

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103 and 212

[CIS No. 2557–2014; DHS Docket No. USCIS–2012–0003]

RIN 1615–AC03

Expansion of Provisional Unlawful Presence Waivers of Inadmissibility

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

ACTION: Final rule.

SUMMARY: This final rule, consistent with the Immigration and Nationality Act (INA), expands the class of individuals who may be eligible for a provisional waiver of certain grounds of inadmissibility based on the accrual of unlawful presence in the United States. The provisional unlawful presence waiver (“provisional waiver”) process allows certain individuals who are present in the United States to request from U.S. Citizenship and Immigration Services (USCIS) a provisional waiver of these grounds of inadmissibility before departing the United States for consular processing of their immigrant visas—rather than applying for a waiver abroad after their immigrant visa interviews using the Form I–601, Waiver of Grounds of Inadmissibility (“Form I–601 waiver process”). The provisional waiver process is designed to encourage unlawfully present individuals to leave the United States, attend their immigrant visa interviews, and return to the United States legally to reunite with their U.S. citizen or lawful permanent resident (LPR) family members. Having an approved provisional waiver helps facilitate immigrant visa issuance at DOS, streamlines both the waiver and the immigrant visa processes, and reduces the time that applicants are separated from their U.S. citizen or LPR family members, thus promoting family unity. The rule is intended to encourage eligible individuals to complete the immigrant visa process abroad, promote family unity, and improve administrative efficiency.

DATES: This final rule is effective August 29, 2016.

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SUPPLEMENTARY INFORMATION: This final rule adopts the proposed rule that the Department of Homeland Security (DHS) published on July 22, 2015, with changes made in response to comments received. This final rule provides that eligibility for the provisional waiver will no longer be limited to the subset of statutorily qualified individuals who seek to immigrate as immediate relatives of U.S. citizens¹ and who can show that denial of admission will result in extreme hardship to a U.S. citizen spouse or parent. Rather, this final rule makes eligibility for the provisional waiver available to all individuals who are statutorily eligible for a waiver of the unlawful presence grounds of inadmissibility. Under this final rule, such an individual must go abroad to obtain an immigrant visa, establish that denial of admission will result in extreme hardship to a U.S. citizen or LPR spouse or parent, establish that his or her case warrants a favorable exercise of discretion, and meet all other regulatory requirements. Eligibility for the provisional waiver will also extend to the spouses and children who accompany or follow to join principal immigrants. The rule is intended to encourage eligible individuals to complete the immigrant visa process abroad, promote family unity, and improve administrative efficiency. DHS believes that this rule will reduce overall immigrant visa processing times for eligible immigrant visa applicants; encourage individuals who are unlawfully present in the United States to seek lawful status after departing the country; save resources and time for the Department of State (DOS), DHS, and the individual; and reduce the hardship that U.S. citizen and LPR family members of individuals seeking the provisional waiver may experience as a result of the immigrant visa process.

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¹ Immediate relatives of U.S. citizens are the spouses, children and parents of U.S. citizens, provided that, in the case of parents, the U.S. citizen son or daughter petitioner is over the age of 21. In certain situations, the former spouse of a deceased U.S. citizen is also considered an immediate relative.

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I. Executive Summary

A. Purpose of the Regulatory Action

This final rule, consistent with the INA, expands the provisional unlawful presence waiver process (hereinafter “provisional waiver process”), which specifies how an individual may be eligible to receive a provisional waiver of his or her inadmissibility for accrual of unlawful presence prior to departing the United States for processing of an immigrant visa application at a U.S. embassy or consulate abroad. *See* 8 CFR 212.7(e).

Generally, individuals who are in the United States and seeking lawful permanent resident (LPR) status must either obtain an immigrant visa abroad through what is known as “consular processing” with the Department of State (DOS) or apply to adjust their immigration status to that of an LPR in the United States, if eligible. Individuals 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 individuals must leave the United States for immigrant visa processing at a U.S. Embassy or consulate abroad. But because these individuals are present in the United States without having been inspected and admitted or paroled, their departures may trigger a ground of

inadmissibility based on the accrual of unlawful presence in the United States under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i).

Under subclause (I) of this provision, an individual who has been 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 the commencement of removal proceedings, is inadmissible 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). Under subclause (II), an individual who has been unlawfully present in the United States for one year or more and then departs the United States (before, during, or after removal proceedings), is inadmissible for 10 years from the date of the 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 individual departs from the United States. *See, e.g., Matter of Rodarte-Roman*, 23 I. & N. Dec. 905 (BIA 2006).

The Secretary of Homeland Security (Secretary) may waive this ground of inadmissibility for an individual who can demonstrate that the refusal of his or her admission to the United States would result in extreme hardship to his or her 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). Prior to the creation of the provisional waiver process in 2013, any individual who was seeking an immigrant visa and became inadmissible under the 3- or 10-year unlawful presence bar upon departure from the United States, could apply for a waiver of such inadmissibility from DHS by filing an Application for Waiver of Grounds of Inadmissibility, Form I-601, with USCIS, but only after having attended the consular immigrant visa interview abroad. Those who applied for waivers under this “Form I-601 waiver process”² were effectively required to remain abroad for at least several months while USCIS adjudicated their waiver applications.³

² The “Form I-601 waiver process,” for purposes of this rule, refers to the process that an applicant uses when seeking an immigrant visa at a U.S. Embassy or consulate abroad and applying for a waiver of inadmissibility by filing an Application for Waiver of Grounds of Inadmissibility, Form I-601.

³ The average adjudication time of Form I-601 applications is currently over five months. Source: U.S. Citizenship and Immigration Services. USCIS Processing Time Information for the Nebraska Service Center-Form I-601, available at <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (last updated Feb. 11, 2016).

For some individuals, the Form I-601 waiver process led to lengthy separations of immigrant visa applicants from their family members, causing some U.S. citizens and LPRs to experience the significant emotional and financial hardships that Congress aimed to avoid when it authorized the waiver. *See* INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v) (providing for an inadmissibility waiver, “if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien”). For this reason, many relatives of U.S. citizens and LPRs who are eligible to obtain LPR status may be reluctant to travel abroad to seek immigrant visas and obtain such status. The Form I-601 waiver process also created processing inefficiencies for both USCIS and DOS through repeated interagency communication and through multiple consular appointments or interviews.

On January 3, 2013, DHS promulgated a final rule, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, in the **Federal Register**. *See* 78 FR 536 (Jan. 3, 2013) (“2013 Rule”). To improve administrative efficiency and reduce the amount of time that a U.S. citizen spouse or parent is separated from his or her relative while the relative completes the immigrant visa process, the 2013 Rule provided a process by which certain statutorily eligible individuals—specifically, certain parents, spouses and children of U.S. citizens—may apply for provisional waivers of the 3- and 10-year unlawful presence bars (“provisional waivers”) before leaving the United States for their immigrant visa interviews. The final rule also limited eligibility for provisional waivers to those immediate relatives of U.S. citizens who could show extreme hardship to a U.S. citizen spouse or parent. One reason DHS limited eligibility for the provisional waiver was to allow DHS and DOS time to assess the effectiveness of the process and the operational impact it may have on existing agency processes and resources. *See* 2013 Rule, 78 FR at 541.

Administration of the provisional waiver process has shown that granting a provisional waiver prior to the departure of an immediate relative of a U.S. citizen can reduce the time that such family members are separated. The grant of a provisional waiver also reduces hardships to U.S. citizen families and lowers the processing costs for DHS and DOS. In light of these benefits, and because other individuals

are statutorily eligible for waivers of the 3- and 10-year unlawful presence bars, DHS decided to remove restrictions that prevented certain individuals from seeking such waivers through the provisional waiver process. On July 22, 2015, DHS proposed to expand the class of individuals who may be eligible for provisional waivers beyond certain immediate relatives of U.S. citizens to all statutorily eligible individuals regardless of their immigrant visa classification. DHS also proposed to expand the class of individuals who could obtain provisional waivers, consistent with the statutory waiver authority, by permitting consideration of extreme hardship not only to U.S. citizen spouses or parents, but also to LPR spouses or parents.

In this final rule, DHS adopts the changes discussed in the proposed rule with several modifications in response to comments submitted on the proposed rule. The new modifications include:

(1) Clarifying that all individuals seeking provisional waivers, including those in removal proceedings before the Executive Office for Immigration Review (EOIR), must file applications for provisional waivers with USCIS.

(2) Allowing individuals to apply for provisional waivers even if USCIS has a reason to believe that they may be subject to other grounds of inadmissibility.

(3) Eliminating the proposed temporal limitations that would have restricted eligibility for provisional waivers based on DOS visa interview scheduling.

(4) Allowing individuals with final orders of removal, exclusion, or deportation to be eligible for provisional waivers provided that they have already applied for, and USCIS has approved, an Application for Permission to Reapply for Admission into the United States After Deportation or Removal, Form I-212.

(5) Clarifying that DHS must have actually reinstated a removal, deportation, or exclusion order in order for an individual who has returned to the United States unlawfully after removal to be ineligible for a provisional waiver on that basis.

In addition, DHS made several technical and non-substantive changes.

B. Costs and Benefits

This rule’s expansion of the provisional waiver process will create costs and benefits for newly eligible provisional waiver (Form I-601A) applicants, their U.S. citizen or LPR family members, and the Federal Government (namely, USCIS and DOS), as outlined in the Summary Table. This rule will impose fee, time, and travel

costs on an estimated 100,000 newly eligible individuals who choose to complete and submit provisional waiver applications and biometrics (fingerprints, photograph, and signature) to USCIS for consideration during the 10-year period of analysis (see Table 8). These costs will equal an estimated \$52.4 million at a 7 percent discount rate and \$64.2 million at a 3 percent discount rate in present value across the period of analysis. On an annualized basis, the costs will measure approximately \$7.5 million at both 7 percent and 3 percent discount rates (see Summary Table).

Newly eligible provisional waiver applicants and their U.S. citizen or LPR family members will benefit from this rule. Those applying for provisional waivers will receive advance notice of USCIS' decision to provisionally waive their 3- or 10-year unlawful presence bar before they leave the United States for their immigrant visa interview

abroad. This offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for waivers of the 3- and 10-year unlawful presence bars before departing from the United States. Individuals with approved provisional waivers may experience shortened periods of separation from their family members living in the United States while they pursue issuance of immigrant visas abroad, thus reducing any related financial and emotional strains on the families. USCIS and DOS will continue to benefit from the operational efficiencies gained from the provisional waiver's role in streamlining immigrant visa application processing, but on a larger scale.

In the absence of this rule, DHS assumes that the majority of individuals who are newly eligible for provisional waivers under this rule will likely continue to pursue an immigrant visa through consular processing abroad and

apply for waivers of grounds of inadmissibility resulting from the accrual of unlawful presence through the Form I-601 waiver process. Those who apply for unlawful presence waivers through the Form I-601 waiver process will incur fee, time, and travel costs similar to individuals applying for waivers through the provisional waiver process. However, without this rule, individuals who must seek a waiver of inadmissibility abroad through the Form I-601 waiver process after the immigrant visa interview may face longer separation times from their families in the United States and will experience less certainty regarding the approval of a waiver of the 3- or 10-year unlawful presence bar before departing from the United States. Absent a waiver, individuals who are subject to these bars would be unable to obtain LPR status for either 3 or 10 years.

SUMMARY TABLE—TOTAL COSTS AND BENEFITS OF RULE, YEAR 1—YEAR 10

	10-Year present values		Annualized values	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Total Costs:				
Quantitative	\$64,168,205	\$52,429,216	\$7,522,471	\$7,464,741
Total Benefits:				
Qualitative	Decreased amount of time that U.S. citizens or LPRs are separated from their family members with approved provisional waivers, leading to reduced financial and emotional hardship for these families.		Decreased amount of time that U.S. citizens or LPRs are separated from their family members with approved provisional waivers, leading to reduced financial and emotional hardship for these families.	
	Provisional waiver applicants will receive advance notice of USCIS' decision to provisionally waive their 3- or 10-year unlawful presence bar before they leave the United States for their immigrant visa interview abroad. This offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for a waiver before departing from the United States.		Provisional waiver applicants will receive advance notice of USCIS' decision to provisionally waive their 3- or 10-year unlawful presence bar before they leave the United States for their immigrant visa interview abroad. This offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for a waiver before departing from the United States.	
	Federal Government will achieve increased efficiencies by streamlining immigrant visa processing for applicants seeking inadmissibility waivers of unlawful presence.		Federal Government will achieve increased efficiencies by streamlining immigrant visa processing for applicants seeking inadmissibility waivers of unlawful presence.	

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

II. Background

A. Legal Authority

Under section 212(a)(9)(B) of the INA, 8 U.S.C. 1182(a)(9)(B), an individual who has accrued more than 180 days of unlawful presence in the United States and then leaves the United States generally is inadmissible for a specified period after the individual's departure. The inadmissibility period lasts for 3 years if the individual accrued more than 180 days but less than 1 year of

unlawful presence, and for 10 years if the individual accrued 1 year or more of unlawful presence. Under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), the Secretary of Homeland Security ("Secretary") has discretion to waive this ground of inadmissibility if the Secretary finds that denying the applicant's admission to the United States would result in extreme hardship to the applicant's U.S. citizen or LPR spouse or parent. INA section 103, 8 U.S.C. 1103, gives the Secretary the

authority to prescribe regulations for the administration and enforcement of the immigration and naturalization laws of the United States.

B. Proposed Rule

On July 22, 2015, DHS published a notice of proposed rulemaking to expand eligibility for provisional waivers of certain grounds of inadmissibility based on the accrual of unlawful presence to all individuals who are statutorily eligible for a waiver

of such grounds, are seeking a provisional waiver in connection with an immigrant visa application, and meet other conditions. See proposed rule, *Expansion of Provisional Waivers of Inadmissibility*, 80 FR 43338 (July 22, 2015) (2015 Proposed Rule).

In response to the proposed rule, DHS received 606 public comments from individuals, advocacy groups, attorneys, organizations, schools, and local governments. Some of the comments were submitted through mass mailing or email campaigns or petitions expressing support for or opposition to the provisional waiver process in general. Opinions on the proposed rule varied, but the majority of commenters (472) were supportive of the proposed expansion. Many of these commenters made additional suggestions to improve the provisional waiver process overall. These suggestions are discussed below.

DHS received 82 comments opposed to the proposed rule. In many of these instances, these commenters argued that the Executive Branch lacks the legal authority to implement the proposed changes. Commenters indicated that expanding the program amounted to an abuse of authority. One commenter asserted that the rule exceeded the Secretary's authority under the INA and that provisionally approving a waiver before an individual departs from the United States based on a family unity rationale was arbitrary and capricious. Some commenters also believed that the provisional waiver process would grant legal status to individuals unlawfully present in the United States. Others asked that USCIS prioritize the lawful immigrant community over those unlawfully present in the United States.

DHS received 52 comments that either did not clearly express an opinion in support of or in opposition to the proposed rule or that did not address any aspect of the proposed rule. For example, a few commenters provided input on immigrants in general, immigration policy, the Federal government, and other government programs that are not within the scope of this rulemaking. Because these comments address nothing in the proposed rule, DHS provides no specific response to them.

Unless mentioned in this supplementary information, commenters did not make any specific suggestions for changes to the provisional waiver process based on what DHS outlined in the proposed rule. In preparing this final rule, DHS counted and considered each public comment and other relevant materials that appear in the Federal Docket Management System (FDMS). All

comments received may be reviewed in FDMS at <http://www.regulations.gov>, under docket number USCIS–2012–0003.

C. Final Rule

This final rule adopts most of the regulatory amendments set forth in the proposed rule except for a few provisions, as explained in this preamble. The rationale for the proposed rule and the reasoning provided in its preamble remain valid with respect to the regulatory amendments adopted. Additionally, DHS has made several changes to the regulatory provisions based on the comments received. This final rule also adopts the technical regulatory amendments suggested in the proposed rule without change. This final rule does not address comments seeking changes in U.S. laws, regulations, or agency policies that are unrelated to the provisional waiver process or the clarifying technical amendments to 8 CFR 212.7. This final rule does not change the procedures or policies of other DHS components or Federal agencies, or resolve issues outside the scope of this rulemaking.

III. Public Comments on the Proposed Rule

A. Summary of Public Comments

The 60-day public comment period for the proposed rule ended on September 21, 2015. The majority of comments came from supporters who agreed that the proposed rule would promote family unity and reduce the length of time family members would be separated. Many considered family unity as one of the core principles of U.S. immigration law and stated that this rulemaking benefitted the United States overall, not just families. Several commenters made suggestions for simplifying the provisional waiver process overall.

Some commenters identified themselves as U.S. citizens or LPR family members (including children) who were worried about their relatives' immigration situations and about being separated from their family members for prolonged time periods. Numerous commenters who urged DHS to implement the proposed expansion shared personal stories and described hardships they have experienced or may experience upon being separated from family members. Many reasoned that keeping families together assists the U.S. economy and otherwise strengthens the country, because many individuals who are undocumented work hard, pay taxes, and are concerned

about the well-being of their children. Many asserted that the 3- and 10-year unlawful presence bars and other bars to admissibility are inhumane and cruel and that these laws need to change. Backlogs in the immigration system, such as visa backlogs, were raised generally by commenters as additional reasons for supporting this rule. Some commenters also believed that expanding eligibility for the provisional waiver process would streamline the waiver adjudication process for applicants inadmissible based on the accrual of unlawful presence in the United States, thereby making the immigrant visa process faster and more predictable. Finally, a commenter expressed the belief that expanding the process would reduce burdens on DOS.

Several commenters who disagreed with the proposed expansion argued that the Executive Branch lacks the legal authority to implement the proposed changes without congressional approval. Others stated that the proposed expansion is the Administration's way of circumventing existing laws, creating amnesty, and favoring those who are unlawfully present over lawful immigrants. Some considered the measure to be unconstitutional, arbitrary, and capricious. A number of commenters asserted that the expansion would reward law breakers, further illegal immigration, and lead to system abuse and fraud, as well as additional social problems.

For several commenters, unifying families was not an acceptable justification for the proposed rule. Some asserted that it is not the U.S. Government's place to accommodate people who are in the country illegally. Those commenters expressed that family separation is a natural consequence of an individual's choice to break the law. Others asserted that expanding the process would undermine the Nation's sovereignty, economy, security, and proper law enforcement efforts. Overall, these commenters believed that the expansion would erode the integrity of the immigration system.

Many of the commenters identified themselves as lawful immigrants or relatives of lawful immigrants. Some of these individuals voiced disappointment over the proposed expansion and indicated that the Federal Government's money and resources would be better invested in assisting U.S. citizens and lawful immigrants. These commenters emphasized that they have complied with the law, paid taxes, and worked hard toward maintaining lawful status,

and they asked DHS to first assist individuals who are lawfully present in the United States to obtain immigrant status by fixing the backlogged immigration system before fixing processes that benefit those who are unlawfully present in the United States.

One commenter suggested that local governments, rather than the Federal Government, should control the immigration process. This commenter indicated that local governments are in a better position to consider the costs of immigration measures to local communities. Other commenters considered the rule unnecessary and current regulations sufficient to address the immigrant community's needs. One commenter asked that DHS restrict and not expand the provisional waiver process in order to better control the U.S. border.

DHS has reviewed all of the public comments received in response to the proposed rule and addresses those comments focused on aspects in this final rule. DHS's responses to these comments are grouped by subject area, with a focus on the most common issues and suggestions raised by the commenters. The response to each comment also explains whether DHS made any changes to address the comment. DHS received no comments on the following topics addressed in the proposed rule: Inclusion of Diversity Visa selectees; inclusion of derivative spouses and children; the rejection criteria; the validity of an approved provisional waiver; and automatic revocation.

B. Legal Authority

A number of commenters questioned the Department's legal authority to expand the provisional waiver process. Some commenters expressed the view that the rule constituted an attempt to circumvent Congress, and that it was as an effort in disregard of current immigration laws, including case law. Some commenters also stated that the proposed rule exceeded DHS authorities in implementing the Secretary's directive to expand eligibility for provisional waivers. Others asserted that the rule was arbitrary and capricious.

DHS disagrees that this rule's expansion of the provisional waiver process exceeds the Secretary's legal authority. As a preliminary matter, the Federal Government has plenary authority over immigration and naturalization, and Congress may enact legislation establishing immigration law and policy. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("The Government of the United States

has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to 'establish [a] uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations." (citations omitted)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The Executive Branch, which includes DHS, implements the laws passed by Congress, and Congress has specifically charged the Secretary with the administration and enforcement of the immigration and naturalization laws. *See* 6 U.S.C. 112, 202(3)–(5); INA section 103, 8 U.S.C. 1103(a). The Secretary is also authorized to promulgate rules and "perform such other acts as he deems necessary for carrying out his authority." INA section 103(a)(3), 8 U.S.C. 1103(a)(3). The Secretary thus has broad discretion to determine the most effective way to administer the immigration laws. *See, e.g., Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) ("The principal responsibility for immigration matters in the Executive branch resides with the [Secretary], who is the beneficiary of broad grants of discretion under the statute."); *aff'd*, 472 U.S. 846 (1985); *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (observing that the INA "need not specifically authorize each and every action taken by the Attorney General [(now Secretary of Homeland Security)], so long as his action is reasonably related to the duties imposed upon him").

More specifically, Congress provided for a waiver of the 3- and 10-year unlawful presence bars in INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), for individuals who can demonstrate extreme hardship to certain qualifying relatives. That section does not restrict the manner in which eligible individuals can seek such waivers. In 2013, DHS created the provisional waiver process to allow certain immigrant visa applicants who are immediate relatives of U.S. citizens to provisionally apply for waivers before they leave the United States for their consular interviews. The creation of this process was merely a procedural change that addressed the manner in which eligible individuals can apply for the statutorily provided waiver of inadmissibility. *See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 FR 536, 541 (Jan. 3, 2013) ("2013 Rule"). This rule expands on that process by simply expanding the pool of individuals eligible to apply for

provisional waivers to statutorily eligible individuals in all immigrant visa classifications, subject to certain conditions. *See* new 8 CFR 212.7(e). Like the 2013 Rule, this Final Rule, therefore, does not create new waiver authority; it implements an existing authority conferred by Congress.⁴

Finally, DHS disagrees with commenters who stated that the proposed rule is arbitrary and capricious. The commenters appear to assert that DHS exceeds its statutory authority by violating the substantive requirements of the Administrative Procedure Act (APA). *See* 5 U.S.C. 706(2)(A). A rulemaking may be considered arbitrary and capricious under the APA when an agency's action is unreasonable, unsound, or not explained, or when it fails to demonstrate that the agency has considered the circumstances surrounding its action. An agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983). DHS has made clear throughout the proposed rule and this preamble all of the factors that were considered in putting forth the proposal and has articulated how the expansion of the provisional waiver process is tied to the purposes of the immigration laws and efficient operation of the immigration system. *See generally* 2015 Proposed Rule, 80 FR 43339. DHS believes that the assertions of these commenters are unfounded.

C. Eligibility for the Provisional Waiver

1. Categories of Eligible Individuals

Many commenters believed that expanding eligibility for the provisional waiver as proposed to all statutorily

⁴ Neither conditioning a waiver on an individual's departure from the United States nor allowing advance application for a waiver is novel. For example, DHS regulations at 8 CFR 212.2(j) have long allowed an individual who is subject to a removal order to seek consent to reapply for admission under INA section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii), while the individual is in the United States and before the individual departs the United States. A grant of consent to reapply for admission, like the provisional waiver, is conditioned on the individual's eventual departure from the United States. *See* 8 CFR 212.2(j). DHS and former Immigration and Naturalization Service (INS) regulations have permitted advance applications for consent to reapply for admission under INA section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii) since at least 1969. *See, e.g.,* 34 FR 9061 (1969); 36 FR 11635 (1971). The INS also permitted advance waiver applications under former INA section 212(c), 8 U.S.C. 1182(c) (repealed 1996). *See* 8 CFR 212.3(b); 52 FR 11620 (1987).

eligible individuals—including beneficiaries in family-sponsored and employment-based preference categories, as well as Diversity Visa selectees—would offer benefits to the U.S. Government and facilitate legal immigration and family unity. These commenters indicated that the expansion would reduce the fear of many immigrants, who otherwise may worry that they would be unable to reunite with their families after leaving the United States to have their immigrant visas processed abroad.

Accordingly, some commenters suggested that all individuals with approved immigrant visa petitions should be able to participate in the provisional waiver process, regardless of whether they are located inside or outside the United States. Other commenters asked that USCIS allow individuals with approved immigrant visa petitions to apply for provisional waivers regardless of their priority dates, especially if they had been present in the United States for many years.

Many commenters asked that DHS allow the following categories of individuals to apply for provisional waivers: (1) Married or unmarried individuals over the age of 21 with U.S. citizen parents; (2) individuals over the age of 21, whether single or married; (3) spouses of U.S. citizens without a criminal record and with good standing in their communities; (4) parents of U.S. citizens with approved petitions; (5) sons-in-law and daughters-in-law; and (6) self-petitioning widows and widowers of U.S. citizens. Some commenters urged DHS to prioritize relatives of U.S. citizens over relatives of LPRs. Some commenters asked that DHS focus not only on families, but also on sponsored employees, corporations, and self-sponsored business owners. Others requested that DHS include the following categories of individuals in the provisional waiver process: (1) Those with nonimmigrant investor-type visas; (2) well-educated professionals; (3) those with approved immigrant visa petitions but without any family in the United States; (4) spouses of nonimmigrant visa holders who are beneficiaries of approved employment-based immigrant visa petitions (Forms I-140); and (5) those with pending immigrant visa petitions. Many commenters requested that USCIS adjust an individual's status to that of an LPR upon approval of the waiver; others mistakenly believed that USCIS already does so.

The Secretary is authorized to waive the 3- and 10-year unlawful presence bars for individuals seeking admission

to the United States as immigrants if they can show that the refusal of admission would result in extreme hardship to a qualifying U.S. citizen or LPR spouse or parent, and provided that the applicant warrants a favorable exercise of discretion. *See* INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). With this final rule, DHS is allowing all individuals who are statutorily eligible for an immigrant visa and who meet the legal requirements for a waiver under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), to seek a provisional waiver in accordance with new 8 CFR 212.7(e). Consistent with the current provisional waiver process, provisional waivers are available only to those who are present in the United States, who must apply for immigrant visas at U.S. embassies or consulates abroad, and who at the time of the immigrant visa interview may be inadmissible based on the accrual of unlawful presence under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i).

DHS can only expand the pool of individuals eligible for this process to those who fall within one of the current statutory immigrant visa classifications and who meet the requirements for the unlawful presence waiver described in INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). DHS cannot expand eligibility to those who are not statutorily eligible for such waivers under current law. Similarly, DHS cannot change who is statutorily eligible to adjust status in the United States. Intending immigrants who are present in the United States but ineligible to adjust status must depart the United States and obtain their immigrant visas through consular processing abroad; approval of a provisional waiver does not change this requirement. *See* INA sections 104, 202(a)(1)(B), 211, 221, 222 and 245; 8 U.S.C. 1104, 1152(a)(1)(B), 1181, 1201, 1202, and 1255. *See generally* 8 CFR part 245; 22 CFR part 42.

As indicated above, many commenters asked that DHS expand the provisional waiver process to include additional categories of individuals, including sons or daughters who have approved immigrant visa petitions and are over the age of 21 or married. To clarify, in the proposed rule, DHS sought to include *all* beneficiaries of approved immigrant visa petitions who are statutorily eligible for a waiver of the 3- and 10-year unlawful presence bars, regardless of age, marital status, or immigration status. Individuals with approved immigrant visa petitions, including sons and daughters (married or unmarried) of U.S. citizens, as well as those who have been selected to

participate in the Diversity Visa program, may participate in the provisional waiver process provided they meet the requirements stated in 8 CFR 212.7(e). Consistent with its statutory authority under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), DHS will no longer limit the provisional waiver process to certain immediate relatives of U.S. citizens.⁵

2. Backlogged Immigrant Visa Categories and Eligibility for Interim Benefits

A large number of commenters suggested that individuals with approved family-sponsored and employment-based immigrant visa petitions should be permitted to obtain provisional waivers if immigrant visas are unavailable to them as a result of visa backlogs.⁶ Many commenters expressed frustration with the current legal immigration system and lengthy wait times for visas, which separate families and hinder the professional development of many individuals and their family members. Some commenters said it was unfair that DHS and USCIS seek to implement rules that assist persons who came to the United States unlawfully. These commenters indicated that those who came legally to the United States but who cannot obtain immigrant status as a result of visa backlogs should also receive assistance. These commenters opined that those who immigrate lawfully, such as employment-based immigrants, bring economic advantages to the United States.

A few commenters suggested that individuals with or without approved provisional waivers should be given interim benefits while awaiting visa availability. For example, one commenter requested that USCIS grant deferred action and work authorization to undocumented individuals who are U.S.-educated professionals in nursing, medical, or engineering fields, are the beneficiaries of family-sponsored petitions, and have displayed good conduct. Another commenter requested that an individual with an approved provisional waiver be issued a temporary Social Security number and renewable work authorization for a minimum of 3 years. A commenter asked USCIS to provide work authorization and advance parole documents to enable travel outside of,

⁵ Additionally, as explained throughout this preamble, DHS is changing other eligibility and ineligibility criteria in response to comments received.

⁶ In particular, some commenters requested that DHS include married and unmarried sons and daughters of U.S. citizens for whom an immigrant visa is unavailable due to immigrant visa backlogs.

and facilitate return to, the United States to lawfully present individuals affected by visa backlogs if they otherwise complied with the immigration laws. Another commenter believed that USCIS should grant parole in place to an individual with an approved immigrant visa petition and provisional waiver, if the petitioner's or beneficiary's disability makes travel abroad hazardous due to a condition covered by the Americans with Disabilities Act (ADA).⁷ After receiving parole in place, the commenter reasoned, the beneficiary could adjust his or her status in the United States and would not have to risk the petitioner's or the beneficiary's life by traveling. Finally, many commenters expressed the desire that individuals be able to adjust status in the United States if they have an approved petition or provisional waiver.

DHS acknowledges the concerns many intending immigrants face due to backlogs in available immigrant visa numbers. As noted, DHS is broadening the availability of the provisional waiver process to include all statutorily eligible individuals—including all beneficiaries of family-sponsored and employment-based immigrant visa petitions, as well as Diversity Visa selectees—who have a qualifying relative under the statute for purposes of the extreme hardship determination. Beneficiaries in family-sponsored and employment-based preference categories, as well as Diversity Visa immigrants, are subject to annual numerical limits that have been set by Congress. *See* INA sections 201, 202 and 203; 8 U.S.C. 1151, 1152 and 1153. Neither DOS nor DHS can change the number of visas that Congress allocates for particular immigrant visa categories, nor can they alter the statutory requirements for adjustment of status in the United States. Addressing those recommendations would require legislative changes.

DHS does not consider it appropriate to make an application for a provisional waiver, or the approval of such an application, a basis for granting interim benefits, including an advance parole document or employment authorization. In particular, because an approved immigrant visa petition and a waiver of inadmissibility do not independently confer any immigration status or otherwise afford lawful presence in the United States, neither may typically serve as the basis for interim benefits. Furthermore, issuance of interim benefits to individuals who are granted provisional waivers may encourage

them to postpone their timely departures from the United States to pursue their immigrant visa applications. The purpose of the provisional waiver process is not to prolong an applicant's unlawful presence in the United States. Rather, the purpose is to facilitate the applicant's departure to attend an immigrant visa interview abroad so that they may complete their application process for an immigrant visa. Moreover, providing an advance parole document is unnecessary because the premise of the provisional waiver process is that the applicant, if eligible, will depart the United States and return with an immigrant visa.

The provisional waiver process is designed to encourage unlawfully present individuals to leave the United States, attend their immigrant visa interviews, and return to the United States legally to reunite with their U.S. citizen or LPR family members. Having an approved provisional waiver helps facilitate immigrant visa issuance at DOS, streamlines both the waiver and the immigrant visa processes, and reduces the time that applicants are separated from their U.S. citizen or LPR family members, thus promoting family unity.

3. Individuals Outside the United States

A few commenters asked DHS to extend eligibility for provisional waivers to individuals outside the United States. Commenters argued that such individuals should be eligible for provisional waivers because they are often relatives of U.S. citizens with approved immigrant visa petitions and have immigrant visa applications pending with DOS. These commenters also suggested that those who need waivers of the 3- and 10-year unlawful presence bars but are now outside the United States should not be disadvantaged by their decision to ultimately comply with the immigration laws by departing the United States. The commenters believed that DHS should apply the same rules and processes to all visa applicants.

DHS understands the difficulties that U.S. citizens and LPRs face when their family members are outside the United States and are attempting to navigate the immigrant visa process. DHS notes, however, that individuals who are outside the United States and are eligible for waivers of the 3- and 10-year unlawful presence bars may apply for such waivers through the preexisting Form I-601 waiver process. Considering the existence of the Form I-601 waiver process, DHS continues to believe that expanding the provisional waiver

process to those individuals abroad would duplicate steps already incorporated in the DOS immigrant visa process and would not be an efficient use of agency resources. DHS thus will not adopt the suggestion.⁸

However, to alleviate some of the delays in waiver processing for those filing from abroad, USCIS has implemented the centralization of Form I-601 application filings, which no longer requires that applicants schedule "waiver filing" appointments with a U.S. embassy or consulate. Instead, Form I-601 applicants now file the waiver application directly with USCIS at a centralized location in the United States, thereby significantly reducing the time they are required to be outside the United States. By centralizing the processing of these waiver applications at locations in the United States, USCIS is able to better ensure that applications are processed in the most efficient manner possible.

4. Extreme Hardship

Several commenters requested that USCIS clarify the term "extreme hardship" in guidance or regulations. Others suggested that the proposed rule was legally flawed because DHS had not promulgated the requirements for establishing extreme hardship. Commenters requested that DHS clearly define the term and apply it fairly, including by considering the financial, emotional, and other harmful effects that result from separating families. Commenters believed that clarifying the term would lead to greater consistency in adjudication. One commenter asked that extreme hardship examples be included in guidance and in the provisional waiver application form.

Many commenters also requested that USCIS ease the extreme hardship standard and its documentary requirements, including, for example, by presuming extreme hardship in certain cases involving vulnerable families. Commenters often referenced the interim rule at 8 CFR 240.64(d)⁹ as a precedent that DHS could consider for purposes of adopting one or more presumptions of extreme hardship. Commenters also urged USCIS to extend the special accommodation for beneficiaries of immigrant visa petitions described in INA section 204(l), 8 U.S.C. 1154(l), to self-petitioning widows and widowers of U.S. citizens when such

⁸ For additional discussion relating to this suggestion, please refer to the 2013 Rule, 78 FR at 543.

⁹ This regulation was promulgated under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105-100 (Nov. 19, 1997).

⁷ *See* Americans with Disabilities Act of 1990 (Pub. L. 101-336), as amended.

citizens died before filing immigrant visa petitions on behalf of their spouses. INA section 204(l), 8 U.S.C. 1154(l), allows for immigrant visa petitions and related applications to be approved or reinstated for certain beneficiaries despite the death of the petitioner or principal beneficiary. Under the special accommodation, the death of the petitioner or principal beneficiary is treated as the “functional equivalent” of a finding of extreme hardship in cases where he or she could have served as a “qualifying relative” for purposes of waiving the 3- and 10-year unlawful presence bars.¹⁰

Other commenters believed that if an applicant demonstrates some or all of the factors listed in the Secretary’s November 20, 2014 memorandum directing expansion of the provisional waiver program¹¹—such as those relating to the age of the affected U.S. citizen or LPR spouse or parent, length of U.S. residence, and family ties in the United States—USCIS should apply a rebuttable presumption and find that the applicant has established extreme hardship. Having a presumption, some believed, would ease the burden of proof for many families. Some commenters also indicated that it was often very difficult for families to produce documentation to demonstrate extreme hardship, which the commenters viewed as an unnecessary barrier.

A considerable number of commenters suggested alternative standards of extreme hardship or asked that DHS include additional individuals as qualifying relatives for purposes of the extreme hardship determination. For example, commenters believed that USCIS should find extreme hardship if: (1) The applicant has a U.S. citizen spouse or parent; (2) a family is separated, or a child is separated from his or her parents; (3) family members lose their jobs because they have to travel to other countries; (4) the applicant’s child would experience extreme hardship; (5) the applicant’s sibling would experience extreme hardship; (6) the applicant would trigger

the 3- or 10-year unlawful presence bar when departing the United States; (7) the applicant has waited for a prolonged period for an immigrant visa to become available; (8) the applicant is the beneficiary of an employment-based immigrant visa petition (because beneficiaries of such petitions may not have U.S. citizen or LPR qualifying relatives);¹² or (9) the applicant has family in the United States but not a qualifying relative. Many commenters also requested that DHS give consideration to extreme hardship that would be suffered by U.S. citizen or LPR sons and daughters who are over the age of 21 or who are married.¹³ One commenter requested that special consideration be given to those in “special situation[s]” with respect to extreme hardship determinations, even if they do not have qualifying relatives. That commenter appeared to suggest that USCIS should create two classifications for assessing waiver eligibility, one for individuals with LPR family members and one for individuals without LPR family members. A few commenters asked DHS to eliminate the extreme hardship standard altogether. Many such commenters felt that taxpaying citizens who are “good people” should be able to keep their families together and that it is unfair to separate families simply because certain individuals cannot establish extreme hardship.

One commenter suggested that USCIS should contact experts and declarants claiming personal knowledge of a qualifying relative’s hardship claim by mail in order to verify that such claims are legitimate. This commenter also suggested that DHS should only consider hardship flowing from a qualifying relative’s decision to remain in the United States and not the hardship such a relative may confront if he or she chooses to depart with the inadmissible applicant. That commenter viewed as “hypothetical” the hardship that may result if the qualifying relative chooses to depart, but as “verifi[able]” the hardship resulting from the choice of a qualifying relative to stay behind in the United States. According to the commenter, considering hypothetical hardship in another country is

unnecessary and too difficult to document.

Other commenters proposed that DHS provide in its regulations a list of consequences or other factors typically associated with removal that adjudicators would consider when making extreme hardship recommendations. These commenters suggested that such a list of factors be drawn from historical data and precedent decisions. The commenters further suggested that such a list would be analogous to what is provided in the regulation for NACARA¹⁴ applicants at 8 CFR 1240.58(b). The commenters considered such an approach invaluable to achieving consistent adjudication of all waiver applications under the INA, not just provisional waiver applications. The commenters also believed that such an approach would reduce the incentive for individuals to make conclusory and unsupported allegations when applying for provisional waivers. According to these commenters, the lack of such a regulation was a “capricious political benefit” to those unlawfully present in the United States.

Finally, another commenter requested that USCIS establish specific questions related to hardship so that USCIS officers can quickly determine whether a threshold level of extreme hardship has been demonstrated.¹⁵ As an alternative to an extreme hardship showing, another commenter suggested that USCIS permit applicants to explain why they violated U.S. immigration laws. Another commenter indicated that it was important to train officers in this area.

DHS cannot adopt suggestions to revise the statutory requirements for waivers of the unlawful presence grounds of inadmissibility under INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). The authorizing statute requires the applicant to show extreme hardship to a U.S. citizen or LPR spouse or parent, and DHS does not have the authority to change the statutory requirement. DHS also cannot approve a provisional waiver application if the applicant has not demonstrated extreme hardship to a qualifying relative as required by the INA.

DHS also declines in this rulemaking to define extreme hardship for purposes of the provisional waiver (or more generally), or to create a rebuttable

¹⁰ See USCIS AFM Chapter 10.21(c)(5), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-1/Chapter10-21.html>. This guidance does not refer to the accommodation as a “presumption,” even though it has similar effect to a presumption. As with any finding of extreme hardship, the accommodation permits, but does not require, approval of the waiver, which remains a matter of USCIS discretion.

¹¹ See Memorandum from Jeh Charles Johnson, Secretary of Homeland Security to León Rodríguez, Director, USCIS, Expansion of the Provisional Waiver Program (Nov. 20, 2014), available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf.

¹² Some commenters asked USCIS to accept a showing of extreme hardship to an employer, but such consideration is not authorized by the statutory waiver authority at INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v).

¹³ In many instances, it was unclear whether commenters were requesting additional eligibility criteria for provisional waivers in general, or whether they were requesting that DHS consider additional classes of individuals to be qualifying relatives for purposes of the extreme hardship determination.

¹⁴ See note 8, *supra*.

¹⁵ The commenter cited the Application for Suspension of Deportation or Special Rule Cancellation of Removal, Form I-881, which contains a list of questions relating to factors considered when evaluating extreme hardship as drawn from the NACARA special rule regulations at 8 CFR 1240.58(b).

presumption related to such determinations. The INA does not define extreme hardship. The Board of Immigration Appeals (BIA) has stated that extreme hardship is not a definable term of fixed and inflexible meaning, and that establishing extreme hardship is dependent upon the facts and circumstances of each case.¹⁶ See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (describing factors to be considered in extreme hardship analysis), *aff'd*, *Cervantes-Gonzales v. INS*, 244 F.3d 1001 (9th Cir. 2001). Accordingly, DHS will continue to make extreme hardship determinations for purposes of provisional waivers on a case-by-case basis, consistent with agency guidance. On October 7, 2015, USCIS posted proposed guidance on extreme hardship determinations for public comment on its Web site at www.uscis.gov.¹⁷ USCIS also continually trains its officers on all aspects of the provisional waiver adjudication, including the extreme hardship determination.

Finally, DHS cannot extend the special accommodation for beneficiaries of immigrant visa petitions described in INA section 204(l), 8 U.S.C. 1154(l), to self-petitioning widows and widowers of U.S. citizens when such citizens died prior to filing immigrant visa petitions on behalf of their spouses. Under this section, USCIS may approve, or reinstate the approval of, an immigrant visa petition despite the death of the petitioner or principal beneficiary, if at least one beneficiary was residing in the United States when the relative died and continues to reside in the United States. If USCIS approves or reinstates the approval of the immigrant visa petition, USCIS also has discretion to act favorably on “any related applications.” INA section 204(l), 8 U.S.C. 1154(l). When Congress enacted INA section 204(l), 8 U.S.C. 1154(l), USCIS interpreted “any related applications” to include waiver applications that a beneficiary would have been able to file had the qualifying relative not died. But that section applies, by its express terms, only to an individual who “immediately prior to

the death of his or her qualifying relative was . . . the beneficiary of a pending or approved petition.” If the deceased qualifying relative had not filed an immigrant visa petition at the time of death, there is no “pending or approved” petition to which INA section 204(l), 8 U.S.C. 1154(l), can apply. Nor can there be said to be any “related applications.”

5. Applicants With Other Grounds of Inadmissibility

A large number of commenters supporting this rule stated that U.S. immigration laws are overly harsh, and that these laws harm families of U.S. citizens and LPRs. In general, many commenters asked DHS to waive certain grounds of inadmissibility for which the INA does not currently provide relief for immigrants.¹⁸ Other commenters asked DHS to consider expanding the provisional waiver process to cover additional grounds of inadmissibility for which waivers are statutorily available. These commenters specifically referenced the waiver for fraud and willful misrepresentation under INA section 212(i), 8 U.S.C. 1182(i), or alien smuggling under INA section 212(d)(11), 8 U.S.C. 1182(d)(11). Some commenters recommended that when an applicant is granted a provisional waiver based on a finding of extreme hardship, the Department should conclude that the applicant has established extreme hardship for other types of waiver applications that apply the same standard. One commenter suggested that the standard for the waiver to overcome inadmissibility for alien smuggling is lower than the extreme hardship standard¹⁹ and that USCIS should thus consider the lower standard as encompassed by the

extreme hardship standard. The commenter thus believed that the waiver to overcome the alien smuggling inadmissibility ground could easily be incorporated into the provisional waiver process. Overall, commenters suggested that DHS allow individuals to apply for all available waivers of inadmissibility through the provisional waiver process, which the commenters believed would further streamline the waiver and immigrant visa processes.²⁰

Several commenters requested that the provisional waiver process be available to individuals who are barred for unlawful reentry after previous immigration violations under INA section 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C). Others suggested making the process available to individuals who are inadmissible under that section if they are spouses of U.S. citizens or LPRs. A few commenters asked that certain categories of individuals receive special treatment.²¹ For example, a commenter requested that DHS create a special waiver for Deferred Action for Childhood Arrivals (DACA) recipients. Others asked that DHS add special provisions to benefit the relatives of active members or veterans of the U.S. Armed Forces.

DHS considered these comments but did not adopt the suggested changes. DHS cannot waive grounds of inadmissibility for those who are not authorized to receive waivers under the immigration laws. Implementation of these suggestions thus would have exceeded DHS's statutory authority. Other suggestions did not support a principal goal of the provisional waiver process, which is to streamline immigrant visa issuance for individuals who are eligible for an immigrant visa and otherwise admissible to the United States²² but whose family members would experience extreme hardship due to application of certain unlawful presence grounds of inadmissibility. As explained in the 2013 Rule, DOS consular officers are charged with

¹⁶ The BIA and immigration judges, both under the jurisdiction of the Department of Justice, Executive Office for Immigration Review (EOIR), also make extreme hardship determinations for purposes of adjudicating applications for extreme hardship waivers under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), and for other immigration benefits and relief from exclusion, deportation, or removal.

¹⁷ The proposed guidance on extreme hardship determinations can be viewed at https://www.uscis.gov/sites/default/files/USCIS/Outreach/Policy%20Review/DRAFT_Extreme_Hardship_Policy_Manual_Guidance_for_public_comment.pdf.

¹⁸ For example, some commenters asked for a waiver for falsely claiming U.S. citizenship under INA section 212(a)(6)(C)(ii), 8 U.S.C. 1182(a)(6)(C)(ii). Another commenter asked that all parents who illegally reentered after having been previously deported should be pardoned, because, according to the commenter, most parents enter to reunite with their children and family. Many commenters felt that children are being punished for the actions of their parents. Other commenters asked that the inadmissibility ground under INA section 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C), be changed and the penalty reduced to a lesser inadmissibility period for which a waiver is available. All of these requests are outside of the scope of this rulemaking, which solely concerns the provisional waiver of the grounds of inadmissibility described in INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i), as authorized by INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v).

¹⁹ DHS may waive the ground of inadmissibility described in INA section 212(a)(6)(E)(i), 8 U.S.C. 1182(a)(6)(E)(i), for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, provided the individual meets all other requirements. See INA section 212(d)(11), 8 U.S.C. 1182(d)(11).

²⁰ Of the commenters who asked DHS to expand the provisional waiver process to include waivers of other grounds of inadmissibility, many requested that DHS specifically include the Application for Permission to Reapply for Admission into the United States After Deportation or Removal, Form I-212.

²¹ It was often unclear if the commenters sought implementation of new waivers or an expansion of the provisional waiver to include these grounds of inadmissibility.

²² Upon departure from the United States to attend a consular interview, an individual no longer would be inadmissible as a result of being present in the United States without admission or parole under INA section 212(a)(6)(A)(i), 8 U.S.C. 1182(a)(6)(A)(i), or for lacking proper immigrant entry documents under INA section 212(a)(7)(A), 8 U.S.C. 1182(a)(7)(A).

determining whether individuals are eligible for issuance of immigrant visas, including whether they are affected by one or more grounds of inadmissibility. Expanding the provisional waiver process to other grounds of inadmissibility would introduce additional complexity and inefficiencies into the immigrant visa process, create potential backlogs, and likely delay and adversely affect the processing of immigrant visas by DOS. Furthermore, USCIS generally assesses waiver applications for inadmissibility due to fraud, misrepresentation, or criminal history through an in-person interview at a USCIS field office. Because DOS already conducts a thorough in-person interview as part of the immigrant visa process, DHS believes that this type of review would be unnecessarily duplicative of DOS's efforts.

Because the text of the statute forecloses the issue, DHS also rejects the suggestion to expand the provisional waiver process to include individuals who are inadmissible based on a return (or attempted return) without admission after previous immigration violations under INA section 212(a)(9)(C)(i), 8 U.S.C. 1182(a)(9)(C)(i). The relevant forms of relief for individuals who are inadmissible under that section are found at INA section 212(a)(9)(C)(ii) and (iii), 8 U.S.C. 1182(a)(9)(C)(ii) and (iii). See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Under the statute, waivers under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), cannot be used to relieve an applicant from inadmissibility under INA section 212(a)(9)(C)(i), 8 U.S.C. 1182(a)(9)(C)(i).

6. Reason-to-Believe Standard

Under current regulations, USCIS must deny a provisional waiver application if USCIS has "reason to believe" that the applicant may be subject to a ground of inadmissibility other than unlawful presence at the time of the immigrant visa interview abroad ("reason-to-believe standard"). 8 CFR 212.7(e)(4)(i).²³ Commenters asked DHS to clarify the reason-to-believe standard and to train officers²⁴ so that they

properly apply the standard. Many argued that USCIS often applies the standard too rigidly by denying applications on mere suspicion, rather than actually adjudicating the relevant inadmissibility concerns consistent with applicable law relating to these grounds.

Commenters also urged DHS to expand the scope of the January 24, 2014 field guidance memorandum on the reason-to-believe standard.²⁵ Commenters specifically asked DHS to direct USCIS officers to consider the totality of the evidence when assessing whether other grounds of inadmissibility apply to an applicant, and to issue Requests for Evidence (RFEs) related to such grounds prior to denying a provisional waiver application for mere suspicion that such grounds apply. Commenters criticized the lack of issuance of RFEs or Notices of Intent to Deny (NOIDs), as well as USCIS' use of standard denial template language when denying a provisional waiver application under the reason-to-believe standard. Commenters stated that the use of these denial templates implies that USCIS does not consider the evidence that applicants submit to show that they are in fact not inadmissible on other grounds. In addition, the commenters stated that the templates did not provide sufficient information to indicate why USCIS determined it had reason to believe that the applicant would be inadmissible at the time of the immigrant visa interview, thus preventing applicants from addressing the agency's concerns upon reapplication. Commenters requested that USCIS instruct its officers to clearly articulate the fact specific circumstances that led them to deny an application for "reason to believe" that the applicant is inadmissible on other grounds.²⁶ A couple of commenters suggested that DHS make exceptions to the reason-to-believe standard for certain circumstances or classes of individuals.

Considering the confusion that has resulted from application of the reason-to-believe standard, DHS is eliminating the standard from the provisional

waiver process in this final rule. Under the 2013 Rule, an approved provisional waiver would take effect if DOS subsequently determined that the applicant was ineligible for an immigrant visa only on account of the 3- or 10-year unlawful presence bar under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). Accordingly, DHS had originally incorporated the reason-to-believe standard in the 2013 Rule to preclude individuals from obtaining provisional waivers if they may have triggered other grounds of inadmissibility. DHS reasoned, in part, that because the goal of the provisional waiver process was to streamline immigrant visa processing, it would be of little benefit to applicants or to DHS to grant provisional waivers to applicants who would eventually be denied immigrant visas based on other grounds of inadmissibility.

Since the implementation of the provisional waiver program, however, stakeholders have raised concerns over the application of the reason-to-believe standard. Among other things, DHS understands that the standard causes confusion for applicants, as evidenced by the comments submitted to this rule. Despite the Department's repeated attempts to explain the reason-to-believe standard, for example, commenters continue to erroneously believe that when USCIS denies a provisional waiver application under the reason-to-believe standard, the agency has actually made an inadmissibility determination with respect to the relevant other ground(s) of inadmissibility.

Alternatively, as explained in the 2013 Rule, it would be counterproductive for USCIS to make other inadmissibility determinations during the adjudication of provisional waiver applications, given DOS's role in the immigrant visa process. It is DOS, and not USCIS, that generally determines admissibility under INA section 212(a), 8 U.S.C. 1182(a), as part of the immigrant visa process, which includes an in-depth, in-person interview conducted by DOS consular officers. Moreover, it is U.S. Customs and Border Protection (CBP) that ultimately determines admissibility at the time that individuals seek admission at a port of entry. See INA sections 204(e), 221(h); 8 U.S.C. 1154(e), 1201(h). It is thus generally not USCIS's role to determine whether an individual applying for an immigrant visa, or for admission as an immigrant at a U.S. port of entry, is admissible to the United States. Any assessment by USCIS with respect to other grounds of inadmissibility would be, at best,

²³ That regulation reads: "Ineligible aliens. Notwithstanding paragraph (e)(3) of this section, an alien is ineligible for a provisional unlawful presence waiver under paragraph (e) of this section if: (i) USCIS has reason to believe that the alien may be subject to grounds of inadmissibility other than unlawful presence under section 212(a)(9)(B)(i)(I) or (II) of the Act at the time of the immigrant visa interview with the Department of State." 8 CFR 212.7(e)(4)(i).

²⁴ USCIS has continually trained its officers on all aspects of the provisional waiver adjudication, including how to determine whether individuals may be subject to additional inadmissibility grounds at the time of the immigrant visa interview. However, since USCIS is removing the reason-to-

believe standard as a basis for eligibility, we will no longer be training officers on application of this specific standard.

²⁵ See USCIS Memorandum, Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers (Jan. 24, 2014), available at http://www.uscis.gov/sites/default/files/files/nativdocuments/2014-0124_Reason_To_Believe_Field_Guidance_Pertaining_to_Applicants_for_Provisional_Unlawful_Presence_Waivers-final.pdf.

²⁶ These commenters suggested adding specific regulatory text in 8 CFR 212.7(e)(4) and 8 CFR 212.7(e)(9) that would require officers to consider the totality of the circumstances and to recount particular facts of the case when denying waiver applications under the reason-to-believe standard.

advisory in nature and would likely cause even greater confusion for applicants.

These considerations have prompted DHS to revisit the current approach. In this final rule, DHS has decided to eliminate the reason-to-believe standard as a basis for denying provisional waiver applications. Accordingly, when adjudicating such applications, USCIS will only consider whether extreme hardship has been established and whether the applicant warrants a favorable exercise of discretion. However, although this final rule eliminates the reason-to-believe standard, the final rule retains the provision that provides for the automatic revocation of an approved provisional waiver application if the DOS consular officer ultimately determines that the applicant is ineligible for the immigrant visa based on other grounds of inadmissibility. *See* 8 CFR 212.7(e)(14)(i). DHS thus cautions and reminds individuals that even if USCIS approves a provisional waiver application, DOS may still find the applicant inadmissible on other grounds at the time of the immigrant visa interview. If DOS finds the applicant ineligible for the immigrant visa or inadmissible on grounds other than unlawful presence, the approval of the provisional waiver application is automatically revoked. In such cases, the individual may again apply for a waiver of the unlawful presence ground of inadmissibility, in combination with any other waivable grounds of inadmissibility, by using the Form I-601 waiver process. As in all discretionary matters, DHS also has the authority to deny provisional waiver applications as a matter of discretion even if the applicant satisfies the eligibility criteria. *See* 8 CFR 212.7(e)(2)(i). Additionally, USCIS may reopen and reconsider its decision to approve or deny a provisional waiver before or after the waiver becomes effective if it is determined that the decision was made in error. *See* 8 CFR 212.7(e)(13) and 8 CFR 212.7(a)(4)(v).

As has always been the case, DHS will continue to uphold the integrity and security of the provisional waiver process by conducting full background and security checks to assess whether an individual may be a threat to national security or public safety. If the background check or the individual's immigration file reveals derogatory information, including a criminal record, USCIS will analyze the significance of the information and may

deny the provisional waiver application as a matter of discretion.²⁷

Finally, the extreme hardship and discretionary eligibility assessments made during a provisional waiver adjudication could be impacted by additional grounds of inadmissibility and other information that was not known and therefore not considered during the adjudication. Accordingly, USCIS is not bound by these determinations when adjudicating subsequent applications filed by the same applicant, such as an application filed to waive grounds of inadmissibility, including a waiver of the unlawful presence grounds of inadmissibility. In other words, because separate inadmissibility grounds and material information not before USCIS at the time of adjudication may alter the totality of the circumstances present in an individual's case, a prior determination that an applicant's U.S. citizen or LPR spouse would suffer extreme hardship if the applicant were refused admission (and that the applicant merits a provisional waiver as a matter of discretion) does not dictate that USCIS must make the same determination in the future, although the factors and circumstances underlying the prior decision may be taken into account when reviewing the cases under the totality of the circumstances.

7. Individuals With Scheduled Immigrant Visa Interviews

The proposed rule would have made certain immediate relatives of U.S. citizens ineligible for provisional waivers if DOS had initially acted before January 3, 2013 to schedule their immigrant visa interviews. DHS had also proposed to make other applicants ineligible if DOS initially acted before the effective date of this final rule to schedule their immigrant visa interviews. *See* 80 FR 43338, 43343 (July 22, 2015). These date restrictions were intended to make the provisional waiver process more operationally manageable and to avoid processing

delays in the immigrant visa process. Commenters suggested that DHS either eliminate these restrictions or apply the January 3, 2013 restriction to all potential applicants.²⁸ Some commenters argued that DHS should eliminate these restrictions altogether for humanitarian reasons. Other commenters pointed out that the cutoff dates will cause preference-based immigrants difficulties with their priority dates.

In response to comments, and after consulting with DOS, DHS is eliminating the restrictions based on the date that DOS acted to schedule the immigrant visa interview. USCIS will adjust its processing of petitions and applications so that neither DOS nor USCIS will be adversely affected by the elimination of this restriction. Please note, however, that elimination of these date restrictions does not alter other laws and regulations relating to the availability of immigrant visas. Applicants will still be unable to obtain immigrant visas until an immigrant visa number is available based on the applicant's priority date. Applicants will need to act promptly, once DOS notifies them that they can file their immigrant visa application. If applicants do not apply within one year of this notice, DOS has authority to terminate their registration for an immigrant visa. *See* INA section 203(g), 8 U.S.C. 1153(g); *see also* 22 CFR 42.8(a). That action will also result in automatic revocation of the approval of the related immigrant visa petition. 8 CFR 205.1(a)(1).

In such a situation, applicants will have two options for continuing to pursue a provisional waiver. One option is for an applicant to ask DOS to reinstate the registration pursuant to 22 CFR 42.83(d). If DOS reinstates the registration, approval of the immigrant visa petition is also reinstated. Once such an applicant has paid the immigrant visa processing fee for the related immigrant visa application, the applicant can apply for a provisional waiver. A second option is for the

²⁷ Under current USCIS policy, officers adjudicating provisional waiver applications may issue a Request for Evidence (RFE) to address deficiencies in the extreme hardship showing or to resolve issues that may impact their exercise of discretion. USCIS will retain this practice. To maintain the streamlined nature of the program, USCIS retains the 30-day response time to any RFE issued in connection with provisional waiver applications. *See* USCIS Memorandum, Standard Timeframe for Applicants to Respond to Requests for Evidence Issued in Relation to a Request for a Provisional Unlawful Presence Waiver, Form I-601A (Mar. 1, 2013), available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files/Memoranda/2013/I-601A_30-Day_RFE_PM.pdf.

²⁸ One commenter also asked that DHS allow individuals to reopen their "visa cases" and to file applications for provisional waivers. The commenter explained that many individuals let their DOS National Visa Center (NVC) cases lapse because they cannot leave to seek their visas and because ameliorative immigration legislation had failed to pass. The commenter asked that the DOS NVC reopen cases for those who have approved petitions so that they may apply for provisional waivers. DHS will not adopt this suggestion. DOS—and not DHS—will continue to determine whether to reopen immigrant visa application cases. Any visa applicant seeking to reopen such a case should consult with DOS. An individual may file a provisional waiver if he or she meets the provisional waiver requirements, as outlined in 8 CFR 212.7(e).

relevant immigrant visa petitioner to file a new immigrant visa petition with USCIS. If USCIS approves the new immigrant visa petition, the beneficiary could then apply for the provisional waiver after paying the immigrant visa processing fee based on the new petition if otherwise eligible.

8. Individuals in Removal Proceedings

Commenters requested that DHS eliminate restrictions that prevent individuals in removal proceedings from seeking provisional waivers. Under the current regulations, those in removal proceedings may apply for and be granted provisional waivers only if their removal proceedings have been and remain administratively closed. *See* 8 CFR 212.7(e)(4)(v). Rather than excluding individuals whose removal proceedings are not administratively closed from obtaining provisional waivers, commenters asserted that DHS should find a way to allow them to apply for such waivers. Commenters suggested that once an individual in removal proceedings has a provisional waiver, he or she should be able to move to either dismiss or terminate proceedings or seek cancellation of the Notice to Appear (NTA)²⁹ so that he or she may depart to seek consular processing of an immigrant visa application. According to commenters, such a process would also ensure that an individual who is issued an NTA while his or her provisional waiver application is pending does not automatically become ineligible for the waiver.

Another commenter noted that immigration courts are severely backlogged and that individuals in removal proceedings often have to wait months or years before their cases can be scheduled or heard. This commenter asserted that requiring the case to be administratively closed before an individual may apply for the provisional waiver places an undue burden on the courts and also creates significant delays. Commenters generally believed that it would be more efficient if individuals were able to pursue provisional waivers and request termination or dismissal of proceedings upon approval of the waivers. They requested that the regulations and the provisional waiver application (Form I-601A) clarify that removal proceedings may be resolved by termination, dismissal, or a grant of voluntary departure if the provisional waiver is approved. Commenters believed that

such a solution would simplify the provisional waiver process, improve efficiency in the immigration court system, and further the spirit of expanding the process to all individuals who are statutorily eligible for waivers of the unlawful presence ground of inadmissibility at INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i).

Due to agency efficiency and resource concerns, DHS declines to adopt the above recommendations. On November 20, 2014, the Secretary directed the Department's immigration components—USCIS, ICE, and CBP—to exercise prosecutorial discretion, when appropriate, as early as possible in proceedings to ensure that DHS's limited resources are devoted to the greatest degree possible to the pursuit of enforcement priorities.³⁰ Prosecutorial discretion applies not only to the decision to issue, serve, file, or cancel an NTA, but also to other broad ranges of discretionary measures.³¹ To promote docket efficiency and to ensure that finite enforcement resources are used effectively, ICE carefully reviews cases pending before the Department of Justice's Executive Office for Immigration Review (EOIR) to ensure that all cases align with the agency's enforcement and removal policies. As such, once an NTA is issued, ICE attorneys are directed to review the case, at the earliest opportunity, for the potential exercise of prosecutorial discretion.³² The Department of Justice (DOJ) likewise instructs its immigration judges to use available docketing tools to ensure fair and timely resolution of cases, and to ask ICE attorneys at master calendar hearings whether ICE is seeking dismissal or administrative closure of a case.³³ In general, those who are low priorities for removal and are otherwise eligible for LPR status may be able to apply for provisional

³⁰ *See* Memorandum from Secretary Jeh Charles Johnson, DHS, Policies for Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

³¹ *See id.*

³² *See* Memorandum from Riah Ramlogan, Acting Principal Legal Advisor, U.S. Immigration and Customs Enforcement (ICE), Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson's Memorandum Entitled Policies for the Apprehension, Detention and Removal Of Undocumented Immigrants (Apr. 6, 2015), available at https://www.ice.gov/sites/default/files/documents/FOIA/2015/guidance_eoir_johnson_memo.pdf.

³³ *See* Memorandum from Brian M O'Leary, Chief Immigration Judge, EOIR, Operating Policies and Procedures Memorandum 15-01: Hearing Procedures for Cases Covered by New DHS Priorities and Initiatives (Apr. 6, 2015), available at <https://www.justice.gov/eoir/pages/attachments/2015/04/07/15-01.pdf>.

waivers. Among other things, ICE may agree to administratively close immigration proceedings for individuals who are eligible to pursue a provisional waiver and are not currently considered a DHS enforcement priority. ICE also works to facilitate, as appropriate, the timely termination or dismissal of administratively closed removal proceedings once USCIS approves a provisional waiver.

DHS believes the aforementioned steps being undertaken by ICE and EOIR to determine whether cases should be administratively closed effectively balances the commenters' provisional waiver eligibility concerns and agency resources in considering the exercise of prosecutorial discretion. Consequently, this rule has not changed the provisional waiver process and will not permit individuals in active removal proceedings to apply for or receive provisional waivers, unless their cases are administratively closed. The Department believes that current processes provide ample opportunity for eligible applicants to seek a provisional waiver, while improving the allocation of government resources and ensuring national security, public safety, and border security.

9. Individuals Subject to Final Orders of Removal, Deportation, or Exclusion

Commenters asked DHS to provide eligibility for provisional waivers to individuals who are subject to final orders of removal, deportation, or exclusion. Commenters asserted that many of these individuals may already request consent to reapply for admission, under 8 CFR 212.2(j), by filing an Application for Permission to Reapply for Admission into the United States After Deportation or Removal, Form I-212, before departing the United States for immigrant visa processing. Upon receiving such consent, the individual's order of removal, deportation, or exclusion would no longer bar him or her from obtaining an immigrant visa abroad. One commenter reasoned that providing eligibility to spouses and children with removal orders would permit more families to stay together.

Many commenters suggested that USCIS allow individuals to file provisional waiver applications "concurrently"³⁴ with Form I-212 applications for consent to reapply for admission. These commenters believed that requiring separate or consecutive processing of the two applications when a domestic process already exists for

³⁴ Filing two or more immigration benefit requests together is often referred to as "concurrent" filing.

²⁹ Notices to Appear (NTAs) are the charging documents that DHS issues to individuals to initiate removal proceedings.

both is unnecessary, inefficient, and a waste of USCIS' resources. In support of their argument, commenters also referenced 2009 USCIS procedures for the adjudication of Form I-601 applications for adjudication officers stationed abroad. Under these procedures, an individual whose Form I-601 application is granted would also normally obtain approval of a Form I-212 application, as both forms require that the applicant show that he or she warrants a favorable exercise of discretion.

As a preliminary matter, DHS notes that requiring the filing of separate Forms I-601A and I-212 simply reflects the fact that they are intended to address two separate grounds of inadmissibility, each with different waiver eligibility requirements. In response to the comments, however, DHS has amended the rule to allow individuals with final orders of removal, deportation, or exclusion to apply for provisional waivers if they have filed a Form I-212 application seeking consent to reapply for admission and such an application has been conditionally approved.

Anyone who departs the United States while a final order is outstanding is considered to have executed that order. See INA section 101(g), 8 U.S.C. 1101(g); 8 CFR 241.7. The execution of such an order renders the individual inadmissible to the United States for a period of 5-20 years under INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A). Certain individuals, however, may seek consent to reapply for admission to the United States before the period of inadmissibility has expired. See INA section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii). DHS regulations provide a process for those in the United States to apply for such consent by filing a Form I-212 application before departing the United States. See 8 CFR 212.2(j). As with the provisional waiver process, the pre-departure approval of a Form I-212 application is conditioned on the applicant subsequently departing the United States. Thus, if an individual who is inadmissible under INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A), obtains a conditional approval of his or her Form I-212 application while in the United States and thereafter departs to attend the immigrant visa interview abroad, he or she generally is no longer inadmissible under that section at the time of the immigrant visa interview and can be issued an immigrant visa.

Given that an applicant still has to demonstrate visa eligibility, including admissibility, at the time of the immigrant visa interview and that DHS

has decided to eliminate the reason-to-believe standard, the Department believes the goals of the provisional waiver process are supported by making it available to those with final orders only if they already have conditionally approved a Form I-212 application. The final rule thus extends eligibility for provisional waivers to such individuals. See 8 CFR 212.7(e)(4)(iv). Such an individual, however, must have the conditionally approved Form I-212 application at the time of filing the provisional waiver application. See 8 CFR 212.7(e)(4)(iv). USCIS will deny a provisional waiver application if the applicant's Form I-212 application has not yet been conditionally approved at the time the individual files his or her provisional waiver application. Additionally, if during the immigrant visa interview the consular officer finds that the applicant is inadmissible on other grounds that have not been waived, the approved provisional waiver will be automatically revoked.³⁵ See 8 CFR 212.7(e)(14)(i).

Finally, DHS notes that approval of Forms I-601A and I-212 does not waive inadmissibility under INA section 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C), for having returned to the United States without inspection and admission or parole after a prior removal or prior unlawful presence. See INA section 212(a)(9)(C)(ii), 8 U.S.C. 1182(a)(9)(C)(ii); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).³⁶

³⁵ In such cases, however, the approved Form I-212 application will generally remain valid and the individual may apply for any available waivers, including waiver of the 3- and 10-year bars, by filing a Form I-601 application after the immigrant visa interview.

³⁶ Although DHS received no comments on the issue, DHS has also amended the regulatory text to provide additional clarity with respect to provisional waiver eligibility for certain individuals who have previously been removed. Prior to the changes made by this rule, 8 CFR 212.7(e)(4)(vii) provided that an alien who is "subject to reinstatement of a prior removal order under section 241(a)(5) of the Act" is not eligible for a provisional waiver. DHS recognizes that this regulatory text was unclear with respect to whether it applies to (1) an individual who is a "candidate" for reinstatement of removal or (2) an individual whose prior removal order has already been reinstated. To avoid confusion, DHS has amended the regulatory text in 8 CFR 212.7(e)(4)(v) to clarify that the prior removal order must actually be reinstated for an individual to be ineligible to apply for a provisional waiver under this provision. DHS notes, however, that USCIS is likely to deny as a matter of discretion a provisional waiver application when records indicate that the applicant is inadmissible under INA 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C), for having unlawfully returned to the United States after a prior removal or prior unlawful presence. Moreover, even if such an individual obtains approval for a provisional waiver, such approval will be automatically revoked if he or she is ultimately determined to be inadmissible under that section.

10. Individuals Granted Voluntary Departure

Commenters requested that DHS address how voluntary departure under INA section 240B, 8 U.S.C. 1229c, affects provisional waiver eligibility. One commenter asked that USCIS provide eligibility for provisional waivers to individuals who have been granted voluntary departure but who failed to depart as required. Another commenter requested that regulations and instructions should clarify that an individual in compliance with an order of voluntary departure is considered by USCIS: (a) Not to be currently in removal proceedings; and (b) not subject to a final order of removal.

DHS has determined that individuals granted voluntary departure will not be eligible for provisional waivers. First, if an individual obtains voluntary departure while in removal proceedings, the immigration judge is required by law to enter an alternate order of removal. See 8 CFR 1240.26(d). DHS cannot execute the alternate order of removal during the voluntary departure period because such an order is not yet in effect. But if the individual does not depart as required under the order of voluntary departure, the alternate order of removal automatically becomes fully effective without any additional proceeding. See 8 CFR 1240.26(d). Thus, an individual who fails to leave as required under a grant of voluntary departure will have an administratively final order of removal, and will thus be ineligible for a provisional waiver. See INA section 240B(d)(1), 8 U.S.C. 1229c(d)(1); 8 CFR 212.7(e)(4)(iv). Under current law, removal proceedings for such individuals are considered to have ended when the grant of voluntary departure, with an alternate removal order, becomes administratively final. See INA sections 101(a)(47), 240(c)(1)(A), 8 U.S.C. 1101(a)(47), 1229(a)(c)(1)(A); 8 CFR 241.1, 1003.39, 1241.1; *Matter of Shih*, 20 I&N Dec. 697 (BIA 1993).

Second, a fundamental premise for a grant of voluntary departure is that the individual who is granted voluntary departure intends to leave the United States as required. See INA section 240B(b)(1)(D), 8 U.S.C. 1229c(b)(1)(D); *Dada v. Mukasey*, 554 U.S. 1, 18 (2008). Allowing an individual whose voluntary departure period has not expired to apply for a provisional waiver would suggest that the individual is excused from complying with the order of voluntary departure. This result would contradict the purpose of voluntary departure—allowing the subject to leave promptly

without incurring the future inadmissibility that results from removal. For these reasons, DHS did not modify the rule to allow those with grants of voluntary departure to apply for provisional waivers.

11. Applications for Lawful Permanent Resident (LPR) Status

Under current regulations, an individual is ineligible for a provisional waiver if he or she has an Application to Register Permanent Residence or Adjust Status, Form I-485 (“application for adjustment of status”), pending with USCIS, regardless of whether the individual is in removal proceedings. *See* 8 CFR 212.7(e)(4)(viii). One commenter suggested that USCIS should allow those seeking LPR status to file applications for adjustment of status concurrently with provisional waiver applications, and that USCIS should hold such applications for adjustment of status in abeyance until final resolution of the provisional waiver applications. According to the commenter, this would provide applicants present in the United States the opportunity to obtain work authorization and to appeal any denial of their provisional waiver applications. The commenter suggested that upon approval of a provisional waiver application, USCIS should route the application for adjustment of status to DOS for consular processing of the applicant’s immigrant visa abroad.

DHS declines to adopt this suggestion. DHS believes that the commenter misunderstands the purpose of filing applications for adjustment of status. Those applications may be filed only by individuals who are in the United States and meet the statutory requirements for adjustment of status. If the applicant is eligible for adjustment of status, approval of the application adjusts one’s status to that of an LPR in the United States, thus making it unnecessary to go abroad and obtain an immigrant visa. For those who are in the United States but are not eligible for adjustment of status, filing an application for adjustment of status serves no legitimate purpose. These individuals may not adjust status in the United States and must instead depart the United States and seek an immigrant visa at a U.S. consulate through consular processing. As these individuals are not eligible for adjustment of status, DHS believes it is inappropriate to invite them to submit applications seeking adjustment of status. Moreover, DOS has its own application process for immigrant visas. Thus, even if USCIS were to forward a denied application for adjustment of status to DOS, that application would have no role in the individual’s

application process with DOS. The individual would still be required to submit the proper DOS immigrant visa application to seek his or her immigrant visa.

12. Additional Eligibility Criteria

A few commenters suggested that DHS consider imposing restrictions in the provisional waiver process, including by adding eligibility criteria for provisional waivers, to better prioritize the classes of individuals eligible to seek such waivers.³⁷ Two commenters suggested that the provisional waiver process should prioritize family members of U.S. citizens over those of LPRs. One commenter suggested using level of education as a factor for prioritizing applicants. This commenter implied that applicants should be prioritized if they have advanced degrees in science, technology, engineering, or mathematics fields. Additional suggestions included: (1) Making provisional waivers easier to obtain for couples who have children or have been married more than two years; (2) limiting the number or percentage of waivers that are made available to particular demographic groups within the United States; (3) combining eligibility for provisional waivers with “cross-chargeability” rules in the INA;³⁸ (4) prioritizing waivers for those with high school degrees or who paid their taxes; (5) making waivers available only to those who submit three letters of recommendation from community members; and (6) making waivers

³⁷ Many of the commenters who suggested additional eligibility criteria also believed that approved waivers should entitle individuals to adjust to LPR status in the United States. Others suggested that provisional waiver applicants should pay fines, and some of these commenters believed that paying fines should allow individuals to apply for adjustment of status as an alternative to consular processing. Many of these commenters believed that such changes would create efficiencies for both the applicant and the government. As explained throughout this rule, DHS cannot change the statutory requirements for adjustment of status in the United States. Similarly, USCIS cannot impose fines as part of its filing fees.

³⁸ Cross-chargeability is a concept employed by the INA in the context of applying the INA’s numerical limits on immigrant visas, particularly the “per country” limitations that restrict the percentage of such visa numbers that may go to nationals of any one country. *See* generally INA sections 201, 202, and 203; 8 U.S.C. 1151, 1152, and 1153. Generally, an immigrant visa number that is allotted to an individual is “charged” to the country of his or her nationality. However, when application of the “per country” limits may lead to family separation, the immigrant visa number allotted to an individual may instead be charged to the country of nationality of that individual’s spouse, parent, or child. *See* INA sections 202(b), 8 U.S.C. 1152(b); *see also* 22 CFR 42.12; Department of State, 9 Foreign Affairs Manual (FAM) ch. 503.2-4A, available at <https://fam.state.gov/FAM/09FAM/09FAM050302.html> (last visited Apr. 26, 2016).

available only to those who can demonstrate proficiency with the English language or who enroll in English language classes.

DHS declines to impose limitations or eligibility requirements for obtaining provisional waivers beyond those currently provided by regulation or statute. *See* INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v); 8 CFR 212.7. In the 2013 Rule, DHS originally limited eligibility to seek such waivers through the provisional waiver process to ensure operational feasibility and reduce the risk of creating processing delays with respect to other petitions or applications filed with USCIS or DOS. Considering the agency’s capacity and the efficiencies gained through the provisional waiver process, DHS now believes that the provisional waiver process should be made available to all statutorily eligible individuals. DHS is confident that the expansion will reduce family separation and benefit the U.S. Government as a whole, and that all agencies involved possess the operational capacity to handle the additional casework.

13. Bars for Certain Inadmissible Individuals

Two commenters suggested that those who have committed crimes should be precluded from participating in the provisional waiver process, and another commenter cautioned DHS against adopting a standard that would allow provisional waiver eligibility to the “wrong people,” in the commenter’s view, such as those who hate American values and principles.³⁹

As indicated above, DHS continues to uphold the integrity and security of the provisional waiver process by conducting full background and security checks to assess whether an applicant may be a threat to national security or public safety. If the background check or the applicant’s immigration file reveals derogatory information, including a criminal record, USCIS analyzes the significance of the information and may deny the provisional waiver application as a matter of discretion.

³⁹ One of these commenters believed that, although accrual of unlawful presence is not desirable, serious criminality and evidence of violent behavior should be the deciding factors when determining whether to separate families. Absent these factors, the commenter reasoned, immediate family members of U.S. citizens and LPRs should be allowed to remain with their loved ones in the United States before consular processing.

D. Adjudication

1. Requests for Evidence (RFEs) and Notices of Intent To Deny (NOIDs)

Several commenters criticized USCIS' practice with respect to issuing Requests for Evidence (RFEs) or Notices of Intent to Deny (NOIDs) in cases where the agency ultimately denies provisional waiver applications. Commenters criticized USCIS for both (1) issuing denials without first submitting RFEs that provide applicants the opportunity to correct deficiencies, and (2) issuing RFEs that failed to clearly articulate the deficiencies in submitted applications. With respect to the latter, commenters indicated that RFEs tend to use boilerplate language that makes it impossible for applicants to respond effectively, especially with respect to assessments of extreme hardship or application of the reason-to-believe standard. Noting that terms such as "reason to believe" and "extreme hardship" are vague, commenters requested that USCIS issue detailed and case-specific RFEs or NOIDs (rather than templates) when the agency intends to deny applications, thereby giving applicants an opportunity to cure any deficiencies before such denials are issued.⁴⁰ Commenters also raised concerns with the number of days that USCIS provides applicants to respond to often lengthy RFEs, noting that, in most instances, USCIS provides only 30 days for such responses.

As provided in 8 CFR 212.7(e)(8), and notwithstanding 8 CFR 103.2(b)(16), USCIS may deny a provisional waiver without issuing an RFE or NOID. USCIS, however, is committed to issuing RFEs to address missing and critical information that relates to extreme hardship or that may affect how USCIS exercises its discretion. USCIS officers also have the discretion to issue RFEs whenever the officer believes that additional evidence would aid in the adjudication of an application. Due to the streamlined nature of the program, USCIS currently provides applicants only 30 days to respond to an RFE in such cases.⁴¹

⁴⁰ One commenter requested that USCIS ensure transparent processing of applications. USCIS is committed to providing processing information on its adjudication processes by including information on the form and its instructions. USCIS also intends to include a section in the USCIS Policy Manual on provisional waivers.

⁴¹ See USCIS Memorandum, Standard Timeframe for Applicants to Respond to Requests for Evidence Issued in Relation to a Request for a Provisional Unlawful Presence Waiver, Form I-601A (Mar. 1, 2013), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files/Memoranda/2013/I-601A_30-Day_RFE_PM.pdf.

USCIS will continue to issue RFEs in provisional waiver cases based on the current USCIS RFE policy⁴² and to assess the effectiveness of its RFE practice in this area. In response to comments, however, the agency has instructed its officers to provide additional detail regarding application deficiencies in RFEs relating to claims of extreme hardship in order to better allow applicants to efficiently and effectively cure such deficiencies. USCIS will retain the 30-day RFE response period, because USCIS and DOS closely coordinate immigrant visa and provisional waiver application processing. The 30-day RFE response time streamlines USCIS processing, prevents lengthy delays at DOS, and allows applicants to complete immigrant visa processing in a timely manner.

As explained in the 2013 Rule, a NOID gives an applicant the opportunity to review and rebut derogatory information of which he or she may be unaware. Because provisional waiver adjudications do not involve full assessments of inadmissibility, however, USCIS is not issuing NOIDs describing all possible grounds of inadmissibility that may apply at the time of the immigrant visa interview. Rather, USCIS continues to decide an applicant's eligibility based on the submitted provisional waiver application and related background and security checks. If the applicant's provisional waiver is ultimately denied, he or she may file a new Form I-601A application in accordance with the form's instructions. Alternatively, the individual can file an Application for Waiver of Grounds of Inadmissibility, Form I-601, with USCIS after he or she attends the immigrant visa interview and after the DOS consular officer determines that the individual is inadmissible.

2. Motions To Reopen, Motions To Reconsider, and Administrative Appeals

A number of commenters requested that USCIS amend the regulations to allow applicants the opportunity to appeal, or otherwise seek reconsideration, of denied applications. Commenters stated that the only option for challenging wrongful denials is to file new applications or to hope that USCIS will exercise its *sua sponte* authority to reopen cases. Commenters felt that this policy damages the public's

trust and fails to hold USCIS officers accountable for errors. One commenter also noted that although denied applicants remain eligible to apply for waivers through the Form I-601 waiver process after the immigrant visa interview abroad, some still choose not to pursue their immigrant visas because of the uncertainty and hardships associated with consular processing. Commenters argued that these individuals are likely to remain in the United States, thereby diminishing the benefits of the provisional waiver process. Consequently, commenters requested that DHS amend its regulations to institute a mechanism for administrative appeal or reconsideration. According to these commenters, such a mechanism would provide additional due process protections for those whose applications are erroneously denied, those who experience changed circumstances, and those without legal representation (including those who have a deficient or improper application filed by a notario or other individual not authorized to practice law in the United States).

DHS declines to allow applicants to appeal or otherwise seek reconsideration of denials. The final rule retains the prohibition on appeals and motions, other than *sua sponte* motions entertained by USCIS. As a preliminary matter, DHS disagrees that there is a legal due process interest in access to or eligibility for discretionary provisional waivers of inadmissibility. See, e.g., *Darif v. Holder*, 739 F.3d 329, 336 (7th Cir. 2014) (no due process interest in discretionary extreme hardship waiver).⁴³ Additionally, and as stated in the 2013 Rule, section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. 704, permits an agency to provide an administrative appeal if the agency chooses to do so. See *Darby v. Cisneros*, 509 U.S. 137 (1993). Due to efficiency concerns, DHS continues to believe that administrative appeals should be reserved for actions that involve a comprehensive, final assessment of an applicant's admissibility and eligibility for a benefit. The provisional waiver process does not involve such a comprehensive assessment, and the denial of such an application is not a final agency action for purposes of the APA. See 8 CFR

⁴³ Other courts of appeals have recognized that due process does not require an agency to provide for administrative appeal of its decisions. See, e.g., *Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004); *Loulou v. Ashcroft*, 354 F.3d 845, 850 (9th Cir. 2003); *Mendoza v. U.S. Att'y Gen.*, 327 F.3d 1283, 1289 (11th Cir. 2003); *Albathani v. INS*, 318 F.3d 365, 376 (1st Cir. 2003); *Guentchev v. INS*, 77 F.3d 1036, 1037-38 (7th Cir. 1996).

⁴² See USCIS Memorandum, Requests for Evidence and Notices of Intent to Deny (June 3, 2013), available at [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20\(Final\).pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/June%202013/Requests%20for%20Evidence%20(Final).pdf).

212.7(e)(9)(ii). If a provisional waiver application is denied, the applicant may either file a new provisional waiver application or seek a waiver through the Form I-601 waiver process after DOS conclusively determines that he or she is inadmissible under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). In contrast to denial of a Form I-601A application for a provisional waiver, the denial of a Form I-601 application is appealable. In this regard, the final eligibility determination as it relates to the Form I-601 application lies with the USCIS Administrative Appeals Office (AAO), and the final immigrant visa eligibility determination rests with DOS. See 2013 Rule, 78 FR at 555.

Moreover, the provisional waiver process is intended to be a streamlined process that is closely coordinated with DOS immigrant visa processing. Holding cases during an administrative appeal of a provisional waiver application would produce logistical complications for the respective agencies, interrupting the regular adjudication flow, and therefore would be counterproductive to streamlining efforts.

3. Confidentiality Provisions

As with the 2013 Rule, commenters asked DHS to include confidentiality protections so that denials of provisional waiver applications would not automatically trigger removal proceedings. The commenters asserted that the Department should provide regulatory assurances stating that DHS will not put provisional waiver applicants in removal proceedings, even if their applications are denied. According to the commenters, such assurances were necessary because a new Administration might institute a change in policy in this area.

DHS declines to adopt these suggestions as the Department already has effective policies on these issues. DHS focuses its resources on its enforcement priorities, namely threats to national security, border security, or public safety.⁴⁴ Similarly, USCIS continues to follow current agency policy on the issuance of NTAs, which are focused on public safety threats, criminals, and those engaged in fraud.⁴⁵ Consistent with DHS enforcement

policies and priorities, the Department will not initiate removal proceedings against individuals who are not enforcement priorities solely because they filed or withdrew provisional waiver applications, or because USCIS denied such applications.

E. Filing Requirements and Fees

1. Concurrent Filing

One commenter requested that DHS allow for the concurrent filing of a Petition for Alien Relative, Form I-130 (“family-based immigrant visa petition”), with the application for a provisional waiver. The commenter reasoned that allowing the concurrent filing of the provisional waiver application and a family-based immigrant visa petition would create efficiencies for applicants and the U.S. Government by reducing paperwork and wait times. Other commenters asked that USCIS allow concurrent filing of a Form I-212 application for consent to reapply for admission with the provisional waiver application if the applicant also needs to overcome the inadmissibility bar for prior removal under INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A), at the time of the immigrant visa interview. Given that processing of Form I-212 applications already takes place in the United States, these commenters believed that it would make sense to adjudicate the Form I-212 and provisional waiver applications at the same time and by the same officer.

DHS has considered these comments but maintains that concurrent filing would undermine the efficiencies that USCIS and DOS gain through the provisional waiver process. Currently, denials of family-based immigrant visa petitions are appealable to the BIA. See 8 CFR 1003.1(b)(5). Denials of other petitions also are generally appealable to the AAO. See 8 CFR 103.3.⁴⁶ If the denial of an immigrant visa petition is challenged on appeal, USCIS would have to either 1) hold the provisional waiver application until the decision on appeal is issued, or 2) deny the provisional waiver application and subsequently consider reopening it if the denial is overturned on appeal. Both scenarios produce administrative inefficiencies and could cause USCIS to incur additional costs for storing provisional waiver applications and transferring alien registration files (A-files) or receipt files between offices

until the administrative appeals process is complete. Therefore, DHS has decided against allowing the concurrent filing of provisional waiver applications and immigrant visa petitions.

DHS also declines to allow concurrent filing of Form I-212 and provisional waiver applications. In the event that a Form I-212 application is denied, the applicant may file an administrative appeal with the AAO. If USCIS allowed the concurrent filing of Form I-212 and provisional waiver applications, USCIS would again be faced with administratively inefficient options in cases where the Form I-212 application is denied and the applicant seeks to appeal that denial. As noted above, the agency would again be faced with the choice of either 1) holding the provisional waiver application in abeyance until the appeal is decided, or 2) denying the provisional waiver application and later reopening it if the appeal is sustained. As previously discussed, the provisional waiver process is intended to streamline DHS and DOS processes ahead of immigrant visa interviews at consular posts. The delay in the adjudication of provisional waiver applications that would result from allowing additional procedural steps would decrease the efficiencies derived from the provisional waiver process and thus be counterproductive to these streamlining efforts. As indicated previously in this preamble, however, DHS will allow an individual who has been approved for consent to reapply for admission under 8 CFR 212.2(j) to seek a provisional waiver. By allowing individuals with conditionally approved Form I-212 applications to apply for provisional waivers, DHS further expands the class of eligible individuals who can benefit from provisional waivers and, at the same time, maintains the program’s streamlined efficiency.

2. Fines or Penalties

Several commenters believed that DHS should require provisional waiver applicants to pay fines or fees of up to several thousand dollars to remain in the United States and obtain LPR status. Other commenters appeared to suggest that DHS should generally impose financial penalties on individuals unlawfully in the United States.

Congress has given the Secretary the authority to administer and enforce the immigration and naturalization laws of the United States. See 6 U.S.C. 112, 202(3)–(5); see also INA section 103, 8 U.S.C. 1103(a). The Secretary also is authorized to set filing fees for immigration benefits at a level that will ensure recovery of the full costs of

⁴⁴ See Memorandum from Secretary Jeh Charles Johnson, DHS, Policies for Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁴⁵ See USCIS Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011), available at www.uscis.gov/NTA.

⁴⁶ See also AAO’s Practice Manual, Chapter 3, Appeals, available at <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-aoa>.

providing adjudication and naturalization services, including services provided without charge to refugees, asylum applicants, and other immigrants. See INA section 286(m), 8 U.S.C. 1356(m). This fee revenue remains available to DHS to provide immigration and naturalization benefits. See INA section 286(n), 8 U.S.C. 1356(n). DHS has already established an appropriate filing fee for the Form I-601A application as authorized by the statute. Congress, however, has not imposed a specific fine or penalty on provisional waiver applicants or individuals unlawfully present in the United States. Congress also did not authorize any type of independent lawful status for such applicants. Such fines, as with a general fine for unlawful presence, would be unrelated to the costs incurred during the adjudication of immigration benefits. USCIS does not have the authority to impose such civil penalties.

3. Fees

DHS received several comments related to fees. One commenter noted that Congress has already approved DHS's funding for this fiscal year, and that Congress did not authorize changes to the Department's budget. The commenter thus requested an explanation as to why DHS believes that funding is available to effectuate the changes proposed by this rule. Another commenter believed that DHS and DOS should return immigrant visa fees to applicants if their provisional waiver applications are ultimately denied. One commenter stated that the derivative spouses of primary beneficiaries should pay separate application fees.

In contrast to many other U.S. Government agencies, USCIS does not rely on appropriated funds for most of its budget. Rather, USCIS is a fee-based agency that is primarily funded by the fees paid by applicants and petitioners seeking immigration benefits. USCIS relies on these fees to fund the adjudication of provisional waiver applications; none of the funds used for these adjudications comes from funds appropriated annually by Congress.

Furthermore, as noted above, the fees received with provisional waiver applications and immigrant visa petitions cover the costs of adjudication. These fees are necessary regardless of whether the application or petition is ultimately approved or denied.

Therefore, USCIS does not return fees when a petition, application, or request is denied. For its part, DOS determines its own fees pursuant to its own authorities. See, e.g., INA section 104, 8

U.S.C. 1104; 8 U.S.C. 1714; see also 22 CFR 22.1, 42.71(b).

Finally, an individual who applies for a provisional waiver must submit the application with the appropriate filing and biometrics fees, as outlined in the form's instructions and 8 CFR 103.7, even if the individual is a derivative beneficiary.

4. Premium Processing

A few commenters recommended that DHS establish a premium processing fee to expedite processing of provisional waiver applications. One commenter indicated that the processing time for a provisional waiver application should not exceed 30 days under premium processing.

DHS declines to adopt the suggestion to extend premium processing to provisional waiver applications. The INA permits certain employment-based petitioners and applicants for immigration benefits to request premium processing for a fee. See INA section 286(u), 8 U.S.C. 1356(u). DHS has established the current premium processing fee at \$1,225.⁴⁷ See 8 CFR 103.7(b)(1)(i)(RR); see also 8 CFR 103.7(e) (describing the premium processing service). The premium processing fee, which is paid in addition to the base filing fee, guarantees that USCIS processes a benefit request within 15 days. See 8 CFR 103.7(e)(2). If USCIS cannot take action within 15 days, USCIS refunds the premium processing fee.⁴⁸ *Id.*

DHS has not extended premium processing to any immigration benefit except for those authorized under INA section 286(u), 8 U.S.C. 1356(u). Notably, INA section 286(u) expressly authorizes premium processing only for employment-based petitions and applications. Even if USCIS could develop an expedited processing fee for other benefits, USCIS would not apply it to the provisional waiver process, as that process requires background checks over which USCIS does not control timing. Additionally, determining an appropriate fee for such a new process would require USCIS to estimate the costs of that service and engage in separate notice-and-comment rulemaking to establish the new fee. Thus, DHS will not establish a Form I-601A premium processing fee at this time.

⁴⁷ The fee was originally set at \$1,000, and may be adjusted according to the Consumer Price Index (CPI). See INA section 286(u), 8 U.S.C. 1356(u).

⁴⁸ Even if USCIS refunds this fee, USCIS generally continues expedited processing of the benefit request.

5. Expedited Processing

One commenter stated that the processing time for a provisional waiver application should generally not exceed 30 days. Other commenters urged USCIS to expedite the processing of applications for family members of active duty members or honorably discharged veterans of the U.S. Armed Forces. One commenter asked that DHS and DOS expedite the immigrant visa interviews of individuals with approved provisional waivers.⁴⁹

DHS did not incorporate these suggestions in this final rule. DHS believes the provisional waiver process is well managed, and officers adjudicate cases quickly after receiving an applicant's background check results. Creating an expedited process for certain applicants, including relatives of military members and veterans, would create inefficiencies and potentially slow the process for all provisional waiver applicants.⁵⁰

Additionally, even if DHS were to expedite the provisional waiver process for certain applicants, they would still be required to spend time navigating the DOS immigrant visa process. DHS believes that expediting the processing of provisional waiver applications for certain individuals would generally not significantly affect the processing time of their immigrant visa processing with DOS. Individuals often file their provisional waiver applications with USCIS while the DOS National Visa Center (NVC) pre-processes their immigrant visa applications. The NVC pre-processing of immigrant visa applications usually runs concurrently with the USCIS processing of provisional waiver applications. Thus, even if DHS were to expedite the provisional waiver process for certain applicants, those applicants would nevertheless be required to wait for DOS to complete its process. Additionally, the processing time for immigrant visa applications at the NVC largely depends on other outside factors, including whether applicants submit necessary documents to the NVC on a timely basis throughout the process. In many cases, including those in which applicants

⁴⁹ One commenter also urged CBP to expedite Freedom of Information Act requests so that individuals are able to obtain the information they need to assess eligibility and complete their applications. The commenter indicated that expanding the provisional waiver process is useless unless potential applicants are given access to their files. DHS declines to adopt this suggestion as it is beyond the scope of this rulemaking.

⁵⁰ Each time USCIS has to set aside a regularly filed case to prioritize the adjudication of another case, it delays those cases that were filed prior to the prioritized case and disrupts the normal adjudication process.

delay in getting necessary documents to the NVC, immigrant visa processing would not be affected by the expediting of other processes.

DHS reminds applicants, however, that they may request expedited adjudication of a provisional waiver application according to current USCIS expedite guidance.⁵¹ Also, relatives of current and former U.S. Armed Forces members may seek USCIS assistance through the agency's special military help line.⁵²

6. Background Checks and Drug Testing

One commenter requested that USCIS conduct background checks and drug testing for provisional waiver applicants.⁵³

DHS is not modifying the background checks and biometrics requirement in this rule to include drug testing. Individuals seeking provisional waivers already must provide biometrics for background and security checks. Based in part on the background check results, USCIS determines whether the applicant is eligible for the waiver, including whether a favorable exercise of discretion is warranted. DHS only collects the biometric information needed to run such checks and to adjudicate any requested immigration benefit. Additional testing, such as a medical examination, is required within the DOS immigrant visa process and for DOS's visa eligibility determinations. Performing medical tests as part of the provisional waiver process would duplicate the DOS process.

⁵¹ For guidance on USCIS expedite procedures, please visit <http://www.uscis.gov/forms/expedite-criteria>.

⁵² Information about the military help line is available at <http://www.uscis.gov/military/military-help-line>. DHS encourages military families that need assistance to reach out to USCIS through the help line.

⁵³ Two commenters also asked that USCIS allow provisional waiver applicants to include medical examinations performed by USCIS-designated civil surgeons with their provisional waiver applications. These commenters believed that the opportunity to provide the results of the medical examination before departure for the immigrant visa interview would further streamline the process. The commenters also believed that applicants could either avoid the higher panel physician examination fee abroad, or detect and treat possible medical conditions that would render them ineligible for their immigrant visas before departure. One of these commenters also indicated that such a process would allow an applicant's representative to check the panel physician's work. DHS did not adopt this suggestion. Under DOS regulations, each immigrant visa applicant must be examined by a DOS-designated panel physician, *see* 22 CFR 42.66, and altering DHS regulations to permit submission of medical examinations with a provisional waiver application would not eliminate that requirement.

F. Comments Outside the Scope of This Rulemaking

DHS received a number of comments that are outside the scope of this rule. For example, one commenter asked USCIS to publish guidance on whether an individual who is subject to the 3- or 10-year unlawful presence bar, but who has already returned to the United States, could satisfy the requisite inadmissibility period while in the United States. Other commenters suggested that those with approved provisional waivers should be permitted to seek adjustment of status in the United States. Many asked DHS to extend the period for accepting adjustment of status applications pursuant to INA section 245(i), 8 U.S.C. 1255(i). Others requested that DHS: create a new waiver for people who leave the United States because of family emergencies; make certain immigrant visa categories immediately available or create new immigrant visa categories; Create new inadmissibility periods for purposes of INA sections 212(a)(9)(B)(i) and 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(B)(i) and 1182(a)(9)(C); and generally modify immigration laws, particularly those perceived as harsh.

Other commenters requested changes to DOS consular processes or regulations, which are also not within the scope of this rule. For example, commenters asked DHS to instruct DOS consular officers to issue immigrant visas to applicants with approved provisional waiver applications.⁵⁴ One commenter criticized the inability to appeal immigrant visa denials to DHS as unfair, even though DOS, not DHS, adjudicates immigrant visa applications. *See generally* 22 CFR part 42. Similarly, another commenter stated that individuals whose immigrant visa applications have been denied by DOS must be allowed to reopen those

⁵⁴ To the extent that these comments are read to suggest that DOS should issue immigrant visas to individuals with approved provisional waiver applications without assessing whether such individuals are inadmissible for other reasons, DHS believes those comments are outside the scope of this rulemaking. To the extent that the comments are read to suggest that DOS should not re-adjudicate or "second-guess" USCIS's provisional waiver determinations, DHS notes that DOS does not reassess USCIS' provisional waiver determination. DOS, however, is required to assess whether an individual is ineligible for an immigrant visa, including whether an applicant is inadmissible. If the individual is inadmissible on a ground other than unlawful presence, or is otherwise ineligible for the immigrant visa, DOS may deny the individual's immigrant visa application, even if the provisional waiver was approved.

applications so that they can be allowed to file provisional waiver applications.⁵⁵

Because DHS believes that these suggestions are outside the scope of this rule, the suggestions will not be addressed in this rule.

G. Comments on the Executive Orders 12866/13563 Analysis

In one comment requesting that the DOS visa interview scheduling cut-off date be eliminated as an ineligibility requirement, the commenter cited DHS's acknowledgement that the 2013 Rule's provisional waiver application projections were overestimated. Because of the overestimation in the 2013 Rule, the commenter suggested that DHS likely overestimated provisional waiver applications resulting from the 2015 Proposed Rule. Since publication of the 2015 Proposed Rule, DHS has adjusted its application projection method based on new, revised data from DOS and this rule's new provisional waiver eligibility criteria. DHS believes this new method will better project the provisional waiver applications resulting from the rule.

DHS received many comments affirming the benefits of the provisional unlawful presence waiver described in the 2015 Proposed Rule. Commenters agreed that the provisional waiver's expansion would provide greater certainty for families, promote family unity, improve administrative efficiency, improve communication between DHS and other government agencies, facilitate immigrant visa issuance, save time and resources, and relieve the emotional and financial hardships that family members experience from separation.

DHS also received several economic-related comments that were outside the scope of this rule. Several commenters mentioned that obtaining legal status, which both the provisional and general unlawful presence waivers may facilitate, provides a significant benefit to the undocumented individual as well as American society. According to the commenters, this is because obtaining legal status tends to increase taxable income, reduce poverty, contribute to job growth, help businesses gain qualified employees, and add to consumer spending. Although DHS agrees that obtaining legal status provides important economic benefits to once-undocumented individuals, and the United States in general, those benefits are not directly attributable to the provisional waiver eligibility

⁵⁵ As with other DOS processes, review of the denial of a visa application is governed by DOS regulations, not DHS regulations.

provided by this rule. Rather, obtaining a waiver of the unlawful presence ground of inadmissibility (provisional or not) is just one step in the process for gaining legal status, which USCIS hopes this rule will facilitate.

A different commenter asserted that non-U.S. citizen workers hurt the economy. DHS disagrees with this comment and finds that it is beyond the scope of this rule because obtaining a waiver of inadmissibility (provisional or not) for unlawful presence does not provide employment authorization for someone who is unlawfully present. Receiving such a waiver is just one step in the process for gaining the legal status required to lawfully work in the United States.

IV. Regulatory Amendments

After careful consideration of the public comments, as previously summarized in this preamble, DHS adopts the regulatory amendments in the proposed rule without change, except for the provisions noted below. In addition to these substantive changes, DHS also has made edits to the text of various provisions that do not change the substance of the proposed rule.

A. Amending 8 CFR 212.7(e)(1) To Clarify Which Agency Has Jurisdiction To Adjudicate Provisional Waivers

Currently, 8 CFR 212.7(e)(1) specifies that all provisional waiver applications, including an application made by an individual in removal proceedings before EOIR, must be filed with USCIS. The provision implies, but does not specifically state, that USCIS has exclusive jurisdiction to adjudicate and decide provisional waivers. With this final rule, DHS modifies the regulatory text to clarify that USCIS has exclusive jurisdiction, regardless of whether the applicant is or was in removal, deportation, or exclusion proceedings. See new 8 CFR 212.7(e)(2).

B. Removing the Reason-to-Believe Standard as a Basis for Ineligibility

Under the 2013 Rule, an individual is ineligible for a provisional waiver if "USCIS has reason to believe that the alien may be subject to grounds of inadmissibility other than unlawful presence under INA section 212(a)(9)(B)(i)(I) or (II), 8 U.S.C. 1182(a)(9)(B)(I) or (II), at the time of the immigrant visa interview with the Department of State." 8 CFR 212.7(e)(4)(i). The 2015 Proposed Rule proposed to retain this requirement but requested any alternatives that may be more effective than the current provisional waiver process or the amended process in the proposed rule.

See 80 FR 43343. In response to comments, DHS is removing this standard as a basis for ineligibility for provisional waivers. See new 8 CFR 212.7(e)(4). DHS, however, retains 8 CFR 212.7(e)(14)(i), which provides that a provisional waiver is automatically revoked if DOS determines, at the time of the immigrant visa interview, that the applicant is inadmissible on any grounds of inadmissibility other than unlawful presence under INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). Revocation of the provisional waiver based on inadmissibility on other grounds, however, does not prevent the individual from applying for a general waiver under 8 CFR 212.7(a) to cure his or her inadmissibility under INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B) or any other ground of inadmissibility for which a waiver is available.

C. Removing the DOS Visa Interview Scheduling Cut-Off Dates in 8 CFR 212.7(e)(4)(iv) and 212.7(e)(5)(ii)(G)

In the proposed rule, DHS sought to retain date restrictions that prevented immediate relatives of U.S. citizens from obtaining provisional waivers if DOS acted prior to January 3, 2013 to schedule their immigrant visa interviews. See 80 FR at 43343. DHS also proposed that other individuals (i.e., individuals other than certain immediate relatives of U.S. citizens) would be ineligible for provisional waivers if DOS had acted on or before the effective date of this final rule to schedule the immigrant visa interview. *Id.* Furthermore, DHS proposed to reject provisional waiver applications that were not filed consistent with the above date restrictions. See proposed 8 CFR 212.7(e)(5)(G)(ii)(1) and (2). In response to comments, DHS has decided to eliminate these filing restrictions. See new 8 CFR 212.7(e)(4) and (5).

D. Allowing Individuals With Final Orders of Removal, Deportation, or Exclusion To Apply for Provisional Waivers

Since the inception of the provisional waiver process, individuals have been ineligible for provisional waivers if they are 1) subject to final orders of removal issued under INA sections 217, 235, 238, or 240, 8 U.S.C. 1187, 1225, 1228, or 1229a; 2) subject to final orders of exclusion or deportation under former INA sections 236 or 242, 8 U.S.C. 1226 or 1252 (pre-April 1, 1997), or 3) subject to final orders under any other provision of law (including an *in absentia* order of removal under INA section 240(b)(5), 8 U.S.C. 1229a(b)(5)). See generally 2013 Rule, 78 FR 536. As indicated in the response to comments

on this subject in the preamble, DHS is amending the rule to provide eligibility for provisional waivers to certain individuals who are subject to an administratively final order of removal, deportation, or exclusion and therefore will be inadmissible under INA section 212(a)(9)(A)(i) or (ii), 8 U.S.C. 1182(a)(9)(A)(i) or (ii), upon departure from the United States. Under the final rule, such individuals will be eligible to apply for provisional waivers if they have been granted consent to reapply for admission under INA section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii) and 8 CFR 212.2(j). See new 8 CFR 212.7(e)(4) (iv). However, they cannot file Form I-212 applications and provisional waiver applications concurrently. See new 8 CFR 212.7(e)(4)(iv).

Notwithstanding this change, individuals will remain ineligible for provisional waivers if 1) they have returned unlawfully to the United States after removal, and 2) CBP or ICE, after service of notice under 8 CFR 241.8, has reinstated a prior order of removal, deportation, or exclusion. Under INA section 241(a)(5), 8 U.S.C. 1231(a)(5), reinstatement of a such an order makes the individual ineligible for waivers of inadmissibility and other forms of relief. See new 8 CFR 212.7(e)(4)(v). Moreover, even in the absence of reinstatement, the individual's unauthorized return to the United States may be considered as an adverse discretionary factor in adjudicating a provisional waiver application. Finally, the approval of a provisional waiver application will be automatically revoked if the applicant is ultimately determined to be inadmissible under INA 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C), for having unlawfully returned to the United States after a prior removal or prior unlawful presence.

E. Clarifying When an Individual Is Subject to Reinstatement and Ineligible for Provisional Waivers

Currently, an individual is ineligible for a provisional waiver if he or she is subject to reinstatement of a prior order under INA section 241(a)(5), 8 U.S.C. 1231(a)(5). See 8 CFR 212.7(e)(4)(vii). DHS retained this ineligibility criteria in the proposed rule. In this final rule, however, DHS clarifies which individuals are ineligible for provisional waivers based on application of the reinstatement of removal provision at INA section 241(a)(5), 8 U.S.C. 1231(a)(5). Under the final rule, an individual will be ineligible for a provisional waiver if ICE or CBP, after service of notice under 8 CFR 241.8, has reinstated the removal, deportation, or

exclusion order prior to the individual filing the provisional waiver or while the provisional waiver application is pending. *See* new 8 CFR 212.7(e)(4)(v).

F. Miscellaneous Technical Amendments

In this final rule, DHS made several technical and non-substantive changes. First, DHS amended 8 CFR 212.7(e)(2) by adding the word “document” after the terms “employment authorization” and “advance parole.” Additionally, DHS simplified the text of 8 CFR 212.7(e)(5). Currently, that provision outlines filing conditions, which are also provided in the instructions to provisional waiver applications. DHS, therefore, revised the provision to refer individuals to the filing instructions of the form.

V. Statutory and Regulatory Requirements

A. Unfunded Mandates Reform Act of 1995

This 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 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 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563

emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a “significant regulatory action,” 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

After careful consideration of public comments on the 2015 Proposed Rule,⁵⁶ DHS adopts most of the regulatory amendments specified in the proposed rule without change, except for the provisions addressing ineligibility for: 1) reason to believe that the applicant may be inadmissible on grounds other than unlawful presence at the time of the DOS immigrant visa interview (8 CFR 212.7(e)(4)(i)); 2) DOS initially acting before January 3, 2013 or before the effective date of this final rule to schedule an applicant’s immigrant visa interview (proposed 8 CFR 212.7(e)(4)(iv) and 212.7(e)(5)(ii)(G)); and 3) the applicant being subject to an administratively final order of exclusion, deportation, or removal (“final order”)(8 CFR 212.7(e)(4)(vi)). With the adoption of most of the proposed regulatory amendments, DHS largely applies the 2015 Proposed Rule’s economic analysis approach to this final rule. However, some changes to the analysis are necessary to capture the population of individuals now eligible for provisional waivers through this final rule’s elimination and modification of certain ineligibility provisions just described and source data revisions.

This rule’s expansion of the provisional waiver process will create costs and benefits to newly eligible provisional waiver (Form I-601A) applicants, their U.S. citizen or LPR family members, and the Federal Government (namely, USCIS and DOS), as outlined in Table 1. This rule will impose fee, time, and travel costs on an estimated 100,000 newly eligible individuals who choose to complete and submit provisional waiver applications and biometrics (fingerprints, photograph, and signature) to USCIS for

consideration during the 10-year period of analysis (*see* Table 8). These costs will equal an estimated \$52.4 million at a 7 percent discount rate and \$64.2 million at a 3 percent discount rate in present value across the period of analysis. On an annualized basis, the costs will measure approximately \$7.5 million at both 7 percent and 3 percent discount rates (*see* Table 1).

Newly eligible provisional waiver applicants and their U.S. citizen or LPR family members will benefit from this rule. Individuals applying for a provisional waiver will receive advance notice of USCIS’ decision to provisionally waive their 3- or 10-year unlawful presence bar under INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B), before they leave the United States for their immigrant visa interviews abroad. This offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for a waiver of certain unlawful presence grounds of inadmissibility before departing from the United States. Individuals with approved provisional waivers may experience shortened periods of separation from their family members living in the United States while they pursue immigrant visas abroad, thus reducing related financial and emotional strains on the families. USCIS and DOS will continue to benefit from the operational efficiencies gained from the provisional waiver’s role in streamlining immigrant visa application processing, but on a larger scale than currently in place.

In the absence of this rule, DHS assumes that the majority of individuals who would have been newly eligible for provisional waivers under this rule will likely continue to pursue an immigrant visa through consular processing abroad and apply for waivers of unlawful presence through the Form I-601 process. Those who apply for unlawful presence waivers through the Form I-601 process will incur fee, time, and travel costs similar to individuals applying for waivers through the provisional waiver process. However, without this rule, those who must seek a waiver of inadmissibility abroad through the Form I-601 process after the immigrant visa interview may face longer separation times from their families in the United States and experience less certainty regarding the approval of a waiver of the 3- or 10-year unlawful presence bar before departing from the United States.

⁵⁶ *See* 80 FR 43338 (July 22, 2015).

TABLE 1—TOTAL COSTS AND BENEFITS OF 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	\$64,168,205	\$52,429,216	\$7,522,471	\$7,464,741
<i>Total Benefits:</i> Qualitative	Decreased amount of time that U.S. citizens or LPRs are separated from their family members with approved provisional waivers, leading to reduced financial and emotional hardship for these families.		Decreased amount of time that U.S. citizens or LPRs are separated from their family members with approved provisional waivers, leading to reduced financial and emotional hardship for these families.	
	Provisional waiver applicants will receive advance notice of USCIS' decision to provisionally waive their 3- or 10-year unlawful presence bar before they leave the United States for their immigrant visa interview abroad. This offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for a waiver before departing from the United States.		Provisional waiver applicants will receive advance notice of USCIS' decision to provisionally waive their 3- or 10-year unlawful presence bar before they leave the United States for their immigrant visa interview abroad. This offers applicants and their family members the certainty of knowing that the applicants have been provisionally approved for a waiver before departing from the United States.	
	Federal Government will achieve increased efficiencies by streamlining immigrant visa processing for applicants seeking inadmissibility waivers of unlawful presence.		Federal Government will achieve increased efficiencies by streamlining immigrant visa processing for applicants seeking inadmissibility waivers of unlawful presence.	

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

2. Background

Individuals 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. Those present in the United States without having been inspected and admitted or paroled are typically ineligible to adjust status in the United States. To obtain LPR status, such individuals must leave the United States for immigrant visa processing at a U.S. Embassy or consulate abroad. Because these individuals are present in the United States without having been inspected and admitted or paroled, many have accrued enough unlawful presence to trigger the 3- or 10-year unlawful presence grounds of inadmissibility when leaving the United States for immigrant visa processing abroad.⁵⁷ 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 will consist almost exclusively of individuals who are eligible for immigrant visas but are unlawfully present in the United States without having been inspected and admitted or paroled.

⁵⁷ Individuals who depart the United States after accruing more than 180 days, but less than 1 year, of unlawful presence are generally inadmissible for 3 years. Those who depart the United States after accruing 1 year or more of unlawful presence are generally inadmissible for 10 years.

Before the introduction of the provisional waiver process, individuals seeking immigrant visas through consular processing were only able to apply for a waiver of a ground of inadmissibility, such as unlawful presence, *after* attending the immigrant visa interview abroad. If a consular officer identified any ground(s) of inadmissibility during an immigrant visa interview, the applicant was tentatively denied an immigrant visa and allowed to seek a waiver of any waivable ground(s) of inadmissibility. The individual could apply for such a waiver by filing Form I–601 with USCIS. Those who applied for Form I–601 waivers were required to remain abroad while USCIS adjudicated their Forms I–601, which currently takes over five months to complete.⁵⁸ If USCIS approved the 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.

In some instances, the Form I–601 waiver process led to lengthy separations of immigrant visa applicants from their U.S. citizen or LPR spouses,

⁵⁸ U.S. Citizenship and Immigration Services. “USCIS Processing Time Information for the Nebraska Service Center- Form I–601.” Available at <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (last updated Feb. 11, 2016).

parents, and children, causing financial and emotional harm. The Form I–601 waiver process also created processing inefficiencies for both USCIS and DOS through repeated interagency 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”).⁵⁹ The 2013 Rule created a provisional waiver process for certain immediate relatives of U.S. citizens (namely, spouses, children (unmarried and under 21), and parents of U.S. citizens (provided the child is at least 21)) who are in the United States, are seeking immigrant visas, can demonstrate extreme hardship to a U.S. citizen spouse or parent, would be inadmissible upon departure from the United States due to only the accrual of unlawful presence, and meet other eligibility conditions. That process currently allows eligible individuals to apply for a provisional waiver and receive a notification of USCIS' decision on their provisional waiver application before departing for DOS consular processing of their immigrant visa applications. The provisional waiver process contrasts to the Form I–601 waiver process, which requires

⁵⁹ See 78 FR 536 (Jan. 3, 2013).

applicants to wait abroad, away from their family members in the United States, while USCIS adjudicates their application for a waiver of inadmissibility. Once approved for a provisional waiver, they are scheduled for the immigrant visa interview abroad. During the immigrant visa interview, a DOS consular officer will determine whether the applicant is otherwise admissible to the United States and eligible to receive an immigrant visa. Since the provisional waiver process's inception, USCIS has approved more than 66,000 provisional waiver applications for certain immediate relatives of U.S. citizens,⁶⁰ allowing these individuals and their families to enjoy the benefits of such waivers.

3. Purpose of Rule

To assess the initial effectiveness of the provisional waiver process, DHS decided to offer this process to a limited group—certain immediate relatives of U.S. citizens—in the 2013 Rule.⁶¹ Based on the lengthy separation periods and related financial and emotional burdens to families associated with the Form I-601 waiver process, and based on 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 immigrant visa applicants.⁶² Consistent with that directive and the INA, on July 22, 2015, DHS published the 2015 Proposed Rule, which proposed to expand eligibility for provisional waivers of certain grounds of inadmissibility based on the accrual of unlawful presence to include all other individuals seeking an immigrant visa (all other immigrant visa applicants⁶³) who are statutorily eligible for a waiver of such grounds, are seeking a waiver in connection with an immigrant visa application, are present in the United States, and meet other

⁶⁰ This figure is based on Form I-601A approvals data through the end of fiscal year 2015 (September 30, 2015). Note that USCIS began accepting provisional waiver applications on March 4, 2013. Source: USCIS' Office of Performance and Quality.

⁶¹ See 78 FR at 542.

⁶² This expansion included, but was not limited to, adult sons and daughters of U.S. citizens; brothers and sisters of U.S. citizens; and spouses and children of LPRs. See Memorandum from Jeh Charles Johnson, Secretary, DHS, to León Rodríguez, Director, USCIS, 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.

⁶³ For the purposes of this analysis, 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.

conditions.⁶⁴ In the 2015 Proposed Rule, USCIS also proposed 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, consistent with the statutory waiver authority. Under this provision, 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 final rule adopts most of the regulatory amendments set forth in the 2015 Proposed Rule except for a few provisions. In particular, USCIS, in response to public comments on the 2015 Proposed Rule, will eliminate the current provisional waiver provisions addressing ineligibility for: (1) Reason to believe that the applicant may be inadmissible on grounds other than unlawful presence at the time of the DOS immigrant visa interview (8 CFR 212.7(e)(4)(i)); (2) DOS initially acting before January 3, 2013 (for certain immediate relatives) or before the effective date of this final rule to schedule an applicant's immigrant visa interview (proposed 8 CFR 212.7(e)(4)(iv) and 212.7(e)(5)(ii)(G)); and (3) applicants who are subject to an administratively final order of exclusion, deportation, or removal (8 CFR 212.7(e)(4)(vi)).⁶⁵ An individual subject to a final order may now seek a provisional waiver, but only if he or she has already requested and been approved for consent to reapply for admission under INA section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii) via a Form I-212 application. Filing and receiving approval of the Form I-212 application is a requirement already in place for these individuals to be eligible for an immigrant visa.

Other than the changes outlined in this rulemaking, DHS will maintain all other eligibility requirements for the provisional waiver as currently described in 8 CFR 212.7(e), including the requirements to submit biometrics, pay the provisional waiver filing fee and the biometric services fee, and be

⁶⁴ See 80 FR 43338 (July 22, 2015).

⁶⁵ As mentioned earlier in this preamble, USCIS will automatically revoke a provisional waiver if DOS determines, at the time of the immigrant visa interview, that the applicant is inadmissible on any ground(s) of inadmissibility other than unlawful presence under INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). Revocation of the provisional unlawful presence waiver for this reason does not prevent an individual from applying under 8 CFR 212.7(a) for a waiver of inadmissibility under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), or for any other waiver that may be available for any other ground(s) of inadmissibility.

present in the United States at the time of the provisional waiver application filing and biometrics appointment.

This rule's amendments will provide more individuals seeking immigrant visas 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 applicants.

4. Current Provisional Waiver Process

In this analysis, DHS draws on applicable DOS visa ineligibility statistics and historical provisional waiver application data to estimate the current demand for provisional waivers and the anticipated demand directly resulting from this final rule. Illustrating the past demand for provisional waivers, Table 2 displays the actual numbers of Form I-601A receipts, approvals, and denials recorded for March of fiscal year (FY) 2013⁶⁶ through the end of FY 2015. Across those years, DHS received about 107,000 Form I-601A applications, for an average of almost 42,000 per year.⁶⁷ During the same period, DHS approved 66,000 Form I-601A applications and denied 27,000.⁶⁸

Of the provisional waiver applications adjudicated from FY 2013 to FY 2015, USCIS denied a total of 9 percent for the following reasons: An applicant's lack of a qualifying relative for the waiver's extreme hardship determination (0.8 percent);⁶⁹ reason to believe an applicant would be inadmissible based on grounds other than unlawful presence at the time of the immigrant visa interview (7.2 percent); DOS initially acting before January 3, 2013 to schedule an applicant's immigrant visa interview (0.1 percent); and an applicant being subject to a final order

⁶⁶ FY 2013 was October 1, 2012 to September 30, 2013.

⁶⁷ DHS calculated the average Form I-601A receipts per month since the provisional waiver process's implementation in March 2013 through the end of FY 2015, which equaled 3,467.65, and multiplied the average monthly receipts by 12 to determine the annual average.

⁶⁸ Approvals and denials reflect actual cases adjudicated, which do not directly correspond to filing receipts for the same year.

⁶⁹ Note that applicants denied for not having a qualifying U.S. citizen spouse or parent include those who could potentially have LPR spouses and/or parents who might experience extreme hardship as well as those who attempted to demonstrate hardship to a U.S. citizen child—a relative who is not a qualifying relative for the purposes of the unlawful presence waiver, provisional or not. The exact number of denials according to these different demonstrations is unknown. Source: Email correspondence with USCIS' National Benefits Center on November 24, 2015.

(0.9 percent).⁷⁰ With this final rule's elimination or modification of these ineligibility grounds, more individuals will presumably be eligible for provisional waivers.

The actual Form I-601A filing demands illustrated in Table 2 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 certain immediate relatives that would have allowed for a precise calculation of the rule's impact. Due to these limitations,

DHS instead estimated the rule's impact based on various demand scenarios. In the analysis for this final rule, DHS uses actual USCIS receipts for provisional waiver applications to determine the future demand for provisional waivers, as discussed later.

TABLE 2—HISTORICAL NUMBERS OF FORM I-601A RECEIPTS, APPROVALS, AND DENIALS

Fiscal year	Month	Receipts	Approvals	Denials	
2013	Mar.	1,306	0	0	
	Apr.	2,737	5	2	
	May	3,267	52	14	
	Jun.	3,119	226	238	
	Jul.	3,425	1,006	603	
	Aug.	3,075	1,435	790	
	Sep.	2,798	1,749	438	
	FY 2013 Total		19,727	4,473	2,085
	2014	Oct.	2,886	1,465	602
Nov.		2,697	1,456	562	
Dec.		2,641	1,708	532	
Jan.		2,256	1,616	780	
Feb.		2,483	1,282	579	
Mar.		2,990	1,216	987	
Apr.		3,266	1,363	996	
May		3,650	2,052	708	
Jun.		4,184	3,151	1,100	
Jul.		3,778	4,211	1,460	
Aug.		3,907	3,912	1,801	
Sep.		4,237	4,075	1,484	
FY 2014 Total		38,975	27,507	11,591	
2015	Oct.	4,540	4,196	1,469	
	Nov.	3,728	2,167	951	
	Dec.	4,103	2,838	1,180	
	Jan.	3,370	3,011	1,433	
	Feb.	3,402	2,986	1,381	
	Mar.	4,588	2,024	960	
	Apr.	4,176	2,966	1,138	
	May	4,030	2,708	934	
	Jun.	4,364	2,883	1,139	
	Jul.	4,162	2,712	946	
	Aug.	4,019	2,939	805	
	Sep.	4,313	2,880	733	
FY 2015 Total		48,795	34,310	13,069	
FY 2013–FY 2015 Total		107,497	66,290	26,745	
FY 2013–FY 2015 Annual Average ⁷¹		41,612	25,661	10,353	

Note: Approvals and denials reflect actual cases adjudicated, which do not directly correspond to filing receipts for the month.
Source: USCIS' Office of Performance and Quality.

Table 3 shows DOS's historical findings of immigrant visa ineligibility due to only unlawful presence inadmissibility grounds, which DOS revised for FY 2010 through FY 2014 following the 2015 Proposed Rule's

publication.⁷² Between FY 2010 and FY 2015, DOS recorded ineligibility due to only unlawful presence for almost 118,000 immediate relative visas and 24,000 all other immigrant visas.⁷³

Table 4 shows DOS's historical findings of immigrant visa ineligibility due to unlawful presence and any other inadmissibility ground barring visa eligibility.⁷⁴ DHS uses this population in part to estimate the number of

⁷⁰ Source: Email correspondence with USCIS' National Benefits Center on October 7, 2015 and December 7, 2015.

⁷¹ To determine these annual averages, DHS calculated the average Form I-601A receipts, approvals, and denials per month since implementation of the provisional unlawful presence waiver process in March 2013 through the end of FY 2015 and multiplied those averages by 12. The average monthly receipts equaled 3,467.65,

while approvals measured 2,138.39 and denials equaled 862.74.

⁷² DOS determined that the rules it used to collect the inadmissibility and ineligibility data included in the 2015 Proposed Rule resulted in errors. DOS has since revised its rules to correct the errors.

⁷³ Of the ineligibility figures recorded for the "all other immigrants" visa category, nearly 97 percent correspond to family-sponsored immigrant visa applications (which does not include applications

filed by immediate relatives of U.S. citizens), 2 percent correspond to employment-based immigrant visa applications, 1 percent correspond to Diversity Visa immigrant applications, and a fraction of 1 percent correspond to certain special immigrant visa applications.

⁷⁴ Other inadmissibility grounds barring visa eligibility can be found in INA section 212(a), 8 U.S.C. 1182(a).

immediate relatives who will become eligible for provisional waivers through this final rule's elimination or modification of certain provisional waiver ineligibilities currently in place.

TABLE 3—NUMBER OF IMMIGRANT VISA INELIGIBILITY FINDINGS DUE TO ONLY UNLAWFUL PRESENCE

Fiscal year	Visa category type		Total
	Immediate relatives ⁷⁵	All Other immigrants ⁷⁶	
2010	15,870	2,739	18,609
2011	18,569	5,043	23,612
2012	19,989	5,100	25,089
2013	10,136	4,126	14,262
2014	18,201	3,406	21,607
2015	34,801	3,522	38,323
Total	117,566	23,936	141,502
FY 2013–FY 2015 Annual Average	21,046	3,685	24,731

Source: Email correspondence with the U.S. Department of State's Bureau of Consular Affairs on December 2, 2015.

Population generally addressed in the 2013 Rule (certain immediate relatives of U.S. citizens). Population impacted by this rule, excluding immediate relatives.

TABLE 4—NUMBER OF IMMIGRANT VISA INELIGIBILITY FINDINGS DUE TO UNLAWFUL PRESENCE AND ANY OTHER GROUND OF INADMISSIBILITY (OR VISA INELIGIBILITY)

Fiscal year	Visa category type		Total
	Immediate relatives	All other immigrants	
2010	4,655	984	5,639
2011	4,679	1,768	6,447
2012	5,436	1,763	7,199
2013	3,891	1,471	5,362
2014	3,298	1,113	4,411
2015	4,323	1,087	5,410
Total	26,282	8,186	34,468
FY 2013–FY 2015 Annual Average	3,837	1,224	5,061

Source: Email correspondence with the U.S. Department of State's Bureau of Consular Affairs on December 2, 2015.

In the 2015 Proposed Rule, DHS based the demand for Form I-601A applications with and without the rule on the FY 2013 to FY 2014 average ratio of Form I-601A receipts to immigrant visa ineligibility findings based on unlawful presence inadmissibility grounds. Since the publication of the proposed rule, DOS provided DHS with revised data. Based on a review of the revised DOS ineligibility data, DHS has determined that using a year-specific ratio of receipts to ineligibility findings is no longer the best option to predict future provisional waiver demand because of recent changes in Form I-601A filing trends. DOS's new data suggests that the majority of immediate

relatives found ineligible for an immigrant visa by DOS based on unlawful presence inadmissibility grounds in one fiscal year have filed provisional unlawful presence waivers of inadmissibility prior to DOS's immigrant visa ineligibility finding, though the dates of these separate events is unknown. Because the time lag between such filings and ineligibility findings is unknown, making same-year comparisons between these data could result in erroneous conclusions. As such, DHS believes it is most appropriate to estimate the future demand for provisional waivers in the absence of this rule using historical Form I-601A filing data.

In the absence of this rule, DHS projects that Form I-601A receipts from immediate relative immigrants would increase from their three-year average of 41,612 (see Table 2) 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 2012.⁷⁷ Under this method, USCIS would receive a projected 478,000 provisional waiver applications across 10 years of analysis in the absence of this rule, as shown in Table 5.

⁷⁵ Population generally addressed in the 2013 Rule (certain immediate relatives of U.S. citizens).

⁷⁶ Population Impacted by this rule, excluding immediate relatives.

⁷⁷ Calculated by comparing the estimated unauthorized immigrant population living in the United States in 2000 (8,500,000) to 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, 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.

TABLE 5—PROJECTED NUMBER OF IMMEDIATE RELATIVE FORM I-601A APPLICATIONS IN THE ABSENCE OF RULE (POPULATION ADDRESSED IN 2013 RULE)

Fiscal year	Form I-601A Receipts—Immediate Relatives ⁷⁸
Year 1	42,652
Year 2	43,719
Year 3	44,812
Year 4	45,932
Year 5	47,080
Year 6	48,257
Year 7	49,464
Year 8	50,700
Year 9	51,968
Year 10	53,267
Total	477,851

Notes: The yearly estimates in this table were originally calculated using unrounded figures. Thereafter, all yearly estimates were simultaneously rounded for tabular presentation.

5. Population Affected by Rule

DHS does not believe this rule will induce any new demand above the status quo for filing petitions or immigrant visa applications for this expanded group of individuals. DHS bases this assumption on the fact that most of the newly eligible visa categories to which this rule will now apply (namely, family-sponsored, employment-based, diversity, and certain special immigrant visa categories) are generally subject, unlike the immediate relative category, to statutory visa issuance limits and lengthy visa availability waits due to oversubscription.⁷⁹ Even with this rule's elimination or modification of specific provisional waiver ineligibility criteria currently in place, DHS does not anticipate that a related rise in the demand for immigrant visas for immediate relatives of U.S. citizens will occur given the low historical share of applications denied for these reasons (approximately 9 percent as mentioned earlier). In addition, because immediate relative visas are readily available,

⁷⁸ Estimated number of provisional waiver applications from the eligible population of immediate relatives. These applications do not necessarily correspond to waiver approvals.

⁷⁹ Family-sponsored immigrant visa applicants, who represent nearly 97 percent of the "all other immigrants" population found ineligible due to only unlawful presence inadmissibility grounds, currently face visa oversubscription. This means that any new family-sponsored visa applicants must wait in line for available visas. Depending on the applicant's country of chargeability and preference category, this wait could be many years. Source: U.S. Department of State, "Visa Bulletin: Immigrant Numbers for December 2015," IX (87), Nov. 2015. Available at http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_December2015.pdf.

immediate relatives who were denied a provisional waiver previously have likely continued on with the consular interview process to obtain LPR status.⁸⁰ Therefore, DHS did not estimate that these immediate relatives would reapply for a provisional waiver. Furthermore, there is no evidence that the Secretary's November 2014 memorandum⁸¹ on the expansion of the provisional waiver process spurred a significant increase in filings of the Petition for Alien Relative (Form I-130) or Immigrant Petition for Alien Worker (Form I-140).⁸² Thus, DHS does not expect that this rule will increase the demand for the immigrant visa categories to which it applies.

With this rule's implementation, the number of provisional waiver applications is expected to increase from the figures listed in Table 5 as the provisional waiver eligibility criteria expands. This rule's broadened group of qualifying relatives for the provisional waiver's extreme hardship determination as well as its elimination or modification of current provisional waiver ineligibility provisions will allow some immediate relatives of U.S. citizens and LPRs to become eligible for provisional waivers. All other immigrant visa applicants⁸³ who are present in the United States and who otherwise meet the requirements of the provisional waiver process described in this final rule will also become eligible for provisional waivers.

⁸⁰ Immigrant visas for immediate relatives of U.S. citizens are unlimited, so they are always available. See INA section 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i). This means that immediate relatives do not have to wait in line for a visa number to become available for them to immigrate. Sources: U.S. Citizenship and Immigration Services, "Visa Availability and Priority Dates." Available at <http://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates> (last reviewed/updated Nov. 5, 2015).

⁸¹ See Memorandum from Jeh Charles Johnson, Secretary, DHS, to León Rodríguez, Director, USCIS, 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.

⁸² Based on a DHS comparison of Form I-130 and Form I-140 filings during the three months immediately following the Secretary's 2014 memorandum on the expansion of the provisional waiver program and during those same three months in FY 2013 and FY 2014.

⁸³ As previously mentioned, the phrase "all other immigrant visa applicants" encompasses the following immigrant visa categories: family-sponsored, employment-based, Diversity Visa, and (certain) special immigrant visa applicants. Examples of family relationships that fall under "all other immigrant visa applicants" 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.

Immediate Relatives Affected by Rule

Some immediate relatives of U.S. citizens were denied provisional waivers under the 2013 Rule because USCIS had "reason to believe" that they were subject to a ground of inadmissibility other than unlawful presence. Others were denied because they were subject to a final order. This rule eliminates denials based on the reason-to-believe standard and modifies the ineligibility criteria related to final orders, thus allowing additional immediate relatives to become eligible for provisional waivers. As previously mentioned, Table 4 shows DOS's historical findings of immigrant visa ineligibility among immediate relatives due to unlawful presence and any other ground for denying visa issuance, such as being subject to a final order.⁸⁴ DHS believes that the population of immediate relatives found ineligible for immigrant visas based on unlawful presence and any other ground of inadmissibility shown in Table 4 best predicts the share of immediate relatives affected by the elimination or modification of ineligibility criteria in this rule, as the DOS figures presumably account for these provisional waiver ineligibilities.⁸⁵ According to the FY 2013 to FY 2015 annual average number of immediate relatives found ineligible for visas based on unlawful presence and any other ground of inadmissibility (and visa ineligibility) (3,837; see Table 4), and the historical 2.5 percent growth in the unauthorized immigrant population, DHS estimates that 3,933 immediate relatives will become eligible, and consequently apply, for provisional waivers as a direct result of this rule's expanded waiver eligibility during the rule's first year of implementation (see Table 6).

Table 6 shows that over a 10-year period of analysis, USCIS will receive approximately 44,000 provisional waiver applications from immediate relatives now eligible for provisional waivers based on this rule's elimination or modification of specific provisional

⁸⁴ Other grounds of inadmissibility barring visa eligibility can be found in INA section 212(a), 8 U.S.C. 1182(a).

⁸⁵ These ineligibility findings likely include the previously discussed 9 percent of historical Form I-601A applicants denied for the following reasons: an applicant's lack of a qualifying relative for the waiver's extreme hardship determination; reason to believe an applicant would be inadmissible based on grounds other than unlawful presence at the time of the immigrant visa interview; DOS initially acting before January 3, 2013 to schedule an applicant's immigrant visa interview; and an applicant being subject to a final order. However, due to data limitations, DHS does not know the exact number of ineligibility findings that correspond to provisional waiver denials.

waiver ineligibility criteria. These figures reflect the assumption that the population of individuals historically found ineligible for immigrant visas based on unlawful presence and any other ground of inadmissibility will apply for provisional waivers even though they may still be inadmissible on another ground that would bar them from receiving an immigrant visa. However, these figures do not account for immediate relatives of U.S. citizens and LPRs who could become eligible for provisional waivers through this rule's broadened group of qualifying relatives for the provisional waiver's extreme hardship determination and its elimination of DOS scheduling date requirements. Due to data limitations, DHS cannot precisely measure the number of individuals impacted by these amendments, though based on historical denials, the number impacted will likely be small.⁸⁶

Due to additional data limitations, DHS cannot determine the exact number of immediate relatives eligible to apply for provisional waivers under the 2013 Rule who either continued taking steps necessary to obtain LPR status or who abandoned the immigrant visa process altogether after being denied provisional waivers for the ineligibility criteria eliminated or modified with this rule (e.g., DOS scheduling date requirements). DHS assumes for the purpose of this analysis that those immediate relatives who applied for provisional waivers prior to this final rule but were denied for the criteria eliminated or modified with this rule have continued taking the steps necessary to obtain LPR status rather than delay their immigration process. These individuals have likely sought waivers of the unlawful presence grounds of inadmissibility through the Form I-601 waiver process as part of obtaining their LPR status. For these reasons, DHS does not believe this rule will affect certain immediate relatives of U.S. citizens previously denied provisional waivers due to this rule's eliminated or modified criteria, and thus does not consider these individuals in the population affected by this rule. As such, Table 6 does not include these individuals.

⁸⁶ Of the provisional waiver applications adjudicated from FY 2013 to FY 2015, USCIS denied less than 1,000 applications in total based on an applicant's lack of a qualifying relative for the waiver's extreme hardship determination and for DOS initially acting before January 3, 2013 to schedule an applicant's immigrant visa interview. Source: Email correspondence with USCIS' National Benefits Center on October 7, 2015 and December 7, 2015.

TABLE 6—PROJECTED NUMBER OF IMMEDIATE RELATIVE FORM I-601A APPLICATIONS RESULTING FROM RULE

Fiscal year	Form I-601A Receipts—immediate relatives newly eligible for provisional waiver under rule ⁸⁷
Year 1	3,933
Year 2	4,031
Year 3	4,132
Year 4	4,235
Year 5	4,341
Year 6	4,450
Year 7	4,561
Year 8	4,675
Year 9	4,792
Year 10	4,912
Total	44,062

Notes: The yearly estimates in this table were originally calculated using unrounded figures. Thereafter, all yearly estimates were simultaneously rounded for tabular presentation.

All Other Immigrants Affected by Rule

In addition to the population of immediate relatives illustrated in Table 6, this rule will affect a portion of all other immigrant visa applicants. To capture the population of all other immigrant visa applicants (that is, those who are not immediate relative immigrant visa applicants) that may file for a provisional waiver due to this rule, DHS uses the following historical data: (1) DOS immigrant visa ineligibility findings due to only unlawful presence inadmissibility grounds (the population included in the 2015 Proposed Rule); (2) DOS immigrant visa ineligibility findings due to unlawful presence and any other inadmissibility ground (the population potentially now included in this final rule); and (3) growth in the unauthorized immigrant population. In particular, DHS applies the previously discussed 2.5 percent compound annual growth rate of unauthorized immigrants from 2000 to 2012 to the sum of the FY 2013 to FY 2015 annual averages of all other immigrant visa ineligibility findings due to: (1) Only unlawful presence inadmissibility grounds; and (2) unlawful presence and any other inadmissibility ground, which equals 4,909 (see Table 3 and Table 4).⁸⁸ For

⁸⁷ Estimated number of provisional waiver applications from the population of immediate relatives inadmissible due to unlawful presence and any other immigrant visa inadmissibility ground. These applications do not necessarily correspond to waiver approvals.

⁸⁸ Calculated as the FY 2013–FY 2015 average number of all other immigrant visa ineligibility

Year 1, DHS projects that Form I-601A applications from the population of all other immigrants now eligible for provisional waivers will measure approximately 5,032. For Years 2 through 10, applications are expected to range from 5,158 to 6,284 (see Table 7).⁸⁹ These figures partly reflect the assumption that the population of individuals historically found ineligible for immigrant visas based on unlawful presence and any other ground of inadmissibility will apply for provisional waivers even though they may still be inadmissible on another ground that would bar them from receiving an immigrant visa.

TABLE 7—PROJECTED NUMBER OF ALL OTHER IMMIGRANT FORM I-601A APPLICATIONS RESULTING FROM RULE

Fiscal year	Form I-601A receipts— all other immigrants ⁹⁰
Year 1	5,032
Year 2	5,158
Year 3	5,286
Year 4	5,419
Year 5	5,554
Year 6	5,693
Year 7	5,835
Year 8	5,981
Year 9	6,131
Year 10	6,284
Total	56,373

Notes: The yearly estimates in this table were originally calculated using unrounded figures. Thereafter, all yearly estimates were simultaneously rounded for tabular presentation.

Total Population Affected by Rule

Table 8 outlines the entire population of immigrant visa applicants potentially impacted by this rule, as measured by the sum of Form I-601A receipts listed in Table 6 and Table 7. Across a 10-year period of analysis, DHS estimates that the provisional waiver applications from this rule's expanded population of individuals (including immediate relatives of U.S. citizens and LPRs, and

findings due to only unlawful presence (3,685) plus the FY 2013–FY 2015 average number of all other immigrant visa ineligibility findings due to unlawful presence and any other ground of inadmissibility (1,224) = 4,909.

⁸⁹ Year 1 figure calculated as the FY 2013–FY 2015 average number of all other immigrant visa ineligibility findings due to: (1) Only unlawful presence, and (2) unlawful presence and any other ground of inadmissibility of 4,909 multiplied by the assumed 2.5 percent growth rate (that is, 1.025), which equals 5,032.

⁹⁰ Estimated number of provisional waiver applications from the population of all other immigrants ineligible due to: (1) Only unlawful presence; and (2) unlawful presence and any other ground of inadmissibility. These applications do not necessarily correspond to waiver approvals.

family-sponsored, employment-based, Diversity Visa, and (certain) special immigrant visa applicants) will be nearly 100,000. These provisional waiver applications may ultimately result in waiver approvals or denials. Note that Table 8 presents only the additional Form I-601A filings that will occur as a result of this rule; it does not account for the provisional waiver applications that DHS anticipates will be filed in the absence of this rule by currently eligible certain immediate relatives of U.S. citizens (see Table 5). As stated earlier, the figures in Table 8 may underestimate the total Form I-601A applications resulting from this rule because they do not account for immediate relatives of U.S. citizens and LPRs who could become eligible for provisional waivers through this rule's broadened group of qualifying relatives for the provisional waiver's extreme hardship determination and its elimination of DOS scheduling date requirements. They could also overestimate the total Form I-601A applications resulting from this rule because they are partly based on the assumption that the population of individuals historically found ineligible for immigrant visas based on unlawful presence and any other ground of inadmissibility will apply for provisional waivers even though they may still be inadmissible on another ground that would bar them from receiving an immigrant visa.

under this rule will bear the costs of this regulation. Although the waiver expansion may require the Federal Government (namely, DHS and USCIS) to expend additional resources on related adjudication personnel, equipment (e.g., computers and telephones), and occupancy demands, DHS expects these costs to be offset by the additional fee revenue collected from the Form I-601A filing fee and the biometric services fee. Currently, the filing fees for Form I-601A and biometric services are \$585 and \$85, respectively.⁹¹ Accordingly, DHS does not believe this rule will impose additional net costs on the Federal Government.

With the exception of applicants subject to final orders,⁹² eligible individuals must generally first complete Form I-601A and submit it to USCIS with its current \$585 filing fee and \$85 biometric services fee to receive a provisional waiver under this rule. DHS estimates the time burden of completing Form I-601A to be 1.5 hours, which translates to a time, or opportunity, cost of \$15.89 per application.⁹³ DHS calculates the Form I-601A application's opportunity cost to individuals 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.⁹⁴ 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 individuals to complete Form I-601A (\$15.89). DHS recognizes that the individuals 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 individuals associated with completing this rule's required application and biometrics collection. The cost for applicants to initially file Form I-601A, including only the \$585 filing fee and opportunity cost, equals \$600.89.

After USCIS receives an applicant's completed Form I-601A and its filing and biometric services fees, the agency sends the applicant 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 will incur the following costs to comply with the provisional waiver's biometrics submission requirement: (1) The opportunity cost of traveling to an ASC, (2) the opportunity cost of submitting his or her biometrics, and (3) the mileage cost of traveling to an ASC. While travel times and distances to an ASC 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 estimates that an applicant 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.⁹⁵ By applying the \$10.59 hourly time value for individuals to the total biometrics-related time burden of 3.67 hours, DHS finds that the opportunity cost for a provisional waiver applicant to travel to and from an ASC, and to submit biometrics, will total \$38.87.⁹⁶ In addition to the opportunity cost of providing biometrics, provisional waiver applicants will experience travel costs related to biometrics collection. The cost of such travel will equal \$28.75 per trip, based on the assumed 50-mile

TABLE 8—TOTAL FORM I-601A APPLICATIONS RESULTING FROM RULE

Fiscal year	Form I-601A receipts
Year 1	8,965
Year 2	9,189
Year 3	9,418
Year 4	9,654
Year 5	9,895
Year 6	10,143
Year 7	10,396
Year 8	10,656
Year 9	10,923
Year 10	11,196
Total	100,435

Notes: The yearly estimates in this table were originally calculated using unrounded figures. Thereafter, all yearly estimates were simultaneously rounded for tabular presentation.

All public comments about specific elements of the projections, costs, or benefits of the rule are discussed earlier in the preamble.

6. Costs and Benefits

Costs

Individuals who are newly eligible to apply for a provisional waiver strictly

⁹¹ Source of fee rates: U.S. Citizenship and Immigration Services. "I-601A, Application for Provisional Unlawful Presence Waiver." Available at <http://www.uscis.gov/i-601a> (last reviewed/updated Oct. 7, 2015). The Form I-601A filing fee and biometric services fee are subject to change through the normal fee review cycle and any subsequent rulemaking issued by USCIS/DHS. USCIS/DHS 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).

⁹² As previously stated, individuals subject to a final order may now seek a provisional waiver only if they also request (and are approved for) consent to reapply for admission under INA section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii) via an Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212). Filing and receiving approval for a Form I-212 is a requirement already in place for individuals subject to inadmissibility under INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A), to be eligible for an immigrant visa. Thus, USCIS does not include the cost to file Form I-212 to the applicable population of provisional waiver applicants in this rule.

⁹³ See 80 FR 16688 (Mar. 30, 2015) for the estimated Form I-601A completion time burden.

⁹⁴ Federal minimum wage information source: U.S. Department of Labor, Wage and Hour Division. "Wages- Minimum Wage." Available at <http://www.dol.gov/dol/topic/wages/minimumwage.htm>

(last accessed Dec. 7, 2015). Employer benefits adjustment information source: U.S. Department of Labor, Bureau of Labor Statistics. "Economic News Release: Employer Costs for Employee Compensation- September 2015, 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 2015- All Workers." Dec. 9, 2015. Available at http://www.bls.gov/schedule/archives/ecec_nr.htm#current.

⁹⁵ See 80 FR 16688 (Mar. 30, 2015) for Form I-601A biometrics collection time burden.

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

roundtrip distance to an ASC and the General Services Administration's travel rate of \$0.575 per mile.⁹⁷ DHS assumes that each applicant will travel independently to an ASC to submit his or her biometrics, meaning that this rule will impose a time cost on each provisional waiver applicant. Adding the fee, opportunity, and travel costs of biometrics collection together, DHS estimates that the provisional waiver's requirement to submit biometrics will cost a total of \$152.62 per Form I-601A filing.

Accounting for all of the fee, time, and travel costs to comply with the provisional waiver requirements, DHS finds that each Form I-601A filing will cost an applicant \$753.51. Table 9 shows that the overall cost of this rule to the expanded population of provisional waiver applicants will measure \$75.7 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 individuals projected to apply for provisional waivers each year following the implementation of this rule (see Table 8). In present value terms, this rule will cost newly eligible waiver applicants \$52.4 million to \$64.2 million across a 10-year period at 7 percent and 3 percent discount rates, respectively (see Table 9). Because this rule will not generate any net costs to the Federal Government (as discussed previously), these costs to applicants also reflect the total cost of this rule. Depending on the population of individuals who apply for provisional waivers beyond the projections shown in Table 8, the costs of this rule may be over- or underestimated.

TABLE 9—TOTAL COST OF RULE TO APPLICANTS/TOTAL COST OF RULE

Fiscal year	Total waiver cost to applicants/ total cost of rule
Year 1	\$6,755,217
Year 2	6,924,003
Year 3	7,096,557
Year 4	7,274,386
Year 5	7,455,981
Year 6	7,642,852
Year 7	7,833,490
Year 8	8,029,403
Year 9	8,230,590

⁹⁷ 50 miles multiplied by \$0.575 per mile equals \$28.75. See 79 FR 78437 (Dec. 30, 2014) for the General Services Administration's mileage rate.

TABLE 9—TOTAL COST OF RULE TO APPLICANTS/TOTAL COST OF RULE—Continued

Fiscal year	Total waiver cost to applicants/ total cost of rule
Year 10	8,436,298
10-Year Total: Undiscounted	75,678,777
10-Year Total: Present Value, Discounted at 3 percent	64,168,205
10-Year Total: Present Value, Discounted at 7 percent	52,429,216

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.

Benefits

The benefits of this rule are largely the result of streamlining the immigrant visa process for an expanded population of individuals who are inadmissible to the United States due to unlawful presence. This rule will provide applicants seeking provisional waivers and their family members advance notice of USCIS' decision on their provisional waiver application prior to leaving the United States for their immigrant visa interviews abroad, offering many individuals the certainty of knowing they have been provisionally approved for a waiver of certain unlawful presence grounds of inadmissibility before departing from the United States. For those newly eligible individuals who receive a provisional waiver through this rule and their U.S. citizen or LPR family members, this rule's primary benefits are its reduced separation time among family members during 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 process, the provisional waiver process allows individuals to file a provisional waiver application while in the United States and receive a notification of USCIS' decision on their provisional waiver application before departing for DOS consular processing of their immigrant visa applications. Although DHS cannot estimate with precision the exact amount of separation time families will save through this rule, DHS estimates that some newly eligible individuals 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.⁹⁸ 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 immigrant 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, individuals 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 others. Although an individual 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 rule, Diversity Visa selectees and their derivatives who wish to use the provisional waiver process may file a waiver application before knowing whether their immigrant visa will ultimately be available to them. For those 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.⁹⁹ 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 will incur the costs but not obtain the benefits associated with a provisional waiver.

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. As previously

⁹⁸ The average adjudication time of Form I-601 waivers is currently over five months. Source: U.S. Citizenship and Immigration Services. "USCIS Processing Time Information for the Nebraska Service Center-Form I-601." Available at <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (last updated Feb. 11, 2016).

⁹⁹ There is a statutory maximum of 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>.

described in the 2013 Rule, the provisional waiver process allows USCIS to communicate to DOS the status of the waiver application prior to an applicant's immigrant visa interview abroad. Such early communication eliminates the current need to transfer cases repeatedly between USCIS and DOS when adjudicating an immigrant visa application and Form I-601.¹⁰⁰ Through the provisional waiver process, DOS receives advance notification from USCIS of the discretionary decision to provisionally waive certain unlawful presence inadmissibility bars, allowing for better allocation of valuable agency resources like time, storage space, and human capital.

D. Executive Order 13132

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

E. Executive Order 12988 Civil Justice Reform

Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DHS has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting and recordkeeping requirements inherent in a rule. See 44 U.S.C. 3507. This final rule requires that an applicant seeking a provisional waiver complete an *Application for Provisional Unlawful Presence Waiver*, Form I-601A, (OMB Control Number 1615-0123). This form is considered an information collection and is covered under the PRA. USCIS is currently seeking OMB approval of revisions that this final rule is causing to this information collection instrument. DHS specifically requested

public comments on the proposed changes to the Application for Provisional Unlawful Presence Waiver, Form I-601A, and the form instructions in the proposed rule in accordance with 5 CFR 1320.11(a). OMB reviewed the request filed in connection with the proposed rule and also filed comments in accordance with 5 CFR 1320.11(c).

1. Comments on the Information Collection

DHS received several comments from the public directly related to the revised form and its instructions, and, in accordance with 5 CFR 1320.11(f), DHS has considered the comments, provided detailed responses to the comments on the form, and explained any modifications it has made in its submission to OMB. The comments and responses are summarized below.

a. The General Need for a Standardized Application Form

One commenter requested that USCIS adjudicate provisional waiver requests without requiring use of a specific form. The commenter believed requiring the completion of a standardized form effectively requires applicants to retain an immigration attorney, who may exploit them.

DHS has not accepted the suggestion. USCIS forms are generally designed for use by the public in a manner that standardizes the collection of necessary information and streamlines the adjudication of immigration benefits, which benefits both USCIS and applicants. Lack of a standardized information collection document, as well as the acceptance of ad hoc requests, could cause confusion and processing delays that adversely impact both USCIS and applicants. Standardized intake methods and forms help USCIS streamline processing requirements and minimize its costs, thereby moderating the fees it must charge for immigration benefit requests.

b. Form I-601A, Information About Your Immigrant Visa Petition or Your Immigrant Visa Case

DHS received several suggestions for improving the section of the form collecting information about the applicant's immigrant visa petition. Two commenters asked USCIS to include a section for applicants on Form I-601¹⁰¹ to indicate the name of the employer, sponsor, or petitioner. One of those commenters requested that the form include a section for applicants to submit information about approved

Immigration Petitions for Alien Worker, Forms I-140, particularly for beneficiaries under the employment-based third preference (EB-3) category.

DHS will not adopt this suggestion because it appears to be related to Form I-601 and not Form I-601A, the form used for this rule. Form I-601A already includes questions about the name of the petitioning employer or sponsor. See Part 3, Information About Your Immigrant Visa Petition and Your Immigrant Visa Case, Item Numbers 3 through 6 of Form I-601A.

Two commenters wanted to ensure that derivative spouses of principal beneficiaries are eligible for the provisional waiver. They requested that USCIS specifically ask whether the individual is filing this application based on an approved Form I-140 petition as a derivative spouse of the primary beneficiary and to provide the USCIS receipt number for the Form I-140 petition.

DHS agrees with the need to collect additional information, as suggested by the commenters, in light of this final rule's extension of eligibility for the provisional waiver to spouses and children who accompany or follow to join principal immigrants. DHS has added questions to Form I-601A about derivative spouses or children that should address the concern raised by the commenters.

c. Form I-601A, Date of Entry and Place or Port of Entry

One commenter suggested that Form I-601A applicants should be permitted to use approximate dates and places of entry when filling out the form, rather than only specific dates or places of entry. The commenter reasoned that it may be difficult for some applicants, especially those who entered at a young age or without lawful status, to specify an exact entry date or place.

Consistent with these comments, DHS has revised Part 1 of Form I-601A to permit applicants to provide approximate dates and places of entry, if necessary. Specifically, DHS added the phrase "on or about" to "Date of Entry (mm/dd/yyyy)" and "(actual or approximate)" after "Place or Port-of-Entry (City or Town)."

d. Form I-601A, and Instructions, Certain Inadmissibility and Criminal History Issues

One commenter requested that USCIS should not require Form I-601A applicants to provide all related court dispositions regarding criminal history if the disclosure of such court dispositions is prohibited by state law. The commenter was concerned that

¹⁰⁰ See 78 FR 536 (Jan. 3, 2013).

¹⁰¹ Both commenters referred to Form I-601 rather than Form I-601A.

such a requirement would effectively ask applicants to violate state confidentiality laws or request records that may be impossible to obtain.

DHS did not adopt this suggestion. DHS does not believe that an individual's request for his or her own court dispositions, and the subsequent disclosure of that information to USCIS, would violate confidentiality laws. Although state confidentiality laws may make it improper for a clerk of court to release information about a case to a third party, such laws do not prohibit the subjects of those proceedings from obtaining information about themselves.¹⁰² USCIS may request any evidence relevant to the adjudication of an immigration benefit, including court records, when needed to assess the applicant's eligibility for the benefit. USCIS often requires court records to assess an applicant's eligibility for a provisional waiver, as well as to determine whether the applicant merits the waiver as a matter of discretion.

e. Form I-601A, Statement From Applicant

A commenter suggested that USCIS add questions related to hardship that would allow officers to quickly determine whether a threshold level of extreme hardship has been demonstrated. The commenter cited the Application for Suspension of Deportation or Special Rule Cancellation of Removal, Form I-881, as an example of a form that poses specific questions related to the establishment of extreme hardship.

DHS has not accepted this suggestion. Although Form I-881 includes questions relating to potential hardship, that form—unlike the provisional waiver application (and the statutory inadmissibility waiver grounds upon which it is based)—is used solely to adjudicate relief under NACARA, and thus utilizes questions generally tracking pertinent regulations outlining hardship factors that may be considered under the NACARA program. *See* 8 CFR 240.64; 8 CFR 1240.58(b). Because similar regulations do not exist in the provisional waiver context, DHS does not believe that adding specific hardship questions to Form I-601A is appropriate. Among other things, such questions may be understood as setting the contours of the extreme hardship determination in the provisional waiver context, which may unintentionally lead applicants to restrict the types of

evidence they submit to establish extreme hardship. Moreover, DHS notes that USCIS does provide, in the relevant form instructions, a list of non-exclusive factors that may be considered in making extreme hardship determinations. *See* Instructions to Form I-601 and Form I-601A.

f. Form I-601A Instructions, Criminal History Issues

One commenter suggested clarifications to the Form I-601A instructions regarding documentation of criminal history in two scenarios: those involving brief detentions and those where criminal records do not exist. First, the commenter suggested a change to the instructions to clarify that the relevant documentation requirements do not apply to an applicant unless he or she has been arrested for, or charged with, a criminal offense (*i.e.*, not individuals who were simply stopped or questioned by law enforcement authorities). Second, the commenter suggested a change to the instructions to clarify that an applicant may submit documents from a relevant court to show the lack of criminal charge or prosecution. To accomplish these two suggestions, the commenter recommended amending the instructions by inserting the following underlined text (and deleting the following text that has been struck through) in the instruction for Item Number 31: "For Item Number 31, if you were *arrested but* not charged with any crime or offense, provide a statement or other documentation from the arresting authority, or prosecutor's office, *or court, if available*, to show that you were not charged with any crime or offense."

In response to these suggestions, DHS has inserted the words "arrested but" and "or court" into the relevant instruction as suggested by the commenter. DHS agrees that the insertion of this language would provide additional clarity to applicants. DHS, however, did not add the words "if available" as suggested by the commenter, because USCIS believes it is self-evident that documents cannot be provided if they are not available. In this final rule, USCIS has provided applicants with various ways to prove the absence of a criminal conviction without necessarily specifying or limiting the types of documents USCIS will consider.

g. Form I-601A Instructions, Purpose of Form I-601A

A commenter suggested adding language to the Form I-601A instructions clarifying the categories of

individuals who may be eligible to apply for provisional waivers under this rule. Specifically, the commenter suggested adding the following underlined text to ensure that certain individuals are eligible to apply for provisional waivers: "Certain immigrant visa applicants who are relatives of U.S. citizen or Lawful Permanent Residents (LPRs); *family-sponsored immigrants; employment-based immigrants; special immigrants; and participants in the Diversity Visa Program* may use this application to request a provisional waiver of the unlawful presence grounds."

DHS has not adopted this suggestion. DHS believes the pre-existing language accurately captures those who have the requisite family relationships to apply for provisional waivers, including those who have become newly eligible to apply under this rulemaking. DHS believes the additional language suggested by the commenter could be read to imply that an applicant is not required to have the requisite relationship with a U.S. citizen or LPR in order to apply for a provisional waiver. DHS has thus not amended this portion of the Form I-601A instructions.

h. Form I-601A Instructions, Who May File

One commenter suggested that DHS add language to the Form I-601A instructions stating that individuals who are not immediate relatives and who filed more than one Form I-601A application are still eligible to file a subsequent Form I-601A application even if DOS acted, before the effective date of this rule, to schedule their first immigrant visa interview.

DHS has not adopted this suggestion. As noted previously, this final rule eliminates the regulatory provisions that make individuals ineligible for provisional waivers depending on the date on which DOS initially acted to schedule their immigrant visa interviews. Therefore, the commenter's suggested amendment is now unnecessary.

i. Form I-601A Instructions, Can I file other forms with Form I-601A?

One commenter suggested adding text to the Form I-601A instructions indicating that an applicant may request electronic notification of USCIS acceptance of the filing of Form I-601A by filing Form G-1145, E-Notification of Application/Petition Acceptance, along with Form I-601A.

DHS adopted this suggestion.

¹⁰² For example, California state law specifies that individuals can obtain a copy of their own case files and can subsequently disclose such records freely. *See* Cal. Welf. & Inst. Code § 827(a)(1)(C) and (5).

j. Form I-601A Instructions, General Instructions

One commenter suggested changes to the Form I-601A instructions to make it easier for individuals with a physical or developmental disability or mental impairment to request waivers. Specifically, the commenter recommended replacing the portion of the Form I-601A instructions concerning the ability of a legal guardian to sign for a mentally incompetent individual with the following: "A designated representative may sign if the requestor is unable to sign due to a physical or developmental disability or mental impairment."

DHS has not adopted this suggestion, as the Department believes that current regulations are sufficient to address the commenter's concerns. First, current regulations provide that a legal guardian may sign for an individual who is mentally incompetent. See 8 CFR 103.2(a)(2). Second, even if no legal guardianship has been established, applicants with disabilities have various options for affecting signatures. Under USCIS policy, a valid signature does not need to be legible or in English, and it may be abbreviated provided it is consistent with the manner in which the individual normally signs his or her name. An individual who is unable to write in any language may place an "X" or similar mark in lieu of a signature. DHS believes existing regulations already address the commenters concern and did not adopt the suggestion.

k. Form I-601A Instructions, General Instructions

One commenter requested that DHS include an example of a translation certification in the Form I-601A instructions.

DHS did not adopt this suggestion. Regulations require that any document containing foreign language submitted to USCIS must be accompanied by (1) a full English language translation that the translator has certified as complete and accurate, and (2) the translator's certification that he or she is competent to translate from the foreign language into English. See 8 CFR 103.2(b)(3). DHS believes the regulation is sufficiently clear, and the Department is worried that providing an example translation certification will be understood by applicants as a required form, thus effectively limiting options for obtaining translation services.

l. Form I-601A Instructions, Specific Instructions

One commenter suggested providing applicants with additional instructions

to help clarify when individuals are deemed to be admitted or to have entered without inspection.

Specifically, the commenter suggested that DHS replace the term "EWI" (entry without inspection) with "no lawful status" in the Form I-601A instructions and to add a note to the instructions indicating that applicants without lawful status who entered at a port of entry may have nevertheless entered pursuant to inspection and admission. The commenter, citing to the decision of the Board of Immigration Appeals at *Matter of Quilantan*, 25 I. & N. Dec. 285 (BIA 2010), stated that an individual without lawful status who is nevertheless permitted to enter the United States at a port of entry may be "admitted," even if the inspection at the port did not comply with substantive legal requirements and there is no record of the individual having been admitted in any particular status.

DHS has not adopted these suggestions. DHS believes that the form instructions are sufficiently clear for applicants to appropriately answer all relevant questions. DHS does not believe it is necessary to add reminders or warnings on the issue raised by the commenter, as DHS does not believe that an applicant will erroneously state that he or she is present without admission or parole.

m. Form I-601A Instructions, Immigration or Criminal History

One commenter requested that the Form I-601A instructions be amended to provide information about grants of voluntary departure and how such grants affect the provisional waiver process. Specifically, the commenter requested that the instructions include a provision specifying that an immigration judge may grant voluntary departure, or dismiss or terminate removal proceedings, prior to the applicant leaving the United States for immigrant visa processing.

DHS has not adopted this suggestion, as an individual granted voluntary departure is not eligible for a provisional waiver. USCIS, however, modified Form I-601A by including a question asking whether the applicant has been granted voluntary departure. USCIS also made corresponding amendments in the form instructions.

n. Form I-601A Instructions, Penalties

One commenter asserted that USCIS established an overly broad standard for denying Form I-601A applications, as well as other immigration benefits, due to the submission of false documents with such applications. To address this concern, the commenter suggested that

the Form I-601A instructions be amended to indicate that applications will be denied only if the applicants submit "materially" false documents.

DHS has not adopted the commenter's suggestion, as there are existing statutory requirements regarding the use of false documents. DHS, however, has modified the relevant language in the form instructions to more closely match the language of 8 U.S.C. 1324c and 18 U.S.C. 1001(a), which relate to civil and criminal penalties for the use of false documents to defraud the U.S. Government or obtain an immigration benefit. The new language reads, "If you knowingly and willfully falsify or conceal a material fact or submit a false, altered, forged, or counterfeited writing or document with your Form I-601A, we will deny your Form I-601A and may deny any other immigration benefit."

2. Changes to the Information Collection (OMB Control No. 1615-0123)

DHS has revised the Form I-601A as indicated in the preceding responses. The revised form and instructions are available for review at <http://www.reginfo.gov/public/do/PRAMain> under OMB control number 1615-0123, or at <https://www.regulations.gov/#/home> in docket USCIS-2012-0003.

As a result of the final rule's elimination or modification of certain provisional waiver eligibility criteria, and a result of newer and better data and historical source data revisions,¹⁰³ DHS has updated the supporting statement for the Form I-601A. The update reflects changes in the respondent estimates that USCIS projected in the 2015 Proposed Rule. In the 2015 Proposed Rule, DHS estimated that approximately 10,258 new respondents would file applications for provisional waivers because of the changes proposed by the rule. DHS also estimated that 42,707 individuals currently eligible for provisional waivers would file Form I-601 applications in the future. DHS has revised these estimates, projecting that approximately 9,191 new respondents will file applications for provisional waivers because of the changes in this final rule and 43,728 individuals currently eligible for provisional waivers will file Form I-601 applications in the future. With these changes in the number of Form I-601A applications, the estimate for the total number of respondents has been

¹⁰³ DOS determined that its rules used to collect the inadmissibility data included in the 2015 Proposed Rule resulted in errors. DOS has since revised its rules to correct the errors.

updated from 52,965 to 52,918, which represents a decrease of 47 respondents. The current burden hour inventory approved for this form is 141,417 hours, and the requested new total hour burden is 141,292 hours. This revision reflects an increase (47,841 annual burden hours) in the annual burden hours previously reported for this information collection.

Overview of this information collection (OMB Control Number 1615–0123):

(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 are: (a) Immigrant visa applicants, including (1) immediate relatives, (2) individuals seeking to immigrate under a family-sponsored, employment-based, or special immigrant visa category, or (3) Diversity Visa selectees and derivatives; and (b) applying from within the United States for a provisional waiver under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(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 52,918 and the estimated hour burden per response is 1.5 hours; and 52,918 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 141,292 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 \$1,496,282.

G. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules.

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

DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this rule directly regulates individuals, who are not, for purposes of the Regulatory Flexibility Act, within the definition of small entities established by 5 U.S.C. 601(6). DHS received no public comments challenging this certification.

List of Subjects

Accordingly, DHS adopts the regulatory amendments proposed on July 22, 2015. In addition, DHS modifies certain provisions based on comments received in response to the proposed rule so that chapter I of title 8 of the Code of Federal Regulations reads as follows:

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.

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), (b)(6) and (7), and (b)(9) 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 “A 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, Pub. L. 110–229, 122 Stat. 754, 854.

■ 4. Section 212.7 is amended by:

■ a. Removing the paragraph (a) subject heading; and

■ b. Revising paragraph (e).

The revision reads 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.

(1) *Jurisdiction.* USCIS has exclusive jurisdiction to grant a provisional unlawful presence waiver under this paragraph (e). An alien applying for a provisional unlawful presence waiver must file with USCIS the form designated by USCIS, with the fees prescribed in 8 CFR 103.7(b), and in accordance with the form instructions.

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

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

(3) *Eligible aliens.* Except as provided in paragraph (e)(4) of this section, an alien may be eligible to apply for and receive a provisional unlawful presence waiver for the grounds of inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act if he or she meets the requirements in this paragraph. An alien may be eligible to apply for and receive a waiver if he or she:

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

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

(i) The alien is under the age of 17;

(ii) 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;

(iii) The alien is in removal proceedings, in which no final order has been entered, 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;

(iv) The alien is subject to an administratively final order of removal, deportation, or exclusion under any provision of law (including an *in absentia* order under section 240(b)(5) of the Act), unless the alien has already filed and USCIS has already granted,

before the alien applies for a provisional unlawful presence waiver under 8 CFR 212.7(e), an application for consent to reapply for admission under section 212(a)(9)(A)(iii) of the Act and 8 CFR 212.2(j);

(v) CBP or ICE, after service of notice under 8 CFR 241.8, has reinstated a prior order of removal under section 241(a)(5) of the Act, either before the filing of the provisional unlawful presence waiver application or while the provisional unlawful presence waiver application is pending; or

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

(5) *Filing.* (i) An alien must file 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 on the form designated by USCIS, in accordance with the form instructions, with the fee prescribed in 8 CFR 103.7(b), and with the evidence required by the form instructions.

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

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

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

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

(D) Is under the age of 17;

(E) Does not include evidence of:

(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.

(6) *Biometrics.* (i) All aliens who apply for a provisional unlawful

presence waiver under this section will be required to provide biometrics in accordance with 8 CFR 103.16 and 103.17, as specified on the form instructions.

(ii) *Failure to appear for 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.* (i) 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.

(ii) 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).

(11) *Appeals and motions to reopen.*

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

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

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

(A) Departs from the United States;

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

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

(ii) Waives, upon satisfaction of the conditions described in paragraph (e)(12)(i), 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;

(iii) Does not waive any ground of inadmissibility other than, upon satisfaction of the conditions described in paragraph (e)(12)(i), the grounds of inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act.

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

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

(i) The Department of State denies the immigrant visa application after

completion of the immigrant visa interview based on a finding that the alien is ineligible to receive an immigrant visa for any reason other than inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act. This automatic revocation does not prevent the alien from applying for a waiver of inadmissibility for unlawful presence under section 212(a)(9)(B)(v) of the Act and 8 CFR 212.7(a) or for any other relief from inadmissibility on any other ground for which a waiver is available and for which the alien may be eligible;

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

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

(iv) The alien enters or attempts to reenter the United States without inspection and admission or parole at any time after the alien files the provisional unlawful presence waiver application and before the approval of the provisional unlawful presence waiver takes effect in accordance with paragraph (e)(12) of this section.

Jeh Charles Johnson,

Secretary.

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