

⁴⁷ 50 miles multiplied by \$0.575 per mile equals \$28.75. See 79 FR 78437 (Dec. 30, 2014) for GSA mileage rate.

(listed in Table 6). In present value terms, this rule would cost newly eligible non-immediate relative waiver applicants \$58.5 million to \$71.6 million across a 10-year period, depending on the discount rate applied (see Table 7). Because this rule would not generate any net costs to USCIS, Table 7 also illustrates the total cost of this rule.

Table 7. Total Cost of This Rule to Non-Immediate Relative Applicants

Fiscal Year	Total Waiver Cost to Applicants
Year 1	\$7,539,621
Year 2	\$7,727,999
Year 3	\$7,921,651
Year 4	\$8,119,824
Year 5	\$8,322,518
Year 6	\$8,530,487
Year 7	\$8,743,730
Year 8	\$8,962,248
Year 9	\$9,186,794
Year 10	\$9,415,861
10-Year Total: Undiscounted	\$84,470,732
10-Year Total: Present Value, Discounted at 3 percent	\$71,622,948
10-Year Total: Present Value, Discounted at 7 percent	\$58,520,192

Notes: Estimates may not sum to total due to rounding. The cost estimates in this table are contingent upon Form I-601A filing (or receipt) projections as well as the discount rates applied.

DHS welcomes any public comments on the costs of this proposed rule.

Benefits

The benefits of this proposed rule are largely the result of streamlining the immigrant visa process for an expanded population of aliens who are inadmissible to the United States solely due to unlawful presence. For those aliens who are newly eligible for a provisional waiver and their U.S. citizen or LPR family members, the primary benefits of this rule are its reduced separation time among family members during the immigrant visa process for aliens granted waivers and improved predictability of the immigrant visa process. Instead of attending multiple

immigrant visa interviews and waiting abroad while USCIS adjudicates a waiver application as required under the Form I-601 waiver process, the provisional waiver process allows aliens to file a provisional waiver application and remain in the United States while it is adjudicated by USCIS. This process generally allows eligible provisional waiver applicants to stay with their family members in the United States while awaiting adjudication and to receive advance notice of USCIS's decision on their waiver application prior to leaving the United States for their immigrant visa interview abroad. Although DHS cannot estimate with precision the exact amount of separation time families would save through this rule, DHS estimates that some newly eligible provisional waiver applicants and their U.S. citizen or LPR family members could experience several months of reduced separation time based on the average adjudication time for Form I-601 waiver applications.⁴⁸ In addition to the humanitarian and emotional benefits derived from reduced separation of families, DHS anticipates that the shortened periods of family separation resulting from this rule may lessen the financial burden U.S. citizens and LPRs face to support their relatives while they remain outside of the country. Because of data limitations, however, DHS cannot predict the exact financial impact of this change.

Due to the unique nature of the Diversity Visa program, aliens seeking an immigrant visa through that program and wishing to use the provisional waiver process are likely to enjoy fewer overall benefits from this rule than other non-immediate relative immigrant visa and waiver applicants. Although an alien may be selected to participate in the Diversity Visa program, he or she may not ultimately receive an immigrant visa due to visa unavailability. Under this proposed rule, Diversity Visa selectees and their derivatives who wish to use the provisional waiver

⁴⁸ The average adjudication time of Form I-601 waivers is currently five months based on information gathered from USCIS's Nebraska Service Center on March 3, 2015. Updated processing times for Form I-601 are also posted on the USCIS website at: <https://egov.uscis.gov/cris/processTimesDisplayInit.do>.

process may file a waiver application in advance of knowing whether their immigrant visa will ultimately be available to them. For those provisional waiver applicants pursuing the Diversity Visa track, the risk of completing the provisional waiver process without being issued a visa is higher compared to applicants of other immigrant visa categories filing Form I-601A.⁴⁹ If a Diversity Visa program selectee's provisional waiver is approved but he or she is not ultimately issued an immigrant visa, he or she would incur the costs but not the benefits associated with a provisional waiver.

Although the main benefits of this rule would center on the expanded group of aliens newly eligible to apply for provisional waivers, certain immediate relatives of U.S. citizens may also experience benefits from this rule. Through this rulemaking, DHS proposes to allow LPR spouses and parents, in addition to currently eligible U.S. citizen spouses and parents, to serve as qualifying relatives for the provisional waiver's extreme hardship determination. This change may allow some immediate relatives of U.S. citizens (included in Table 5's inadmissible immediate relative estimates) to now qualify for a provisional waiver, although the exact number of individuals who would benefit from this change is unknown due to data limitations.

Based on USCIS and DOS efficiencies realized as a result of the current provisional waiver process, DHS believes that this rule could provide additional Federal Government efficiencies through its expansion to a larger population of aliens. As previously described in the 2013 rule, the provisional waiver process allows USCIS to communicate to DOS the status of an

⁴⁹ There is a statutory maximum of only 55,000 diversity visas authorized for allocation each fiscal year, but this number is reduced by up to 5,000 visas set aside exclusively for use under the Nicaraguan and Central American Relief Act. See NACARA section 203(d), as amended. DOS regularly selects more than 50,000 entrants to proceed on to the next step for diversity visa processing to ensure that all of the 50,000 diversity visas are allotted. Source: U.S. Department of State, Office of the Spokesman. Special Briefing: Senior State Department Official on the Diversity Visa Program. May 13, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/05/166811.htm>.

unlawful presence inadmissibility waiver prior to a waiver applicant's immigrant visa interview abroad. Such early communication eliminates the current need for USCIS and DOS to transfer cases repeatedly between the two agencies when adjudicating an immigrant visa application and Form I-601 waiver application.⁵⁰ Through the provisional waiver process, DOS receives advance notification from USCIS of the discretionary decision to provisionally waive the unlawful presence inadmissibility bar, which allows for better allocation of valuable agency resources like time, storage space, and human capital.

DHS welcomes any public comments on the benefits of this proposed rule.

D. 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 (Mar. 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 would 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 not, for purposes of the Regulatory Flexibility Act, within the definition of small entities established by 5 U.S.C. 601(6).

E. Executive Order 13132

⁵⁰ See 78 FR 536 (Jan. 3, 2013).

This proposed rule would 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.

F. 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 rule meets the relevant standards of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. This rule proposes a revision to the Application for a Provisional Unlawful Presence Waiver, Form I-601A, OMB Control Number 1615-0123. USCIS estimates that approximately 10,258 new respondents would file applications for provisional waivers as a result of the changes proposed by this rule.

DHS is requesting comments on the revisions it is proposing to make to this information collection until [Insert date 60 days from date of publication in the FEDERAL REGISTER].

In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the Federal Register to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (i.e. the time,

effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments. When submitting comments on this information collection, your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Application for Provisional Unlawful Presence Waiver.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-601A; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Individuals or households: Individuals who: (a) are immigrant visa applicants, including: (1) immediate relatives of U.S. citizens, (2) aliens seeking to immigrate under a family-sponsored, employment-based, or special immigrant visa category, and (3) Diversity Visa selectees and derivatives, and (b) are applying from within the United States for a provisional

waiver under INA section 212(a)(9)(B)(v) before obtaining an immigrant visa abroad.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-601A is 52,965 and the estimated hour burden per response is 1.5 hours; and 52,965 respondents providing biometrics at 1.17 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 141,417 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$1,497,601.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, 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, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103 – IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS;

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; 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; Pub. L. 112-54.

§ 103.2 [Amended]

2. Section 103.2 is amended by:

- a. In paragraphs (a)(2) and (3) and (b)(6) and (10) by removing “an benefit request” and adding in its place “a benefit request”, wherever it appears; and
- b. In paragraph (b)(12) by removing “An benefit request” and adding in its place “A benefit request”, wherever it appears.

**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, Public Law 110-229, 122 Stat. 754, 854.

4. Amend §212.7 by:

- a. Removing the heading for paragraph (a);
- b. Revising paragraphs (e) heading and introductory text and (e)(3)(i), (ii), (iii), (iv), (v), and (vi);
- c. Remove paragraph (e)(3)(vii); and
- d. Revising paragraphs (e)(4)(iii), (iv), (v), and (vi), (e)(5)(i), (e)(5)(ii)(E), (F), and (G), (e)(6)(ii), (e)(7), (8), (9), and (10), (e)(12)(i)(C), (e)(12)(ii), and (e)(14)(i), (iii), and (iv).

The revisions read as follows:

§ 212.7 Waivers of certain grounds of inadmissibility.

* * * * *

(e) Provisional unlawful presence waivers of inadmissibility. The provisions of this

paragraph (e) apply to certain aliens who are pursuing consular immigrant visa processing.

* * * * *

(3) * * *

(i) Is present in the United States at the time of filing the application for a provisional unlawful presence waiver;

(ii) Provides biometrics to USCIS at a location in the United States designated by USCIS;

(iii) Upon departure, would be inadmissible only under section 212(a)(9)(B)(i) of the Act at the time of the immigrant visa interview;

(iv) Has a case pending with the Department of State, based on:

(A) An approved immigrant visa petition, for which the Department of State immigrant visa processing fee has been paid; or

(B) Selection by the Department of State to participate in the Diversity Visa Program under section 203(c) of the Act for the fiscal year for which the alien registered;

(v) Will depart from the United States to obtain the immigrant visa; and

(vi) Meets the requirements for a waiver provided in section 212(a)(9)(B)(v) of the Act.

(4) * * *

(iii) The alien does not have a case pending with the Department of State, based on:

(A) An approved immigrant visa petition, for which the Department of State immigrant visa processing fee has been paid; or

(B) Selection by the Department of State to participate in the Diversity Visa program under section 203(c) of the Act for the fiscal year for which the alien registered;

(iv) The Department of State initially acted to schedule the immigrant visa interview:

(A) Before January 3, 2013, for an immediate relative of a U.S. citizen with an approved immediate relative petition on which a provisional unlawful presence waiver is based, even if the interview was cancelled or rescheduled on or after January 3, 2013; or

(B) For all other immigrant visa applicants, before [EFFECTIVE DATE OF FINAL RULE], for the approved immigrant visa petition or the Diversity Visa program application on which a provisional unlawful presence waiver is based, even if the interview was cancelled or rescheduled on or after [EFFECTIVE DATE OF FINAL RULE];

(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 application for a provisional unlawful presence waiver;

(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 section 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);

* * * * *

(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 application for a provisional unlawful presence waiver, 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) * * *

(E) Does not include evidence of:

(1) An approved immigrant visa petition;

(2) Selection by the Department of State to participate in the Diversity Visa Program under section 203(c) of the Act for the fiscal year for which the alien registered; or

(3) Eligibility as a derivative beneficiary of an approved immigrant visa petition or of an alien selected for participation in the Diversity Visa Program as provided in this section and outlined in section 203(d) of the Act.

(F) Fails to include documentation evidencing:

(1) That the alien has paid the immigrant visa processing fee to the Department of State for the immigrant visa application upon which the alien's approved immigrant visa petition is based; or

(2) In the case of a Diversity immigrant, that the Department of State selected the alien to participate in the Diversity Visa Program for the fiscal year for which the alien registered; or

(G) Has indicated on a provisional unlawful presence waiver application that the Department of State initially acted to schedule the immigrant visa interview:

(1) Before January 3, 2013, for an immediate relative of a U.S. citizen with an approved immediate relative petition on which a provisional unlawful presence waiver is based, even if the interview was cancelled or rescheduled on or after January 3, 2013; or

(2) For all other immigrant visa applicants, before [EFFECTIVE DATE OF FINAL RULE], for the approved immigrant visa petition or the Diversity Visa Program application upon which a provisional unlawful presence waiver is based, even if the interview was cancelled or rescheduled on or after [EFFECTIVE DATE OF FINAL RULE].

(6) * * *

(ii) Failure to appear for biometric services. If an alien fails to appear for a biometric services appointment or fails to provide biometrics in the United States as directed by USCIS, a provisional unlawful presence waiver application will be considered abandoned and denied under 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 and standard of proof. The alien has the burden to establish, by a preponderance of the evidence, eligibility for a provisional unlawful presence waiver as described in this paragraph, and under section 212(a)(9)(B)(v) of the Act, including that the alien merits a favorable exercise of discretion.

(8) Adjudication. USCIS will adjudicate a provisional unlawful presence waiver application in accordance with this paragraph and section 212(a)(9)(B)(v) of the Act. If USCIS finds that the alien is not eligible for a provisional unlawful presence waiver, or if USCIS 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 may notify the Department of State of the denial of an application for a provisional unlawful presence waiver. A denial is without prejudice to the alien's filing another provisional unlawful presence waiver application under this paragraph (e), provided the alien meets all of the requirements in this part, including that the alien's case must be pending with the Department of State. An alien also may elect to file a waiver application under 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 an application 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 applications. An alien may withdraw his or her application 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 application for a provisional unlawful presence waiver, in accordance with the form instructions and required fees, provided that the alien meets all of the requirements included in this paragraph (e).

* * * * *

(12) * * *

(i) * * *

(C) Is determined to be otherwise eligible for an immigrant visa by the Department of State 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 immigrant based on the approved immigrant visa petition upon which a provisional unlawful presence waiver application is based or selection by the Department of State to participate in the Diversity Visa Program under section 203(c) of the Act for the fiscal year for which the alien registered, with such selection being the basis for the alien's provisional unlawful presence waiver application;

* * * * *

(14) * * *

(i) The Department of State determines at the time of the immigrant visa interview that the alien is ineligible to receive an immigrant visa for any reason other than under section 212(a)(9)(B)(i)(I) or (II) of the Act;

* * * * *

(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 a 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.

Jeh Charles Johnson,
Secretary.

[FR Doc. 2015-17794 Filed: 7/21/2015 08:45 am; Publication Date: 7/22/2015]