

An estimated 1.3 million Americans are married to a spouse who is undocumented. Another 155,000 are married to a DACA recipient. While many of these individuals may be able to petition their spouses for green cards on paper, significant procedural hurdles have made pursuing this path difficult. Twenty-four of the nation's largest Hispanic civil rights organizations have urged the administration to address this inequity by permitting these spouses to work.

Administrative Relief for Longtime Residents

Work Permits for Spouses of Americans

1 Why Are Changes Needed to Support the Spouses of Americans?

The path to green cards for many of the undocumented spouses of Americans involves a process known as consular processing, which typically requires the spouse to depart the U.S. to complete their green card application abroad. The fact of their departure from the U.S. will mean that many of these individuals will need to concurrently apply for a waiver of what are known as the 3/10 year unlawful presence bars. In 2013, USCIS established a process known as the "provisional waiver" to address concerns that families had about being separated for months while a waiver applicant awaited a decision on their case. The provisional waiver was specifically designed to reduce the amount of time applicants had to wait outside of the U.S. for their waiver to be adjudicated by allowing them to apply for waivers and receive a provisional decision before departing the U.S. for consular processing. The policy change was largely seen as a success – reducing the time families had to be apart from several months to mere days. Most importantly, it helped to address one of the biggest barriers faced by mixed-immigration status families in accessing the family-based immigration system – fear of uncertainty and prolonged family separation.

Unfortunately, this essential aspect of the green card application has become significantly backlogged in recent years, discouraging many of these families from pursuing existing family-based paths to green cards. Many spouses of Americans who must leave the U.S. to complete their journey to a green card face excessively long wait periods along the way—once months, now over 3.5 years. Making matters worse is that, despite having no control over bureaucratic government delays in their cases, these spouses seeking green cards generally can't apply for work permits to help support their families while they wait. It doesn't have to be this way: the administration should explore all available options— from its parole and deferred action authorities to amending existing work permit regulations— to enable them to work while they wait for their green card applications to make it through growing backlogs. Solutions are needed to put these families back on the path to legal status. Leveraging existing legal authorities to allow these spouses of Americans to work is an important first step to allow these families an opportunity to organize their lives as they wait years for their cases to be decided.

2 What Tools Can the Administration Use to Extend Work Permits These Spouses?

The administration has at least two tools to address this issue. First, it could leverage its existing parole authority, on a case-by-case basis, for undocumented spouses of Americans for "urgent humanitarian" or "significant public benefit" reasons. A compelling humanitarian interest for parole could be based on our nation's strong family unity tradition, while a "significant public benefit" interest could be realized by improving administrative efficiency at the agencies grappling with unprecedented pressures related to managing the situation at the border. Individuals granted parole may be able to apply for work permits and adjust their status within the United States.

Second, DHS could amend applicable regulations to allow the spouses of Americans who need “provisional waivers” as part of a green card application process that requires them to depart the U.S. to process abroad – the ability to work while they wait on their cases. It could do this as part of rulemaking that DHS intends to pursue on adjustment of status, temporary protected status, and employment authorization. Because of the staggering backlogs in the “provisional waiver” process described below, the inclusion of provisions to allow these spouses to work would be consistent with the rule’s goals of reducing processing times and “promoting the efficient use of immediately available immigrant visas.”

3 What is the Scope and Scale of this Issue?

Given its prominent role in the green card application for thousands of mixed-immigration status families in the country, provisional waiver processing serves as an important bellwether for the health of this key aspect of the immigration system. In recent years, it has been a concerning picture. Since FY 2020, the number of provisional waiver cases “pending” with USCIS has more than doubled. Case approvals have also trended downward since FY2017, and current processing times for these cases now stand at 42.1 months, representing an over 800% increase from FY2018. It’s crucial to remember that the current delays exclude the processing of other aspects of the individual’s case, such as the underlying family-based petition and the immigrant visa application with the Department of State, which means processing times exceeding 3.5 years.

Provisional Waiver Metrics (as of 03-21-2024)

Year	Received	Approved	Denied	Pending
FY2024 (Q1)	9,352	12,287	921	139,893
FY2023	35,386	11,724	1,024	133,147
FY2022	36,309	5,052	1,012	121,793
FY2021	45,344	18,324	1,724	91,796
FY2020	49,491	23,508	1,694	66,509
FY2019	52,506	46,092	3,327	41,428
FY2018	60,748	41,580	2,315	39,095
FY2017	65,729	68,636	3,331	22,711

4 Is the Backlog Discouraging Families from Applying, and How Can the Trend be Reversed?

Using the provisional waiver as a gauge for mixed-immigration status families and their willingness to pursue green cards, it appears that these backlogs are impacting overall “take-up” rates. USCIS data above shows a trend toward fewer cases received year-over-year in recent years, while pending cases have more than doubled in that time. Meanwhile, anecdotal experiences seem to support the view that these backlogs are influencing decisions to pursue family-based paths to green cards. For example, the American Immigration Lawyers Association filed a class-action lawsuit on January 23, 2023, challenging the growing delays in processing times. In other words, these delays are undermining the original purpose of the provisional waiver policy, which was designed to encourage more individuals with existing paths to green cards to come forward and apply.

In March 2023, USCIS announced plans to increase its capacity to process more cases, including provisional waiver applications. This is a welcome development, but it is not sufficient on its own. Leveraging existing legal authorities to allow the spouses of Americans to apply for work permits while they wait for decisions on their underlying green card cases could help reverse this trend. It would provide these families with a meaningful opportunity to better organize their lives as they navigate the very long backlogs.

5 Has Anything Like This Been Done Before?

USCIS has leveraged its administrative authorities to mitigate the impact of significant case backlogs in other recent situations. For instance, in March 2022, USCIS announced that it would consider deferred action and related employment authorization for noncitizens who have an approved Special Immigrant Juvenile application but could not yet apply to adjust status to lawful permanent resident because the visa number is not yet available. Similarly, in June 2021, the agency created a “bona fide determination process” to enhance efficiency in the U nonimmigrant status context due to significant backlogs and wait times for final adjudications. There is also precedent with USCIS leveraging its parole authority to support mixed-status families with military service members, which could be instructive in this context.