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## Keeping Families Together? The Façade of the I-601A Provisional Unlawful Presence Waiver

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*FEATURE ARTICLE*

**KEEPING FAMILIES  
TOGETHER? THE FAÇADE OF  
THE I-601A PROVISIONAL  
UNLAWFUL PRESENCE  
WAIVER**

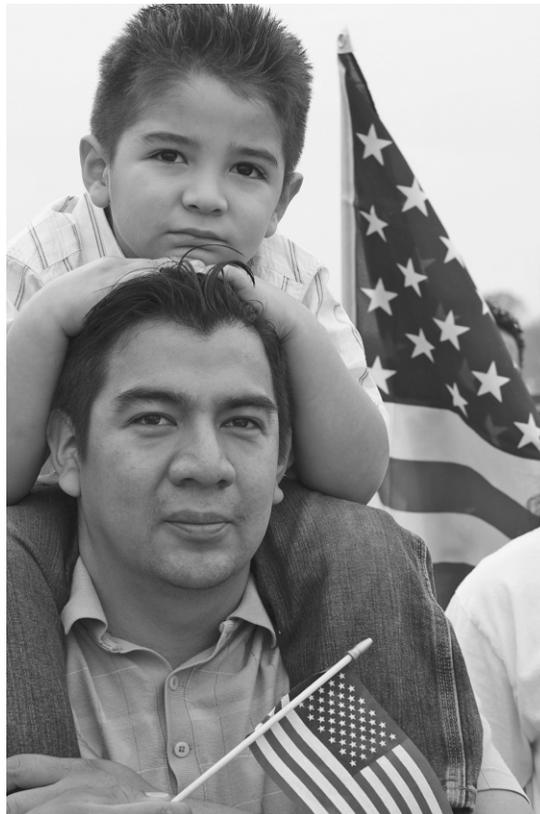
*by* NATALIE TEPELI

**O**n January 6, 2013, the Obama Administration announced that it was “taking a major step toward bolstering legal immigration and protecting families” by creating the “provisional unlawful presence waiver.”<sup>1</sup> The provisional unlawful presence waiver was enthusiastically marketed as “a fix to a

Catch-22 in immigration law that could spare hundreds of thousands of American citizens from prolonged separations from illegal immigrant spouses and children.”<sup>2</sup>

PROMISES TO “KEEP FAMILIES TOGETHER”

The provisional waiver was optimistically anticipated to be a “rational solution to a simple problem” that would “ease a path to [a] green card” and allow “thousands upon thousands of families” to remain together in the United States.<sup>3</sup> It was expected to “open up a huge door” and bring hundreds of thousands of undocumented immigrants hiding in the shadows “into the light.”<sup>4</sup> The Obama administration stated that the main goal of the provisional unlawful presence waiver was “to prevent the long separation of families.”<sup>5</sup> It was considered an administrative action that balanced “humane policies with the rule of law.”<sup>6</sup>



## STANDARD WAIVER OF GROUNDS OF INADMISSIBILITY

Under current immigration law, certain individuals who are present in the U.S. in violation of the law but are actively seeking an immigration visa, adjustment of status, or other immigration benefit, may file Form I-601 in order to seek a Waiver of Grounds of Inadmissibility.<sup>7</sup> An immigration waiver is a pardon of some past offense, such as entering the U.S. illegally.<sup>8</sup> The waiver process requires an alien who is an immediate relative of a U.S. citizen to leave the U.S. and appear for a visa interview abroad.<sup>9</sup> At this interview, a consular officer from the Department of State must determine whether the individual is ineligible for a visa because he is inadmissible to the U.S.<sup>10</sup> If the consular officer abroad indicates that the individual is eligible to seek a Waiver of Grounds of Inadmissibility, then Form I-601 may be filed with the U.S. Citizenship and Immigration Services (USCIS).<sup>11</sup> It takes approximately six months for the government to issue a decision on a waiver.<sup>12</sup>

One of the most notorious problems in the U.S. immigration system is unlawful presence, which complicates the filing and adjudication of Form I-601. The Immigration and Nationality Act defines unlawful presence as “the period where an individual is present in the United States after the expiration of the period of lawful stay authorized by the government, or is present in the United States without having been admitted or paroled.”<sup>13</sup> An individual who has been unlawfully present in the U.S. for more than 180 days but less than one year, and voluntarily leaves the U.S., is barred from reentry for a period of three years.<sup>14</sup> An individual who has been unlawfully present in the U.S. for one year or more and leaves the U.S. is barred from reentry for a period of 10 years.<sup>15</sup> Thus, an individual who has been unlawfully present in the U.S. and departs to attend their visa interview risks the possibility of having their waiver denied and subsequently being barred from reentry into the U.S.

## OBAMA’S NEW POLICY: THE PROVISIONAL UNLAWFUL PRESENCE WAIVER

The provisional unlawful presence waiver, also known as the “stateside waiver” or “family unity waiver,” became effective on March 4, 2013.<sup>16</sup> An individual may apply for the provisional waiver by filing Form I-601A, rather than Form I-601.<sup>17</sup> The provisional waiver contrasts a standard Waiver of Grounds of Inadmissibility as it “allows individuals, who only need a waiver of inadmissi-

bility for unlawful presence, to apply for a waiver in the United States. . .before they depart for their immigrant visa interviews at a U.S. embassy or consulate abroad.”<sup>18</sup> Thus, this stateside waiver allows aliens to remain in the U.S. until they receive a decision on their waiver, preventing the possible three or 10-year unlawful presence bar.

#### DISAPPOINTING OUTCOMES

While the provisional unlawful presence waiver was intended to keep families together and avoid the consequences associated with unlawful presence, provisional waiver decisions recently issued by USCIS have proven disappointing.

According to immigration attorney Keren Zwick, provisional waivers present a variety of problems, and “are much harder to get approved than we had previously anticipated.”<sup>19</sup> Zwick states that because provisional waivers are often referred to as “stateside waivers,” “people are under the [false] impression that they don’t have to go back” to their country of origin, and that the waiver process can be completed within the U.S.<sup>20</sup> However, an alien is still required to briefly depart the U.S. after the waiver is approved, and then reenter legally.<sup>21</sup> Zwick exemplifies the hardship this can impose: “I deal with a lot of lesbian, gay, bisexual, and transgender clients who don’t want to leave the U.S. out of fear of persecution, no matter if it is a year, or for three weeks, or however long it is taking for the waivers to be adjudicated.”<sup>22</sup>

According to immigration attorney Nacios Toro, “the problem [with the provisional waiver] is just the way the media portrayed it — as easily reuniting families, keeping families together. In actuality, that [is] not what it [is] doing. It [is] harder to get a waiver here.”<sup>23</sup> The Form I-601A seems to require “a higher standard than what the Obama Administration has indicated,” in that it explicitly states that the alien’s qualifying relative must be either a spouse or parent who is a U.S. citizen.<sup>24</sup> Therefore, even if an alien’s initial petitioner was a U.S. citizen, if their qualifying relative for purposes of the waiver is a parent or spouse who is only a lawful permanent resident, the alien is not eligible to file an I-601A.<sup>25</sup>

Additionally, immigration attorney Rosalba Piña questions how the provisional waiver can maintain family unity and keep families together when it does not extend relief to aliens who are parents of U.S. citizen children.<sup>26</sup> If an alien

applying for an I-601A has a U.S. citizen child, but not a U.S. citizen parent or spouse, he or she is ineligible for the waiver.<sup>27</sup>

“It [is] hard to get the waiver here, because even though it appears to be so broad that a lot of people can benefit, when you really look at it at the end of the day, very few people can actually benefit.”<sup>28</sup> The provisional waiver is limited because it is a discretionary determination and, therefore, is not reviewable in federal court.<sup>29</sup> Furthermore, motions to reconsider or reopen a denied provisional waiver are not permitted.<sup>30</sup> Consequently, if a provisional waiver is denied, an alien’s only option is to restart the process from the beginning and “hopefully better document the hardship.”<sup>31</sup>

According to the American Immigration Lawyers Association, provisional waivers are being needlessly denied due to USCIS “applying an overly rigid interpretation of [the] ‘reason to believe’” standard.<sup>32</sup> The reason to believe standard parallels the probable cause standard and similarly requires more than mere speculation or conjecture.<sup>33</sup> “[T]here must exist the probability, supported by evidence, that the alien is not entitled to status.”<sup>34</sup> This application of the reason to believe standard is causing denial of provisional waiver applications where there is only “a mere suspicion of inadmissibility on grounds other than unlawful presence,” without even requesting additional evidence.<sup>35</sup>

USCIS relies on the reason to believe standard to deny provisional waivers due to “any prior criminal issue,” regardless of the nature or severity of the offense, or how long ago it occurred.<sup>36</sup> Even though question 29 on Form I-601A indicates “that traffic violations are not considered when evaluating eligibility,” waiver applications have been denied for mere traffic citations or violations, or “because of a ‘hit’ on the application’s record, without any analysis of the accompanying evidence.”<sup>37</sup> Numerous I-601A waiver applications have been denied “based on an allegation that the applicant provided a false name or date of birth when apprehended at the border” without consideration of evidence submitted explaining why the applicant is not inadmissible.<sup>38</sup>

Applications have also been denied due only to a conviction for a DUI, an offense that does not constitute a crime involving moral turpitude for immigration purposes, and thus “does not render a person inadmissible.”<sup>39</sup> Further, applications have been denied due to convictions for minor transgressions that fall under the petty offense exception for immigration purposes.<sup>40</sup> Crimes that fall under this exception do not render an alien inadmissible.<sup>41</sup>

## NO MORE BAND-AID IMMIGRATION REFORM

The provisional unlawful presence waiver was “a good idea in theory,” explains Zwick.<sup>42</sup> “To his credit, President Obama is trying to put as many band-aids on the broken immigration system as he can,” but the results are simply “not as good as they should have been.”<sup>43</sup> The denials, limitations, and unavailability of the provisional waiver to those it was intended to benefit undermine the goals of the policy. Upon implementation, it is clear that the Obama Administration’s efforts to “keep families together” fell short. Empty promises and piecemeal, band-aid immigration policies are unacceptable. Comprehensive immigration reform is the only way to prevent separation of families and maintain family unity.

## NOTES

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- 22 *Id.*
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- 24 Interview with Rosalba Piña, Immigration Attorney, Law Offices of Rosalba Piña (Sep. 27, 2013).
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- 40 Application of "Reason to Believe," *supra* note 34.
- 41 *Id.*
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