



The Three- and Ten-Year Bars How New Rules Expand Eligibility for Waivers

Most Americans take it for granted that marriage to a U.S. citizen and other family relationships entitle an immigrant to permanent residence (a green card), but there are barriers that often prevent or delay these family members from becoming lawful permanent residents, even if they are already in the United States. Among these barriers are the “three- and ten-year bars,” provisions of the law which prohibit applicants from returning to the United States if they depart after having previously been in the country illegally. Many people who qualify for green cards based on their relationships to U.S. citizen or lawful permanent resident relatives are caught in a Catch-22—under current law they must leave the United States to apply for their green card abroad, but as soon as they depart, they are immediately barred from re-entering the country for a period of time. In other words, because of the punitive effect of our immigration laws, immigrants who have a chance to legalize their status may not be able to do so. Instead, they must choose between leaving the United States and taking the risk they might not be able to return, or remaining in the country without legal status.

The Secretary of Homeland Security may waive the three- and ten-year bars to admission in certain circumstances. Recent regulatory changes have broadened the number of people eligible for a process that allows them to apply for advance approval of the waiver in the United States, rather than enduring a lengthy separation from their loved ones while they apply abroad. Effective August 29, 2016, the U.S. Department of Homeland Security (DHS) published a final rule that expands eligibility for the “provisional unlawful presence waiver.”¹ This Fact Sheet provides background on the three- and ten-year bars and waivers, and explains the recent regulatory changes.

What Are the Three- and Ten-Year Bars?

The three- and ten-year bars were created as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996.² Incorporated into section 212(a)(9)(B) of the Immigration and Nationality Act (INA), the statute imposes re-entry bars on immigrants who accrue “unlawful presence” in the United States, leave the country, and want to re-enter lawfully. “Unlawful presence” is a term of art that is not defined in the statute or regulations. However, the U.S. Citizen and Immigration Services (USCIS) Adjudicator’s Field Manual includes guidance on determining when a noncitizen accrues unlawful presence.³ Generally, an immigrant who enters the United States without inspection, or who overstays a period of authorized admission, will be deemed to have accrued unlawful presence. Individuals who accrue more than 180 days, but less than one year, of unlawful presence are barred from being re-admitted or re-entering the United States for three years; those who accrue more than one year of unlawful presence are barred for ten years.

Who Must Leave the United States for a Green Card and Why?

Under the family-based immigration system, U.S. citizens and legal permanent residents (LPRs) may petition for green cards for certain family members.⁴ Sometimes the immigrant family members are outside of the United States when the petition is filed and when the visa becomes available, and sometimes those family members are already residing within the country while they wait for their petition to be adjudicated and their visa to become available. Those in the United States may be here legally on a visa, they may have come on a visa but that period of authorized stay expired, or they may have entered the country without proper documentation.

If the applicant for a family-based green card is the spouse, parent, or child under age 21 of a U.S. citizen (immediate relative) **and** if the applicant entered and remained in the country with a valid visa (such as a visitor or student visa), that applicant may, in most cases, get their green card in the United States through a process called “adjustment of status.”⁵

However, all other people applying through the family-based system must go abroad and apply for their immigrant visa at a U.S. consulate in a procedure known as “consular processing.” The adult children and siblings of U.S. citizens, as well as the spouses and children of LPRs, must leave the country to get their green cards, whether they initially entered on a legal visa or not.⁶ Immediate relatives who entered without inspection must also apply outside the United States.

Are Waivers of the Three- and Ten-year Bars Available?

A waiver of the three- or ten-year bar is available, if the visa applicant is the spouse or child of a U.S. citizen or the spouse or child of an LPR and only if the visa applicant can prove that the bar would result in “extreme hardship” to the applicant’s citizen or permanent resident spouse or parent.⁷ Hardship to the immigrant is not a factor, and hardship to the immigrant’s children is not a factor (even if the children are U.S. citizens).

What Is a Provisional Waiver and Who Is Eligible?

Under the traditional process, an immigrant visa applicant appears for an interview at the U.S. consulate and if the consular officer determines that the person is inadmissible for unlawful presence, but is eligible for a waiver, the consular officer places the case on hold to allow the person the opportunity to apply for the waiver. Unfortunately, the person must wait outside the United States, separated from his or her family, while the waiver is adjudicated, which takes many months. In 2013, the wait time for a waiver could sometimes take one year or longer. This created a great deal of uncertainty for families who had to leave the country not knowing whether or when they would be allowed to re-enter.

In 2013, the federal government created a new process so that spouses and children of U.S. citizens and parents of adult U.S. citizens who are subject to the three- and ten-year bars could apply for “provisional” approval of an unlawful presence waiver from within the United States and then travel abroad for consular processing.⁸ Assuming there are no other issues, an applicant granted a provisional waiver could then travel to complete the consular process and receive their immigrant visa more quickly and efficiently. These changes significantly reduced the time that family members have to remain outside the country and provide more confidence that they will be able to return.

The new rule, which was published July 29, 2016, and took effect August 29, 2016, expands eligibility for a **provisional** waiver to anyone who would be eligible to apply for a waiver under the INA.⁹ In other words, anyone coming through the employment-based immigration system, the diversity visa lottery, the family-based immigration system, or any other immigrant classification may be eligible for a provisional waiver as long as they can demonstrate “extreme hardship” to a U.S. citizen or LPR spouse or parent. The 2016 rule also expands eligibility to certain individuals with final orders of removal, deportation, or exclusion, and clarifies that individuals who are “subject to” reinstatement of removal, but have not yet received notice, may apply for a provisional waiver.¹⁰

Getting a provisional waiver does not guarantee that the individual will be issued a visa and be allowed to legally re-enter the United States. Individuals can still be found inadmissible for other reasons, such as for unlawfully returning to the United States after a prior removal. In these cases, the provisional waiver approval would be revoked.

What Is “Extreme Hardship?”

Unfortunately, “extreme hardship” is not defined in the immigration statute or regulations, and over the years, the government has failed to apply the standard consistently. New guidance released in October 2016 and effective December 5, 2016, clarifies the steps that must be taken to adjudicate an extreme hardship waiver and provides a list of factors that USCIS may consider when making a determination.¹¹ The guidance further clarifies that to be considered “extreme,” the hardship must exceed that which is usual or expected and must go beyond what is typically associated with deportation.¹²

USCIS and the waiver applicant must consider two different scenarios:

1. Extreme hardship may occur if the family member remains in the United States while the applicant remains outside of the country. For example, if the applicant is the primary caretaker of an ill family member, separation may result in extreme hardship.
2. Extreme hardship may occur if the family member leaves the United States to reside with the applicant elsewhere. For example, if both were to reside in the home country, the family member may be subject to ostracism, discrimination, or persecution, or may not have access to necessary medical treatment.

The guidance includes a lengthy list of social, cultural, economic, health, and other conditions that may be considered relevant, and USCIS is directed to examine the totality of the evidence to make a hardship determination.¹³

Conclusion

While new regulations in the last several years have ameliorated some of the complications created by the three- and ten-year bars, problems remain. There is still a great deal of uncertainty for these family members who are subject to the bars and do not know whether they will meet the “extreme hardship” standard, receive a waiver, and be allowed to re-enter the United States.

Only a legislative repeal of the three- and ten-year bars would eliminate the Catch-22 inherent in obtaining a green card for many close family members of U.S. citizens and LPRs. While repealing this provision would not change the need for comprehensive immigration reform, it would promote family unity and government efficiency, and allow more people who are already eligible to obtain a green card the chance to do so without undermining existing laws.

Endnotes

1. Federal Register, Vol. 81 No. 146, July 29, 2016, 8 CFR Parts 103 and 212, Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule.
2. INA § 212(a)(9)(B).
3. U.S. Citizenship and Immigration Services Adjudicator's Field Manual Chapter 40.9 (AFM Update AD 08-03). See also U.S. Citizenship and Immigration Services Interoffice Memorandum from Donald Neufeld, Lori Scialabba, and Pearl Chang to Field Leadership, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act," May 6, 2009, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF.
4. See American Immigration Council, "How the United States Immigration System Works," August 12, 2016, <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.
5. 8 U.S.C. § 1255 (2006).
6. Ibid.
7. 8 U.S.C. § 1182(a)(9)(B)(v) (2006).
8. USCIS Final Rule No. No. 2519-2011, 78 Fed. Reg. 535 (January 3, 2013), <https://www.federalregister.gov/documents/2013/01/03/2012-31268/provisional-unlawful-presence-waivers-of-inadmissibility-for-certain-immediate-relatives>.
9. Federal Register, Vol. 81 No. 146, July 29, 2016, 8 CFR Parts 103 and 212, Expansion of Provisional Unlawful Presence Waivers of Inadmissibility; Final Rule.
10. "AILA Frequently Asked Questions (FAQs): The 2016 Provisional Unlawful Presence Waiver Rule," (August 2, 2016) AILA Doc. No. 16080230, <http://www.aila.org/infonet/aila-faqs-2016-provisional-unlawful-waiver-rule>.
11. U.S. Citizenship and Immigration Services, "Extreme Hardship," *Policy Manual*, Vol. 9 Part B (Washington, DC: DHS, 2016), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB-Chapter1.html>.
12. Ibid.
13. Ibid.