June 1, 2012

Sunday Aigbe
Chief, Regulatory Products Division
Office of the Executive Secretariat
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave. NW
Washington, DC 20529-2020

Re: UFW Foundation's Comments on Proposed Rule, "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives"
DHS Docket No. USCIS–2012–0003

Dear Chief Aigbe:

The United Farm Workers (UFW) Foundation submits the following comments in response to the U.S. Citizenship and Immigration Services (USCIS) proposed rule, "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives." The UFW Foundation is a non-profit organization founded by labor rights leader Cesar E. Chavez. Our mission is to open the doors of opportunity to working people and their communities. We have an immigration legal program staffed by an immigration attorney and her team of 4 Board of Immigration Appeals (BIA) Accredited Representatives. We help farm workers and other low-income immigrants to understand their rights and responsibilities with respect to immigration laws. We also help them apply for immigration benefits. The provisional waiver is extremely important to the communities we serve because so many of our clients would benefit from this new process. The UFW Foundation represents scores of people in California and Arizona whose family members are unable to immigrate because, under current law, they would have to leave the country to consular process and by doing so, trigger the unlawful presence bars.

USCIS proposes to amend the current process for filing and adjudicating unlawful presence waivers of inadmissibility to allow certain immediate relatives of U.S. citizens to request and receive a provisional waiver prior to departing the United States for consular processing of their immigrant visa application.[1] Noting that the action required to obtain lawful permanent resident (LPR) status—departure to attend the visa interview—is the very action that triggers the need for an unlawful presence waiver, USCIS states that the procedural change would "facilitate immigrant visa issuance shortly after the first consular interview," and "reduce the overall visa processing time, the period of separation of the U.S. citizen from his or her immediate relative, and the financial and emotional impact on the U.S. citizen and his or her family due to the immediate relative's absence from the United States."[2] The proposed change would also create a more predictable process and would therefore "encourage individuals to take affirmative steps to obtain an immigrant visa."[3] Finally, USCIS states that the proposed

[1] 77 Fed. Reg. 19902 (Apr. 2, 2012).

[2] 77 Fed. Reg. at 19907.

rule would minimize case transfers between USCIS and the Department of State (DOS), thereby saving both agencies time and resources.[4]

The UFW Foundation applauds USCIS for taking steps to create a more efficient adjudication process forunlawful presence waivers while simultaneously offering protection to U.S. families whowould otherwise suffer unnecessary hardships as a result of a lengthy separation from their relative. However, we are concerned that the rule as currently written is unnecessarily restrictive and therefore threatens to undermine the rationale and spirit of the proposed change.

USCIS Should Expand the Rule to Permit Preference Relatives to Apply for Provisional Waivers

As currently formulated, the proposed rule permits only a very limited group of individuals to apply for a provisional waiver: immediate relatives of U.S. citizens who can show extreme hardship to a U.S. citizen spouse or parent.[5] However, the hardships suffered by preference category families, who face the same lengthy separation from loved ones when they seek LPR status, are as equally compelling as those suffered by immediate relatives. Therefore, the provisional waiver process should be expanded to include preference relatives, including unmarried and married adult children of U.S. citizens, and spouses and children of LPRs. Opening up the provisional waiver process to these individuals would offer more measurable benefits to USCIS and DOS, would better facilitate legal immigration by encouraging a more sizable group to come out of the shadows, and comports with USCIS's goal of alleviating unnecessary familial hardships.

The UFW Foundation would like to note that farm workers often take longer on their path from permanent residence to citizenship than other immigrant groups-- they work in areas where English is not the main language, and are often far from community resources like ESL and Civics programs. While their technical skills are essential in our country, farm workers typically have lower levels of formal schooling in their home countries than other immigrant groups and therefore require more preparation before becoming U.S. Citizens. Limiting family unity to spouses and children of U.S. Citizens denies the benefits of family unification to this hard-working population of permanent residents who are abiding by the laws, working towards becoming citizens, and have often waited for years to regularize their families' immigration status. One of the UFW Foundation's lawful permanent resident clients, "Fernando" (not his real name), is truly worried about his wife and two young daughters going to Mexico for up to a year to apply for a waiver, as the US-Mexico border region is an especially dangerous place for women. Fernando is a farm worker with a primary school education and has lived legally in the U.S. for over 10 years. He is currently taking ESL classes with the UFW Foundation in the hopes of applying for U.S. citizenship. However, despite his best efforts, he is afraid he will not pass the English test to become a citizen. He knows his limited education and the long hours he works in the fields are barriers to meeting the English language requirement for U.S. citizenship.

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[3] *Id*.
[4] *Id.*
[5] Proposed 8 CFR §212.7(e)(2)(iii), (vii); 77 Fed. Reg. at 19921.

Fernando is now preparing for his wife and US citizen daughters to leave for Mexico for up to 12 months or more while he stays in the U.S. to support them by continuing to work. Fernando's daughters are only aged 6 and 4, and do not understand why they and their mother has to leave their father and go to a foreign country. The 6-year-old, "Fabiola", asks her dad questions like "Why are you going to leave Mommy?" Fernando and his wife are heartbroken that they will have to separate for an indefinite length of time while she attempts to obtain a waiver in Ciudad Juarez. He is terribly worried about sending his wife and daughters there, but as the sole bread-winner in the home, he must stay in the U.S. and continue working in the fields. Fernando's family is just one example of many hard-working, deserving lawful permanent residents whose families would benefit if the provisional waiver process was made available to them.

In explaining why the rule is limited to immediate relatives, USCIS notes that Congress placed no limitation on the number of immediate relatives that can be admitted to the U.S. each year.[6] However, if USCIS were to permit preference relatives to apply for a provisional waiver only when they have a current priority date, there would be no discernable difference between immediate and preference relatives and no reason not to include preference relatives in this process.

Qualifying Relatives for the Provisional Waiver Should Include LPR Spouses and Parents

The proposed rule limits the provisional waiver process to immediate relatives who can show extreme hardship to a U.S. citizen spouse or parent.[7] USCIS should open the provisional waiver process to applicants who can establish extreme hardship to an LPR spouse or parent.

USCIS states that limiting the process to those who can show hardship to a U.S. citizen is consistent with Congressional prioritization of reunification of U.S. citizen families, and with legal precedent that favors U.S. citizens over LPRs. Yet, as mentioned, in enacting the statutory unlawful presence waiver provision, Congress made no such distinction between U.S. citizens and LPRs, nor does it distinguish between the two groups in many other areas of immigration law.[8] While the creation of the provisional waiver process can be viewed as an administrative change to improve efficiency, the exclusion of LPRs as qualifying relatives effectively changes the substance of the statute.

USCIS admits that a major problem with the current waiver process is that an immediate relative's extended absence from the United States to apply for a waiver can give rise to the sort of extreme hardship that the waiver is intended to address and ultimately avoid.[9] This problem applies with equal force to an immediate relative whose LPR spouse or parent is the one who would suffer extreme hardship. In addition, many immediate

[6] 77 Fed. Reg. at 19907.

[7] Proposed 8 CFR §212.7(e)(2)(vii); 77 Fed. Reg. at 19921.

[8] *See* INA §212(a)(9)(B)(v) (waiver of unlawful presence); INA §212(h)(1)(B) (waiver of certain crimes); INA §212(i) (waiver of fraud or misrepresentation); INA §240A(b)(D) (cancellation of removal for nonpermanent residents).

[9] *See* 77 Fed. Reg. at 19906.

relatives, whose U.S. citizen spouse or parent would suffer relatively minor hardships due to a lengthy separation, also have an LPR spouse or parent who would suffer immensely if separated from the applicant. By excluding LPR hardship from consideration, many applicants will choose to file a provisional waiver application with marginal evidence of hardship to their U.S. citizen relative in the hope that the waiver will be approved so that the significant LPR hardships can be avoided. These applications, which have a greater chance of being denied, will unnecessarily slow the processing of provisional waivers in general. Instead, USCIS should revise the rule to permit consideration of hardship to an LPR relative as envisioned in the statute.

Loosen the Restrictions on Motions to Reopen/Reconsider and Refiling

Under the proposed rule, the denial of a provisional unlawful presence waiver cannot be appealed, and the alien may not file a motion to reopen or reconsider a denied provisional waiver.[10] In addition, an alien is ineligible for a provisional waiver if he or she "has previously filed a provisional unlawful presence waiver application"[11] and is even precluded from filing a new application if the first application is withdrawn.[12] The only opportunity for having a denied application reconsidered is if USCIS elects to reopen and approve a denied case on its own motion. This "one bite at the apple" approach is extremely narrow and will result in eligible applicants being unreasonably excluded from the process.

While we are sensitive to the fact that the Administrative Appeals Office (AAO) is already overburdened, it is imperative that mechanisms be put in place to address the following, specific scenarios:

• ***Changed Circumstances.*** The proposed elimination of all appellate review makes it all the more imperative to have some mechanism in place to address situations where changed circumstances materially affect an applicant's eligibility for a waiver. A waiver applicant, for example, may have an LPR spouse or parent who naturalizes shortly after adjudication, giving her another qualifying relative for the hardship analysis.[13] Or, an existing qualifying relative may become ill shortly after the first review, dramatically altering the hardship calculus. Other comparable provisions in the Act and regulations recognize the need for a limited opportunity, with reasonable time and numerical limitations, to come back to the agency with new, material facts. Therefore, the stateside waiver provisions should have similar, limited opportunities for refiling, or reopening or reconsideration on an applicant's motion.

• ***Cases Denied in Error***. A mechanism for review, reconsideration, or refiling must be in place to address applications that are denied in error. When a provisional waiver denial is clearly erroneous, neither the applicant, nor USCIS or DOS, should be required to needlessly spend additional time and resources to fix

[10] Proposed 8 CFR §212.7(e)(10); 77 Fed. Reg. at 19902, 19922.

[11] Proposed 8 CFR §212.7(e)(3)(xi); 77 Fed. Reg. at 19922.

[12] Proposed 8 CFR §212.7(e)(9); 77 Fed. Reg. at 19222.

[13] Proposed 8 CFR §212.7(e)(2)(vii); 77 Fed. Reg. at 19921.

the error through the filing of a waiver abroad.
• ***Deficient Applications Filed by Pro Se Individuals***. Successful waiver applications require significant preparation and documentation with a high level of detail. Pro se applicants with colorable hardship claims should not be banished from the process for unknowingly submitting a deficient application the first time around.
• ***Deficient or Otherwise Improper Applications Filed by Notarios***. Applicants who fall victim to notarios and other unauthorized practitioners should not be penalized for actions taken on their behalf. This is particularly troubling given the provision that would preclude a second provisional waiver application if the alien withdraws the original application.

Though individuals whose applications are denied are permitted to proceed under the regular process by filing a waiver application abroad, both the applicant and USCIS will be forced to expend additional time and resources in completing and adjudicating a new application. In addition, many of these individuals, who have long refused to apply for a regular waiver due to the uncertainty of the process, hardships, and dangers associated with residing for a lengthy period of time in a turbulent environment, will instead choose to remain in the U.S. without status. Either way, the benefits of the provisional waiver process will be lost.

USCIS states that permitting multiple applications "would significantly interfere with the interagency operations between USCIS and DOS and substantially delay immigrant visa processing."[14] However, USCIS and DOS must already coordinate to handle the logistical challenges that arise when a provisional waiver is denied, and the applicant must decide whether to proceed abroad or withdraw the immigrant visa application. The two agencies must also coordinate when USCIS elects to reopen a denied provisional waiver on its own motion. USCIS and DOS should take this one step further and develop mechanisms to handle cases that are reopened on the applicant's motion or where the applicant elects to refile.

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

Under the proposed rule, individuals who have already been scheduled for immigrant visa interviews are ineligible to apply for a provisional waiver.[15] USCIS states that "resource constraints and timing issues" warrant exclusion of these cases from the provisional waiver process.[16] However, in the absence of further justification or explanation, 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

[14] 77 Fed. Reg. at 19907.
[15] Proposed 8 CFR §212.7(e)(3)(iv); 77 Fed. Reg. at 19921.
[16] 77 Fed. Reg. at 19909.

U.S. consulates abroad, and particularly at Ciudad Juarez, 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.[17] 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.

Those Who Qualify Should Receive Waivers of the I-601 Fees

The UFW Foundation represents low-income immigrants, approximately 80% of whom qualify for fee waivers on other immigration applications, such as the N-400. The average farm worker earns approximately $17,000 per year, making fee waivers an extremely important pathway for our clients to avail themselves of immigration benefits for which they qualify. We urge the USCIS to consider making Form I-912 available to those applying for waivers of inadmissibility as well.

Suggested Changes to Proposed Form I-601A and Instructions

The proposed Form I-601A and accompanying instructions are largely sufficient with the exception of the section under Part 1, "Immigration or Criminal History Records." The questions in this section are confusing and contain inaccuracies that should be corrected. The inaccuracies are summarized as follows:

1. **Form Item 25**: Only individuals who indicated in Item 25.a that they are currently in removal proceedings are supposed to answer Question 25.b (regarding administrative closure and voluntary departure). However, a person who was granted voluntary departure would likely have answered "No" to item 25.a and would have therefore skipped item 25.b.
2. **Form Item 26**: The "Note" preceding question 25.a states that if an individual answers "No" to item 26.b (regarding cancellation of an NTA), the individual is ineligible for a provisional waiver. Yet a person who was issued an NTA and placed into removal proceedings that were eventually terminated would respond "No" to item 26.b and would be eligible for a provisional waiver.
3. **Form Questions 28, 29, 30, 33**: According to the proposed rule a person is ineligible for the provisional waiver if USCIS has reason to believe he or she may be subject to grounds of inadmissibility other than unlawful presence.46 The "Note" preceding item 25.a states that the provisional waiver application will be denied if the applicant answers "Yes" to items 28 (relating to false or misleading information), 29 (relating to assisting entry of a person without a valid travel document), 30 (relating to the commission of crimes) and 33 (relating to criminal convictions). However, Questions 28, 29, 30, and 33 are broader than the corresponding ground of inadmissibility and will potentially exclude eligible individuals from the process. For example, if a person answers "Yes" to Question

[17] Such as applications under the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).

33 (whether the applicant has ever been convicted of a crime), the form and instructions indicate that the person is ineligible for the provisional waiver. However, not every conviction results in inadmissibility. Therefore, the notes in reference to these questions should be revised to indicate that by answering "Yes" to these questions, the applicant "*may*" not be eligible for a provisional waiver, and his or her application "*may*" be denied.

4. **Instructions, Page 5, Items 25.-33.**:

• This instruction currently reads, "If you answer "Yes," to Items 30. or 31., provide the location and date of the event, and a brief description, in the appropriate fields in Items 33.a.-33.e." This should be revised to read, "If you answer "Yes," to Items 31. or 32., provide the location and date of the event, and a brief description, in the appropriate fields in Items 34.a.-34.e."

• This instruction currently reads, "If you answer "Yes," to Items 30. or 31., provide any related court dispositions to show that you were not convicted of a crime." This should be revised to read, "If you answer "Yes," to Items 31. or 32. provide any related court dispositions to show that you were not convicted of a crime."

• This instruction currently reads: "NOTE: USCIS will deny your provisional waiver application if you answered "Yes" to Items 25., 26., 27., 28., 29., or 32." This instruction should be revised to read: "USCIS will deny your provisional waiver application if you are currently in removal proceedings or if you are subject to a final order of removal, deportation, or exclusion, or to the reinstatement of a prior removal order. USCIS may deny your provisional waiver application if you answer "Yes" to Items 28, 29, 30, or 33."

5. **Instructions, Page 6, Part 5 – Additional Information**: The instructions for Part 5 should include similar language as is included in Part 4 for attaching a separate letter: "If you intend to submit a statement in a separate letter, you may do so, but you must write into the space provided that you are attaching a separate letter. The letter must be submitted at the same time as this Form I-601A application. Include your name and A-Number on each page of the letter."

6. **Instructions, Page 6, Parts 6 and 7 – Signature of Applicant/Person Preparing This Application**: Like other immigration forms, this section should include a reference to the form instructions which set forth the penalties for knowingly and willfully falsifying or concealing a material fact or submitting a false document in connection with the request. In addition, to further facilitate USCIS's efforts to combat notario fraud, USCIS should also include a reference to its M-712 brochure, "The Wrong Help Can Hurt: Beware of Immigration Scams."

In order to make this section of the form less confusing and more reflective of the intent of the proposed rule, the Form should be revised to read:

Immigration or Criminal History Records

25. Have you ever been issued a Notice to Appear (NTA) or Order to Show Cause (OSC) in immigration court?

□ Yes □ No

Note: If you answered "No," please skip to Question 27.

26. If you answered "Yes" to Question 25, please check the box that most accurately

describes your current situation:
□ I was issued an NTA but it was cancelled by DHS.
□ I was in removal proceedings but my proceedings were terminated or dismissed.
□ I was in removal proceedings and I am now subject to a final order of removal, deportation, or exclusion, or to the reinstatement of a prior removal order.
Note: You are not eligible for a provisional unlawful presence waiver and your application will be denied.
□ I am currently in removal proceedings and I have a future court date scheduled.
Note: You are not eligible for a provisional unlawful presence waiver and your application will be denied.
□ My removal proceedings are currently administratively closed and I do not have a future court date at this time.
Note: You are not eligible for a provisional unlawful presence waiver, unless your proceedings are reopened and you are granted voluntary departure (see below).
□ My removal proceedings were administratively closed, but they were reopened and I was granted voluntary departure.
Note: You will need to provide a copy of the administrative closure notice and voluntary departure order.
27. Have you ever given false or misleading information to a U.S. Government official while applying for an immigration benefit or to gain entry or admission into the United States?
□ Yes □ No
Note: If you answer "Yes" to Item 27, you may be ineligible for a provisional unlawful presence waiver, and your application may be denied.
28. Have you ever assisted the entry of someone, even a family member, into the United States without the benefit of a valid travel document?
□ Yes □ No
Note: If you answer "Yes" to Item 28, you may be ineligible for a provisional unlawful presence waiver, and your application may be denied.
29. Have you ever committed a crime for which you were not arrested?
□ Yes □ No
Note: If you answer "Yes" to Item 29, you may be ineligible for a provisional unlawful presence waiver, and your application may be denied.
30. Have you ever been arrested, cited, or detained by a law enforcement officer (including immigration and military officers) for any reason other than traffic violations in the United States, your home country, and/or any other country?
□ Yes □ No
31. Have you ever been charged, indicted, imprisoned or jailed for any crime or offense?
□ Yes □ No
32. If you answered "yes" to Item Numbers 30 or 31, were you ever convicted of a crime?

□ Yes □ No
Note: If you answer "Yes" to Item 32, you may be ineligible for a provisional unlawful presence waiver, and your application may be denied. If you were convicted of a crime, you must answer "Yes" even if your records were expunged; you were placed in an alternative sentencing or rehabilitation program (for example: diversion, deferred prosecution, withheld adjudication, deferred adjudication); your records were sealed or otherwise cleared; or if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record.

If USCIS incorporates the changes suggested above to the "Immigration or Criminal History Records" section, the instructions will need to be redrafted accordingly.

The UFW Foundation appreciates the opportunity to comment on this proposed rule and looks forward to a continuing dialogue with USCIS on issues concerning this important matter.

Sincerely,

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