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Sunday Aigbe, Chief, Regulatory Products Division,
Office of the Executive Secretariat
U.S. Citizenship and Immigration Services,
Department of Homeland Security

Re: Comment on Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives Document ID: USCIS-2012-0003-0001

Dear Mr. Aigbe:

I am an immigration lawyer who routinely represents U.S. citizens and their noncitizen family members in seeking waivers of inadmissibility. I am writing to comment on the above proposed rule. I generally support the proposed rule, but suggest the following changes:

IMMEDIATE RELATIVES WITH HARDSHIP TO LPR'S

USCIS proposes to not permit immediate relatives to use the provisional process if the hardship is to an permanent resident spouse or parent (rather than to the petitioning U.S. citizen). USCIS asserts the goal of reunification of U.S. citizen families justifies the limitation, but the exclusion of immediate relatives from the provisional process where the hardship is to a permanent resident qualifying relative does not advance this goal. By definition, an immediate relative has a citizen parent, spouse, or child even where the hardship is to another family member who happens to be a permanent resident.

Perhaps the implicit rationale for this proposal is that hardship to permanent resident qualifying relatives should count less, but that rationale is not supported by the INA. The INA does not distinguish between hardship to U.S. citizen and permanent resident qualifying relatives and the final rule should not either. In other words, why should a U.S. citizen be separated from her spouse for a lengthy period of time simply because qualifying extreme hardship is to the spouse's disabled permanent resident parent? USCIS's proposal does not provide any satisfactory answer to that question.

I submit that immediate relatives should be eligible for the provisional process even where the hardship is to a permanent resident qualifying relative.

APPLICANTS WITH VOLUNTARY DEPARTURE

USCIS also proposes to exclude noncitizens in removal proceedings from using the provisional process unless the proceedings are terminated or administratively closed and then reopened for

voluntary departure. There is no apparent reason for requiring voluntary departure grantees to get administrative closure and then reopening to qualify for the provisional process.

A better course would be to permit any noncitizen in removal proceedings to apply for the provisional waiver if he or she receives a grant of voluntary departure and is otherwise qualified (without requiring the pointless additional step of administrative closure and then reopening). Immigration judges routinely grant voluntary departure under 8 USC 1229c(a)(2)(A) for the maximum period of 120 days. During those four months, applicants should be allowed to start the waiver process to minimize their separation from their family.

I understand, however, that it would be impractical to complete the required biometrics processing if an applicant files the I-601A shortly before he or she must voluntarily depart. Either the applicant will miss the biometrics appointment or will trigger an additional ground of inadmissibility by overstaying the voluntary departure and incurring a removal order.

I suggest limiting eligibility to persons in removal proceedings who either obtain termination of the proceedings or who receive voluntary departure and file the I-601A with at least 60 days left in their voluntary departure period.

DRAFT FORM I-601A

Regarding the draft I-601A, I suggest changes conforming to the above suggestions and also point out the following issues:

The note following the heading “Immigration or Criminal History Records” indicates that a “yes” answer to question 30 or 33 would make the applicant ineligible for the provisional process, but this does not appear to conform to the proposal in the Federal Register. The proposal indicates that only applicants inadmissible on another basis would be ineligible. Not everyone who has committed a crime for which they were not arrested is inadmissible. Nor is everyone who is convicted of a crime inadmissible. Yet the note gives the impression that impression. For example, an applicant who once was intoxicated on the public street in front of a fraternity house in college would have committed a “crime” at some point in the past (drunk in public), but would not be inadmissible and should not be ineligible for the process.

Either the note or the questions should be amended. For example, the language for question 30 could be conformed to the language in Form I-485, which asks if the applicant has ever “Knowingly committed any crime of moral turpitude or drug-related offense for which you have not been arrested?” These crimes, crimes of moral turpitude and drug offenses, are the only relevant offenses for persons who have not been convicted. Question 33 could remain as it is, but the note preceding it should make it clear that a “yes” answer will not categorically disqualify the person.

Respectfully submitted,

Scott A. Mossman, Attorney at Law