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Sunday Aigbe, Chief
Regulatory Products Division
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U.S. Citizenship and Immigration Services
Department of Homeland Security
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RE: DHS Docket No. USCIS-2012-0003
8 CFR Parts 103 and 212
Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives

Dear Chief Aigbe:

This comment is in response to the proposed "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives" published in the Federal Register on April 2, 2012, DHS Docket No. USCIS-2012-0003.

HIAS, the Hebrew Immigrant Aid Society, is the international migration agency of the American Jewish community. HIAS has provided legal and other assistance to refugees and immigrants escaping violence, repression, and poverty for over 130 years. We also advocate for immigration laws that are humane, enhance national security, and reflect our Jewish values.

HIAS believes that a fair and humane immigration system keeps families together. Family is the cornerstone of Jewish history, education, and values. According to Jewish tradition, "kin and family resemble a heap of stones; if one stone is taken out of it, the whole collapses." Under current procedures, undocumented immigrants who seek to adjust their status must endure prolonged separations from their parents, children and spouses, undermining the basic principle that families should remain intact.

We commend the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) for taking this initial step to change the way in which some unlawful presence waivers are processed. The new provisional waiver will do much to alleviate the hardships now faced by U.S. citizens and their families as they navigate the complex and lengthy permanent residence process. Permitting individuals to

await adjudication of an unlawful presence waiver while remaining in the United States will encourage individuals to come out of the shadows and seek the lawful status for which they are eligible under the law, keep families together, and increase efficiencies in our immigration system. Currently, many individuals who would qualify for a waiver choose not to apply because of the significant risks, costs, and hardships associated with the often lengthy application process and resulting family separation. We believe that this simple change in process will protect families and at the same time create a faster, more streamlined adjudication process.

Although we strongly support the creation of a provisional waiver process, we believe that the proposed regulations are unnecessarily restrictive and will exclude many eligible individuals from seeking and ultimately obtaining provisional waivers. We also believe that certain provisions of the proposed rule undermine both the rationale for the proposed change and other key DHS initiatives. We recommend that USCIS make the following changes to the proposed regulation in order to better achieve USCIS's dual goal of protecting families and increasing agency efficiency:

1. Certain Priority Relatives Should Be Eligible for Provisional Waivers. We recommend that USCIS open the provisional waiver process to preference categories, including unmarried adult children of U.S. citizens, and spouses and children of lawful permanent residents (LPRs). The hardships suffered by these preference category families, who face the same lengthy separation from loved ones when they seek LPR status, are as compelling as those suffered by immediate relatives. USCIS states that in limiting the provisional waiver to immediate relatives, it is following Congressional preference prioritizing U.S. citizens over LPRs. However, if USCIS only permits preference relatives to apply for the provisional waiver once the priority date is current, the distinction Congress has drawn between preference and immediate relatives will have already been satisfied. Thus we see no discernable difference between immediate and preference relatives and no reason not to include them in this process.

2. Qualifying Relatives for the Provisional Waiver Should Include LPR Spouses and Parents. We recommend that individuals who can show extreme hardship to an LPR spouse or parent be eligible for the provisional waiver process. Currently, the proposed rule is limited to individuals who can show extreme hardship to U.S. citizen spouses or parents. USCIS explains that a major concern with the current inadmissibility waiver process that will be fixed by the rule change is that an immediate relatives' extended absence from the United States [to apply for the unlawful presence waiver] can give rise to the sort of extreme hardship to U.S. citizen family members that the unlawful presence waivers are intended to address and, if the waiver is merited, avoid.[1]

This "Catch-22" situation applies with equal force to LPR relatives.

USCIS defends its choice to limit qualifying relatives to U.S. citizens by saying that it is following Congressional and legal precedent that favors U.S. citizens over LPRs. Yet in many areas of immigration law, U.S. citizens and LPRs are treated *equally*. No

[1] *See* 77 FR 19906.

distinction is drawn between U.S. citizen and LPR relatives for waivers of inadmissibility grounds. Both citizens and LPRs can serve as anchor relatives for cancellation of removal applications. In creating the unlawful presence waiver, Congress did not draw any distinction between LPR and U.S. citizen relatives, and it is illogical for USCIS to do so now.

3. Individuals in Removal Proceedings Should be Eligible to Apply for And Receive a Provisional Waiver. We strongly believe that DHS should 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. The proposed regulations state that individuals with active cases pending before the immigration court are not eligible for a provisional waiver. To be able to apply, such individuals would have to persuade ICE to agree to dismiss or terminate proceedings. In addition, those whose cases have been administratively closed would be required to have their cases re-calendared and accept voluntary departure before they would be eligible to apply for the provisional waiver. In cases where ICE, CBP, or USCIS has issued an NTA but not yet filed it with the immigration court, the applicant would have to convince the issuing agency to cancel the NTA.

- **The proposed rule is unworkable:** Component agencies are unlikely to agree to dismiss, terminate, or cancel an NTA on the mere assurance that an individual intends to apply for a provisional waiver. Additionally, requiring applicants to have their NTA disposed of prior to even filing for a provisional waiver will force EOIR, ICE, and CBP to expend resources before the applicant's eligibility for the waiver has been established. Practically speaking, it would also mean that ICE or CBP, and not USCIS, would take the first cut at deciding who can and cannot apply for a provisional waiver; the refusal to agree to terminate, dismiss, or cancel would render those prospective applicants ineligible.

- **The proposed rule undermines DHS' prosecutorial discretion initiative. In addition, many eligible applicants will not risk applying for the provisional waiver, thereby undermining USCIS's stated goals for this initiative:** Last November, DHS launched a prosecutorial discretion initiative focused primarily on removing low priority cases from the immigration court docket and ensuring that such individuals were not placed into removal proceedings in the future. DHS has repeatedly explained that the prosecutorial discretion initiative is necessary for better enforcement of immigration laws and more effective use of finite enforcement resources. If the proposed rule is implemented as it is now written, USCIS would be requiring individuals granted administrative closure under this initiative to accept voluntary departure.

  If a provisional waiver is denied, applicants who were granted voluntary departure would either have to leave the U.S. and pursue an immigrant visa and waiver through the existing process, return to ICE to request prosecutorial discretion a second time, or remain in the U.S. and have their voluntary departure order convert into a removal order. In any of these scenarios, ICE would be

forced to expend additional resources on cases it has already determined are low priority.

If USCIS fails to adjudicate the waiver prior to the expiration of the voluntary departure period, the respondent would have to depart and await processing of the provisional waiver from outside the U.S.[2]—resulting in the lengthy separation that the provisional waiver rule is attempting to overcome—or have their voluntary departure order convert into a removal order, rendering them ineligible for the provisional waiver.

In short, the proposed rule would force these low priority respondents, who have deep ties to our country and communities, to give up the temporary reprieve granted to them by ICE to seek a provisional waiver, which, if delayed or denied, would require them to depart the U.S. immediately. As a result, many of these low priority individuals whose cases have been administratively closed will choose not to apply for the provisional waiver, and will instead remain in the U.S. without lawful status, thereby undermining USCIS's own rationale for developing this new rule.

- **The final rule should allow individuals issued NTAs and in removal proceedings to apply for and be granted the provisional waiver:** A better process 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 so that they could depart the U.S. for their immigrant visa interview at the U.S. consulate. This would also ensure that a provisional waiver applicant who is issued an NTA while the provisional waiver application is pending does not automatically become ineligible for the waiver in the middle of the process. It is essential that USCIS, ICE, and CBP develop a policy so that the provisional waiver can be efficiently adjudicated and then the NTA or removal proceedings be dismissed, terminated, or cancelled if the provisional waiver is approved.[3]

4. Applicants in the U.S. Who Have Been Scheduled for an Immigrant Visa Interview at a Consulate Should Be Eligible to Apply for a Provisional Waiver. Under the proposed rule, individuals who have already been scheduled for immigrant visa interviews are ineligible to apply for a provisional waiver. These applicants face the same lengthy separation and resulting hardships that the provisional waiver process is

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[2] This assumes that USCIS will have scheduled a biometrics appointment prior to the end of the voluntary departure period. If biometrics are not taken before the applicant is forced to depart the U.S., under the proposed rule, the applicant's provisional waiver application will be deemed abandoned and will be denied. *See* 77 F.R. 19910, 19922.

[3] A similar coordination between USCIS and ICE is already established in the ICE Memorandum, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions*, August 20, 2010, and accompanying USCIS Policy Memorandum, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings*, PM-602-0029, February 4, 2011.

seeking to correct. In the proposed rule, USCIS explains that "resource constraints and timing issues warranted exclusion of these cases from participation."[4] However, concerns that USCIS would be unable to handle any initial surge of applications that might result, or that there would be disruptions in scheduling of appointments at 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 at gearing up to handle waves of applications, for example when a country is designated or renewed for Temporary Protected Status (TPS) or when a regulatory change or new law results in additional adjudication responsibilities for USCIS.[5] Moreover, USCIS has acknowledged that it will already need to develop close communication and coordination with DOS to implement this rule.[6] We strongly recommend that applicants who have been scheduled for immigrant visa interviews but who have not left the U.S. be eligible to apply for provisional waivers.

5. USCIS Should Permit Concurrent Filing of the Provisional Waiver with a Form I-212 Waiver for a Prior Removal Order. As USCIS notes in the proposed rule, there is already a similar stateside adjudication process in place for individuals who are inadmissible due to a prior removal order. Moreover, current adjudication policy directs that:

> generally, if the Form I-601 is approved, the Form I-212 filed under INA 212(a)(9)(A)(iii) will also be approved, since approval of the Form I-212 involves the exercise of discretion and, by deciding to approve the Form I-601, the adjudicator has determined that the alien merits a favorable exercise of discretion.[7]

However, even though each of these waivers can be obtained stateside, under the proposed rules, applicants requiring both waivers would be ineligible for the provisional waiver process. We recommend that applicants requiring both waivers be permitted to apply for them concurrently. If concurrent waivers are not possible, applicants who apply for and are granted the I-212 waiver stateside will have to depart for processing of the unlawful presence waiver abroad. A second USCIS adjudicator will then have to expend valuable resources reviewing the same case a second time. This is particularly nonsensical since the provisional waiver requires a higher showing by the applicant. This type of consecutive, rather than concurrent adjudication is a waste of USCIS time and resources.

6. USCIS Should Permit Motions to Reopen/Reconsider and More Than One Provisional Waiver Application. We recommend that applicants denied provisional waivers be permitted to file a motion to reopen or reconsider AND be able to refile an application for a provisional waiver if the initial application is denied. Currently, the

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[4] *See* 77 F.R. 19909.

[5] For example when adjudications for applications under the Cuban Adjustment Act moved from the Immigration Court to USCIS or when laws, such as NACARA and HRIFA, took effect.

[6] *See* 77 F.R. 19906-07.

[7] *See Immigrant Waivers: Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers*, April 28, 2009, at 59, *reprinted on* AILA InfoNet at Doc. No. 09061772 (*posted* 6/17/09). USCIS has removed this document from its website pending revision.

proposed rule does not permit any appeal or motion to reopen/reconsider, and applicants are only permitted to apply once for the provisional waiver. The only exception is if USCIS, on its own motion, reopens and approves a case that was initially denied. This unduly restrictive approach will result in eligible applicants being unable to benefit from the provisional waiver process.

While we are sensitive to the fact that the Administrative Appeals Office (AAO) is already overburdened, we firmly believe that there must be a formal process in place for the reconsideration of denied cases and the ability to reapply at least once. Applications are sometimes denied in error. Pro se applicants may not fully understand the level of detail that is required for a successful waiver case. Finally, unscrupulous actors may mislead individuals, leading to deficient applications being filed on an applicant's behalf. As a result, many eligible applicants may be denied a provisional waiver and will be barred from contesting an incorrect decision or reapplying. Suggesting that individuals whose applications are denied for any reason should simply proceed under the current process is not an adequate solution. Rather than electing to proceed abroad, many eligible individuals will choose to remain in the U.S. without status. In either case, the benefits of creating the provisional waiver will be lost.

USCIS explains that permitting multiple applications "would significantly interfere with the interagency operations between USCIS and DOS and substantially delay immigrant visa processing." Presumably, this is because the proposed rule requires applicants to begin the consular process, and thus requests to reconsider or readjudicate a provisional waiver might result in coordination difficulties with the Department of States (DOS). Yet the proposed rule also recognizes the need for significant and close coordination with the National Visa Center (NVC). For example, "NVC and USCIS intend that both document collection for the immigrant visa interview and waiver adjudication should occur as parallel processes that will conclude at the same time . . ."[8] As USCIS and DOS consider how to effectuate this close cooperation, they should also work to develop efficient mechanisms for coordination in instances when provisional waivers are denied and applicants must decide whether to go forward abroad, withdraw the immigrant visa application, file a motion to reopen or reconsider, or reapply.

7. USCIS Should Not Limit RFEs Solely to Issues Regarding Extreme Hardship and Discretion. We recommend that USCIS expand the use of RFEs to include cases where USCIS has "reason to believe" that an alien may be inadmissible based on a ground other than unlawful presence, and for other reasons. Under the proposed rule, USCIS would "limit RFEs solely to the issues of whether an alien has established extreme hardship and/or merits a favorable exercise of discretion." We believe that limiting RFEs to such a narrow issue will result in eligible applicants being unnecessarily excluded from the provisional waiver process.

During adjudication, issues may arise that impact an applicant's eligibility for a provisional waiver or require further explanation. For example, a pro se applicant who was arrested but never convicted of a criminal offense may fail to submit all of the

[8] *See* 77 F.R. 19906-07

necessary documents to establish this. Or information already in an individual's A-file may raise but not establish other issues of admissibility. USCIS should issue an RFE to obtain more information, rather than force officers to deny an application based on a "reason to believe" the person may be inadmissible.

8. Approved Provisional Waivers Should Carry a Presumption of Extreme Hardship. Under the proposed rules, if the consular officer determines that the applicant is subject to another ground of inadmissibility, "the provisional unlawful presence waiver is automatically revoked and the alien would be required to file a new waiver application that covers all applicable grounds of inadmissibility, including the 3-year or 10-year unlawful presence bar."[9] This is true even though USCIS made the prior decision to grant the waiver and will be making the decision with regard to the future waiver. Instead of requiring an entirely new adjudication, we recommend that an approved provisional waiver should give rise to a presumption of extreme hardship. This presumption should also apply to the adjudication of waivers of additional grounds of inadmissibility with the same standard.

9. Training on the Extreme Hardship Standard to Ensure Fair and Consistent Outcomes. As explained in the proposed rule, the change being contemplated would only impact the way an unlawful presence waiver is processed, not the standard for qualifying for such a waiver. Nevertheless, we would strongly suggest that part of the implementation of the provisional waiver include training on the extreme hardship standard, including extensive training on country conditions and hardships that are unique to various localities. Currently, waivers are processed by USCIS employees who are in-country or are very knowledgeable about conditions in the applicant's country. Centralizing the waiver process will increase efficiencies, but it is also important that country-specific knowledge is not lost in the process. Training is also important to ensure consistent and fair outcomes.

10. Suggested Revisions to Form I-601A and Instructions. Questions 25 to 33 and the accompanying instructions are confusing and inaccurate. We would suggest that they be rewritten as follows:

- Question 25b—about voluntary departure—is to be answered only by an individual currently in removal proceedings. However, individuals granted voluntary departure are no longer in removal proceedings.
  Suggested Revision: *delete question 25b. Revise the "Note" beneath question 25a to: "Note: You may answer "No" if the removal proceedings have been terminated or dismissed, or if you were granted voluntary departure. You must answer "Yes" to this question if your removal proceedings are currently administratively closed.*

- The "Note" preceding question 25a. states that if an individual answers "No" to question 26b, they are ineligible for a provisional waiver. Yet someone who was issued an NTA, placed into removal proceedings, and those proceedings were

[9] *See* 77 F.R. 19911.

terminated would respond "No" to question 26b; they were issued an NTA but it was not cancelled.
Suggested Revision: *Revise question 26.b. to: If you answered "Yes" to Item 26.a., was the NTA subsequently cancelled by DHS or were you subsequently placed into removal proceedings?*

- The "Note preceding question 25a and the Form Instructions state that the provisional waiver application will be denied if the applicant answers "Yes" to Questions 28, 29, and 33 concerning potential inadmissibility grounds. According to the proposed rule a person is ineligible for the provisional waiver if they are subject to other grounds of inadmissibility. However, questions 28, 29, and 33 are broader than the corresponding ground of inadmissibility. In other words, the form states that a broader group of individuals are ineligible for the provisional waiver than is actually the case under the proposed rule. For example, question 33 asks whether a person has ever been convicted of a crime. If the answer is "yes," the form and instructions indicate that the person is ineligible for the provisional waiver. Yet only certain convictions make someone inadmissible and, therefore, ineligible for the provisional waiver.
  Suggested Revisions:
  (1) Revise the Note preceding question 25a to: "if you answer "Yes" to Item 27., you are not eligible for a provisional unlawful presence waiver and your application will be denied. If you answer "Yes" to Items 28., 29., 30. or 33. you may be ineligible for a provisional unlawful presence waiver and your application may be denied.
  (2) Revise the Instructions for Form I-601A, Items 25.-33. to: "NOTE: USCIS will deny your provisional waiver application if you answered "Yes" to Items 25 or 27. USCIS may deny your provisional waiver application if you answered "Yes" to Items 28, 29, 30, or 33 . . ."

Thank you for your consideration of our comments.

Sincerely,

Mark Hetfield
President and CEO, HIAS (Interim)