Comments for Provisional Waivers

Preamble

This is a presentation of comments from a group of immigration attorneys who regularly file I-601 waiver applications in the United States and/or abroad. We recognize each other as experts in this specialty of immigration law. Our names appear at the end of this document.

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I. Introduction

We applaud United States Citizenship and Immigration Services (USCIS) in its effort to create a procedure in which spouses and minor children of US citizens may file their waiver applications in advance of the consular interview. The new procedure will significantly reduce family separation for the majority of applicants. This reflects the importance Americans place on family values. It will also improve safety for government officials as they can be removed from assignments in dangerous parts of the world, such as Ciudad Juarez, and will increase efficiency, thereby saving money.

The draft rule for the Provisional Waiver Program indicates that the program is only for the unlawful presence waiver described in the Immigration and Nationality Act (INA) section 212(a)(9)(B)(v). Congress stated that USCIS has discretion to grant the waiver if refusing the alien's admission "would result" in extreme hardship to a qualifying relative. The term "would result" implies that the analysis is meant to be prospective. Congress did not use present or past tense for the term; the passage does not use the terms "results", "is resulting" or "has resulted". Congress used the conditional tense, suggesting that the waiver is meant to avoid extreme hardship altogether, not merely to minimize extreme hardship that is already occurring. However, Congress also intended for the alien to proceed abroad as soon as possible. INA §245(a) prevents an alien from adjusting status if he entered without inspection and INA §212(a)(9)(B)(i) increases the ban for the alien depending on the length of his unlawful presence, suggesting that Congress wants the unlawfully present alien to end his period of unlawful presence and depart the country as soon as possible. These two goals of Congress – requiring the alien to depart the country as soon as possible while at the same time creating a waiver for unlawful presence that is meant to avoid family separation – can only both be satisfied by USCIS if the adjudication of waiver applications is instantaneous. Congress failed to account for processing times. The existence of processing times means that Congress' two goals are potentially in opposition to one another. USCIS has been left with the impossible task of attempting to comply with Congress' two opposing goals. The Provisional Waiver Process will bring better balance to Congress' two goals.

Further, the new procedure creates a possible opportunity to bring before USCIS several issues of legal interpretation regarding grounds of inadmissibility that attorneys have until now not had the opportunity to bring before USCIS, most notably the application to minors of various grounds of inadmissibility, such as false claim of US citizenship and inadmissibility under INA §212(a)(9)(C). Cases involving such grounds of inadmissibility are usually 'killed' at the consulate as the applicant has been barred from bringing the matter before the Department of Homeland Security (DHS), the parent organization of USCIS. We are concerned that because applicants have been unable to bring this issues forward to DHS in the context of individual cases, DHS' authority to create controlling policy on all questions of law under INA §103(a)(1) has been circumvented. Furthermore, if DHS authority under INA §103(a)(1) has been circumvented and applicants have been prevented from presenting their questions of law in the

context of an individual case, applicants have not been afforded full due process of law, thereby violating the rights of the US citizen petitioner as described in *Bustamante v Mukasey*, 531 F.3d 1059, 1060 (9th Cir. 2008). If applicants have the opportunity for USCIS to make determinations of inadmissibility, especially the determination that a given ground of inadmissibility DOES NOT apply, the cause of justice will be better served.

II. Comments

As the government prepares its formal rule to present to the government, we make the following comments for the government to consider, in descending order of importance:

a. RFE When Additional Ground of Inadmissibility Found

On page 33 of the Proposed Rule, it states, "DHS proposes to limit RFEs solely to the issues of whether the alien has established extreme hardship and/or merits a favorable exercise of discretion". This appears to eliminate RFEs where the adjudicator thinks an additional ground of inadmissibility may exist that would lead to denial of the waiver application. The attorneys preparing these draft comments express great concern that any possibility of an additional ground of inadmissibility would lead to denial, without providing the applicant an opportunity to respond to the government's concerns.

b. Allow Appeals for Questions of Law

The Draft Rule states that the applicant for a Provisional Waiver will not be permitted to appeal the denial to the AAO and would instead be required to proceed abroad and file a new waiver application through the regular process. While we recognize concerns DHS may have over (a) lengthy backlogs of cases at the AAO, and (b) the accompanying lengthy unlawful presence of an applicant whose waiver has already been denied, we respectfully request that at least for bona fide questions of law regarding inadmissibility, the applicant be permitted to appeal so that DHS can better create unified policy on such questions of law. As it stands under current procedures, applicants with such questions of law – e.g. false claim of citizenship for minors – are opting out of the process and are not bringing their legal issues forth. The Provisional Waiver Process creates a golden opportunity for such cases to finally be reviewed, if applicants believe they will be able to remain with their US citizen spouses and children while these legal issues make their way through appeal processes that commonly last for years. The alternative is for attorneys to bring these issues to Federal Court, which would again circumvent DHS' role in creating unified policy on questions of law. By relegating certain questions of inadmissibility to either the Department of State (DOS) or Federal Court, DHS abdicates its authority to interpret the law for grounds of inadmissibility where no waiver is available.

c. Res Judicata on Extreme Hardship Finding

If the Provisional Waiver is approved and the consulate unexpectedly makes a finding of an additional ground of inadmissibility and requires a waiver for that ground, then *res judicata* should be observed, meaning the extreme hardship finding should stand, and the new waiver should be adjudicated purely on the basis of discretion, considering the additional information. This policy would recognize the fact that "extreme hardship" in one waiver described in the INA is supposed to be the same as "extreme hardship" in another waiver described by the INA.

d. Medical Waivers and Smuggling Waivers

We theorize that the reason the government plans to allow Provisional Waivers for simple unlawful presence and not for misrepresentation and criminal history is because the government sees the misrepresentation and criminal history grounds as 'more severe' grounds of inadmissibility than unlawful presence. We note that the smuggling waiver – for the child, spouse or parent of the applicant – requires a lower threshold for approval (family unity or humanitarian concerns, as opposed to extreme hardship) than the unlawful presence waivers and therefore may be considered 'less severe'. Likewise the standard for approval for medical waivers, such as the absence of vaccinations, is unrelated to extreme hardship; in fact the medical grounds of inadmissibility are not considered punitive in any way, i.e. lacking in severity. Because smuggling ground of inadmissibility and medical grounds of inadmissibility are 'less severe' than unlawful presence, they should be permitted to apply for Provisional Waivers.

e. Expedite Procedures

While it is expected that expedite requests will diminish as family separation is limited, there may still be occasions where an expedite request is warranted. We understand that an expedite request is effectively a request for the applicant to be moved to the front of the line before thousands of other deserving families who are also feeling the effects of processing times. We recognize that standards for expedites should therefore be high. But in light of the fact that some cases will be able to meet such high standards, we would like clear, written procedures and standards for making expedite requests, such as a special form that does not require a fee. In order to prevent expedite requests from slowing down the work of adjudicators, we recommend a special expedite unit to review such requests.

f. Concurrent I-130/I-601 Filing

On the Ombudsman's recommendations from June 10, 2010, it was recommended that applicants be permitted to concurrently file forms I-130 and I-601. We were fully expecting that to be the procedure and were surprised that USCIS is instead planning concurrent I-601 and NVC processing. The Ombudsman did not really explain why she thought the I-601

should be filed with the I-130 (as opposed to with NVC filing) nor did USCIS in the Draft Rule explain why it thinks the I-601 should be filed with NVC processing (as opposed to with the I-130). We as the attorneys believe it makes more sense to file the I-601 with the I-130. Both the I-130 and the I-601 require thoughtful adjudication, whereas NVC processing is the mere collection of documents. It is easier to train people to collect documents or even contract out such work, than it is to train people to approve or deny an application or petition. Because it is easier to train people for NVC processing or contract out such work, should there be a dramatic increase in applications, processing times are less likely to increase substantially for this step of the process than they are to increase for the I-130 step of the process. For example, if the number of applications increases dramatically and it takes a year for the I-130 to be adjudicated – noting that at one point in the past ten years it took around two years for the I-130 to be adjudicated for the spouse of a citizen – that year of processing time would be preceding an I-601 processing time of about six months or more (noting that USCIS maintains 'six months' as its goal processing time for I-601 waivers). It would seem to cut down on total processing time if the I-130 and I-601 were adjudicated together before going on to NVC processing, where the government will be better able to keep processing times under control.

Furthermore, both the I-130 and the I-601 are adjudicated by the same agency – USCIS under DHS – while NVC processing is done by the National Visa Center under DOS. Surely USCIS is not implying that it experiences no challenges in coordinating with a separate agency. If the I-130 and I-601 are adjudicated together, they can be adjudicated by a single USCIS official simultaneously before completing the case and passing it on to NVC in the entirety. Working with NVC to synchronize I-601 adjudication with NVC processing seems to create an unnecessary logistical challenge.

One must wonder why USCIS wants to process the I-601 concurrently with NVC processing given the above, and given the Ombudsman's recommendation. There must be some reason why USCIS wants to do this. Because there was no explanation for this move in the Draft Rule, we are left to guess the reason. One can only imagine that USCIS is interested in some of the documents required by the NVC that are not required with an I-130, which may reveal additional grounds of inadmissibility to the adjudicator. Such documents include, but are not limited to: criminal records, identity records for the applicant such as birth certificate, and removal documents. But we know that it is not beyond the ability of USCIS to require such records without assistance of the NVC as this would be the typical requirements of an adjustment of status application. Presuming that we are correct on the reason for why USCIS wants concurrent NVC/I-601 processing, we respectfully submit that USCIS should simply require these items with the I-601 and allow concurrent I-130/I-601 filing. This would create some redundancy in the process as the applicant would submit such records both with the I-601 and later in NVC processing, but the benefits of limiting processing times outweigh the detriments of redundancy.

g. Video Interviews upon Request of the Applicant

It is noted that in the Notice of Intent for the rule change, DHS mentioned that on occasion the applicant may be brought in for an interview regarding the waiver. This presumably would necessitate a shuffling of the case from Service Center to local office and in some cases a long trek for the applicant to attend an appointment at an office that may be a long distance from his/her home. For such cases, where the applicant has access to the appropriate technology – e.g. Skype – we recommend that the applicant be able to request a video interview, possibly with the adjudicator at the Service Center. However, we also recognize that some applicants might not have access to such technology or may for one reason or another prefer to appear in person. These individuals should be able to elect an in-person interview at the local office. For ease of administration, we suggest that such an election be made on the original application form at the time the application for waiver is made.

h. Affirmative Finding that a Specified Ground of Inadmissibility Does Not Apply

Upon request, the government should make an affirmative finding that a specifically identified additional ground of inadmissibility does not apply to the applicant so that the consulate will be persuaded or influenced by the finding. The newly revised form should have a section where the attorney and/or applicant may request an affirmative finding for a specified ground and state the facts that give rise to the question of inadmissibility. Such grounds that can be reviewed should not be limited to those for which a waiver is available. USCIS has already stated that it intends to review other grounds of inadmissibility and deny the waiver if another ground applies, so this request does not represent a significant burden on USCIS beyond what was already envisioned as part of the adjudication process. The analysis should be made whether the issue at hand is a question of fact or a question of law, and adverse decisions should be fully appealable. We recognize that it is impractical for USCIS to affirmatively find that every ground of inadmissibility except unlawful presence does not apply to the applicant, as the number of potential grounds are too great and this would create a burden on the adjudicator. For this reason we concede that such a finding would only be made upon request and only when the facts giving rise to the concern have been detailed.

i. Remove the Requirement that Aliens Be Present in the US to File

USCIS should avoid creating incentives for unlawfully present aliens to remain in the US. The requirement that applicants be physically present at the time of waiver filing and remain present for biometrics is likely to create a situation where our clients inform us that they must leave the country to attend to a family emergency abroad and we as the attorneys are in the ridiculous position of telling an unlawfully present client that he will actually damage his case if he ceases violating the law. We understand that USCIS wants to fingerprint the

applicants, but biometrics can in fact be taken at consulates abroad. There will be some logistical challenges as it would involve coordination between the two agencies, but these challenges are outweighed by the elimination of an incentive AGAINST terminating one's period of unlawful presence. The chances of this scenario occurring are greater if the applicant is not able to file the I-601 until the I-130 is approved. If one imagines that an I-130 takes five months to adjudicate and the biometrics don't occur until at least a month after the I-601 is filed, this would be a standard period of six months or more where attorneys are actually telling their unlawfully present clients NOT to stop breaking the law (which may create an ethical dilemma for attorneys who are never supposed to advise clients to continue breaking the law). USCIS should always strive to avoid creating such a predicament.

j. Change the Minimum Age from 17 to 18

We do not understand why applicants will be permitted to file the application at age 17, given the rest of the rules. If one is an immediate relative of a US citizen and is age 17 at the time one pays the immigrant visa bill at the NVC, then why would one need an unlawful presence waiver? The unlawful presence ground of inadmissibility does not 'kick in' on the alien's 18th birthday. That's the day the alien begins to accrue unlawful presence toward the bar. But one is not inadmissible until at least 180 days of unlawful presence are acquired. It seems a bit generous for USCIS to give the applicant more than 180 days to complete NVC processing and proceed abroad, when the applicant should be able to finish up with the NVC in half that time, spend a few weeks abroad picking up the visa and get it issued without incident as the applicant is not yet inadmissible. The age 17 rule makes more sense if the waiver can be filed concurrently with the I-130 (as processing times for the I-130 may increase substantially) or if one can waive other grounds of inadmissibility. Otherwise, attorneys are concerned that this 'age 17' rule simply creates an opening for unscrupulous notaries to take advantage of people who don't need waivers.

k. Electronic Filing

Given the new technology available, even application packets over 100 pages can be converted into a single electronic file (PDF) in a matter of minutes with a typical office copier or for a few dollars at a professional copy center. For applicants and attorneys to be able to electronically file such applications will save money, time and paper normally required to send the packet via mail or private courier. The government can program their computers to automatically issue an electronic receipt immediately when the case is received. Electronic filing is consistent with the government's Transformation initiative. The government may also be able to coordinate with the State Bars, require the filer to indicate the State Bar number if the applicant was assisted, and get an automatic notice if the Bar Number is not found or the attorney is suspended/disbarred.

l. Notario Warning on Instructions and USCIS Page with Links to State Bars

There is a lot of concern that the unauthorized practice of law will increase with this new procedure. The instructions for the waiver (for all applications and petitions, actually) should include a brief warning regarding the Unauthorized Practice of Law, suggest that the applicant not entrust his family's future to a criminal, and direct the reader to a USCIS website that has links to the State Bars of all 50 states that the applicant may contact to be sure the person assisting him/her is a license attorney.

m. Centralized Filing of All Waiver Applications

It is understood that the government envisions adjudicating unlawful presence waivers (i.e. Provisional Waivers) at two Service Centers, and that the government envisions adjudicating the other waivers for overseas applicants at a Service Center after receiving them through the Lockbox (i.e. Lockbox Waivers). Lockbox waivers will include some unlawful presence waivers, e.g. where the qualifying relative is not an immediate relative US citizen, but will primarily be waivers for misrepresentation and criminal history as well as a handful of other grounds of inadmissibility. We note that currently many waivers for misrepresentation and criminal history are filed in conjunction with adjustment of status applications where the applicant entered with inspection. We recommend that in-country waivers filed with adjustment applications be sent to the location where Lockbox Waivers are adjudicated in an effort to improve consistency in the standard for approval and that the I-485 remain pending until a decision is reached on the I-601. We understand that due to volume, it is unlikely that all the waivers could be adjudicated at the same Service Center.

n. Including Other Categories of Waiver Applicants

When Congress created the various waiver categories, it did not differentiate between waivers available to immediate relatives of US citizens and waivers available to applicants in the various preference categories. In order to best comply with Congressional intent for these waivers, applicants in the various preference categories should have the same opportunities for relief as immediate relatives of US citizens. We understand that an applicant in a preference category may be in that category with an approved petition for many years before a visa becomes available and the applicant can apply for the visa. We further understand that extreme hardship to a qualifying relative has a tendency to change over time and that it does not make sense to file or adjudicate a waiver application years before the visa would actually be issued as the hardships that exist at the time of waiver filing may no longer exist at the time of visa application. If this is the reasoning behind USCIS' decision to only make Provisional Waivers available to immediate relatives of US citizens, we recommend that those in the various preference categories be eligible to apply for a Provisional Waiver only when their visa priority date is current. We understand that processing times may be such that the Provisional Waiver application could not be

adjudicated in the time period between the date the visa becomes current and the date upon which the applicant must act on the availability of the visa, and we understand any concern USCIS may have that this would result in expedite requests where applicants in preference categories would ask to have their cases adjudicated before immediate relatives of US citizens. We would be amenable to a policy that this would not be an acceptable reason to expedite a Provisional Waiver application.

o. Include All Waiver Types

The language of the statute for all the extreme hardship waivers uses the words "would result in extreme hardship". This phrase appears not only in the waiver for unlawful presence (INA §212(a)(9)(B)(v)), but also the waivers for misrepresentation (INA §212(i)) and for criminal history (INA §212(h)(1)(B)). The phrase "would result", rather than "has resulted" means that the adjudication of the waiver is meant to be a prospective analysis for all these types of waivers. That is, the waivers are all meant to prevent family separation and extreme hardship. The Provisional Waiver rule would do just that, improving compliance of the Executive Branch with the intent of the Legislative Branch. But in order to best comply, all the waivers that indicate a prospective analysis should have the Provisional Waiver process available.

p. Exit Papers

We recognize that CBP is a different subagency of DHS, separate from USCIS. However, if there is a possibility of coordination between the agencies, it would make a lot of sense for applicants to have some assurance that they will not be detained, attempting to DEPART the US if they are in possession of a waiver approval notice and a consular interview appointment notice. At the moment many applicants actually fear ending their periods of unlawful presence because in order to depart the country, they risk apprehension and detention by going to the airport or travelling to the border. CBP can and does take people into detention who have no criminal record and are caught attempting to depart the US voluntarily. This ironically has become a *deterrent* to people ending their continued violation of the law. DHS should take steps to encourage unlawfully present aliens to depart the US of their own accord at no cost to the taxpayer. We will repeat this request to CBP.

III. Requests for Clarification

Below are matters where we believe USCIS policy is already consistent with what we would recommend, but we'd just like some clarification.

a. Child Status Protection Act

In regard to Provisional Waivers only being available to spouses and children of US citizens, clarify that CSPA applies, and that as long as the I-130 was filed before the child

turned age 21, his/her status as a child of a US citizen is preserved for purposes of the Provisional Waiver.

b. Applicants with Consular Appointments Scheduled Can Become Eligible by Re-filing I-130

Many attorneys were taken by surprise by the rule that one is ineligible for the Provisional Waiver Program if one has an appointment scheduled at the consulate. We don't understand *why*. A theory is that – as described above – USCIS wants to view the NVC documents to check for additional grounds of inadmissibility, which becomes difficult once the case is forwarded to the consulate abroad. If this is the reason, then making this group of people ineligible for the Provisional Waiver is a practical issue, rather than a punitive measure. But if that is the reason, then the problem would theoretically be 'cured' by starting over with a new I-130. We'd like confirmation that re-filing the I-130 would, in fact, make an applicant eligible for the Provisional Waiver Program, presuming he meets other eligibility criteria, even if he previously had a waiver appointment scheduled at the consulate.

c. Additional Qualifying Relatives Would be Considered

In order to be eligible, the applicant must have a US citizen spouse, or must be a child under age 21 with a US citizen parent. That US citizen spouse or parent must be the primary qualifying relative. But what if the applicant has additional qualifying relatives who do not fall into those categories, e.g. an LPR parent IN ADDITION TO a US citizen spouse? We would like to clarify that hardship to these other qualifying relatives will be considered for the Provisional Waiver Program as long as the applicant has a primary qualifying relative that meets the criteria.

d. Criminal History That Does Not Make One Inadmissible Won't Make One Ineligible

On page 5 of the instructions for the draft form it indicates that if the applicant answers 'yes' to question 32, which asks if the applicant has ever been charged, etc. for 'any crime or offense', that the applicant will be ineligible for the Provisional Waiver Process. This is inconsistent with the Draft Rule, as it means one would be ineligible for the process even if the crime qualifies for the petty offense exception, even if is not a crime of moral turpitude, even if was a juvenile offense, etc. We seek clarification that the instructions are in error and crimes which do not make one inadmissible on criminal grounds under INA 212(a)(2) will not make one ineligible to apply for a Provisional Waiver.

e. **Provisional Waiver Manual**

Previously, RAIO had posted an adjudicator's manual for overseas filing of I-601 application that explained the entire process, standard of review, and various requirements from the side of the government. This resource has been invaluable. We strongly recommend the creation of a similar manual for Provisional Waivers and that it of course be publicly available.

f. **Online Tracking**

It probably goes without saying that we'd like to be able to track the cases online in the same way we track other types of cases.

IV. List of Attorneys Signing on to these Comments

The following attorneys, listed in alphabetical order, submit the comments above together as a group.

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