



PRACTICE ADVISORY¹

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I-601A PROVISIONAL WAIVER PROCESS A HARDSHIP WAIVER FOR UNLAWFUL PRESENCE

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Beginning March 4, 2013, the United States Citizenship and Immigration Services (USCIS) instituted a new application procedure, the I-601A Provisional Waiver, for certain individuals who would be subject to the three- or ten-year bars for having accrued unlawful presence when they depart the U.S. These applicants are able to file a provisional waiver of inadmissibility prior to leaving the U.S. for their consular interviews. Being able to apply for the waiver before travelling abroad for a consular interview provides tremendous benefits to the applicant. This process allows applicants with legal avenues to immigration status to avoid the risk of long-term family separation and uncertainty. Because USCIS adjudicates the waiver in advance through this process, applicants avoid having to wait for adjudication of a waiver while abroad, and it allows them to avoid the risk of getting stuck outside the US if the waiver is denied. The provisional waiver is only a change in the administrative process, not a change in the law. This practice advisory will walk you through steps to determine if your client is eligible for the I-601A provisional waiver.

UPDATE: In August 2016, USCIS updated the I-601A Provisional Waiver process. Now anyone who is statutorily eligible for a waiver of unlawful presence can use the I-601A process to waive the unlawful presence grounds of inadmissibility found at INA §212(a)(9)(B). The biggest change to the I-601A Provisional Waiver is the expansion to include applications from beneficiaries of **all** visa categories (not just those with U.S. citizen immediate relatives) who can show hardship to an **LPR** spouse or parent, in addition to U.S. citizen spouse or parent qualifying relatives. The applicant is still required to have an approved immigrant visa petition.

IMPORTANT: We are only discussing the I-601 waiver form within the context of the waiver for unlawful presence. The I-601 waiver can be used for other grounds of inadmissibility, but those topics are outside the scope of this practice advisory.

STEP ONE: Does the applicant need a waiver for unlawful presence under INA §212(a)(9)(B)?

1. How much unlawful presence has the applicant accrued?

INA § 212(a)(9)(B) covers noncitizens who were unlawfully present in the United States for specific periods of time, left the United States, and now seek readmission. The term “unlawful presence” was first introduced into the grounds of inadmissibility in 1996 by the Illegal Immigration Reform and Immigrant

¹ The Immigrant Legal Resource Center is a national, nonprofit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit www.ilrc.org. For questions regarding the content of this advisory, please contact Nikki Marquez or Erin Quinn at nmarquez@ilrc.org or equinn@ilrc.org.

Responsibility Act of 1996.² Under the statute, an individual accrues unlawful presence when he or she is “present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”³ This ground of inadmissibility was implemented on April 1, 1997, and applies to time in the United States since that date. Therefore, time spent in the United States “unlawfully” prior to April 1, 1997 does not count towards this bar. For someone who enters on a nonimmigrant visa but who subsequently violates the terms of the visa—such as by working without authorization—unlawful presence begins only after a determination by USCIS or an immigration judge that the person violated status. No regulation defines or interprets unlawful presence, but USCIS has clarified the agency’s policies in memoranda.⁴

The three- and ten- year bars for unlawful presence do not kick in until a person has accrued at least 180 days of unlawful presence. If a person is here for 180 days or less unlawfully, then departs they do not face these bars to admissibility.⁵

Three-Year Bar. Noncitizens who (a) beginning on April 1, 1997 are unlawfully present in the United States for a continuous period of *more than 180 days but less than one year*, and (b) then voluntarily depart the United States *before* any immigration proceedings commence are inadmissible for a period of *three years* from the date of departure.⁶

Ten-Year Bar. Noncitizens who (a) beginning on April 1, 1997 are unlawfully present in the United States for a continuous period of *one year or more*, and (b) leave the United States are inadmissible for a period of *ten years* from the date of departure or removal.⁷

The statute lists certain categories of individuals who are not subject to accruing unlawful presence—notably a person does not accrue unlawful presence until they are 18-years-old.⁸ Under INA § 212(a)(9)(B)(iii), unlawful presence does not accrue for purposes of the three- and ten-year bars during times that the noncitizen:

1. is under 18 years of age;
2. has been approved for Deferred Action of Childhood Arrivals (DACA);
3. has a bona fide asylum application or bona fide Asylee-Refugee Relative Petition pending, unless the noncitizen works without authorization during that time;
4. is the beneficiary of Family Unity protection under § 301 of the Immigration Act of 1990;⁹
5. was battered or subjected to extreme cruelty by a U.S. citizen or permanent resident spouse or parent, or a U.S. citizen son or daughter or a member of the spouse of parent’s family, where there was a substantial connection between the battery or cruelty and the violation of the terms of the person’s nonimmigrant visa;

² Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208 (Sept. 30, 1996).

³ INA § 212(a)(9)(B)(ii).

⁴ USCIS Policy Memorandum (May 6, 2009), available at

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

⁵ Remember to always screen for the permanent bar. Unlawful presence under the permanent bar found at INA § 212(a)(9)(C) is assessed cumulatively, and small period of unlawful presence over various visits can trigger the permanent bar.

⁶ INA § 212(a)(9)(B)(i)(I).

⁷ INA § 212(a)(9)(B)(i)(II).

⁸ INA § 212(a)(9)(B)(iii).

⁹ By USCIS policy, this exemption has been extended to Family Unity under § 1504 of the LIFE Act Amendments of 2000, for both § 212(a)(9)(B) and the permanent bar.

6. is a victim of a severe form of trafficking in persons, where the individual can demonstrate that the trafficking is at least one central reason for their unlawful presence in the U.S.

In addition, USCIS has clarified its policies regarding specific situations where an individual does not accrue unlawful presence. Importantly, USCIS policies indicate that properly filed applications for adjustment of status or registry under the following sections of law stop accrual of unlawful presence and toll that accrual until the application is denied, even if it is determined that the individual was ineligible for the benefit in the first place:

1. Adjustment of status under:
 - a. INA §§ 209, 245 and 245(i);
 - b. NACARA § 202(b);
 - c. HRIFA § 902; and
 - d. Cuban-Haitian Adjustment Act of § 202.¹⁰
2. Registry under INA § 249

USCIS policy also indicates that unlawful presence is not accrued during pending extension of status or change of status requests, pending Special Agricultural Worker applications, and several other specific situations.¹¹

EXAMPLE: Suppose Carlos came to the U.S. one year ago by crossing the border without inspection. He turned 18-years-old one week ago. He is undocumented but qualifies for a visa through his stepmother. Carlos does not need an I-601 waiver because he did not start accruing unlawful presence until he turned 18. As a result, if Carlos leaves within 6 months of his 18th birthday, he will not have enough unlawful presence to trigger the three- or ten-year inadmissibility bar when he returns to his home country for consular processing.

2. Is the applicant going to trigger the three- or ten- year bar to admissibility?

To trigger the three- and ten-year bar, an applicant must depart the U.S. after having accrued the sufficient number of days of unlawful presence. Prior to departing the U.S., the unlawful presence bar to admissibility is not triggered. Thus, it does not apply no matter how long a noncitizen has been unlawfully present, if the person never departs the U.S.

Adjustment of Status. Some people are eligible to immigrate through family members at their local USCIS office, through a process called adjustment of status. People fortunate enough to adjust their status do not have to depart the U.S., and so the three- and ten-year bars will not apply to them regardless of how much unlawful presence they have accumulated, as long as they have not left the U.S.

EXAMPLE: Evie first came to the U.S. on a valid visitor visa. She stayed in the U.S. after her visa expired and currently does not have legal status. After working without authorization in the U.S. for a few years, she met and married Bob, a U.S. citizen. As a U.S. citizen spouse, Bob can file an immediate relative visa petition for Evie. As the spouse of a U.S. citizen, Evie can also adjust status (even though she is out of status and working) without having to leave the U.S. to consular process. Because Evie does not need to leave the U.S., she does not trigger the three- or ten-year bar and does not need a waiver for unlawful presence grounds of inadmissibility.

¹⁰ The policies further indicate that, except in cases of NACARA or HRIFA applications, persons filing the listed applications after being served with a Notice to Appear in removal proceedings will not be protected from accrual of unlawful presence.

¹¹ USCIS Policy Memorandum (May 6, 2009), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.

Advance Parole.¹² Note that leaving the U.S. under a grant of advance parole, will **not** count as a “departure” under INA § 212(a)(9)(B)(i)(II) and will **not** thereby trigger this ground of inadmissibility. In the Board of Immigration Appeals (BIA) decision, *Arrabally and Yerrabally*, the BIA held that the unlawful presence bar under INA § 212(a)(9)(B)(i)(II) is not triggered by someone “who left and returned to the United States pursuant to a grant of advance parole.”¹³ The BIA found that a departure under a grant of advance parole is not a departure within the meaning of INA § 212(a)(9)(B)(i)(II). Although *Arrabally and Yerrabally* involved individuals with pending adjustment applications, based on the reasoning in the BIA’s decision, any advanced parole departure should not trigger the unlawful presence bars. Since this decision, those with TPS and DACA¹⁴ have also successfully traveled on advanced parole after periods of unlawful presence, returned, and adjusted status here in the United States without requiring waivers for unlawful presence. In a memorandum regarding parole in place, USCIS indicated that it agrees with this interpretation.¹⁵

EXAMPLE: Sarah entered with a tourist visa 10 years ago and never left. She is now married to Maya, a U.S. citizen, and they filed an I-130 and adjustment packet for Sarah. Sarah has not triggered the unlawful presence bar because she has not left the U.S. since she overstayed her visa.

Sarah then received advance parole while her adjustment was pending, and they travelled to Argentina to meet Sarah’s family. Sarah did not trigger any unlawful presence bars because her trip was made with advance parole. She is still eligible to adjust.

EXAMPLE: Lana entered without inspection in 1998, and received TPS in 2001. She is now married to a U.S. citizen but cannot adjust status here since she entered without inspection. If she visits her family in El Salvador on advance parole, she would not trigger unlawful presence bars and would become eligible to adjust status. This is because her last entry will now be a “parole” entry which would make adjustment possible. The trip would not trigger the unlawful presence bar because she left with advance parole.

The three-year bar and removal proceedings. The three-year bar is only triggered when a person voluntarily departs from the U.S. before being placed in proceedings. If the person is placed in removal proceedings, then receives voluntary departure from the judge or is ordered deported, and leaves after 180 days in the U.S. but prior to accruing one year of unlawful presence, the person does not fall under the 3-year unlawful presence bar. Thus, someone with more than 180 days of unlawful presence, who was placed in removal proceedings, can accept voluntary departure and leave before one year and not require a waiver to consular process. This is a useful strategy for those already in relationships that would support a family-based petition.

¹² **Asylees with Refugee Travel Document.** According to USCIS, asylees who have secured valid refugee travel documents will trigger the three- or ten-year bars upon departing, if they had accrued unlawful presence before applying for asylum. Persons who reenter the U.S. as asylees with valid refugee travel documents will be permitted to reenter the U.S., even if they trigger unlawful presence. Nonetheless, they will require a waiver for this ground of inadmissibility at time of adjustment, if they apply to adjust during the applicable 3- or 10-year bar. Asylees adjusting status may apply for a waiver of inadmissibility for unlawful presence and other grounds under INA § 209(c), which is a more generous waiver provision. Following the logic of the BIA decision in *Arrabally and Yerrabally*, asylees should argue that their departure is not a departure that triggers unlawful presence for purposes of INA § 212(a)(9)(B).

¹³ *Matter of Arrabally and Yerrabally*, 25 I. & N. Dec. 771 (BIA 2012) (clarifying the holding in *Matter of Lemus*).

¹⁴ At the time of this manual’s writing, USCIS has put a hold on DACA cases involving the application of *Arrabally and Yerrabally*, so make sure to check for any updates or changes in government policy before clients travel.

¹⁵ USCIS Policy Memorandum (Nov. 15, 2013), available at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

In contrast, the ten-year bar is triggered regardless of the circumstances in which the person leaves the U.S. (unless the person leaves pursuant to a grant of advance parole, see above). It will include any departure from the U.S. whether the person decides to leave on his or her own or is required to depart pursuant to removal proceedings.¹⁶

EXAMPLE: Danny entered the U.S. without any documentation and without inspection. Shortly after arriving in the U.S. he met Sue, a U.S. citizen, and they were married 6 months after Danny arrived in the U.S. Because Danny entered without inspection he is unable to adjust status and must instead depart the U.S. for consular processing. Departing for consular processing would trigger the three-year bar (because he has been in the U.S. for more than 180 days but less than one year). But before Danny can make any arrangements, he is apprehended by ICE. At his immigration hearing, Danny requests and is granted voluntary departure. He returns to his home country for consular processing without triggering the three-year bar. **NOTE:** Danny can also pursue a provisional I-601A waiver, as discussed in more detail below.

Re-entry or Attempted Re-Entry and the Permanent Bar. Those who depart but then re-enter or attempt to re-enter illegally may be inadmissible under the “permanent” bar under INA § 212(a)(9)(C). The permanent bar applies to anyone (1) who has cumulatively accrued more than a year of unlawful presence or who has a prior removal order and (2) enters or attempts to enter without being admitted. If the permanent bar applies, the intending immigrant will be ineligible to even apply for a waiver of inadmissibility until they have spent 10 years outside the United States. For this reason, make sure to screen carefully for all entries and departures from the United States.

EXAMPLE: Inez wants to consular process based on her marriage to Calvin, a U.S. citizen. She tells you she entered without inspection in 1998 when she was 20 years old. As you are preparing her I-601A waiver, you learn that Inez actually left the United States in 2001 to go to her grandmother’s funeral, after which she re-entered illegally. Unfortunately, Inez is subject to the permanent bar. She will not be able to consular process unless she remains outside the U.S. for 10 years, and only then if a waiver is granted.

STEP TWO: Does the applicant meet the statutory requirements for an I-601 waiver for unlawful presence?

Once you have determined that the applicant is unable to adjust status and has accrued sufficient unlawful presence that departure from the U.S. for consular processing abroad would trigger the three- and ten-year bar, the next step is to determine whether the applicant is eligible for a waiver of unlawful presence. The waiver for these grounds requires showing hardship to a qualifying relative. If the applicant is not able to establish this relationship and hardship, a waiver will not be possible. See INA § 212(a)(9)(B)(v).

1. Does the applicant have a qualifying U.S. citizen or lawfully permanent resident relative?

For the purposes of this waiver, a qualifying relative is a spouse or parent of the applicant who is either a U.S. citizen or lawful permanent resident. No other relatives, including children, are considered qualifying relatives for this type of waiver. The qualifying relative does not have to be the same person who filed the underlying immigrant visa petition for the applicant.

EXAMPLE: Maria’s daughter, Joy, is a U.S. citizen and wants to petition for Maria. Maria has been living in the United States without documents since she entered without inspection 15 years ago. Maria’s mother is an LPR. Joy can petition her mother as an immediate relative of a U.S. citizen. To

¹⁶ INA § 212(a)(9)(B)(i)(II). See also *Matter of Lemus*, 24 I. & N. Dec. 373 (BIA 2007); vacated by *Lemus-Losa v. Holder*, 576 F.3d 752 (7th Cir. 2009).

qualify for the waiver, Maria would need to show hardship to her LPR mother. (Joy is not a qualifying relative for the waiver.)

2. Would the applicant's qualifying relative experience extreme hardship if the applicant was denied admission to the U.S. (i.e. did not receive the waiver)?

For an unlawful presence waiver, the applicant must demonstrate a *U.S. citizen or permanent resident spouse or parent* would suffer extreme hardship if the waiver were denied. Family separation, financial hardship, and other common consequences of inadmissibility are not enough. Rather, the applicant must show the qualifying relative would experience hardship beyond the common consequences of family separation or moving to another country. Factors that may be relevant in establishing extreme hardship include emotional and psychological trauma suffered from separation, loss of employment or educational opportunities, access to medical care, and other severe changes in the life of the qualifying family member resulting from the separation as well as conditions in the country to which the relative may have to move because of her inability to remain in the U.S. without the applicant.

Extreme Hardship to a U.S. Citizen or Lawful Permanent Resident Spouse or Parent. When crafting your extreme hardship argument, be sure to read the USCIS Policy Manual section on Extreme Hardship in the context of waivers. The Policy Manual is a useful tool for organizing your hardship argument. Below we briefly summarize the points you will be able to find discussed in more detail in the Policy Manual. This guidance is available at: <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html>.

USCIS will only consider hardship to the applicant's U.S. citizen or LPR spouse or parent, *not* to him- or herself, nor is hardship to the applicant's *child or children* considered.¹⁷ Hardship to the applicant or to another, non-qualifying relative can also be included in the I-601 waiver application, but in the context of the impact this hardship would have on the qualifying relative. For example, you can discuss how separation can increase the hardship to the qualifying spouse who is left in the United States caring for the couple's child. Hardship to the child is not relevant to the waiver but the impact that the child's hardship would have on the qualifying spouse is relevant to the extreme hardship inquiry.

NOTE: The qualifying relative DOES NOT have to be the petitioning family member. The extreme hardship inquiry for the purposes of the waiver is separate from the underlying petition. While the petitioning family member *can* be the same person as the qualifying relative, it does *not* have to be the same person. Additionally, a person may have more than one qualifying relative.

Burden of Proof and Standard of Proof. In establishing extreme hardship and other eligibility requirements, the burden of proof is on the applicant¹⁸ and it requires a showing by a preponderance of the evidence or "more likely than not" standard.¹⁹

Separation versus Relocation. When establishing extreme hardship, the applicant must show that either separation from a qualifying relative or relocation of the qualifying relative or both is reasonably foreseeable. Based on the scenario that is reasonably foreseeable, the applicant must then show that extreme hardship would result under that scenario. The applicant is not required to show extreme hardship under both scenarios, but only one scenario that is reasonably foreseeable.

Aggregating Hardships. In establishing hardship, relevant factors are considered in the aggregate, not individually.²⁰ Thus, one factor taken alone may be insufficient to meet the extreme hardship standard but when considered together with other factors it may be sufficient. An applicant can aggregate hardships

¹⁷ INA § 212(a)(9)(B)(v).

¹⁸ See INA § 291.

¹⁹ See *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) (identifying preponderance of the evidence as the standard for immigration benefits generally, in that case naturalization).

²⁰ See *Bueno-Carrillo v. Landon*, 682 F.2d 143, 146 n.3 (7th Cir. 1982).

to one qualifying relative or the applicant can aggregate hardships to multiple qualifying relatives in order to establish extreme hardship.²¹

Common Consequences, Extreme Hardship Considerations, and Particularly Significant Factors. The USCIS Policy Manual categorizes hardship into three categories based on severity of hardship. Common consequences are the hardships suffered by most individuals and families facing separation and/or relocation. On their own, common consequences are not sufficient to warrant a finding of extreme hardship. However, taken together and/or with more extreme hardship factors, a finding of extreme hardship may be warranted. Particularly significant factors are factors that weigh heavily in support of an extreme hardship determination. Particularly significant factors are **not** a presumption of hardship, but rather hardships that tend to warrant a finding of extreme hardship. Because the extreme hardship analysis is cumulative, be sure to include all hardships the applicant's qualifying relative will face. Do not be deterred if you do not have a particularly significant factor. And if you do have a particularly significant factor, be sure to include other hardship factors as it is not a guarantee of extreme hardship.

EXAMPLE: Carlos and Anna have been married for a few years and have a two-year-old daughter, Clara, and are expecting their second child. Anna is a U.S. citizen but Carlos is undocumented and came to the U.S. without a visa, so he will need to depart the U.S. for consular processing. Carlos is the main income earner for the family. Anna stays home to care for Clara (also a U.S. citizen), who has cystic fibrosis. Clara needs a lot of medication and help to manage her medical condition. Anna is healthy, and before deciding to stay home to care for Clara, worked full-time as a secretary. For the I-601 waiver, Carlos will need to show extreme hardship to his wife, Anna, who is the qualifying relative, if the couple separates or if Anna relocates with Carlos. Because of Clara's health conditions, Anna would likely remain in the U.S. with the couple's children instead of relocating with Carlos. As a result, Carlos can show how loss of income will result in extreme hardship to Anna. Further, while Clara's hardship is not, on its own, relevant for the I-601 waiver, it is relevant for how it impacts Anna. Carlos can show how Anna would need to return to work to support the family. Anna will not be able to afford Clara's specialists and daycare, as well as daycare for the new baby, so the quality of Clara's medical care will decrease and the daycare will not be specially trained to care for a child with Clara's healthcare needs. Carlos can show how this hardship to Clara will cause extreme hardship for Anna. Carlos can aggregate all of the hardships to Anna in order to show that it rises to the level of extreme hardship.

The key to establishing hardship is a well-prepared declaration by the affected applicant and/or qualifying relatives and documentation backing up the hardships stated in the declaration. It is important to present a clear picture of the situation to the USCIS officer evaluating the case. Ideally, the declaration should reflect not only the hardships the declarant would face but also bring a "human" face to the mind of the examiner.

USCIS Policy Manual, Volume 9 – Waivers, Part B – Extreme Hardship

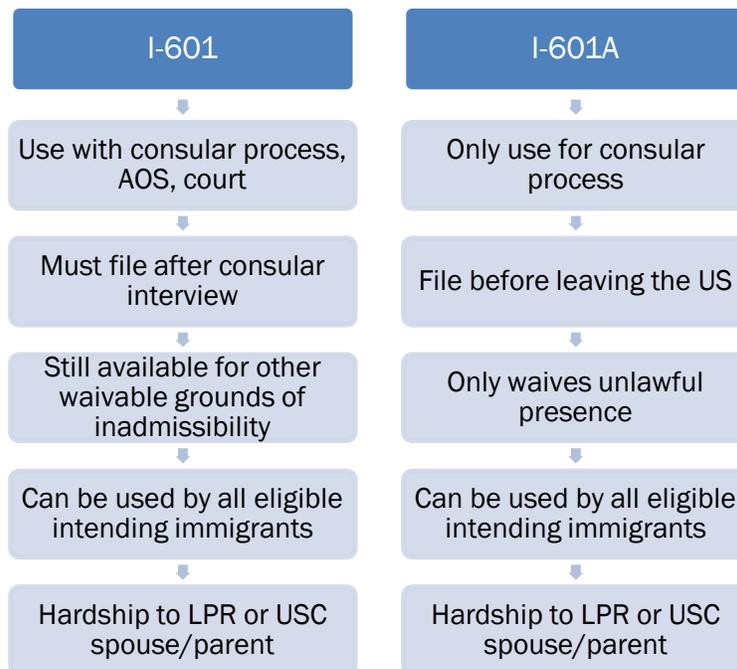
Available at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB.html>

STEP THREE: Does your the applicant qualify for the I-601A provisional waiver process?

If the intending immigrant qualifies for a waiver for unlawful presence, then he or she may be able to use the I-601A provisional waiver process. The new I-601A process and form, released in August 2016,

²¹ See *Prapavat v. INS*, 638 F.2d 87, 89 (9th Cir. 1980) (holding that extreme hardship may be satisfied by aggregating hardship to multiple family member, even if the hardship to one family member is insufficient), *reheard*, 662 F.2d 561, 562-63 (9th Cir. 1981)(per curiam)(finding the BIA had failed to aggregate hardships to multiple family members).

made several significant changes to the I-601A process.²² Beginning August 29, 2016, anyone who meets the statutory requirements for an unlawful presence waiver might be able to use the provisional waiver process. (Prior to this date, the provisional waiver process was only available to those with immediate relative petitioners who could show hardship to a U.S. citizen qualifying relative. Now, anyone in a preference category, who can show hardship to a U.S. citizen or LPR parent or spouse may qualify.) The chart below provides an overview of the differences between the I-601 waiver and the I-601A provisional waiver.



Despite the expansion of the I-601A process, there are still specific requirements and considerations that distinguish it from the traditional I-601 waiver process. If the applicant does not qualify for the provisional waiver process, a traditional I-601 filing may still be an option.

1. Do any of these RED FLAGS apply to the applicant's case?

- Does the applicant currently have an adjustment of status application pending with USCIS?
- Is the applicant subject to reinstatement proceedings of a final order of removal, exclusion, or deportation?
- Does the applicant have a prior order of removal?
- Are there any other grounds of inadmissibility that apply to the applicant?

If any one of these situations applies to your the applicant, he or she is not eligible for the I-601A waiver process or has significant risks to proceeding.

2.. Is the applicant waiting on a pending adjustment of status application with USCIS?

If yes, then the applicant does not need the I-601A waiver process because he or she does not need to go through consular processing. Instead, the applicant should just wait for his or her adjustment of status application to be adjudicated. The I-601A provisional process is specifically designed to help those that must consular process by allowing them to apply for a waiver prior to leaving the United States to process their residency at the consulate. If the person is adjustment eligible and needs a waiver, she can file a traditional I-601 waiver with the adjustment.

²² See 8 C.F.R. 212.7(e).

3. Is the applicant currently in removal proceedings?

If the applicant is not currently in removal proceedings, continue on to the next question. If the applicant is currently in removal proceedings, he or she may still be able to use the I-601A provisional waiver but the proceedings must be administratively closed and must not be re-calendared before the time of filing the waiver application. Usually, counsel will notify the Assistant Chief Counsel assigned to the case to ask if they agree to administratively close the case in order for your client to pursue a provisional waiver. Then, a motion to administratively close the case is filed with or stated verbally in court. Once the case is closed, the applicant may proceed with filing an I-601A waiver.

If a waiver is granted while a case is administratively closed, the applicant must re-calendar proceedings and ask the court to either terminate proceedings or grant voluntary departure. Those who are either subject to reinstatement of a prior order of removal or subject to a current final order of removal or a final order of exclusion or deportation, or any other provision of law, are discussed below.

The I-601A waiver application must be filed with USCIS. By regulation, Immigration Judges do *not* have jurisdiction to adjudicate I-601A waivers.

4. Does the applicant have a prior order of removal?

Another change to the I-601A process is that individuals with a prior order of removal can apply for an I-601A waiver, if they have an approved I-212 Application for Permission to Reapply for Admission to waive inadmissibility for a prior order. While this may be a good option in theory, in practice there may be some very real risks to pursuing an I-601A waiver with a prior removal order, especially if it is an unexecuted order. This would require that ICE also grant the I-212 waiver “provisionally” before the applicant departs the U.S. (indeed, before the applicant files the I-601A), yet there were no changes to regulations controlling the I-212 process. Because of the current political climate, the risks of applying for an I-212 waiver with ICE while in the U.S. with an outstanding removal order is unknown. Those with outstanding removal orders should evaluate the risks of coming forward to ask for such a waiver in advance of departure. Local practice may vary, and discussing with other local practitioners may be helpful. Nonetheless, filing an I-212 waiver generally requires making the applicant’s whereabouts known to ICE and putting the agency on notice that the person has remained in the United States after an order of removal.

It is also important to remember the limits of this policy change. There is still no waiver for the permanent bar. While the I-212 may waive inadmissibility based on a prior removal order, it cannot waive the permanent bar.²³ Further, be very cautious with cases involving *in absentia* orders of removal. The I-212 waives inadmissibility based on INA §212(a)(9)(A), but not inadmissibility for failure to attend a hearing under INA §212(a)(6)(b). If the applicant cannot show reasonable cause for missing the hearing, they will be inadmissible for 5 years, and there is no waiver available.

If the applicant decides to move forward with the I-601A and I-212 process despite the risks, please report back your experience with I-212 filings to the ILRC.

5. Is the applicant inadmissible under any other section of the INA other the three- or ten-year bar?

In addition to unlawful presence, there are a number of grounds of inadmissibility that may impact an applicant.

The I-601A provisional waiver only waives inadmissibility for the three- or ten-year bar. It does not waive any other ground of inadmissibility. USCIS will now adjudicate the Form I-601A without considering

²³ See INA §212(a)(9)(A), inadmissibility based on prior order. In contrast, INA §212(a)(9)(C) does not have a similar waiver provision.

whether other grounds of inadmissibility apply to the applicant. As a result, the applicant may be granted the I-601A provisional waiver even if other grounds of inadmissibility apply. Additional grounds of inadmissibility may be uncovered during consular processing, at which point the applicant's provisional waiver will be revoked. For this reason, it is important you carefully screen for other grounds of inadmissibility. While some grounds of inadmissibility have waivers available, for which the applicant may pursue a traditional I-601 waiver, many grounds do not, such as controlled substance related grounds or the permanent bar. If the applicant is not inadmissible under any other grounds, continue on to the next question.

Beware the Consulate. A person may be granted an I-601A provisional waiver even if other grounds of inadmissibility apply. Under the new I-601A process, an applicant's case will not be evaluated for other grounds of inadmissibility. While this may make it easier to apply for and be granted a waiver, the I-601A waiver does not waive any other inadmissibility bars except for unlawful presence. Rather, the applicant will still be evaluated for other grounds of inadmissibility but this will take place at the consular interview. As a result, it is very important that you carefully screen the applicant before moving forward with the I-601A process to avoid the applicant being stuck outside of the U.S.

Once you have determined what grounds of inadmissibility apply to the applicant, you can determine whether the applicant can proceed with the I-601A process, file a traditional I-601 waiver for multiple grounds of inadmissibility, or decide not to file at this time based on the risks. If the three- or ten-year bar is the **only** grounds of inadmissibility that applies to the applicant, continue to the next question.

EXAMPLE: After meeting with Carlos and Anna multiple times, You ask Carlos several questions about his immigration history and activities in the United States. Carlos has no convictions or arrests. After your meetings, you determine that Carlos is eligible to consular process. You prepare an I-601A waiver application with the help of Anna and Carlos and help Carlos and Anna navigate filings with the National Visa Center. Carlos gets his interview date at the consulate, and he leaves to complete his medical exam with the panel physician and interview at the consulate. During his medical exam, Carlos admits that he recently smoked marijuana. The Panel Physician indicates his findings, and Carlos is barred from entering the United States until he can get a new assessment from a panel physician showing his addiction is in remission.²⁴

6. Is the applicant ready to submit an I-601 provisional waiver?

- Is the applicant physically present in the United States at the time of filing the waiver application?
- Has the applicant paid the immigrant visa processing fee?
- If the applicant is in removal proceedings, has his or her case been administratively closed prior to filing the Form I-601A?
- Is the applicant at least 17 years old?

If you were able to check off all four boxes for the applicant, then he or she is ready to apply for an I-601A provisional waiver. USCIS will deny or reject an I-601A application that is submitted before these conditions are met. If in removal proceedings, the applicant's case must be administratively closed *before* filing. Additionally, immigrant fee bills must be paid before filing. If the applicant does not satisfy the requirements above, the applicant may become eligible to file in the future, but should not file at this time.

STEP FOUR: Deciding which waiver application process is right for the applicant: The I-601 or the I-601A?

Comparing the I-601A process to a traditional I-601 filing

²⁴ See Volume 8, Part B of the USCIS Policy Manual for more information on health-related grounds of inadmissibility, including drug abuse and drug addiction (Chapter 8). The Policy Manual is available at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume8-PartB.html>.

Generally, if a person is immigrating through a U.S. consulate abroad and requires a waiver for a ground of inadmissibility, the traditional I-601 waiver procedure requires the person to first attend their interview at the consulate before applying for a waiver. The waiver application cannot be filed until a consular officer makes a finding that the immigrant visa applicant is inadmissible. Once the consular officer has found the person inadmissible, only then may the person submit the waiver Form I-601, the fee, and the supporting documents to the appropriate USCIS address. More than one waivable ground of inadmissibility may be included with the same waiver. Unfortunately, it will often take the USCIS office several months to approve or deny the waiver.²⁵

The provisional waiver allows the applicant to leave to consular process with a waiver for unlawful presence already granted. This allows those that are only inadmissible for unlawful presence to avoid long waits outside the U.S. while USCIS adjudicates the waiver, and takes away the fear of not knowing whether a waiver will be granted after leaving the United States.

Nonetheless, the traditional I-601 can waive other grounds of inadmissibility—not just unlawful presence—and it can be used in more situations. For instance, those adjusting status here in the U.S. can use the I-601 to waive grounds of inadmissibility in conjunction with the adjustment application. An immigration judge or an immigration officer can adjudicate a traditional I-601 request. The chart below can be a starting point for determining whether or not he should apply using the I-601 waiver or the I-601A provisional waiver.

Consideration	The I-601 Waiver	The I-601A Provisional Waiver Process
What type of relief is the applicant considering?	Can be used with consular processing and adjustment of status cases.	Can only be used for consular processing.
Has the applicant already left the U.S. or completed his consular interview?	If yes, can apply for the I-601 waiver. Can only apply after the consular interview has taken place and the applicant has been found inadmissible. If no, the applicant is not yet able to apply for the I-601 waiver (but he can and should be advised about it prior to departing).	If yes, the applicant cannot apply for the I-601A provisional waiver. It must be applied for and received prior to departing the U.S. for consular processing. If no, then the applicant may be eligible for the I-601A waiver.
Is the applicant subject to or appears to be subject to multiple grounds of inadmissibility?	Can be used to waive multiple grounds of inadmissibility (so long as the grounds are waivable—see next question)	Adjudicators do not screen for other grounds of inadmissibility , so the applicant may be granted I-601A if other grounds of inadmissibility are present. However, the waiver will be

²⁵ Current processing times vary by country, and range from 6 months to around 18 months. The new centralized filing is expected to standardize the processing time to 6 months for all waivers.

		revoked once additional grounds of inadmissibility are identified.
What grounds of inadmissibility might the applicant need a waiver for?	<p>May be used to waive the following grounds, if the person is eligible:</p> <ul style="list-style-type: none"> • Health-related grounds of inadmissibility (INA § 212(a)(1)) • Certain criminal grounds of inadmissibility (INA § 212(a)(2)) • Immigration fraud and misrepresentation (INA § 212(a)(6)(c)) • Membership in totalitarian party (INA § 212(a)(3)) • Helping Someone enter illegally (alien smuggling) (INA § 212(a)(6)(e)) • Being subject to civil penalty (INA § 212(a)(6)(F)) • 3- or 10-year bar due to previous unlawful presence in the US (INA § 212(a)(9)(B)) 	<p>Only waives 3- or 10- year bar due to unlawful presence in the U.S. (INA § 212(a)(9)(B)). It does not waive any other ground of inadmissibility.</p> <p>However, if during the consular interview or medical exam, another ground of inadmissibility is identified, the I-601A provisional waiver will be revoked. But the applicant can then go through the regular I-601 waiver process.</p>
Is the applicant in removal proceedings?	If yes, do not need to administratively close removal proceedings, if otherwise eligible to adjust, can apply for the I-601 at the same time as adjustment.	If yes, must be administratively closed so that USCIS can adjudicate the waiver, then applicant consular processes. Cannot be adjudicated by an IJ.
Any other considerations that are specific and relevant to the applicant’s case?		

STEP FIVE: What happens if the I-601A waiver is denied or revoked?

Revocation of the I-601A Waiver. The I-601A Waiver will be revoked automatically if one of the following events occurs:

- The immigrant visa is denied at the consular interview;
- The I-130 petition associated with the I-601A waiver is revoked, withdrawn, or rendered invalid (and not otherwise reinstated for humanitarian reasons or converted to a widow or widower petition);
- The applicant reenters the U.S. without inspection by immigration authorities (EWI) at any time before approval of the I-601A waiver or after approval but before an immigrant visa is issued.

Denial of the I-601A Waiver. If an I-601A waiver is denied, there is no appeal process. A person can re-file a new waiver, but only if the immigrant visa case is still pending with the Department of State. In such a case, an applicant must notify the Department of State of his or her intent to file a new I-601A waiver. An applicant can also re-file Form I-601A if a new petition process is started. If a consular officer determines inadmissibility at the immigrant visa interview, an applicant can also pursue a traditional I-601 waiver with the USCIS Lockbox after attending their immigrant visa interview. But the applicant will have to remain outside of the U.S. until the issue is resolved and he is able to continue the consular process with the appropriate waiver.

Risk of deportation. The risk of applying for this waiver, should it be denied, is low for individuals whose only ground of inadmissibility is the unlawful presence (i.e., those whose I-601A is denied because they fail to meet the hardship element). However, there is a higher risk to consider with applicants whose I-601A is denied because they have an additional ground of inadmissibility, especially one related to a criminal record or an immigration violation, such as unlawful entries, fraud or misrepresentation, etc. The USCIS has said it will continue to follow their current NTA Policy to decide whether or not to refer a particular individual to ICE for removal proceedings.²⁶

REMEMBER the limits of the I-601A provisional waiver.

The I-601A Provisional Waiver does not grant legal status. Neither the filing nor the approval of a provisional unlawful presence waiver application will confer any legal status on the person granted the waiver; protect against accruing more unlawful presence; confer employment authorization; confer travel authorization (such as advance parole); or protect the person from being placed in removal proceedings or from being removed from the U.S.

The applicant must still go through Consular Processing once the I-601A provisional waiver has been approved. Once the applicant has received the I-601A provisional waiver, he or she will need to depart the U.S. in order to complete Consular Processing in his or her home country. Once he or she leaves the U.S., the three- or ten-year bar will be triggered, but the I-601A provisional waiver will waive this ground of inadmissibility. But there are still risks related to leaving the U.S.

First, during the consular interview **other grounds of inadmissibility** may arise. Not only will the I-601A provisional waiver not cover any other grounds of inadmissibility, but if another ground of inadmissibility is identified, the I-601A waiver will be revoked and the applicant will no longer have a waiver for the three- or ten-year bar.

EXAMPLE: Elisa's I-601 A was granted, and she went back to Honduras to consular process. During her interview, she explains that she first entered the United States with her young child, Diego. The Consular Officer finds that she has engaged in alien smuggling. Her I-601A is revoked, and she must instead file a traditional I-601 and wait outside the U.S. while the application is adjudicated by USCIS.

Second, the applicant will still have to do his or her consular interview and medical screening in his or her home country. It is unclear how long this process can take, and while the applicant is going through consular processing, he or she **cannot return to the U.S.** (the I-601A waiver does not grant permission to re-enter the U.S.). Your client may be eligible for advance parole, but it is not a benefit included automatically with the I-601A provisional waiver. It is important to consider all of the consequences that this separation may have on the applicant and his or her family.

²⁶ USCIS Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," November 7, 2011.

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REMEMBER: Neither the I-601 waiver nor the I-601A provisional waiver waive the permanent bar. Be sure to carefully review with the applicant all entries into the U.S. before he leaves the U.S. for consular processing.