

THE NEW PROVISIONAL WAIVER RULE REVISITED: AS LAWYERS WE ARE SUPPOSED TO BE SUSPICIOUS AND CONSERVATIVE.

On January 6th, 2012, the U.S. Department of homeland Security (“DHS”) announced that it will be issuing new regulations for how unlawful presence waivers will be processed for certain immediate relatives who are filing immigrant visa applications abroad. Specifically, the new procedure will allow these individuals to file for a provisional unlawful presence waiver and await adjudication while in the U.S. If approved, they will still have to depart the U.S. to undergo visa processing and an interview at a U.S. consulate abroad. To receive a provisional waiver, they will still need to show that a lengthy bar from the U.S. would cause their U.S. citizen spouse or parent “extreme hardship.” The proposed change would create a more streamlined and efficient process for waiver applicants whose sole inadmissibility ground is unlawful presence while simultaneously minimizing family separation.

HOWEVER, WHAT WILL HAPPEN TO INDIVIDUALS WHO ARE DENIED WAIVERS UNDER THE PROPOSED PROCESS? For some, the proposed change could mean a “direct ticket” to their home country. We also fear that DHS will be creating a database of out-of-status individuals in the U.S. who entered without inspection. DHS envisions that an alien seeking a provisional waiver would be required to undergo biometrics collection and thus the Government would have all necessary information to initiate removal proceedings upon denial of a waiver (and also be able to build that database). While everyone is excited about proposed regulations, it is important to take a step back and think about negative consequences for some of our clients.