AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Laura Dawkins,
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2020

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Re: OMB Control Number 1615–0123
USCIS Proposed Rule: Expansion of Provisional Unlawful Presence Waivers of Inadmissibility

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced proposed rule on the expansion of the provisional unlawful presence waiver program, published in the Federal Register on July, 22, 2015.[1]

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We believe that our members' collective expertise and experience makes us particularly well qualified to offer views on this matter.

AILA commends USCIS for expanding the provisional waiver program to include all individuals who are statutorily eligible for waivers of unlawful presence – including employment-based immigrants, Diversity Visa applicants, and certain Special Immigrants – and for expanding the list of those who can be considered a "qualifying relative." The current provisional waiver program has done much to alleviate unnecessary familial hardships while facilitating legal immigration by encouraging a sizable group of individuals to come out of the shadows and obtain permanent residence. The hardships suffered by preference category families, who face the same lengthy separation from loved ones when they seek lawful permanent resident (LPR)

[1] 80 Fed. Reg. 43338 (July 22, 2015).

status, are as equally compelling as those suffered by immediate relatives, and these families will benefit greatly from the program's expansion. We offer the following comments and recommendations to help ensure the successful implementation of the expansion.

DHS Must Take Steps to Correct Deficiencies in the Current Provisional Waiver Program While Seeking to Expand its Scope

In addition to expanding the availability of the provisional waiver process to a broader group of individuals, DHS must also take steps to correct a number of deficiencies in the current process. The provisional waiver program, which was announced with great fanfare through a notice of intent to amend USCIS regulations on January 6, 2012, was met with equally great enthusiasm and optimism from the stakeholder community. Through reports submitted from many of our members, AILA has actively monitored provisional waiver adjudications since the program began on March 4, 2013.[2] Unfortunately, AILA has observed a number of problems over the course of the program, such as an unnecessarily broad application of the "reason to believe" standard, template RFEs and denial letters, and the lack of any formal mechanism for appeal or reconsideration. In order to ensure the program's success, expansion must be accompanied by changes to fix the following issues.

Template Requests for Evidence on Extreme Hardship

During the first year of the provisional waiver program, AILA received many reports from members who received denials for failure to establish extreme hardship, without first receiving an RFE articulating the perceived shortcomings in the initial filing.[3] While reports of denials for lack of extreme hardship without an RFE have decreased, RFEs seeking additional hardship evidence are "boilerplate" in nature: there is no indication that the officer reviewed and considered the initial evidence submitted and the RFEs do not specify the aspects of the claimed hardship that is lacking. Instead, the RFEs simply re-state the extreme hardship standard and the factors and evidence that USCIS will consider in making its determination. The RFEs we have observed contain the following identical or nearly identical language:

> *[a]fter a careful review of your application and the evidence you submitted to support your claim of extreme hardship, USCIS has determined that your request for a provisional unlawful presence waiver does not include sufficient evidence that your U.S. citizen spouse or parent would experience extreme hardship if you were refused admission to the United States.*
>
> *Please submit a statement explaining in detail the hardships your U.S. citizen spouse or parent would experience if you were found ineligible for an immigrant*

[2] *See, e.g.* AILA Seeks Examples of I-601A Provisional Waiver Approvals, Denials, and RFEs, AILA Doc. No. 13061907; Practice Alert: Provisional Waiver "Reason to Believe" Standard, AILA Doc. No. 13071542; AILA Memorandum to USCIS on Provisional Waivers and "Reason to Believe," AILA Doc. No. 13080740; USCIS to Reopen I-601A Denials Based on "Reason to Believe," AILA Doc. No. 14031846; Call for Examples: I-601A Provisional Waiver Denials Based on Lack of Extreme Hardship, AILA Doc. No. 14052944; AILA Recommendations on Provisional Waiver Expansion and Extreme Hardship, AILA Doc. No. 15031370.
[3] AILA NBC Liaison Committee Meeting Minutes (5/9/14), AILA Doc. No. 14082152.

> *visa. The statement should explain how the hardship is greater than the common results of immigrant visa refusal. Your statement should also be supported by documentary evidence; merely stating that your U.S. citizen spouse or parent would suffer extreme hardship is not sufficient…*

This language is consistent throughout the RFEs we observed, even in cases where substantial documentary evidence and supporting statements from the qualifying relative and the applicant were included with the original application. The generic request for a "statement … supported by documentary evidence," without reference to what was previously submitted, understandably leads the applicant to believe that USCIS ignored or overlooked the documentary evidence and supporting statements submitted with the original application.

The RFEs we observed continue with a recitation of the factors USCIS considers when determining extreme hardship, which mirrors that which is listed in the I-601A instructions. The RFEs then go on to provide a general list of evidence to support the requested statement. In some RFEs we observed, the adjudicator highlighted or marked one or more of these items thereby indicating, without specifically saying, that the applicant should focus on these items when preparing their response. But again, in no case is there any reference to documentary evidence previously submitted. Without any means of contacting the individual adjudicator to discuss the case, this lack of detail forces the applicant and attorney to guess what the adjudicator believes is lacking and necessary to demonstrate extreme hardship.

It is important to note that USCIS Standard Operating Procedures (SOP) for I-601A waiver applications require adjudicators to issue specific, targeted RFEs when an applicant's supporting evidence does not establish the requisite level of hardship. The SOP states, "[t]he RFE must explain why the evidence submitted with the I-601A was insufficient."[4] This procedure is in place for good reason – the hardship decision is discretionary, and "there is no specific amount of evidence required to support any particular extreme hardship claim." A detailed RFE will enable the applicant to better understand how the officer weighed the initial evidence submitted and to respond to the RFE with targeted evidence to address the officer's specific concerns. In order to ensure predictability and fairness in the process, the following language should be added at the end of 8 CFR §212.7(e)(8): "When issued, a request for evidence or notice of intent to deny will identify the particular evidentiary deficiencies identified by the adjudicator that must be overcome."

Unnecessarily Broad Interpretation of "Reason to Believe"

AILA continues to receive reports that USCIS is applying an overly-rigid interpretation of "reason to believe" and denying applications for individuals who would clearly not be deemed inadmissible for reasons other than unlawful presence at a consular interview. In a detailed memorandum dated August 6, 2013, AILA advocated for the implementation of a "reason to believe" review based on the totality of the evidence submitted.[5] Though we were pleased that USCIS released the January 24, 2014 memorandum revising its policy in this area, the

[4] *See* USCIS NBC Standard Operating Procedures for Form I-601A Version 1.1, Sec. 4.3.3 at p.53 (Mar. 2, 2013).
[5] http://www.aila.org/infonet/aila-memo-to-uscis-on-provisional-waivers.

memorandum falls short in that it only instructs adjudicators to consider the totality of the evidence in cases involving a potential criminal ground of inadmissibility, and does not address cases in which the applicant allegedly provided false information to legacy INS or DHS authorities where such information was not given in an effort to procure a visa, other documentation, or admission in violation of INA §212(a)(6)(C).[6] Unfortunately, the proposed rule also fails to address this issue.[7]

While providing a false name in conjunction with the formal inspection and admission process may certainly raise concerns regarding admissibility (for example, presenting a false passport at a port of entry), in most circumstances, simply providing a false name *after* an arrest for attempting to enter without inspection does not support a finding of inadmissibility under INA §212(a)(6)(C)(i) because it is not made in an attempt to "procure … a visa, other documentation, or admission into the United States" or other benefit under the INA. Moreover, the Department of State takes the approach that misrepresentations regarding identity are material only if the alien is "inadmissible on the true facts or the misrepresentation tends to cut off a relevant line of inquiry which might have led to a proper finding of ineligibility."[8] Providing a false name or date of birth after arrest (in a "catch and release" or "voluntary return" situation) when it has already been determined that the individual is inadmissible is not, by definition, "material."[9]

In many of these case examples received by AILA, a review of supporting documentation submitted with the application could have provided the adjudicator with assurances that the facts do not support a finding of inadmissibility. In cases where the applicant was not even aware of the allegations, the issuance of a request for evidence would provide applicants with notice of the derogatory information and provide them with the opportunity to rebut the "reason to believe." 8 CFR §103.2(b)(16) states that "[a]n applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision," and also provides "an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered." Therefore, we respectfully request that USCIS expand the scope of the January 24, 2014 memorandum to instruct adjudicators to consider the totality of the evidence in situations involving potential misrepresentation under INA §212(a)(6)(C). In addition, we suggest that 8 CFR §212.7(e)(4)(i) be amended to read:

> ***After review of the totality of the evidence submitted****, 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;*

Template "Reason to Believe" Denials

[6] USCIS Memorandum, "Guidance Pertaining to Applicants for Provisional Unlawful Presence Waivers," (Jan. 24, 2014), AILA Doc. No. 14012455.
[7] 80 Fed. Reg. at 43342, 43346.
[8] 9 FAM 40.63 N. 6.3-3.
[9] *See Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1960, AG 1961); *Kungys v. U.S.*, 485 U.S. 759 (1998).

AILA has also received numerous reports from members who received formulaic I-601A denials based on a "reason to believe" the applicant was inadmissible for reasons other than unlawful presence. For example, in the criminal context, a typical denial reads:

> *The record shows that you have a criminal history that includes a conviction for at least one crime.… Based on the information noted above … USCIS has reason to believe that you may be found inadmissible by a Department of State consular officer at the time of your immigrant visa interview for a reason other than unlawful presence.*

In the misrepresentation context, a typical denial reads:

> *Your background and security checks show, however, that you provided a false name and/or date of birth to immigration officials when you were apprehended after you attempted to enter the United States without inspection…. Based on the information noted above … USCIS has reason to believe that you may be found inadmissible by a Department of State or consular officer at the time of your immigrant visa interview for a reason other than unlawful presence.*

Template denials such as these are insufficient for a number of reasons. In the criminal context, the standard denial language gives no indication that the adjudicator complied with the January 24, 2014 memorandum by evaluating the totality of the evidence before reaching a conclusion on "reason to believe." This leaves the applicant with the impression that any evidence submitted to demonstrate that the crime would not lead to a finding of inadmissibility was not reviewed, and undermines the public's confidence in the process. In the misrepresentation context, we have heard from many members who received such denials, even though they conducted the necessary due diligence and background checks on behalf of their clients prior to filing, and the clients insist that they were never apprehended upon entry or provided false information to border officials. Template denials such as these provide no discernable information regarding the date, time, or location where the alleged conduct took place, and therefore, provide no basis for challenging the finding upon reapplication or *sua sponte* motion. Though we recognize the utility of template denials as an efficient adjudication tool, USCIS must instruct officers to provide case-specific factual information within the template letters, in order to provide adequate notice of the basis for denial to applicants. Therefore, USCIS should amend 8 CFR §212.7(e)(9) to read:

> ***Notice of Decision****. USCIS will notify the alien and the alien's attorney of record or accredited representative of the decision in accordance with 8 CFR 103.2(b)(19). USCIS may also notify the Department of State.* ***The decision to deny a provisional unlawful presence waiver application must state the particular reasons for the denial, with reference to the individual facts of the case****….*

No Appeal or Motion to Reopen/Reconsider

Under current 8 CFR §212.7(e)(11), administrative appeals and motions to reopen or reconsider the denial of a provisional unlawful presence waiver are prohibited. In the Supplementary

Information to the January 3, 2013 final rule, DHS stated that while it appreciates the concerns expressed by the public regarding the lack of appeal or reconsideration process, it "nonetheless believes that allowing motions to reopen or reconsider would undercut the efficiencies USCIS and DOS will gain through the streamlined provisional unlawful presence waiver process."[10] Unfortunately, USCIS has again refused to permit motions to reopen or appeals in the present notice of rulemaking.

Without an appeal or motions process, the only options for an individual who believes his or her application was wrongfully denied is to file a new application with a new filing fee, or hope that USCIS will exercise its *sua sponte* authority to reopen the case on its own motion. This policy fails to hold USCIS adjudicators accountable for even the simplest of mistakes, and decreases the public's trust in the program. Though individuals whose I-601A applications are denied are permitted to proceed under the regular process by filing an I-601 waiver after attending a consular interview abroad, these are the same individuals who have long declined to obtain permanent residence due to the uncertainty of consular processing and the hardships associated with a lengthy family separation. These individuals in all likelihood will not opt to proceed abroad but will instead choose to remain in the U.S. without status, thus diminishing the benefits of the provisional waiver program.

In terms of process, we understand that USCIS informs DOS of the decisions made in provisional waiver cases by sending a weekly report to the National Visa Center (NVC). If a provisional waiver is denied, USCIS sends the file to the National Records Center for storage. If a provisional waiver is approved, the file is sent to the Texas Service Center (TSC). If an appeal/motion process is implemented, it does not seem unrealistic to ask USCIS to hold denied provisional waiver applications at the NBC for the 30 day appeal period. If an appeal or motion is not filed within the 30 day period, USCIS could notify DOS via the weekly report, and DOS could resume normal procedures. If an appeal or motion is filed, USCIS and DOS could continue to hold the case in abeyance until the appeal or motion is decided. This should not significantly impede any administrative efficiencies gained by the agencies from the provisional waiver process, as it would appear that there would be few logistical challenges to overcome during the pendency of an appeal or motion.

USCIS must amend 8 CFR §212.7(e)(11) and institute a mechanism for appeal or reconsideration in order to provide adequate due process protections for those whose applications are denied in error, where there are changed circumstances, where a deficient application is filed by a pro se applicant, or where a deficient or improper application is filed by a notario or other individual not authorized to practice U.S. immigration law.

Additional Guidance on the Definition of "Extreme Hardship" Is Critical to Consistency in Adjudications and the Success of the Provisional Waiver Program

A review of individual case reports received by AILA indicates that USCIS is taking an overly narrow interpretation of "extreme hardship" in adjudicating provisional waivers. In the November 20, 2014 memorandum, "Expansion of the Provisional Waiver Program," DHS

[10] 78 Fed. Reg. 536, 553 (Jan. 3, 2013).

Secretary Johnson directed USCIS to issue additional guidance on the definition of extreme hardship, including clarifying the factors that should be considered and criteria by which a presumption of extreme hardship may be determined to exist. As noted by the Secretary, the publication of additional guidance on the definition of "extreme hardship" would provide for broader use of the provisional waiver program and is critical to the program's success. We hope that this guidance will be published in draft form in the near future and look forward to the opportunity to provide comments prior to issuance of a final memorandum.

Permit Provisional Waivers for Individuals Who Have Already Been Scheduled for an Immigrant Visa Interview

- Preference category immigrants cannot apply if they had their interview scheduled before the effective date of the final rule.
- IRs can apply if they did not have interview scheduled prior to 1/3/13.

Unfortunately, DHS again proposes to limit the eligibility for provisional waivers to the following groups: (1) preference category immigrants who have not had their immigrant visa interview scheduled prior to the effective date of the final expansion rule; and (2) all immediate relatives of U.S. citizens, except those who had an immigrant visa interview scheduled prior to January 3, 2013, the effective date of the current provisional waiver rule.[11] In the original federal register notice announcing provisional waivers, USCIS stated that "resource constraints and timing issues" warranted exclusion of these cases from the provisional waiver process.[12] In the present rule-making notice, it says that the same restrictions are necessary.[13] However, we believe that individuals who have been scheduled for an immigrant visa interview, but have not left the U.S. and attended an interview at the time the final rule becomes effective, should be permitted to apply for a provisional waiver. These individuals face the same lengthy separation and resulting hardships that the provisional waiver process seeks to alleviate. Concerns that there would be disruptions in scheduling appointments at U.S. consulates abroad, should be outweighed by the humanitarian considerations that form the foundation for the proposed process change. USCIS has extensive experience handling waves of applications, for example when a country is designated or renewed for Temporary Protected Status, or a regulatory change or new law results in a large number of new applications.[14] The proposed rule should be amended to accommodate applicants who have been scheduled for immigrant visa interviews but who have not left the U.S.

Individuals in Removal Proceedings Should be Eligible for Provisional Waivers

Under 8 CFR §212.7(e)(4)(v), an alien in removal proceedings is not eligible for a provisional waiver unless such removal proceedings have been administratively closed and have not been recalendared at the time of filing. We strongly encourage USCIS to amend the regulations to

[11] 80 Fed. Reg. at 43343.
[12] 77 Fed. Reg. at 19909.
[13] 80 Fed. Reg. at 43343.
[14] Such as applications under the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).

permit individuals who are currently in removal proceedings or who have been issued a notice to appear (NTA) to apply for and receive a provisional waiver. Rather than excluding such a broad group of people from the provisional waiver process, a better system would allow individuals who have been issued NTAs or who are currently in removal proceedings, including those whose cases have been administratively closed, to apply for a provisional waiver. If granted, they would then move to dismiss or terminate proceedings, or seek cancellation of the NTA, so that they could depart the U.S. for the immigrant visa interview. This would also ensure that a provisional waiver applicant who is issued an NTA while the application is pending does not automatically become ineligible for the waiver in the middle of the process.

Permit Concurrent Filing of Form I-212

In order to further broaden the pool of individuals who could benefit from the provisional waiver process, USCIS should amend §212.7(e)(4)(i) to make an exception to the requirement that the applicant only be inadmissible for unlawful presence, and to permit concurrent filing of an I-601A provisional waiver application and an I-212 waiver. Not only does a similar stateside adjudication process currently exists for certain I-212 applicants, USCIS adjudication policy provides that in general, if an I-601 waiver is approved, an I-212 waiver will also be approved since both applications require the adjudicator to find that the applicant warrants a favorable exercise of discretion.[15] To demand separate or consecutive processing, when a domestic process exists for both waivers, is unnecessary and a waste of USCIS resources.

Conclusion

We appreciate the opportunity to provide comments on the expansion of the provisional waiver process and forthcoming guidance on extreme hardship and look forward to a continuing dialogue with the Department on these matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[15] *See* Immigrant Waivers: Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers, April 28, 2009, at 59, reprinted on www.aila.org at Doc. No. 09061772.