U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Field Operations Directorate
Washington, DC 20529

U.S. Citizenship and Immigration Services

January 24, 2014

Field Guidance

SUBJECT: Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers.

Purpose
This field guidance addresses the adjudication of Form I-601A, Application for Provisional Unlawful Presence Waiver in cases involving applicants with criminal history.

Scope
This field guidance applies to and binds all USCIS employees.

Authority
8 CFR 212.7(e)

Background
On March 4, 2013, we began a new provisional unlawful presence waiver program for certain relatives of U.S. citizens whose only ground of inadmissibility is unlawful presence in the United States under section 212(a)(9)(B)(i)(I) and (II) of the Immigration and Nationality Act (INA). See 78 FR 536-01 (January 3, 2013). The provisional unlawful presence waiver process allows immediate relatives of U.S. citizens (spouses, children, or parents) who are currently residing in the United States to apply for a provisional waiver while in the United States, provided they meet all eligibility requirements outlined in 8 CFR 212.7(e) and warrant a favorable exercise of discretion.

There are several circumstances that may render an individual ineligible for a provisional unlawful presence waiver. For example, individuals with final orders of exclusion, deportation, or removal; individuals who are currently in removal proceedings that are not administratively closed at the time of filing; and individuals who have a pending application with USCIS for lawful permanent resident status are not eligible to apply for the provisional unlawful presence waiver. Individuals for whom there is a reason to believe that they may be subject to grounds of inadmissibility other than unlawful presence at the time of the immigrant visa interview with a Department of State (DOS) consular officer also are ineligible for the provisional unlawful presence waiver. See 8 CFR 212.7(e) (2013).

If a USCIS officer determines, based on the record, that there is a reason to believe that the applicant may be subject to a ground of inadmissibility other than unlawful presence at the time of his or her immigrant visa interview with a DOS consular officer, USCIS will deny the request for a provisional unlawful presence waiver. See 8 CFR 212.7(e)(4)(i) (2013).

In some cases, USCIS has denied a Form I-601A if an applicant has any criminal history. In these cases, if the record contains evidence that an applicant was charged with an offense or convicted of any crime (other than minor traffic citations such as parking violations, red light/stop sign violations, expired license or registration, or similar offenses), regardless of the sentence imposed or whether the offense is a crime involving moral turpitude (CIMT), USCIS has denied the Form I-601A.[1]

We have examined whether USCIS officers should find a reason to believe that an applicant may be subject to inadmissibility under INA section 212(a)(2)(A)(i)(I) at the time of the immigrant visa interview if it appears that the applicant's criminal offense falls within the "petty offense" or "youthful offender" exception under INA section 212(a)(2)(A)(ii) or it appears that the applicant's criminal offense is not a crime involving moral turpitude (CIMT) under INA section 212(a)(2)(A)(i)(I). After further consideration, USCIS issues this field guidance.

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USCIS officers should review all evidence in the record, including any evidence submitted by the applicant or the attorney of record. If, based on all evidence in the record, it appears that the applicant's criminal offense: (1) falls within the "petty offense" or "youthful offender" exception under INA section 212(a)(2)(A)(ii) at the time of the I-601A adjudication, or (2) is not a CIMT under INA section 212(a)(2)(A)(i)(I) that would render the applicant inadmissible, then USCIS officers should not find a reason to believe that the individual may be subject to inadmissibility under INA section 212(a)(2)(A)(i)(I) at the time of the immigrant visa interview solely on account of that criminal offense. The USCIS officer should continue with the adjudication to determine whether the applicant meets the other requirements for the provisional unlawful presence waiver, including whether the applicant warrants a favorable exercise of discretion.

Use

This field guidance is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this field guidance should be addressed through appropriate directorate channels to the Field Operations Directorate.

[1]All applicants who are ineligible for a provisional unlawful presence waiver, including applicants with a criminal history, may seek a waiver of inadmissibility abroad after they appear for their immigrant visa interviews at a U.S. Embassy or consulate.