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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103 and 212

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

RIN 1615-AB99

Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives

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

ACTION: Proposed rule.

SUMMARY: On January 9, 2012, U.S. Citizenship and Immigration Services (USCIS) announced its intention to change its current process for filing and adjudication of certain applications for waivers of inadmissibility filed in connection with an immediate relative immigrant visa application. USCIS now proposes to amend its regulations to allow certain immediate relatives of U.S. citizens who are physically present in the United States to request provisional unlawful presence waivers under the Immigration and Nationality Act of 1952, as amended (INA or Act), prior to departing from the United States for consular processing of their immigrant visa applications. Currently, such aliens must depart from the United States and request waivers of inadmissibility during the overseas immigrant visa process, often causing U.S. citizens to be separated for extended periods from their immediate relatives who are otherwise eligible for an immigrant visa and admission for lawful permanent residence. Under the proposal, USCIS would grant a provisional unlawful presence waiver that would become fully effective upon the alien's departure from the United States and the U.S. Department of State

(DOS) consular officer's determination at the time of the immigrant visa interview that, in light of the approved provisional unlawful presence waiver and other evidence of record, the alien is otherwise admissible to the United States and eligible to receive an immigrant visa. USCIS does not envision issuing Notices to Appear (NTA) to initiate removal proceedings against aliens whose provisional waiver applications have been approved. However, if USCIS, for example, discovers acts, omissions, or post-approval activity that would meet the criteria for NTA issuance or determines that the provisional waiver was granted in error, USCIS may issue an NTA, consistent with USCIS's NTA issuance policy, as well as reopen the provisional waiver approval and deny the waiver request. USCIS anticipates that the proposed changes will significantly reduce the length of time U.S. citizens are separated from their immediate relatives who are required to remain outside of the United States for immigrant visa processing and during adjudication of a waiver of inadmissibility for the unlawful presence. USCIS also believes that the proposed process, which reduces the degree of interchange between the DOS and USCIS, will create efficiencies for both the U.S. Government and most applicants. In addition to codifying the new process, USCIS proposes amendments clarifying other regulations.

Even after USCIS begins accepting provisional unlawful presence waiver applications, the filing or approval of a provisional unlawful presence waiver application will not: confer any legal status, protect against the accrual of additional unlawful presence, authorize an alien to enter the United States without securing a visa or other appropriate entry document, convey any interim benefits (e.g., employment authorization, parole, or advance parole), or protect an alien from being placed in removal proceedings or removed from the United States.

Do not send an application requesting a provisional waiver under the procedures under

consideration in this proposed rule. Any provisional waiver application filed before the rule becomes final and effective will be rejected and the application package returned to the applicant, including any fees. USCIS will begin accepting provisional waiver applications only after a final rule is issued and the procedural change becomes effective.

DATES: Written comments should be submitted on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

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

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: You may submit comments directly to USCIS by e-mail at uscisfrcomment@dhs.gov. Include DHS Docket No. USCIS-2012-0003 in the subject line of the message.
- Mail: Sunday Aigbe, Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2020. To ensure proper handling, please reference DHS Docket No. USCIS-2012-0003 on your correspondence. This mailing address may be used for paper, disk, or CD-ROM submissions.
- Hand Delivery/Courier: Sunday Aigbe, Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-

2020. Contact Telephone Number is (202) 272-8377.

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

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This proposed 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.
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- F. Paperwork Reduction Act
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SUPPLEMENTARY INFORMATION:

I. Public Participation

All interested parties are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of this rule, explain the reason for any recommended change, and include data, information, or authority that supports the recommended change.

Instructions: All submissions must include the agency name and DHS Docket No. USCIS-2012-0003. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

II. Executive Summary

A. Purpose of the Regulatory Action

1. Need for the Regulatory Action

Currently, certain spouses, children and parents of U.S. citizens (“immediate relatives”)

who are in the United States are not eligible to apply for lawful permanent resident status (LPR) without leaving the United States because they entered the country unlawfully. These immediate relatives must travel abroad to obtain an immigrant visa from the Department of State (DOS) and, in many cases, also must request from the Department of Homeland Security (DHS) a waiver of the inadmissibility that resulted from their unlawful presence while they remain outside of the United States, separated from their U.S. citizen spouses, parents, or children. In some cases, waiver application processing can take well over a year, and the prolonged separation from immediate relatives can cause many U.S. citizens to experience extreme humanitarian and financial hardships. In addition, the action required for these immediate relatives to obtain LPR status in the United States—departure from the United States to apply for an immigrant visa at a DOS consulate abroad—is the very action that triggers the unlawful presence inadmissibility grounds under INA section 212(a)(9)(B)(i). As a result, many immediate relatives who may qualify for an immigrant visa are reluctant to proceed abroad to seek an immigrant visa.

2. Proposed Provisional Unlawful Waiver Process

DHS proposes to change its current process for the filing and adjudication of certain waivers of inadmissibility for qualifying immediate relatives of U.S. citizens, who are physically present in the United States, but must proceed abroad to obtain their immigrant visas. DHS proposes to allow qualifying immediate relatives to apply for a provisional waiver of their inadmissibility for unlawful presence while they are still in the United States and before they leave to attend their immigrant visa interview abroad.

Approving an application for a provisional unlawful presence waiver prior to the immediate relative's immigrant visa interview will allow the DOS consular officer to issue the

immigrant visa without delay if there are no other grounds of inadmissibility and if the immediate relative otherwise is eligible to be issued an immigrant visa. The immediate relative would not have to wait abroad during the period when USCIS adjudicates his or her waiver request, but rather could remain in the United States with his or her U.S. citizen spouse or parent during that period. As a result, U.S. citizens' separation from their immediate relatives would be significantly reduced. In addition, given the greater certainty that will result from this process, U.S. citizens and their family members would also be able to better plan for the immediate relative's departure and eventual return to the United States.

3. Legal Authority

The Secretary of Homeland Security's authority for this proposed procedural change can be found in the Homeland Security Act of 2002, Public Law 107-296, section 102, 116 Stat. 2135, 6 U.S.C. 112, and section 103 of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1103, which give the Secretary the authority to administer and enforce the immigration and nationality laws. The Secretary's discretionary authority to waive the ground of inadmissibility for unlawful presence can be found in INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). The regulation governing certain inadmissibility waivers is 8 CFR 212.7, and the fee schedule for waiver requests is found at 8 CFR 103.7.

B. Summary of the Major Provisions of the Regulatory Action in Question

DHS proposes to allow certain immediate relatives to file provisional waiver applications before they depart from the United States for their immigrant visa interviews.

1. Eligibility for the Provisional Waiver

Individuals may request a provisional waiver if:

- i. Their sole ground of inadmissibility at the time of the immigrant visa interview with

DOS would be unlawful presence for more than 180 days;

ii. They are the beneficiary of an approved Form I-130, Petition for Alien Relative or Form I-360, Petition for Amerasian, Widow(er), and Special Immigrant (classifying them as immediate relatives), and seek an immigrant visa from DOS based on this approved petition;

iii. They are physically present in the United States when they file the application for the provisional unlawful presence waiver;

iv. They appear for biometrics capture in the United States;

v. They establish that a U.S. citizen spouse or parent would experience extreme hardship if the individual is denied admission to the United States as an LPR;

vi. They warrant a favorable exercise of discretion; and

vii. They are 17 years or older at the time of filing an application for a provisional unlawful presence waiver.

2. Ineligibility for the Provisional Unlawful Presence Waiver

Individuals are ineligible for a provisional waiver if:

i. They are outside the United States;

ii. They do not have an approved Form I-130 or Form I-360 petition, classifying them as an immediate relative;

iii. They have not paid the immigrant visa processing fee to DOS and are not actively pursuing the immigrant visa process based on the approved petition;

iv. They have already been scheduled for an immigrant visa interview;

v. They are under the age of 17 years when the provisional unlawful presence waiver is filed;

vi. They are in removal proceedings that have not been terminated or dismissed;

- vii. They have not had the charging document (Notice to Appear) to initiate removal proceedings cancelled;
- viii. They are in removal proceedings that have been administratively closed but not subsequently reopened for the issuance of a final voluntary departure order;
- ix. They are subject to a final order of removal;
- x. They have a pending application for adjustment of status to that of an LPR in the United States;
- xi. USCIS has reason to believe they would be subject to one or more other grounds of inadmissibility;
- xii. They fail to establish extreme hardship or do not merit a favorable exercise of discretion; or
- xiii. They previously filed a provisional unlawful presence waiver application.

3. Adjudication and Decision

USCIS would adjudicate the provisional unlawful presence waiver application and issue requests for evidence. USCIS would not issue Notices of Intent to Deny (NOIDs). If USCIS approves the provisional waiver application, USCIS would notify the applicant and DOS of the approval. Denials cannot be appealed and aliens will not have the right to seek motions to reopen or reconsider USCIS's decision. Aliens whose provisional waiver requests are denied, however, may still apply for a waiver through the current I-601 waiver process. USCIS also reserves the authority to reopen and reconsider on its own motion an approval or a denial of a provisional waiver application at any time.

4. Effect of Waiver

An approved provisional waiver would not become effective until the alien departs from

the United States, appears for his or her immigrant visa interview and is found admissible and otherwise eligible for the immigrant visa by DOS. The provisional waiver would then become a permanent waiver, waiving the inadmissibility based on the period of unlawful presence noted in the waiver request.

5. Revocation

An approved provisional waiver is automatically revoked if DOS denies the immigrant visa application or if the underlying immigrant visa petition approval is revoked, withdrawn, or otherwise rendered invalid. An approved waiver also is revoked if the alien is inadmissible on grounds other than for unlawful presence under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i), if the alien is otherwise ineligible for an immigrant visa, or if DOS terminates the alien's immigrant visa registration under INA section 203(g), 8 U.S.C. 1153(g).

C. Costs and Benefits

This proposed rule is expected to result in a reduction in the time that U.S. citizens are separated from their alien immediate relatives, thus reducing the financial and emotional hardship for these families. In addition, the Federal Government would achieve increased efficiencies in processing immigrant visas for individuals subject to the inadmissibility bar.

DHS estimates the discounted total ten-year cost of this rule would range from approximately \$100.6 million to approximately \$303.8 million at a seven percent discount rate. Compared with the current waiver process, this rule proposes that the provisional waiver applicants submit biometric information. Included in this cost estimate is the cost of collecting biometrics, which we estimate will range from approximately \$28 million to approximately \$42.5 million at seven percent over ten years. In addition, as this rule significantly streamlines the current process, DHS expects that additional applicants will apply for the provisional

unlawful presence waiver compared to the current waiver process. To the extent that this rule induces new demand for immediate relative visas, additional forms such as the Form I-130, Petition for Alien Relative, will be filed compared to the pre-rule baseline. These additional forms will involve fees being paid by applicants to the Federal Government for form processing and additional opportunity costs of time being incurred by applicants to provide the information required by the forms. The cost estimate for this rule also includes the impact of this induced demand, which we estimate will range from approximately \$72.6 million to approximately \$261.3 million at seven percent over ten years.

Estimates for the costs of the proposed rule were developed assuming that current demand is constrained because of concerns that families may endure lengthy separations under the current system. Because of uncertainties as to the degree of the current constraint of demand, DHS used a range of constraint levels with corresponding increases in demand to estimate the costs. The costs for each increase in demand are summarized below.

Estimated Increase in Costs with an Increase in Demand of:				
	25 %	50 %	75 %	90 %
Cost of Biometrics Collection and Processing				
10 year Costs Undiscounted	\$40,353,130	\$48,423,756	\$56,494,382	\$61,336,758
Total 10 year Costs Discounted at 7%	27,967,676	33,561,211	39,154,746	42,510,867
Total 10 year Costs Discounted at 3%	34,221,714	41,066,057	47,910,400	52,017,006
Costs of Applications for the Additional (Induced) Demand for Immigrant Visas				
10 year Costs Undiscounted	\$104,738,108	\$209,476,215	\$314,214,323	\$377,057,188
Total 10 year Costs Discounted at 7%	72,591,182	145,182,365	217,773,547	261,328,257
Total 10 year Costs Discounted at 3%	88,823,781	177,647,563	266,471,344	319,765,613
Total Costs to New Applicants				
10 year Costs Undiscounted	\$145,091,238	\$257,899,971	\$370,708,705	\$438,393,945
Total 10 year Costs Discounted at 7%	100,558,858	178,743,575	256,928,293	303,839,123
Total 10 year Costs Discounted at 3%	123,045,496	218,713,620	314,381,745	371,782,619

III. Background

A. Legal Authority

The Homeland Security Act of 2002, Public Law 107-296, section 102, 116 Stat. 2135, 6 U.S.C. 112, and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary of Homeland Security (Secretary) with administration and enforcement of the immigration and naturalization laws. The Secretary would effectuate these proposed changes under the broad authority to administer the Department of Homeland Security and the authorities provided under the Homeland Security Act of 2002, the immigration and nationality laws, and other delegated authority.

B. Grounds of Inadmissibility

U.S. immigration laws provide mechanisms for U.S. citizens to bring their families into the United States for family reunification, including, in some cases, their immediate relatives who have previously violated the immigration laws. At the same time, however, the immigration laws prescribe acts, conditions, and conduct that bar aliens, including immediate relatives of U.S. citizens, from being admitted to the United States or obtaining an immigrant visa. Such acts, conditions, and conduct include certain criminal offenses, public health concerns, fraud and misrepresentation, failure to possess proper documents, accrual of more than 180 days of unlawful presence in the United States, and terrorism. The grounds of inadmissibility are set forth in section 212(a) of the INA, 8 U.S.C. 1182(a). The Secretary has the discretion to waive certain inadmissibility grounds, if the alien files a request and if he or she meets the relevant statutory and regulatory requirements and agency policy. If the Secretary grants the waiver, the waived ground will no longer bar the alien's admission, readmission, or immigrant visa

eligibility.

C. Unlawful Presence

The inadmissibility grounds based on accrual of unlawful presence in the United States can be found in INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i). Under part (I) of this provision, an alien who was unlawfully present in the United States for more than 180 days but less than one year, and who then departs voluntarily from the United States before the commencement of removal proceedings, will be inadmissible for 3 years from the date of departure. Under part (II) of the same provision, an alien who was unlawfully present in the United States for one year or more and then departs the United States before, during, or after removal proceedings, will be inadmissible for 10 years from the date of the departure.

These 3-year and 10-year unlawful presence bars do not take effect unless and until an alien departs from the United States. See, e.g., Matter of Rodarte-Roman, 23 I. & N. Dec. 905 (BIA 2006). By statute, aliens are not considered to accrue unlawful presence for purposes of INA section 212(a)(9)(B)(i) if they fall into certain categories. For example, aliens do not accrue unlawful presence while they are under 18 years of age. See INA section 212(a)(9)(B)(iii)(I), 8 U.S.C. 1182(a)(9)(B)(iii)(I). Similarly, individuals with pending asylum claims generally are not considered to be accruing unlawful presence while their applications are pending. See INA section 212(a)(9)(B)(iii)(II), 8 U.S.C. 1182(a)(9)(B)(iii)(II). Battered women and children and victims of a severe form of trafficking in persons are not subject to the INA section 212(a)(9)(B)(i) ground of inadmissibility at all if they demonstrate that there was a substantial connection between their victimization and their unlawful presence. See INA section 212(a)(9)(B)(iii)(IV)-(V), 8 U.S.C. 1182(a)(9)(B)(iii)(IV)-(V).

The Secretary has the discretion to waive the 3-year and 10-year unlawful presence bars

if the alien is seeking admission as an immigrant and if the alien demonstrates that the denial of his or her admission to the United States would cause “extreme hardship” to the alien’s U.S. citizen or LPR spouse or parent. See INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). Because the granting of a waiver is discretionary, the alien also must establish that he or she merits a favorable exercise of discretion. Aliens who are subject to the unlawful presence bars must apply for and be granted a waiver in order to receive an immigrant visa and be admitted to the United States.

D. Current Waiver Process

If a U.S. citizen wishes to sponsor an alien spouse, parent, or child (unmarried and under the age of 21) – known as “immediate relatives” in the immigration laws, see INA section 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i) – to immigrate to the United States as an LPR, he or she must first file a Petition for Alien Relative, Form I-130, with USCIS, with appropriate fees and in accordance with USCIS form instructions.¹ See INA section 204(a), 8 U.S.C. 1154(a); 8 CFR 204.1 and 8 CFR 204.2. USCIS determines if an alien qualifies for classification as an immediate relative of the U.S. citizen.² Id.

If USCIS approves the petition for the alien relative, many aliens are eligible to apply for adjustment of status to that of an LPR under INA section 245, 8 U.S.C. 1255, or other provisions

¹ U.S. citizens also may sponsor unmarried sons and daughters (21 years of age and older) and married sons and daughters, and lawful permanent residents may sponsor spouses, children (unmarried and under the age of 21), and unmarried sons and daughters (21 years of age and older). See INA sections 203(a), 204(a), 8 U.S.C. 1153(a), 1154(a). Because these relatives would not be eligible for the provisional waiver process for the reasons described in this proposed rule, they are not included in this discussion.

² Certain immediate relatives (i.e., widows/widowers of U.S. citizen and their minor unmarried children) can self-petition by filing a Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. Additionally, if the U.S. citizen spouse is deceased after the Form I-130 has been filed, the I-130 converts automatically to an approved I-360 widow/widower petition if the I-130 was approved at the time of the U.S. citizen’s death. If the I-130 was pending at the time of the U.S. citizen’s death, the pending I-130 converts automatically to a pending I-360 widow/widower petition.

of law. Through adjustment of status, the alien can obtain LPR status in the United States without having to depart. There are various reasons why an alien may be statutorily ineligible for adjustment of status. For example, the alien would be ineligible if he or she entered the United States without inspection and admission or parole. Also, there are some individuals who are eligible to adjust status in the United States but choose to proceed through consular processing abroad. An alien who is seeking LPR status based on an approved Form I-130 but who is ineligible for adjustment of status must obtain an immigrant visa from a consular officer abroad before the alien can return to the United States and be admitted as an immigrant.

If USCIS determines that the alien qualifies as an immediate relative of a U.S. citizen, and the alien will be pursuing consular processing of an immigrant visa application abroad, USCIS forwards the approved petition to the DOS National Visa Center (NVC). At the NVC, DOS begins to process the immigrant visa application and requests that the applicant submit the fee and the documents required for visa processing. Upon submission of all necessary documents by the alien, DOS schedules the alien for an immigrant visa interview with a DOS consular officer at a U.S. Embassy or consulate abroad. During the immigrant visa interview, the consular officer determines whether the alien is admissible to the United States and eligible for an immigrant visa. If the consular officer finds that the alien is subject to any ground of inadmissibility, including the 3-year or 10-year unlawful presence bars, the consular officer informs the alien that he or she may file an Application for Waiver of Grounds of Inadmissibility, Form I-601 (waiver application), with USCIS or, where USCIS is not present, with DOS, if a waiver is authorized for the relevant ground of inadmissibility. If the waiver application is filed with DOS, DOS forwards it to USCIS for adjudication.

The alien must remain abroad while USCIS adjudicates the waiver application.

Currently, USCIS adjudicates waiver applications filed abroad at various locations in other countries and within the United States, depending on where the alien applied for his or her immigrant visa. If USCIS approves the waiver, it notifies DOS, and DOS may issue the immigrant visa if DOS determines that the alien is otherwise eligible to receive an immigrant visa. If the waiver is denied, the alien is subject to the unlawful presence bars and must remain outside of the United States for 3 or 10 years before being able to reapply for an immigrant visa. The alien may file an appeal of a denied waiver application with the USCIS Administrative Appeals Office, or file another waiver application in the future.

The 3-year and 10-year unlawful presence bars do not apply unless and until the alien departs from the United States. As noted above, many aliens who would trigger these bars if they depart from the United States are, for other reasons, statutorily ineligible to apply for adjustment of status to that of an LPR while in the United States. Consequently, these aliens must depart the United States and apply for immigrant visas at a U.S. Embassy or consulate abroad before being able to return to the United States as immigrants. The action required to obtain lawful permanent residence in the United States, departure from the United States in order to apply for an immigrant visa at a consulate abroad, is the very action that triggers the INA section 212(a)(9)(B)(i) inadmissibility grounds.

E. Problems with the Current Inadmissibility Waiver Process

Under the current system, the entire waiver adjudication process occurs while the immediate relative remains outside of the United States, separated from his or her U.S. citizen spouse or parent. In some cases, the waiver processing time can take well over one year for reasons explained below. As a result, many immediate relatives are reluctant to proceed abroad to obtain an immigrant visa. In addition, the processing delays and extended absences of

immediate relatives can cause many U.S. citizens and their families to experience extreme humanitarian and financial hardships. As such, an immediate relative's extended absence from the United States can give rise to the sort of extreme hardships to U.S. citizen family members that the unlawful presence waivers are intended to address and, if the waiver is merited, avoid.

The current waiver adjudication process also creates inefficiencies and costs for the Federal Government. Overseas adjudication processing times for waivers vary by location and the number of waiver requests pending at any given time. Processing times are affected by the resources, personnel, and space available at USCIS offices abroad and the U.S. Embassy or consulate in a particular location. It is expensive for USCIS to maintain staff outside the United States, and space in U.S. Embassies and consulates is limited. Waiver processing times also are affected by the need for USCIS and DOS to transfer cases between the two agencies when adjudicating the immigrant visa application and waiver request. These limitations often prolong the overall waiver adjudication process and contribute significantly to the time U.S. citizens and their family members are separated from their immediate relatives.

F. Notice of Intent

On January 9, 2012, USCIS published a notice of intent announcing its intent to change the current process for filing and adjudication of certain applications for waivers of inadmissibility filed in connection with an immediate relative immigrant visa application.³ The notice explained the proposed process that USCIS was considering and that USCIS would further develop, and ultimately finalize, the proposal through the rulemaking process.

On January 10, 2012, USCIS conducted a stakeholder engagement to discuss the notice of intent. USCIS provided an overview of how the proposed process changes may affect filing

³ See 77 FR 1040 (Jan. 9, 2012).

and adjudication, and USCIS addressed questions from stakeholders. More than 900 people participated via telephone and in person. Topics covered included eligibility, procedures, and consequences of an approval or denial of a provisional waiver request.

IV. Proposed Changes

A. Overview of Proposed Provisional Unlawful Presence Waiver Process

DHS proposes to allow certain “immediate relatives” (spouse, parents, and children (unmarried and under the age of 21)) of U.S. citizens, as defined in INA section 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i), to apply for a waiver of inadmissibility of the unlawful presence bars before leaving the United States to attend their immigrant visa interviews abroad. Individuals filing under the new process would be subject to a biometrics collection requirement to assist in identifying other possible grounds of inadmissibility and ensure the integrity of the process. If USCIS has reason to believe that, at the time of the visa interview, the individual may be inadmissible on grounds of inadmissibility other than the unlawful presence grounds, USCIS would deny the application. If USCIS denies the provisional waiver application, USCIS will follow the NTA issuance policy in effect at the time of adjudication to determine if it will initiate removal proceedings against the applicant.⁴

If USCIS approves the provisional unlawful presence waiver, the approval would be provisional. It would become fully effective only upon the alien’s departure from the United States and a determination by DOS that the alien is, in light of the approved provisional unlawful presence waiver, otherwise admissible and eligible for an immigrant visa.

If USCIS denies the provisional unlawful presence waiver, the alien may apply for a

⁴ See USCIS Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011), available at: [http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20\(Aproved%20as%20final%2011-7-11\).pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Aproved%20as%20final%2011-7-11).pdf).

waiver of the 3- or 10-year unlawful presence bar through the current process described above, following the immigrant visa interview with a DOS consular officer. Given that USCIS is establishing these provisional waiver procedures purely as a matter of agency discretion, USCIS will not, in the interests of administrative efficiency and finality, allow for more than one provisional unlawful presence waiver filing. USCIS also will not permit administrative appeals or motions to reopen or reconsider the denial of a provisional unlawful presence waiver request. See proposed 8 CFR 212.7(e)(3) and (10). USCIS, however, proposes to retain its discretionary authority to reopen or reconsider a case on a USCIS motion when warranted. See 8 CFR 103.5(a)(5). USCIS is committed to issuing Requests for Evidence (RFE) in considering applications that it receives from unrepresented individuals or others if their applications are missing critical information needed to demonstrate extreme hardship. USCIS believes that RFEs will allow the applicant to address any deficiencies and to provide any additional information to establish eligibility for the provisional waiver. However, allowing applicants to file multiple applications would significantly interfere with the interagency operations between USCIS and DOS and substantially delay immigrant visa processing.

B. Rationale for Proposed Change

The 3-year and 10-year unlawful presence bars do not apply unless the alien departs from the United States. Accordingly, aliens who have accrued more than 180 days of unlawful presence do not trigger the inadmissibility ground unless and until they depart. Many of these aliens are not eligible to adjust status to that of an LPR while remaining in the United States and must depart from the United States to apply for and obtain an immigrant visa at a U.S. Embassy or consulate abroad. Therefore, the action required from the alien in order to obtain LPR status – the departure to attend the immigrant visa interview – is the very action that triggers the 3-year

or 10-year unlawful presence bar.

If DHS could approve an application for a provisional waiver of the unlawful presence bars prior to the alien's immigrant visa interview abroad, the consular officer could issue the immigrant visa without delay following the interview. The alien would not have to wait abroad while USCIS adjudicates the waiver request. Instead, the alien could remain in the United States with his or her U.S. citizen spouse or parent while USCIS adjudicates his or her provisional unlawful presence waiver request. U.S. citizens, aliens, and their family members also could better plan for the immediate relative's departure for the consular interview and eventual return to the United States. The concept of allowing applicants to apply for a waiver while still in the United States, in advance of their departure, is not new and has been implemented in other contexts. For example, certain aliens who previously were ordered removed or were removed from the United States must obtain the Secretary's consent to reapply for admission to the United States because they are inadmissible under INA section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A). By law, consent to reapply must be obtained before the alien seeks to return to the United States. However, such aliens have been allowed to request consent to reapply in advance, while still in the United States before they depart and trigger inadmissibility under INA section 212(a)(9)(A). Thus, the proposed provisional unlawful waiver process is consistent with past practice with respect to certain pre-departure adjudications that address other grounds of inadmissibility under INA section 212(a)(9), 8 U.S.C. 1182(a)(9).

An approved provisional unlawful presence waiver would facilitate immigrant visa issuance shortly after the first consular interview. DHS believes that this process change would reduce the overall visa processing time, the period of separation of the U.S. citizen from his or her immediate relative, and the financial and emotional impact on the U.S. citizen and his or her

family due to the immediate relative's absence from the United States. It also may encourage individuals to take affirmative steps to obtain an immigrant visa to become an LPR as reduced waiting times abroad would render it an efficient, more predictable process, rather than one with unpredictable and prolonged periods of separation.

For USCIS and DOS, the proposed changes would minimize the case transfers that are currently part of the waiver process and save both agencies time and resources. If USCIS could process and adjudicate the provisional unlawful presence waivers domestically, USCIS could move a large part of its workload to USCIS Service Centers or field offices in the United States with resources that are less expensive than overseas staffing resources and that are available and flexible enough to accommodate filing surges. By adjudicating the provisional unlawful presence waiver applications domestically, USCIS also may be able to better standardize its waiver processing times for all requests for waivers of inadmissibility that are filed by applicants who process their immigrant visas at a U.S. Embassy or consulate. Most waivers of inadmissibility filed overseas are filed by aliens who are subject to the unlawful presence bars only.

USCIS has identified immediate relatives of U.S. citizens to participate in this streamlined process, in part, because the focus on U.S. citizens and their immediate relatives is consistent with Congress' prioritization in the immigration laws of family reunification.⁵

Congress did not set an annual limit on the number of immediate relatives who may be admitted

⁵Congress' emphasis on family reunification has long been reflected in immigration statutes. See, e.g., S. Rep. No. 89-748, at 13 (1965) (Comm. Rep. for the Immigration Act of 1965, Pub. L. 89-236, 79 Stat. 911) ("Reunification of families is to be the foremost consideration. The closer the family relationship the higher the preference. In order that the family unit may be preserved as much as possible, parents of adult U.S. citizens, as well as spouses and children, may enter the United States without numerical limitation.") (emphasis added); see also Statement by President George Bush Upon Signing S.358 (Immigration Act of 1990), 1990 U.S.C.C.A.N. 6801-1 (Nov. 29, 1990) ("The Act maintains our Nation's historic commitment to family reunification by increasing the number of immigrant visas allocated on the basis of family ties").

to the United States each year; consequently, visas for these aliens can be processed without awaiting availability of an immigrant visa number.

USCIS proposes to limit the provisional unlawful presence waiver process to aliens who would be subject only to the unlawful presence bars at the time of visa issuance because of the unique nature of INA section 212(a)(9)(B), as described above, and because preliminary data collected from DHS systems shows that approximately 80% of the waiver applications filed overseas are filed by aliens solely inadmissible under the unlawful presence bars. Accordingly, this proposed rule would likely affect a large number of U.S. citizens and their families who could be reunited more quickly with their immediate relatives.

Finally, USCIS is further limiting eligibility for a provisional unlawful presence waiver only to immediate relatives of U.S. citizens who can establish that denial of the waiver would result in extreme hardship to their U.S. citizen spouse or parents, as provided in INA section 212(a)(9)(B)(v). DHS would not modify the extreme hardship standard.

USCIS is not extending this provisional unlawful presence waiver process to preference aliens. Preference aliens do not qualify as immediate relatives of U.S. citizens; they include unmarried sons and daughters of U.S. citizens (21 years of age or older); spouses, children, unmarried sons and daughters of LPRs; married sons and daughters of U.S. citizens; and siblings of U.S. citizens. Unlike immediate relatives, the preference categories have annual numerical limitations set by statute. The processing of visas for these aliens depends on the availability of an immigrant visa number, while immediate relatives always have visa availability.

Additionally, USCIS is not extending this provisional unlawful presence waiver process to immediate relatives who are basing their claim on extreme hardship to an LPR spouse or parent. For the provisional unlawful presence waiver, the qualifying relative must be a U.S.

citizen. Preference aliens and immediate relatives whose qualifying relative for the extreme hardship claim is an LPR can still apply for a waiver under the current waiver process, after a consular interview abroad.

This approach is consistent with the Secretary's authority to determine how best to administer the immigration laws and is within USCIS's discretion to determine the most efficient means for effectuating the waiver process. This new process is only a change in filing procedures (i.e., where an alien can seek a waiver of inadmissibility); it is not a substantive change in how USCIS determines extreme hardship. Limiting eligibility for this alternative waiver process to immediate relatives of U.S. citizens who can establish extreme hardship to a U.S. citizen spouse or parent is consistent with Congress' policy choice of focusing on reunification of U.S. citizen families. Focusing on hardship to U.S. citizens in the development of this discretionary procedure also is consistent with permissible distinctions that may be drawn between U.S. citizens and aliens and between classes of aliens in immigration laws and policies, *see, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976), and with the governmental interest in encouraging naturalization, *see, e.g., City of Chicago v. Shalala*, 189 F.3d 598, 608 (7th Cir. 1999), and cases cited therein.⁶

DHS recognizes that certain immediate relatives of U.S. citizens may not be eligible to avail themselves of this alternative waiver process. Aliens who need a waiver of inadmissibility for unlawful presence based on extreme hardship to an LPR spouse or parent can still apply for such waivers after their consular interviews abroad.

⁶ The Department has not determined whether it might extend the availability of this procedure to other aliens. *See, Beach Commc'ns v. FCC*, 508 U.S. 307, 316 (1993) (observing that policymakers "must be allowed leeway to approach a perceived problem incrementally").

C. Aliens Eligible to Seek a Provisional Unlawful Presence Waiver

USCIS proposes to limit the provisional unlawful presence waiver to aliens who meet the following criteria:

1. Alien must be the beneficiary of an approved immediate relative petition

USCIS proposes to limit this proposed provisional unlawful presence waiver process to aliens who are “immediate relatives” under INA section 201(b)(2)(A)(i), 8 U.S.C.

1151(b)(2)(A)(i). See proposed 8 CFR 212.7(e)(2). Immediate relatives of U.S. citizens include spouses of U.S. citizens; unmarried children under the age of 21 of U.S. citizens; and parents of U.S. citizens over age 21. Certain surviving spouses and children of deceased U.S. citizens, self-petitioners, and aliens who would become conditional permanent residents based on a marriage to a U.S. citizen for less than two years are also considered immediate relatives. Such aliens are included in the category of eligible individuals who could seek a provisional unlawful presence waiver. See INA section 201(b)(2)(A)(i), 8 U.S.C. 1151(b)(2)(A)(i); INA section 204(l), 8 U.S.C. 1154(l); and INA section 216, 8 U.S.C. 1186.

USCIS has considered the possibility that the proposed process may lead to an increase in fraudulent family-based immigrant visa petitions. USCIS is committed to preventing and detecting fraud in its immigration benefits programs and to implementing existing preventive measures provided in the immigration laws.

Fraud detection and prevention are integral to USCIS’s mission and to its standard operating procedures governing adjudications. USCIS’s Fraud Detection and National Security division (FDNS) focuses entirely on fraud detection and national security. FDNS investigates fraud in the benefit process and makes appropriate referrals to U.S. Immigration and Customs Enforcement (ICE), the Department of Justice, or other law enforcement agencies when such

fraud should be considered for criminal prosecution. USCIS also has established standard operating procedures in field offices for referrals to FDNS on potential fraud cases that may require additional review. For fraud prevention, FDNS conducts benefit fraud assessments to detect any patterns or increase in fraudulent practices in a particular application type or area of the United States.

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

As a general matter, the U.S. citizen petitioner and the conditional permanent resident must jointly seek to remove the condition within the 90-day period immediately preceding the second anniversary of the date the alien obtained conditional permanent residence status. See id. If the U.S. citizen petitioner and the conditional permanent resident fail to do so, the alien's conditional permanent resident status is terminated automatically, and any waiver granted in connection with the status is automatically void. See id.; see also 8 CFR 212.7 and 216.4(a)(6). Furthermore, if USCIS determines that the marriage was entered into to evade the immigration laws, USCIS cannot approve future petitions for that alien. See INA section 204(c), 8 U.S.C.

1154(c).

The administrative process for removal of conditions and the USCIS assessment of whether the marriage was entered into to evade the immigration laws provide strong tools for combating potential fraud. USCIS, therefore, is not proposing to exclude from the provisional unlawful presence waiver process aliens who have been married less than two years and will be admitted as conditional residents. However, in the case of marriages that would be subject to the conditional LPR provisions of INA section 216, USCIS reserves the right, in the exercise of discretion, to interview the alien and the U.S. citizen spouse (as provided in proposed 8 CFR 212.7(e)(7) of this proposed rule) in connection with the provisional waiver application, when USCIS determines that the facts in a particular case warrant additional inquiry and review.

2. Alien must be present in the United States when filing the provisional unlawful presence waiver application and for the biometrics appointment

USCIS proposes to limit the category of immediate relatives eligible for the provisional unlawful presence waiver to aliens who are present in the United States but who are required to depart to immigrate through the DOS consular process abroad. See proposed 8 CFR 212.7(e)(2)(i). Eligible immediate relatives also must be present in the United States to provide biometrics at an USCIS Application Support Center (ASC). This new biometric requirement will help USCIS determine if the alien potentially is subject to other grounds of inadmissibility or does not merit a favorable exercise of discretion, and is consistent with the agency's security and public safety priorities. Aliens who are outside the United States may not seek a provisional unlawful presence waiver but can proceed through the current waiver process.

3. Alien must seek a visa based on the approved immediate relative petition

USCIS proposes to require an alien seeking a provisional unlawful presence waiver to

submit evidence demonstrating that he or she has initiated the immigrant visa process with the DOS NVC based upon the approved immediate relative petition, by submitting evidence that he or she has paid the immigrant visa processing fee required by DOS. Such evidence is required to ensure that the alien is pursuing consular processing, as the provisional unlawful presence waiver would be granted to facilitate the immigrant visa interview. The alien, however, is not eligible to apply under the proposed process if he or she has already been scheduled for an immigrant visa interview at a DOS Embassy or consulate abroad. See proposed 8 CFR 212.7(e)(2) and (3). USCIS analyzed whether cases already scheduled for visa interview should be included in the provisional unlawful presence waiver process. USCIS determined that resource constraints and timing issues warranted exclusion of these cases from participation. Therefore, any immigrant visa applicants who have already had their appointments scheduled, whether they actually appeared for the interview or not, should proceed with the immigrant visa process and not delay.

4. Alien must be inadmissible based solely on unlawful presence at the time of the immigrant visa interview with DOS

USCIS proposes to further limit this provisional unlawful presence waiver process to immediate relatives whose only ground of inadmissibility is, or would be upon departure from the United States, the 3-year or 10-year unlawful presence bars under INA section 212(a)(9)(B)(i)(I) or (II), 8 U.S.C. 1182(a)(9)(B)(i)(I) or (II) at the time of the consular interview. See proposed 8 CFR 212.7(e)(2) and (e)(3)(i). USCIS proposes that if, when processing the provisional waiver application, USCIS has reason to believe that an alien may be inadmissible on a ground of inadmissibility other than unlawful presence under INA section 212(a)(9)(B)(i) at the time of the visa interview with DOS, USCIS will deny the provisional unlawful presence waiver application. Such a denial of a provisional unlawful presence waiver

request would not be appealable; however, it would not preclude the alien from filing a waiver application under the current waiver process following the consular interview. See proposed 8 CFR 212.2(e)(7) and (e)(10).

Furthermore, USCIS's determination that it does not have reason to believe that the individual may be inadmissible on grounds other than the 3-year or 10-year unlawful presence bar at the time of the immigrant visa interview does not preclude DOS from making its own admissibility determination and its own finding that the individual may be ineligible for the immigrant visa despite the approved provisional unlawful presence waiver. Jurisdiction for making final ineligibility findings in relation to the consular immigrant visa process lies with DOS, not with USCIS. Similarly, neither USCIS's approval of the provisional unlawful presence waiver application nor DOS's visa eligibility determination and subsequent immigrant visa issuance guarantees that an alien will be admitted to the United States by U.S. Customs and Border Protection (CBP) if CBP determines that the individual is inadmissible on grounds other than those that were validly waived. See INA sections 204(e), 221(h); 8 U.S.C. 1154(e), 1201(h).

5. Alien must meet the requirements for the unlawful presence waiver

An alien must meet all statutory requirements for the unlawful presence waiver, as outlined in INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), including the limitation that the alien must show extreme hardship to a U.S. citizen spouse or parent.⁷ The alien also must establish that he or she warrants a favorable exercise of discretion.

Under current policy, USCIS considers the death of a U.S. citizen petitioner to be the

⁷ INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), allows for consideration of extreme hardship to a U.S. citizen spouse or parent or to an LPR spouse or parent. As explained previously, USCIS is limiting eligibility for the provisional waiver to those who can show extreme hardship to a U.S. citizen spouse or parent.

functional equivalent of extreme hardship for purposes of a waiver sought by an applicant who is a surviving immediate relative of a deceased U.S. citizen and who meets the requirements of INA section 204(l), 8 U.S.C. 1154(l), if the extreme hardship being claimed by the surviving beneficiary would have been on account of extreme hardship to the U.S. citizen petitioner if he or she had survived. Note, however, that the finding of extreme hardship merely permits, and never compels, a favorable exercise of discretion.⁸

Any alien who can only qualify for a waiver based on extreme hardship to an LPR spouse or parent can still apply for a waiver under the existing process after an immigrant visa interview at a U.S. Embassy or consulate abroad.

6. Alien must be age 17 or older at the time of filing a provisional unlawful presence waiver

USCIS proposes to accept provisional unlawful presence waiver applications for immediate relatives 17 years of age and older but reject applications filed by those under the age of 17. Unlawful presence does not begin to accrue until an alien who is unlawfully present in the United States reaches the age of 18. Accepting waiver applications from an alien who is 17 years of age or older would prevent an alien's prolonged separation from his or her U.S. citizen relative in the event that the alien's immigrant visa interview is scheduled after his or her 18th birthday.

D. Aliens Ineligible for a Provisional Unlawful Presence Waiver

Under the proposed rule, immediate relatives of U.S. citizens would not be eligible for a provisional unlawful presence waiver under proposed 8 CFR 212.7(e) if:

⁸ See USCIS Memorandum, Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act (Dec. 16, 2010), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf>; see also Matter of Cervantes-Gonzalez, 22 I. & N. Dec. 560, 565 (BIA 1999), aff'd, 244 F.3d 1001 (9th Cir. 2001).

- i. They are outside the United States;
- ii. They are not the beneficiaries of either an approved Petition for Alien Relative, Form I-130, classifying them as an immediate relative, or an approved Petition for Amerasian, Widow(er), and Special Immigrant, Form I-360, classifying them as an immediate relative;
- iii. They are not actively pursuing consular processing of an immigrant visa based on the approved immediate relative petition and have not paid the immigrant visa processing fee to DOS;
- iv. They have been scheduled for an immigrant visa interview at the time they submit an application for a provisional unlawful presence waiver;
- v. They fail to comply with the biometric capture requirements;
- vi. They are under the age of 17 years when the provisional unlawful presence waiver application is filed;
- vii. They are in removal proceedings that have not been terminated or dismissed;
- viii. They have not had the charging document (Notice to Appear) to initiate removal proceedings cancelled;
- ix. They are in removal proceedings that have been administratively closed but not subsequently reopened for the issuance of a final voluntary departure order;
- x. They are subject to a final order of removal issued under section 235, 238 or 240 of the Act or any other provision of law (including an in absentia removal order under section 240(b)(5) of the Act);
- xi. They have a pending application with USCIS for lawful permanent resident status in the United States;
- xii. USCIS has reason to believe that the alien may be subject to other grounds of

inadmissibility at the time of immigrant visa interview with DOS;

xiii. They have not established to USCIS's satisfaction that denial of the waiver would result in extreme hardship to the alien's U.S. citizen spouse or parent or that a favorable exercise of discretion is merited; or

xiv. The alien has previously filed a provisional unlawful presence waiver application.

While individuals with cases pending with the NVC who have paid the immigrant visa processing fee to DOS and not yet been scheduled for a consular visa interview would be eligible to apply for the provisional unlawful presence waiver, applicants who have had their immigrant visa interviews scheduled will not be allowed to participate in the provisional waiver process. The inclusion of these cases was analyzed but resource constraints and the close coordination with DOS on the timeframes for interview scheduling once the provisional waiver application has been filed, led to the decision to exclude the cases from participation. NVC and USCIS intend that both document collection for the immigrant visa interview and waiver adjudication should occur as parallel processes that will conclude at the same time, thus allowing NVC to schedule the immigrant visa interview and transfer the case to post with no additional delay. Therefore, any immigrant visa applicant who has already had his or her appointment scheduled, whether they actually appeared for the interview or not, should proceed with the immigrant visa process and not delay.

DHS is considering development of a process to permit filing of provisional unlawful presence waiver applications by certain individuals who: (a) are in removal proceedings but have had such proceedings administratively closed and were subsequently granted voluntary departure, (b) were in removal proceedings that have been terminated or dismissed or (c) have had the charging document (Notice To Appear) to initiate removal proceedings cancelled.

Aliens who cannot participate in the proposed provisional unlawful presence waiver process may still pursue a waiver through the current waiver process.

E. Filing, Adjudication, and Decisions

1. Filing the provisional unlawful presence waiver application

DHS proposes to require an alien seeking a provisional unlawful presence waiver to file an application on the form designated by USCIS, with the fees prescribed in proposed 8 CFR 103.7(b)(1) and (b)(1)(i)(C), and in accordance with the form instructions. See proposed 8 CFR 212.7(a)(1) and (e)(4). For this new process, USCIS has created and proposes to use a new Application for Provisional Unlawful Presence Waiver, Form I-601A. The filing fee for the Form I-601A will be the same as Form I-601, which is currently \$585, since the adjudication time required for both forms is the same.⁹ See proposed 8 CFR 103.7(b)(1)(i)(AA). USCIS will not accept fee waiver requests for the Form I-601A. The biometrics fee is currently \$85 and also cannot be waived. See proposed 8 CFR 103.7(b)(1)(i)(C) and 8 CFR 103.17. The new Form I-601A will minimize the potential for confusion between the provisional waiver process and the current Form I-601 waiver process.

Additionally, applicants for a provisional unlawful presence waiver would be required to undergo biometrics collection to ensure the integrity of the process and assist USCIS in determining if the applicants have other potential grounds of inadmissibility. See proposed 8 CFR 212.7(e)(5). DHS would deny the provisional unlawful presence waiver application based on abandonment of the application if the applicant fails to provide biometrics or fails to appear at

⁹ The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other applicants. INA section 286(m), 8 U.S.C. 1356(m). The INA provides that the fees may recover administrative costs as well. For further information about USCIS fees, see U.S. Citizenship and Immigration Services Fee Schedule, 75 FR 58962 (Sept. 24, 2010) and 75 FR 33445 (June 11, 2010).

the biometrics appointment. See proposed 8 CFR 103.2(b)(13) and proposed 8 CFR 212.7(e)(5).

2. Adjudication of the provisional unlawful presence waiver application

Once a provisional unlawful presence waiver application is properly filed, USCIS would adjudicate the provisional unlawful presence waiver. The alien still would have the burden to establish that he or she is eligible for the waiver and meets the requirements outlined in INA section 212(a)(9)(B)(v), with the additional limitation that the alien must establish extreme hardship only to his or her U.S. citizen spouse or parent. See proposed 8 CFR 212.7(e)(2) and 8 CFR 212.7(e)(7). The alien also would have to demonstrate that he or she warrants a favorable exercise of the Secretary's discretion. See INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v); proposed 8 CFR 212.7(e)(6). If the alien meets all eligibility requirements, and a favorable exercise of discretion is warranted, USCIS would approve the provisional unlawful presence waiver. See 8 CFR 212.7(e)(2).

3. Requests for Evidence

DHS proposes to issue RFEs in accordance with USCIS regulations at 8 CFR 103.2 and applicable USCIS policy. USCIS will not issue Notices of Intent to Deny (NOIDs) to provisional unlawful presence waiver applicants. DHS proposes to limit RFEs solely to the issues of whether the alien has established extreme hardship and/or merits a favorable exercise of discretion. USCIS is committed to issuing RFEs to address applications it receives that are missing critical information needed to demonstrate extreme hardship. USCIS also has determined that issuing NOIDs could significantly interfere with the operational agreements between USCIS and DOS and could substantially delay immigrant visa processing. If an alien fails to respond to an RFE within the stated time frame, USCIS may deny the provisional unlawful presence waiver application as abandoned. See 8 CFR 103.2(b)(13)(i).

4. Denials

USCIS would deny a provisional unlawful presence waiver application without issuing an RFE when the alien fails to meet any of the specified eligibility criteria described in proposed 8 CFR 212.7(e). An alien whose provisional unlawful presence waiver application is denied may seek a waiver after the DOS consular officer has made an admissibility determination at the immigrant visa interview at a U.S. Embassy or consulate abroad. See proposed 8 CFR 212.7(e)(10). An alien may not seek multiple provisional unlawful presence waivers. See proposed 8 CFR 212.7(e)(3).

5. Rejections of provisional unlawful presence waiver applications

USCIS also proposes to codify the criteria for when an application will be rejected and fees returned to the applicant. The goal is to reduce the likelihood that an alien will erroneously file a waiver application and further delay his or her immigrant visa processing. USCIS would reject a request for a provisional unlawful presence waiver if the alien:

- A. Fails to pay the required fees for the waiver application or biometrics collection or pay the correct fee;
- B. Fails to sign the 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 years.
- E. Does not include evidence of an approved petition that classifies the alien as an immediate relative of a U.S. citizen;
- F. Does not include a copy of the immigrant visa fee receipt evidencing that the alien has paid the immigrant visa processing fee to DOS;
- G. Has indicated on the provisional unlawful presence waiver application that a visa

interview has been scheduled with DOS; or

H. Has not indicated on the provisional unlawful presence waiver application that the qualifying relative is a U.S. citizen spouse or parent.

See proposed 8 CFR 212.7(e)(4)(ii). An alien whose application was rejected is not prohibited from filing a new provisional unlawful presence waiver application according to the procedures outlined in proposed 8 CFR 212.7(e).

6. Withdrawal of the request for a provisional unlawful presence waiver

An alien may withdraw a provisional unlawful presence waiver application at any time prior to a final decision. Subsequent to the withdrawal, the case will be closed, and the alien and his or her representative (if applicable) will be notified. DOS/NVC also will be notified of the action. See proposed 8 CFR 212.7(e)(8) and (9). An alien who withdraws an application for a provisional unlawful presence waiver will not be permitted to later file a new application, and the filing fees will not be refunded.

F. Motions to Reopen or Reconsider or Appeals of Denied Provisional Unlawful Presence Waiver Applications

Aliens seeking a provisional unlawful presence waiver would not be able to file a motion to reopen or motion to reconsider or to appeal a denial of a request for a provisional waiver. See proposed 8 CFR 212.7(e)(10). Rather, such aliens could apply for a waiver through the current consular immigrant visa process. See id.

USCIS proposes to retain its authority and discretion to reopen or reconsider a decision on its own motion. See proposed 8 CFR 212.7(a)(4)(v) and 8 CFR 212.7(e)(12). For the provisional unlawful presence waiver process, USCIS may reopen the decision and deny or approve the provisional unlawful presence waiver at any time if USCIS finds that the decision

was issued in error or approval is no longer warranted. USCIS would follow the requirements of 8 CFR 103.5(a)(5) before reopening a case and denying a waiver application. A USCIS decision to deny a provisional unlawful presence waiver is not subject to administrative appeal. USCIS's decision is discretionary and is not a final agency action subject to judicial review, since USCIS's decision is without prejudice to the alien's ability to seek a waiver from USCIS through the consular immigrant visa process. See proposed 8 CFR 212.7(a)(3) and (e)(8) and (e)(10).

G. Terms and Conditions of the Provisional Unlawful Presence Waiver

DHS proposes that a provisional unlawful presence waiver will not become a final waiver unless and until the alien departs from the United States, he or she presents himself or herself for the immigrant visa interview at a U.S. Embassy or consulate abroad, and the DOS consular officer determines that, in light of the approval of the provisional waiver and other evidence of record, the alien is otherwise admissible to the United States and eligible for an immigrant visa. See proposed 8 CFR 212.7(e)(11). Once DOS determines that the alien is eligible for an immigrant visa, the provisional unlawful presence waiver will become final and fully effective, subject to 8 CFR 212.7(a)(4). See proposed 8 CFR 212.7(a)(4) and 8 CFR 212.7(e)(11) and (e)(12).

A provisional unlawful presence waiver would only be effective for immigrant visa issuance based on the approved immediate relative petition. If the consular officer determines that the alien is inadmissible on other grounds, the provisional unlawful presence waiver is automatically revoked and the alien would be required to file a new waiver application that covers all applicable grounds of inadmissibility, including the 3-year or 10-year unlawful presence bar. See proposed 8 CFR 212.7(e)(13).

DHS also proposes to limit the grant of a provisional unlawful presence waiver to the

time period of the immigrant visa registration of an alien in accordance with INA section 203(g), 8 U.S.C. 1153(g).¹⁰ DOS may terminate an alien's immigrant visa registration if the alien fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa. DOS, however, may reinstate the alien's immigrant visa registration if the alien establishes that within two years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond his or her control. See INA section 203(g), 8 U.S.C. 1153(g); 22 CFR 42.83. Thus, the grant of the provisional unlawful presence waiver is valid as long as the alien's immigrant visa registration has not been terminated by DOS pursuant to INA 203(g) and the underlying immigrant visa petition has not been revoked, withdrawn, or otherwise terminated.

Furthermore, the validity of the provisional unlawful presence waiver also is dependent on the continued validity of the approved immediate relative petition. See proposed 8 CFR 212.7(a)(4), (e)(11), (e)(12) and (e)(13). If the approval of the visa petition or self-petition is revoked for any reason, the provisional waiver would be automatically revoked, unless it is otherwise reinstated for humanitarian reasons or converted to a widow/widower petition. Under proposed 8 CFR 212.7(a)(4) and 8 CFR (e)(13), the provisional unlawful presence waiver also would be revoked automatically when: an immigrant visa ineligibility cannot be overcome; the approved immigrant visa application is withdrawn, or otherwise rendered invalid at any time; or when DOS terminates the registration of the immigrant visa application pursuant to INA section 203(g), 8 U.S.C. 1153(g), and DOS has not reinstated the registration in accordance with section

¹⁰ INA section 203(g) provides in relevant part: "The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control." See also 22 CFR 42.83 (implementing INA section 203(g)).

203(g), 8 U.S.C. 1153(g). Termination of registration under INA section 203(g), 8 U.S.C. 1153(g), also automatically revokes the approval of the underlying immediate relative petition under 8 CFR 205.1(a)(1).

Finally, a provisional unlawful presence waiver grant is revoked automatically if the alien, at any time, reenters or attempts to reenter the United States without admission or parole. See proposed 8 CFR 212.7(e)(13).

H. Validity of the Provisional Unlawful Presence Waiver

Once the provisional waiver takes full effect in accordance with this rule, the alien would no longer be inadmissible to the United States under INA section 212(a)(9)(B) based on previously-accrued unlawful presence. The alien's period of unlawful presence in the United States upon which the waiver is based would be permanently waived, other than for conditional permanent residents whose status is terminated and certain K nonimmigrants, as described below. See proposed 8 CFR 212.7(a)(4) and (e)(12). The consular officer could issue the immigrant visa since the alien is no longer inadmissible.

I. Limitations of a Provisional Unlawful Presence Waiver

The application for, or grant of, a provisional unlawful presence waiver under this proposed rule does not create a lawful immigration status or extend any authorized period of stay to the alien while the provisional waiver application is pending review with USCIS or while the alien is waiting for his or her immigrant visa interview. If an alien is present in the United States without lawful immigration status, he or she remains subject to removal, as provided by law. See INA section 240, 8 U.S.C. 1229a. A pending or approved application for a provisional unlawful presence waiver also will not toll the accrual of unlawful presence, but a grant of the provisional unlawful presence waiver will cover inadmissibility under both the 3-year and the

10-year bars under INA section 212(a)(9)(B)(i). A pending or approved application for a provisional unlawful presence waiver will not protect the alien from any other grounds of inadmissibility that he or she may be subject to in the future, such as the bar for unlawful reentry after previous immigration violation in the United States, under INA section 212(a)(9)(C), 8 U.S.C. 1182(a)(9)(C). A pending or approved provisional unlawful presence waiver does not provide an individual with the right to obtain advance parole, the right to enter the United States, or the right to obtain and be granted any other immigration benefit. Finally, a pending or approved provisional unlawful presence waiver does not guarantee issuance of an immigrant visa or admission to the United States based upon the immigrant visa.

J. Clarification of 8 CFR 212.7(a)(1) and (a)(4)

DHS also proposes two clarifying amendments to 8 CFR 212.7(a)(1) and (a)(4). See proposed 8 CFR 212.7(a)(1) and (a)(4). The first clarifying amendment is necessary because of an amendment to 8 CFR 212.7(a)(1) that DHS included as part of the final rule published in the Federal Register on August 29, 2011, at 76 FR 53764 (August 29, 2011 final rule). The August 29, 2011 final rule provides the regulatory framework that will enable USCIS to migrate from a paper file-based, nonintegrated systems environment to an electronic customer-focused, centralized case management environment for benefits processing.

Before the August 29, 2011 final rule entered into effect on November 28, 2011, 8 CFR 212.7(a)(1) read:

Form I-601 must be filed in accordance with the instructions on the form. When filed at a consular office, Form I-601 shall be forwarded to USCIS for a decision upon conclusion that the alien is admissible but for the grounds for which a waiver is sought.

The August 29, 2011 final rule revised the provision, effective November 28, 2011, so that it now reads:

Any alien who is inadmissible under sections 212(g), (h), or (i) of the Act who is eligible for a waiver of such inadmissibility may file on the form designated by USCIS, with the fee prescribed in 8 CFR 103.7(b)(1) and in accordance with the form instructions. When filed at the consular section of an embassy or consulate, the Department of State will forward the application to USCIS for a decision after the consular official concludes that the alien is otherwise admissible.

8 CFR 212.7(a)(1), as amended at 76 FR 53787 (emphasis added). Deletion of the specific reference to the Form I-601 is consistent with the purpose of the August 29, 2011 final rule by facilitating the move to electronic filing and case management. The reference to aliens “inadmissible under sections 212(g), (h), or (i) of the Act,” however, is an error. The cited provisions are not grounds of inadmissibility but are the statutory bases for some of the waivers of inadmissibility that an alien may seek under 8 CFR 212.7. For example, an alien who is inadmissible based on the 3-year and 10-year unlawful presence bar under INA section 212(a)(9)(B)(i), 8 U.S.C. 1182(a)(9)(B)(i), uses the same application process to seek a waiver of inadmissibility for unlawful presence under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). Therefore, the reference to INA section 212(g), (h) and (i) is removed and replaced with the more general reference “who is inadmissible under any provision of section 212(a) of the Act.” In addition, the second sentence in 8 CFR 212.7 about “forwarding” of an application from DOS to USCIS is not necessary. The second sentence is an internal case management provision that does not directly affect how an applicant seeks the benefit.

For these reasons, DHS proposes to revise 8 CFR 212.7(a)(1) so that its text more fully aligns with the purpose of the August 29, 2011 final rule. Rather than referring only to three types of waivers that an alien may seek, the amended provision would apply to any waiver of inadmissibility that an alien currently seeks by filing the Form I-601 or any future form that may be designated by USCIS for waivers of grounds of inadmissibility under these provisions. The proposed amendment would remove what is now the second sentence in current 8 CFR 212.7(a)(1). Finally, the proposed amendments would clarify who can apply for the waivers covered under 8 CFR 212.7(a)(1).

DHS also proposes to amend 8 CFR 212.7(a)(4), concerning the validity of a waiver of inadmissibility. Two general principles are that a waiver of inadmissibility applies only to the specific grounds for which a waiver is sought, and that, except as described in this rule with respect to provisional unlawful presence waivers, the waiver, once granted, is valid indefinitely. DHS does not intend to alter these principles, and the proposed amendment includes them.

One exception to these general principles relates to aliens who obtain a waiver of inadmissibility in conjunction with an application for lawful permanent resident status and who are admitted as LPRs on a conditional basis under section 216 or 216A of the Act, 8 U.S.C. 1186 or 1186A. For any such aliens, termination of conditional LPR status would also terminate the validity of the waiver. The waiver would be restored if the alien challenges the termination in removal proceedings and the removal proceedings result in the restoration of the alien's status as an LPR. See current 8 CFR 212.7(a)(4) and proposed 8 CFR 212.7(a)(4).

Another exception is necessarily inferred from the statute. Sections 101(a)(15)(K)(i) and 214(d) of the Act, 8 U.S.C. 1101(a)(15)(K)(i) and 1184(d), permit the nonimmigrant admission of the alien fiancé(e) of a citizen of the United States. Although technically issued nonimmigrant

visas and admitted as nonimmigrants, the fiancé(e), and any accompanying or following-to-join children, are treated like immigrants who are immediate relatives. See Matter of Le, 25 I&N Dec. 541 (BIA 2011), and Matter of Sesay, 25 I&N Dec. 431 (BIA 2011). DOS regulations require such aliens to qualify for immigrant visas. 22 CFR 41.81(d). Since the publication of a final rule on August 10, 1988, DHS has allowed nonimmigrant fiancé(e)s and their children to seek inadmissibility waivers as immigrants. See Marriage Fraud Amendments Regulations, 53 FR 30011 (Aug. 10, 1988). This practice is consistent with the principle, recognized in Matter of Le and Matter of Sesay, that the fiancé(e) and accompanying children are similar in important respects to immigrants who are immediate relatives. The statutory provisions, including INA sections 212(a)(9)(B)(v), (g), (h) and (i), 8 U.S.C. 1182(a)(9)(B)(v), (g), (h), and (i), however, generally make the waivers available only to “spouses” of citizens and LPRs. The fiancé(e) is not yet a spouse. For this reason, a waiver granted to a fiancé(e), and any accompanying or following-to-join children, can only be fully effective once the intended marriage takes place. DHS proposes to amend 8 CFR 212.7(a)(4) to make this necessary corollary explicit.

V. Public Input

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

- A. The proposed waiver process;
- B. Proposed filing procedures; and
- C. Any alternatives to the proposed waiver process that may be more effective than the current USCIS overseas waiver process.

VI. Statutory and Regulatory Requirements

A. Unfunded Mandates Reform Act of 1995

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

B. Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

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

1. 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.”

Summary

The proposed rule would allow certain immediate relatives of U.S. citizens who are physically present in the United States to apply for a provisional waiver of the 3-year or 10-year bar for accrual of unlawful presence prior to departing for consular processing of their immigrant visa. This new provisional unlawful presence waiver process would be available to aliens whose only ground of inadmissibility is, or would be, the 3-year or 10-year unlawful presence bar.

This proposed rule is expected to result in a reduction in the time that U.S. citizens are separated from their alien immediate relatives, thus reducing the financial and emotional hardship for these families. In addition, the Federal Government would achieve increased efficiencies in processing immediate relative visas for individuals subject to the inadmissibility bar.

DHS estimates the discounted total ten-year cost of this rule would range from approximately \$100.6 million to approximately \$303.8 million at a seven percent discount rate. Compared with the current waiver process, this rule proposes that the provisional waiver applicants submit biometric information. Included in this cost estimate is the cost of collecting biometrics, which we estimate will range from approximately \$28 million to approximately \$42.5 million at seven percent over ten years. In addition, as this rule significantly streamlines the current process, DHS expects that additional applicants will apply for the provisional waiver compared to the current waiver process. To the extent that this rule induces new demand for

immediate relative visas, additional forms such as the Petitions for Alien Relative, Form I-130 will be filed compared to the pre-rule baseline. These additional forms will involve fees being paid by applicants to the Federal Government for form processing and additional opportunity costs of time being incurred by applicants to provide the information required by the forms. The cost estimate for this rule also includes the impact of this induced demand, which we estimate will range from approximately \$72.6 million to approximately \$261.3 million at seven percent over ten years.

A key uncertainty that impacts any cost estimate of this rule is the uncertainty involving the actual number of people that will avail themselves to this streamlined provisional waiver process. USCIS is not aware of any data that will allow us to estimate with precision the increase in demand due to this rule. For cost estimating purposes, DHS has analyzed the cost of an increase in demand of 25%, 50%, 75% and 90% compared to the existing waiver process.

2. Problems Addressed by the Proposed Changes

Currently, aliens undergoing consular processing of their immediate relative visas cannot apply for an unlawful presence waiver until the consular officer determines that they are inadmissible during their immigrant visa interviews. The current unlawful presence waiver process requires these immediate relatives to remain abroad until USCIS adjudicates the waiver. DOS can only issue the immigrant visa upon notification from USCIS that the waiver has been approved. As previously mentioned, the processing time under the current waiver process can take over one year. Because of these lengthy processing times, U.S. citizens may be separated from their immediate relative family members for prolonged periods resulting in financial, emotional, and humanitarian hardships. Family unification is a foundational principle of immigration law.

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

3. The Population Affected by the Proposed Rule

As explained above, only certain immediate relatives undergoing consular processing for an immigrant visa who would be inadmissible based on accrual of unlawful presence at the time of the immigrant visa interview would be eligible to apply under the proposed waiver process. Immediate relatives of U.S. citizens who are able to adjust status in the United States are not affected. Immediate relatives who are eligible for adjustment of status in the United States generally include those who were admitted to the United States on nonimmigrant visas (student, tourist, etc.) or who were paroled, including those who are present in the United States after the expiration of their authorized periods of stay.

In most instances, aliens present in the United States without having been admitted or paroled are not eligible to adjust their status and must leave the United States for immigrant visa processing at a U.S. Embassy or consulate abroad to immigrate to the United States. Since these aliens are present in the United States without having been admitted or paroled, many already have accrued more than 180 days of unlawful presence and, if so, would become inadmissible

under the unlawful presence bars upon their departure from the United States to attend their immigrant visa interviews. While there may be limited exceptions, the affected population would consist almost exclusively of alien immediate relatives present in the United States without having been admitted or paroled.

DHS does not maintain data on the number of immediate relatives present in the United States who would qualify under the proposed unlawful presence waiver process. The DHS Office of Immigration Statistics (DHS OIS) estimates that the population of unauthorized immigrants (those present without admission or parole) residing in the United States is approximately 10.8 million as of January 2010.¹¹ While all persons affected by the proposed rule are within the estimated population of 10.8 million, it is estimated that only a portion are immediate relatives of U.S. citizens who meet the criteria required for the new process.

Other estimates are equally inconclusive of the number of immediate relatives of U.S. citizens who are subject to the unlawful presence bars. For example, the Pew Hispanic Trust estimates that there are 9.0 million persons¹² living in mixed status families in the United States that include at least one unauthorized adult alien and at least one U.S.-born child. This, and associated information from the Pew Hispanic Trust, does not provide a reliable means for the calculation of how many of the individuals in these families are U.S. citizens rather than alien immediate relatives, or the proportion of persons with unlawful presence who are the immediate

¹¹ Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*. Available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

¹² Pew Hispanic Trust, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, December 2011, pg.6. Available at <http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf>.

relatives of LPRs rather than U.S. citizens.¹³ Nor do these data indicate how many persons within these families are under the age of 18¹⁴ or have alternative methods of normalizing their immigration status without having to leave the United States and, consequently, are unlikely to be affected by the proposed rule.

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

4. Demand

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

The proposed process would allow an immediate relative who meets the eligibility

¹³ The proposed rule applies only to alien immediate relatives of U.S. citizens, not to alien relatives of lawful permanent residents.

¹⁴ In the Pew Hispanic Trust report *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, "families" are defined as adults age 18 and older who live with their minor children (i.e., younger than 18) and unmarried, dependent children younger than 25.

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

The costs associated with normalizing a qualifying immediate relative's status also may be a constraint to demand. These current costs include:¹⁵

1. Petition for Alien Relative, Form I-130, to establish a qualifying relationship to a U.S. citizen; fee cost = \$420.00
2. Application for Waiver of Grounds of Inadmissibility, Form I-601, to obtain a waiver of inadmissibility for unlawful presence; fee cost = \$585.00
3. Time and expense of preparing the evidence to support the "extreme hardship" requirements for a waiver of inadmissibility. The evidentiary requirements could include sworn statements from family members, friends and acquaintances, medical records, psychiatric/psychological records, school records, evidence of illness of family members, financial information and tax returns, letters from teachers, support letters from churches and community organizations, evidence of health and emotional problems that may result from the separation, and such other documentation; cost = variable
4. Travel from the United States to the immediate relative's home country or

¹⁵ Fees quoted are as of December 2011. Source for DOS fees: http://travel.state.gov/visa/temp/types/types_1263.html#perm. Source for USCIS fees: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b1ae408b1c4b3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=b1ae408b1c4b3210VgnVCM100000b92ca60aRCRD>.

country where the visa is being processed, and any additional living expenses required to support two households while awaiting an immigrant visa; cost = variable

5. Immigrant visa processing fees paid to: a) the Department of State (\$330), processed on the basis of a USCIS-approved I-130 petition; and b) USCIS (\$165).

Total fee cost = \$495.00

6. An Affidavit of Support Under Section 213A of the Act, Form I-864; fee cost = \$88.00

7. Immigrant visa background and security check surcharge per person applying for any immigrant visa category; fee cost = \$74.00

8. Other forms, affidavits, etc. as required for individual applications; cost = variable.

The costs listed above are not new to this proposed rule; they are required under the current process.

Under the proposed process, aliens would be required to submit biometrics after filing the provisional unlawful presence waiver application, along with the corresponding fee (currently \$85.00). This biometric fee would be in addition to the visa security fee required by DOS for the immigrant visa application. The proposed requirement to submit biometrics, with the associated fee and travel costs, would be a small portion of the total costs of the visa application process.

As there are no annual limitations on the number of immediate relative visas that can be issued, the increase in the annual demand for waivers would be determined by the size of the affected population and the increased propensity to apply. As previously mentioned, a potential increase in demand might be limited, as is current demand, by the costs previously noted.

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

The current level of demand, shown in Table 1, is a result of the existing constraints described previously: the possibility of lengthy separation of immediate relatives and their U.S. citizen relatives; uncertainty of the ultimate success of obtaining an approved inadmissibility waiver; and the financial constraints (costs). Because of the variability in timing between when immigrant visa petitions and waiver applications are submitted and adjudicated and the time when an immigrant visa is issued, comparisons between the totals within a single year are not meaningful.

Table 1: Historical Immigration Data - Fiscal Years 2001 through 2010
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Fiscal Year	Petitions for Alien Relative, Form I-130	Immediate Relative Visas Issued	Ineligibility Finding ¹⁶	Ineligibility Overcome ¹⁷
2001	903,348 ¹⁸	172,087	5,384	6,157
2002	392,655	178,142	2,555	3,534
2003	362,756	154,760	3,301	1,764
2004	367,436	151,724	4,836	2,031
2005	370,427	180,432	7,140	2,148
2006	437,744	224,187	13,710	3,264
2007	546,833	219,323	15,312	7,091
2008	172,000	238,848	31,069	16,922
2009	188,749	227,517	24,886	12,584
2010	217,238	215,947	22,093	18,826
10 year average	395,919	196,297	13,029	7,432
Ineligibility Findings overcome (10 year average)	n/a	n/a	n/a	57.0%

Note: Sums may not total due to rounding.

Sources: Petitions for Alien Relative, Form I-130, from USCIS. Immediate relative visas issued are from individual annual Report(s) of the Visa Office, Department of State Visa Statistics, accessible at http://travel.state.gov/visa/statistics/statistics_1476.html. Ineligibility data are also from the individual annual report(s) of the Visa Office, Department of State Visa Statistics and appears in Table XX of each annual report.

As is evident, each of the data sets in Table 1 demonstrates a wide variability. The estimate of future demand under the new process would be determined by the number of ineligibility findings. The data for Ineligibility Findings and Ineligibility Overcome in Table 1 refer only to ineligibility where the grounds of inadmissibility were the 3-year or the 10-year unlawful presence bar. This data, however, also includes immediate relatives of LPRs who are

¹⁶ Both the Ineligibility Finding and Ineligibility Overcome columns refer only to ineligibility in which the grounds of inadmissibility were the 3-year or the 10-year unlawful presence bar. This figure is not limited to immigrant petitioners who are immediate relatives of U.S. citizens and includes relatives of LPRs. Ineligibility findings were low between 2001 and 2005/2006 because many individuals were not seeking immigrant visas through the consular process overseas; instead, they adjusted to lawful permanent resident status stateside under INA section 245(i).

¹⁷ Id. Ineligibility Findings/Ineligibility Overcome includes immediate relatives who are not affected by the proposed rule. Comparisons between the totals of Ineligibility Findings/Ineligibility Overcome within a single year are not meaningful because of the variability in timing between when an ineligibility finding is made and when (and if) it is overcome.

¹⁸ The number of Petitions for Alien Relative, Form I-130, filed in 2001 is high because many filed petitions in anticipation of the INA section 245(i) sunset date, which occurred on April 30, 2001.

not affected by this rule. DHS has provided the data in Table 1 to provide historical context noting that the last three years of ineligibility findings are well above the 10-year historical average. For this reason, DHS used the estimate for the future filings for waivers of inadmissibility made by the USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch, as the basis for the estimated future filings. The current OPQ estimate for future waivers of inadmissibility is approximately 24,000 per year. Currently, 80 percent (or 19,200) of all waivers of inadmissibility are filed on the basis of inadmissibility due to the unlawful presence bars.¹⁹ This estimate is further confirmed when examining the most recent 5-year period between FY 2006 – FY 2010 where the average unlawful presence ineligibility finding is approximately 21,400. In light of the recent upward trend of immediate relative visas issued and ineligibility findings presented in Table 1, OPQ's estimate of 19,200 applications for waivers of unlawful presence represents as reasonable of an approximation as possible for future demand based on available data of the current waiver process.

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

¹⁹ The 80 percent estimate was calculated by USCIS based on data from all I-601s completed by overseas offices from August, 2010 to October 28, 2011 and comparing those that listed only unlawful presence as an inadmissibility ground.

Table 2 indicates the estimate of demand under the current process. This is the baseline demand expected in the absence of the proposed rule.

Table 2: Baseline Estimates of Growth in Petitions for Alien Relatives and Ineligibility Findings Based on Unlawful Presence under the Current Process		
Fiscal Year	Petitions for Alien Relative, Form I-130²⁰	Ineligibility Finding²¹
Year 1	405,510	19,665
Year 2	415,340	20,142
Year 3	425,410	20,630
Year 4	435,720	21,130
Year 5	446,280	21,642
Year 6	457,100	22,167
Year 7	468,180	22,704
Year 8	479,530	23,255
Year 9	491,150	23,818
Year 10	503,050	24,395
10 Year Totals	4,527,570	219,549

Note: Sums may not total due to rounding.

Based on the data available on requests for waivers under the current process, Table 2 forecasts the number of findings of inadmissibility due to accrual of unlawful presence. The results presented in Table 2 are meant to show forecasts for future demand for waivers due to unlawful presence bars under the current process. DHS assumes that in every case where a consular officer determines inadmissibility based on unlawful presence, the alien would apply for a waiver. Thus, Table 2 represents the baseline totals we would expect in the absence of the proposed waiver process.

In these calculations, the petitions for an alien relative made by U.S. citizens are expected to increase annually by the 2.4 percent compound annual growth rate for the undocumented

²⁰ The first year estimate is the 10 year average of 395,919 multiplied by the 2.4 percent compound annual growth rate for the undocumented population for the previous 10 years reported in the DHS Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, pg. 1. Subsequent years are increased at the same 2.4 percent growth rate. As a comparison, the U.S. population as a whole rose at a compound annual growth rate of 0.930 percent over the same period.

²¹ Ineligibility Findings are calculated at the USCIS estimate of .04849 per 100,000 petitions for an alien relative.

population for the previous 10 years based on reports by the DHS OIS.²² This is an imperfect calculation, as the undocumented population has declined since its peak in 2007,²³ but because of the data association problems noted previously, DHS used the 10-year (long term) compound average growth rate.

The ineligibility findings in Table 2 are calculated using the estimate of 19,200 average annual waivers filed on the basis of unlawful presence, which equates to 0.04849 ineligibility findings for every alien relative petition based on the 10-year average. Again, these calculations are imperfect since they are based on immigrant visas granted for the alien relative population (both immediate relative and family preference).

DHS does not have data available that would permit an estimation of the escalation of change in this variable. Thus, this estimate of future petitions for alien relatives and ineligibility findings is based on a range of assumptions concerning the current constraint on demand. As a result, Table 3 provides a scenario analysis utilizing estimates of various amounts of constraint on demand. For example, an assumption that demand is currently constrained by 25 percent would mean that there would be a 25 percent increase from the baseline in the number of I-601A applications for each year under the proposed rule. The findings of this range analysis are presented in Table 3.

Table 3: Preliminary Estimates of Inadmissibility Findings Requiring an Unlawful Presence Waiver, Form I-601A Associated with the Increased Demand of the Proposed Rule	
Year	Expected Demand for Form I-601A with

²² DHS Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, pg.1. The 2.4 percent (rounded) compound annual growth rate is calculated from the estimated populations of unauthorized immigrants living in the United States in 2000 (8.5 million) and in 2010 (10.8 million).

²³ Id.

	Current Constrained Demand of			
	25 Percent	50 Percent	75 Percent	90 Percent
Year 1	24,581	29,498	34,414	37,364
Year 2	25,177	30,213	35,248	38,269
Year 3	25,788	30,945	36,103	39,197
Year 4	26,413	31,695	36,978	40,147
Year 5	27,053	32,463	37,873	41,120
Year 6	27,709	33,250	38,792	42,117
Year 7	28,380	34,056	39,733	43,138
Year 8	29,068	34,882	40,696	44,184
Year 9	29,773	35,727	41,682	45,255
Year 10	30,494	36,593	42,692	46,351
10 Year Totals	274,436	329,324	384,211	417,143

Note: Numbers may not total due to rounding.

Table 4 is the expected increase in inadmissibility waiver applications due to the proposed rule. These estimates are obtained by subtracting the baseline estimates in Table 2 (without the proposed rule) from the preliminary estimates under the proposed rule in Table 3.

Table 4 Preliminary Estimates of the Additional Ineligibility Findings Requiring an Inadmissibility Waiver Under the Proposed Rule (Induced Demand)²⁴				
Year	Additional Ineligibility Findings Requiring an Inadmissibility Waiver with Current Constrained Demand of			
	25 Percent	50 Percent	75 Percent	90 Percent
Year 1	4,916	9,833	14,749	17,699
Year 2	5,035	10,071	15,106	18,128
Year 3	5,158	10,315	15,473	18,567
Year 4	5,283	10,565	15,848	19,017
Year 5	5,411	10,821	16,232	19,478
Year 6	5,542	11,083	16,625	19,950
Year 7	5,676	11,352	17,028	20,434
Year 8	5,814	11,627	17,441	20,929
Year 9	5,955	11,909	17,864	21,436
Year 10	6,099	12,198	18,296	21,956
10 Year Totals	54,887	109,775	164,662	197,594

Note: Numbers may not total due to rounding.

²⁴ The increased ineligibility findings in Table 4 are the difference in ineligibility findings from the different assumptions of the level of constrained demand in Table 3 and the baseline ineligibility findings shown in Table 2.

5. Costs

The proposed rule would require provisional waiver applicants to submit biometrics to USCIS. This is the only new cost applicants would incur under the proposed provisional unlawful presence waiver process in comparison to the current waiver process. The other costs of the proposed rule emanate from the increase in the demand created by the proposed rule. These other costs include the fees and preparation costs for forms prepared by individuals who would not file under the current rule.

For the biometric collection, the alien immediate relative would incur the following costs associated with submitting biometrics with an application for the provisional unlawful presence waiver: the required USCIS fee and the opportunity and mileage costs of traveling to a USCIS ASC to have the biometric recorded.

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

DHS recognizes that the individuals impacted by the proposed rule are unlawfully present and are generally not eligible to work; however, consistent with other DHS rulemakings, we use wage rates as a mechanism to estimate the opportunity or time valuation costs associated with

the required biometric collection. The Federal minimum wage is currently \$7.25 per hour.²⁵ In order to anticipate the full opportunity cost of providing biometrics, DHS multiplied the minimum hourly wage rate by 1.44 to account for the full cost of employee benefits such as paid leave, insurance, and retirement, which equals \$10.44 per hour.²⁶ In addition, the cost of travel includes a mileage charge based on the estimated 50 mile round trip at the GSA rate of \$0.51 per mile, which equals \$25.50 for each applicant.

Using an opportunity cost of time of \$10.44 per hour and the 3.5 hour estimated time for travel and service and the mileage charge of \$25.50, DHS estimates that the cost per provisional waiver applicant to be \$62.04 for travel to and service at the ASC.²⁷ When the \$85.00 biometric fee is added, the total estimated additional cost per provisional unlawful presence waiver over the current waiver process is \$147.04. All other fees charged by USCIS and DOS to apply for immediate relative visas remain the same under the current and proposed processes.²⁸

The incremental costs of the biometric requirement of the rule are computed as the \$147.04 cost per provisional unlawful presence waiver multiplied by the total number of applicants for provisional waivers applying after the proposed rule is finalized. This population is represented in Table 3. The incremental costs of the additional biometric fee are shown in Table 5.

²⁵ U.S. Dep't of Labor, Wage and Hour Division. The minimum wage is as of July 24, 2009. Bureau of Labor Statistics, Occupational Employment and Wages - May 2010 National Occupational Employment and Wage Estimates (May 17, 2011), available at: <http://www.dol.gov/whd/minimumwage.htm>. <http://www.bls.gov/news.release/pdf/ocwage.pdf>.

²⁶ U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, March 2011, viewed online at <http://www.bls.gov/news.release/eccc.t01.htm>.

²⁷ $(\$10.44 \text{ per hour} \times 3.5 \text{ hours}) + (\$0.51 \text{ per mile} \times 50 \text{ miles}) = \62.04 .

²⁸ The proposed Application for a Provisional Waiver of Inadmissibility, Form I-601A, would carry the same USCIS fee as Form I-601.

Table 5: Costs of Proposed Biometric Requirement to Immediate Relatives filing a Provisional Waiver Application (Table 3 multiplied by \$147.04)				
Year	Additional Inadmissibility Waiver Application Fees with Current Constrained Demand of			
	25 Percent	50 Percent	75 Percent	90 Percent
Year 1	\$3,614,451	\$4,337,342	\$5,060,232	\$5,493,966
Year 2	3,702,070	4,442,484	5,182,898	5,627,146
Year 3	3,791,827	4,550,193	5,308,558	5,763,577
Year 4	3,883,724	4,660,468	5,437,213	5,903,260
Year 5	3,977,849	4,773,418	5,568,988	6,046,330
Year 6	4,074,291	4,889,149	5,704,007	6,192,922
Year 7	4,173,051	5,007,661	5,842,271	6,343,037
Year 8	4,274,217	5,129,061	5,983,904	6,496,811
Year 9	4,377,791	5,253,349	6,128,907	6,654,242
Year 10	4,483,859	5,380,631	6,277,403	6,815,466
10 Year Totals Undiscounted	\$40,353,130	\$48,423,756	\$56,494,382	\$61,336,758
10 Year Totals Discounted at 7.0 percent	\$27,967,676	\$33,561,211	\$39,154,746	\$42,510,867
10 Year Totals Discounted at 3.0 percent	\$34,221,714	\$41,066,057	\$47,910,400	\$52,017,006

Note: Numbers may not total due to rounding.

In addition to the costs of the biometric requirement, DHS expects that the proposed rule will induce an increase in demand for immediate relative visas, which will generate new fees paid to the USCIS and DOS. As the only new requirement imposed by this rule on provisional waiver applicants compared with the current waiver process is biometrics, fees collected for filing forms that are already required (such as the Form I-130) are not costs of this rule. The new fees are those generated by the additional demand shown in Table 4 and are transfers made by applicants to USCIS and DOS to cover the cost of processing the forms. In addition to the fees, there are nominal costs associated with completing the forms. We estimate the amount of these fees and their associated preparation costs to give a more complete estimate of the impact of this rule. The additional fees and preparation costs are shown in Table 6.

In determining the preparation cost for the forms, different labor rates were used

depending on the citizenship status of the petitioner. If the form is completed by the alien immediate relative (Form I-601A), the loaded minimum wage of \$10.44 per hour was used. If the form is completed by a U.S. citizen, we used the mean hourly wage for “all occupations” as reported by the Bureau of Labor Statistics and then adjusted that wage upward to account for the costs of employee benefits, such as annual leave, for a fully loaded hourly wage rate of \$30.74.²⁹ The times to complete the forms are based on the USCIS form instructions for the individual forms.

These costs are calculated by the formula:

1. Cost of Form I-130: Preparation cost = ($\$30.74 \times 1.5$ hours) = \$46.12; USCIS fee to cover processing costs = \$420.00. Total cost = \$466.12
2. Cost of Form I-601A: Preparation cost = ($\$10.44 \times 1.5$ hours) = \$15.66; USCIS fee to cover processing costs = \$585.00. Total cost = \$600.66
3. Cost of Form I-864: Preparation cost = ($\$30.74 \times 6.0$ hours) = \$184.46; DOS fee to cover processing costs = \$88.00. Total cost = \$272.46
4. Cost of Immigrant Visa Processing Fees: DOS fee to cover processing costs = \$330; USCIS fee to cover processing costs = \$165. Total cost = \$495.00.
5. Cost of Visa Security fee: Preparation cost = DOS fee to cover processing costs = \$74.00

Based on the above, the total costs per application: ($\$466.12 + 600.66 + 272.46 + 495.00 + 74.00$) = \$1,908.24.

<p>Table 6: Costs for Preparing and Filing USCIS and DOS Forms (Table 3 multiplied by \$1,908.24)</p>
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²⁹ The 30.74 rate is calculated by multiplying the \$21.35 average hourly wage for all occupations May 2010 (available at http://www.bls.gov/oes/current/oes_nat.htm#00-0000) by the 1.44 fully loaded multiplier.

Year	Additional Preparation Costs and Filing Fees with Current Constrained Demand of			
	25 Percent	50 Percent	75 Percent	90 Percent
Year 1	\$9,381,448	\$18,762,897	\$28,144,345	\$33,773,214
Year 2	9,608,865	19,217,730	28,826,595	34,591,914
Year 3	9,841,834	19,683,667	29,525,501	35,430,601
Year 4	10,080,355	20,160,710	30,241,065	36,289,278
Year 5	10,324,660	20,649,320	30,973,979	37,168,775
Year 6	10,574,980	21,149,960	31,724,940	38,069,927
Year 7	10,831,315	21,662,630	32,493,945	38,992,734
Year 8	11,093,896	22,187,793	33,281,689	39,938,027
Year 9	11,362,724	22,725,449	34,088,173	40,905,808
Year 10	11,638,030	23,276,060	34,914,091	41,896,909
10 Year Totals Undiscounted	\$104,738,108	\$209,476,215	\$314,214,323	\$377,057,188
10 Year Totals Discounted at 7.0 percent	\$72,591,182	\$145,182,365	\$217,773,547	\$261,328,257
10 Year Totals Discounted at 3.0 percent	\$88,823,781	\$177,647,563	\$266,471,344	\$319,765,613

Note: Sums may not total due to rounding.

The totals in Table 6 are calculated by multiplying the induced demand shown in Table 4 by the \$1,908.24 shown above. We acknowledge there are additional costs to the existing process, such as travel from the United States to the immediate relative's home country where the immigrant visa is being processed and the additional expense of supporting two households while awaiting an immigrant visa. Such costs are highly variable and depend on the circumstances of the specific petitioner. We did not estimate the impacts of these variable costs. To the extent that this rule allows immediate relatives to reduce the time spent in their home country, this rule would allow for such existing costs to be reduced and these savings represent a benefit of this rule.

The total cost to applicants is shown in Table 7 as the sum of Table 5 and Table 6.

Year	Estimated Total Cost Current Constrained Demand of			
	25 Percent	50 Percent	75 Percent	90 Percent
Year 1	\$12,995,900	\$23,100,239	\$33,204,577	\$39,267,181
Year 2	13,310,935	23,660,213	34,009,492	40,219,059

Year 3	13,633,661	24,233,860	34,834,059	41,194,178
Year 4	13,964,079	24,821,178	35,678,278	42,192,538
Year 5	14,302,508	25,422,738	36,542,968	43,215,105
Year 6	14,649,271	26,039,109	37,428,947	44,262,850
Year 7	15,004,366	26,670,291	38,336,216	45,335,771
Year 8	15,368,114	27,316,854	39,265,594	46,434,838
Year 9	15,740,515	27,978,798	40,217,080	47,560,050
Year 10	16,121,890	28,656,692	41,191,494	48,712,375
10 Year Totals Undiscounted	\$145,091,238	\$257,899,971	\$370,708,705	\$438,393,945
10 Year Totals Discounted at 7.0 percent	\$100,558,858	\$178,743,575	\$256,928,293	\$303,839,123
10 Year Totals Discounted at 3.0 percent	\$123,045,496	\$218,713,620	\$314,381,745	\$371,782,619

Note: Sums may not total due to rounding.

Costs to the Federal Government include the possible costs of additional adjudication personnel associated with increased volume and the associated equipment (computers, telephones) and occupancy costs (if additional space is required). However, we expect these costs to be offset by the additional fee revenue collected for form processing. Consequently, this rule does not impose additional costs on the Federal Government.

6. Benefits

The benefits of the proposed rule are the result of streamlining the immigrant visa waiver process. The primary benefits of the proposed changes are qualitative and result from reduced separation time for U.S. citizens and their alien relatives. In addition to the obvious humanitarian and emotional benefits derived from family reunification, there also would be significant financial benefits accruing to the U.S. citizen due to the shortened period he or she would have to financially support the alien relative abroad. DHS is currently unable to estimate the average duration of time an immediate relative must spend abroad while awaiting waiver adjudication under the current process, and so cannot predict how the time spent apart would be reduced under the proposed provisional waiver process.

As a result of streamlining the unlawful presence waiver process, there also would be efficiencies realized by both USCIS and DOS. The proposed process would enable USCIS to process and adjudicate the provisional unlawful presence waivers domestically. As a result, USCIS could move a large part of its workload to Service Centers or field offices with resources that are less expensive than overseas staffing resources and that are flexible enough to accommodate filing surges. In addition, the proposed process would allow DOS to review these cases once, as opposed to the current unlawful presence process where these cases are reviewed twice, at a minimum. DHS anticipates that the new process will make the immigrant visa process more efficient.

DHS encourages public comment on the benefits, both quantitative and qualitative, of this proposed rule.

D. Executive Order 13132

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

E. Executive Order 12988 Civil Justice Reform

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

F. Paperwork Reduction Act

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

Accordingly, DHS is requesting comments on this information collection for 60 days until [Insert date 60 days from the date of publication in the FEDERAL REGISTER].

Comments on this information collection should address one or more of the following four points:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of information collection:

- a. Type of information collection: Revised information collection.
- b. Abstract: This collection will be used by individuals who file a request for a provisional unlawful presence waiver of the inadmissibility grounds under INA section 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v). Such individuals are subject to biometric collection in connection with the filing of the waiver.
- c. Title of Form/Collection: Application for Provisional Unlawful Presence Waiver.
- d. Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection: Form I-601A, U.S. Citizenship and Immigration Services.
- e. Affected public who will be asked or required to respond: Individuals or Households: Individuals who are immediate relatives of U.S. citizens and who are applying from within the United States for a waiver of inadmissibility under INA section 212(a)(9)(B)(v) prior to obtaining an immigrant visa abroad.
- f. An estimate of the total numbers of respondents: 38,277
- g. Hours per response: 1.5 hours per response.
- h. Total Annual Reporting Burden: 57,416

Comments concerning this form can be submitted to Sunday Aigbe, Chief, Regulatory Products Division, Office of the Executive Secretariat, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2020.

G. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act and certifies that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this rule directly regulates individuals who are the immediate relatives of U.S. citizens seeking to apply for an unlawful presence waiver of inadmissibility in order to be eligible to obtain an immigrant visa outside the United States. The impact is on these persons as individuals, so that they are not, for purposes of the Regulatory Flexibility Act, within the definition of small entities established by 5 U.S.C. 601(6).

List of Subjects

8 CFR Part 103

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

8 CFR Part 212

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

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows.

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

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

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

2. Section 103.7 is amended by revising paragraph (b)(1)(i)(AA) to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

(i) * * *

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

* * * * *

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

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

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

4. Section 212.7 is amended by:

a. Revising paragraphs (a)(1), (a)(3), and (a)(4); and

b. Adding paragraph (e)

The revisions and addition read as follows:

§ 212.7 Waivers of certain grounds of inadmissibility

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

* * * * *

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

(4) Validity. (i) A provisional unlawful presence waiver granted according to paragraph (e) of this section is valid subject to the terms and conditions as specified in paragraph (e). In any other case, approval of an immigrant waiver of inadmissibility under this section applies only to the grounds of inadmissibility, and the related crimes, events, or incidents that are specified in the application for waiver.

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

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

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

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

* * * * *

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

(1) In general. 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)(2) 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.

(2) Eligible aliens. Except as provided in paragraph (e)(3) 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:

(i) Is present in the United States at the time of filing the application for a provisional unlawful presence waiver, and for biometrics collection at a USCIS Application Support Center;

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

(iii) Qualifies as an immediate relative under section 201(b)(2)(A)(i) of the Act;

(iv) Is the beneficiary of an approved immediate relative petition;

(v) Has a case pending with the Department of State based on the approved immediate relative petition and has paid the immigrant visa processing fee as evidenced by a State Department Visa Processing Fee Receipt;

(vi) Will depart from the United States to obtain the immediate relative immigrant visa;
and

(vii) Meets the requirements for a waiver provided in section 212(a)(9)(B)(v) of the Act, except that the alien must show extreme hardship to his or her U.S. citizen spouse or parent.

(3) Ineligible Aliens. Notwithstanding paragraph (e)(2) of this section, an alien is ineligible to apply for or receive a provisional unlawful presence waiver under paragraph (e) of this section if:

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

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

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

(iv) The alien has been scheduled for an immigrant visa interview at a U.S. Embassy or Consulate abroad at the time the application is received by USCIS;

(v) The alien is in removal proceedings that have not been terminated or dismissed;

(vi) The alien has not had the charging document (Notice to Appear) to initiate removal proceedings cancelled;

(vii) The alien is in removal proceedings that have been administratively closed but not subsequently reopened for the issuance of a final voluntary departure order;

(viii) The alien is subject to a final order of removal issued under section 235, 238, or 240 of the Act or any other provision of law (including an in absentia removal order under section 240(b)(5) of the Act);

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

(x) The alien has a pending application with USCIS for lawful permanent resident status; or

(xi) The alien has previously filed a provisional unlawful presence waiver application;

(4) Filing. (i) An application for a provisional waiver of the grounds of inadmissibility for the unlawful presence bars under section 212(a)(9)(B)(i)(I) or (II) of the Act must be filed in accordance with 8 CFR part 103 and on the form designated by USCIS. The prescribed fee under 8 CFR 103.7(b)(1) and supporting documentation must be submitted in accordance with the form instructions.

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

(A) Fails to pay the required fees for the waiver application or to pay the correct fee;

(B) Fails to sign the 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 years;

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

(F) Does not include a copy of the fee receipt evidencing that the alien has paid the immigrant visa processing fee to DOS;

(G) Has indicated on the provisional unlawful presence waiver application that an immigrant visa interview has been scheduled with DOS; or

(H) Has not indicated on the provisional unlawful presence waiver application that the qualifying relative is a U.S. citizen spouse or parent.

(5) Biometrics. (i) All aliens who apply for a provisional unlawful presence waiver

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

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

(6) Burden of proof. The alien has the burden to establish eligibility for the provisional unlawful presence waiver as described in this paragraph of this section, and under section 212(a)(9)(B)(v) of the Act, including that the alien merits a favorable exercise of the Secretary's discretion.

(7) Adjudication. USCIS will adjudicate the provisional unlawful presence waiver application in accordance with this paragraph of this section and section 212(a)(9)(B)(v) of the Act. USCIS also may require the alien and the U.S. citizen petitioner to appear for an interview pursuant to 8 CFR 103.2(b)(9). If USCIS finds that the alien does not meet the eligibility requirements for the provisional unlawful presence waiver as described in this paragraph (e), 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.

(8) Notice of Decision. USCIS will notify the alien or the alien's attorney of record or accredited representative of the decision in accordance with 8 CFR 103.2(b)(19). USCIS also may notify the Department of State. Denial of an application for a provisional unlawful presence waiver is without prejudice to the alien filing a waiver application under paragraph (a)(1) of this section after the immigrant visa interview overseas. Accordingly, denial of a request for a

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

(9) Withdrawal of waiver requests. An alien may withdraw his or her request for a provisional unlawful presence waiver at any time before the final decision, but the alien will not be permitted to later file a new provisional unlawful presence waiver. Once the case is withdrawn, USCIS will close the case and notify the alien and his or her attorney or accredited representative.

(10) 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.

(11) 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 admissible and otherwise eligible for an immigrant visa by a Department of State consular officer in light of the approved provisional unlawful presence waiver.

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

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

(12) Validity. Until the provisional unlawful presence waiver takes full effect as provided in paragraph (e)(11) 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)(11), the period of unlawful presence for which the provisional unlawful presence waiver is granted is waived permanently and, in accordance with and subject to paragraph (a)(4) of this section, the waiver is valid indefinitely.

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

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

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

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

(iv) The alien, at any time, reenters or attempts to reenter the United States without being inspected and admitted or paroled.

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Janet Napolitano,
Secretary.

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