From: Cecelia Friedman Levin [mailto:cecelia@asistahelp.org]
Sent: Tuesday, May 31, 2016 10:20 PM
To: USCISFRComment@uscis.dhs.gov
Cc: Gail Pendleton <gail@asistahelp.org>
Subject: Comment: OMB Control Number 1615-0023

Good evening,

Attached please find a comment related to DHS, USCIS Agency Information Collection Activities: Application To Register Permanent Residence or Adjust Status, Form I–485, and Adjustment of Status Under Section 245(i), Supplement A to Form I–485; Revision of a Currently Approved Collection, Docket ID USCIS-2009-0020.

Please let me know if you require any additional information. We thank you for the opportunity to provide feedback on these important issues.

Appreciatively,
Cecelia Levin

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May 31, 2016

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Submitted via email: *USCISFRComment@uscis.dhs.gov*
Docket ID: USCIS-2009-0020

Re: OMB Control Number 1615-0023
Agency Information Collection Activities: Application To Register Permanent Residence or Adjust Status, Form I–485, and Adjustment of Status Under Section 245(i), Supplement A to Form I–485; Revision of a Currently Approved Collection

ASISTA Immigration Assistance submits the following comments in response to the above-referenced 60-day Notice and request for comments on the proposed revisions to the Application To Register Permanent Residence or Adjust Status, Form I–485, and Adjustment of Status Under Section 245(i), Supplement A to Form I–485; Revision of a Currently Approved Collection. Specifically, this comment will focus on the Form I-485 and its instructions.

I. I-485 Form

A. Part 8: General Eligibility and Inadmissibility Grounds

1. **Page 10, Part 8, Item 27,** "Have you EVER committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)?"

Comment: This question goes beyond the language of any statutory ground of inadmissibility at INA 212(a)(2). The question is vague and overbroad, potentially encompassing very minor infractions as well as serious criminal activity. Furthermore, it assumes that applicants for adjustment are aware of all of the elements of every crime.

Recommendation: Given its obvious overbreadth, this question should be deleted.

2. Questions Regarding Prostitution

- **Page 10, Part 8, Item 36,** "Have you EVER engaged in prostitution or are you coming to the United States to engage in prostitution?"

- **Page 10, Part 8, Item 37**, "Have you EVER directly or indirectly procured (or attempted to procure) or imported prostitutes or persons for the purposes of prostitution?
- **Page 10, Part 8, Item 38**, "Have you EVER received any proceeds or money from prostitution?"

Comment: Questions 36 through 38 exceed the statutory grounds of inadmissibility which are limited to the past 10 years. The questions are overlapping, and taken together, they place disproportionate focus on heavily stigmatized conduct that can be a product of trafficking or coercion. Because question 36 asks about both past and future conduct, a 'Yes' answer would inappropriately stigmatize, for example, an applicant who was in the past forced to engage in prostitution but has no intention of doing so in the future; he or she would also be forced to repeat a "Yes" answer to item 38 for the exact same conduct covered by item 36, resulting in needless re-stigmatization.

Recommendation**:** Delete "are you coming to the United States to engage in prostitution?" Merge the three items into a single question limited to the past 10 years, such as, "Have you within the past 10 years engaged in prostitution, or procured or attempted to procure persons for prostitution, or received any proceeds or money from prostitution?"

3. **Questions Related to Trafficking**

- **Page 11, Part 8, Item 45,** "Are you the spouse, son or daughter of a foreign national who engaged in the trafficking of persons and have received or obtained, within the last five years, any financial or other benefits from the illicit activity of your spouse or your parent, although you knew or reasonably should have known that this benefit resulted from the illicit activity of your spouse or parent?"

Comment: Some child migrants have been abused, neglected, or abandoned by parents who may have been involved in trafficking activities, causing the child to escape and seek immigration relief in the United States. Evaluating what they "reasonably should have known" may be unreasonably difficult for many children, and consistent with that, the statute exempts "a son or daughter who was a child at the time he or she received the benefit described" – so, too, should the question. Additionally, the word "trafficking" should be clarified again to be the definition of a "severe form of trafficking in persons" as defined in 21 USC §7102(9).

Recommendation: Revise this question consistent with the scope of INA 212(a)(2)(H)(ii) and (iii), and reference the term "severe form of trafficking in persons as defined in 22 USC §7102" instead of the term "trafficking."

B. Applicant's Statement, Contact Information, Certification, and Signature

1. VAWA Confidentiality

The Applicant's Statement, Contact Information, Certification, and Signature in I-485 forms should reference VAWA confidentiality provisions.

Recommendation: USCIS should include the following bolded and underlined language:

> I further authorize release of information contained in this petition, in supporting documents, and in my USCIS records to other entities and persons where necessary for the administration and enforcement of U.S. immigration laws. **Any disclosure shall be in accordance with the VAWA confidentiality provisions at 8 U.S.C. §1367.**

II. I-485 Instructions

A. Human trafficking victims (T Nonimmigrant, Form I-914) or qualifying relatives (Form I-914A) (page 23)

1. **Passports:** In accordance with the regulations, these instructions should specify that if applicants do not have a passport or travel document they instead may include a valid explanation as to why such a document is not in their possession.

2. **Reasons for Departure (page 24).** The instructions state that if you departed from the United States while in T-1 nonimmigrant status, you must provide the reason for each departure (if applicable). You can provide this information using the space provided in Part 13. Additional Information of Form I-485 or attach a separate sheet of paper.

   Comment: This requirement that those in T-1 status must provide a reason for their departure is beyond the scope of the T visa adjustment statute and regulations. Neither INA 245(l) nor 8 CFR 245.23 require this justification for travel.

   Recommendation: Delete "If you departed from the United States while in T-1 nonimmigrant status, you must provide the reason for each departure (if applicable). You can provide this information using the space provided in **Part 13. Additional Information** of Form I-485 or attach a separate sheet of paper."

3. **List of Documentation, page 24:** The list of documentation that may be used to establish continuous physical presence should reflect the "credible evidence" standard and be more inclusive regarding the types of documents that may be submitted. For example, "College Transcripts" should be changed to "Education Documents" which may include but is not limited to evidence such as registration documentation, academic progress reports, program certificates, and/or high school or college transcripts.

B. Crime victims (U Nonimmigrant, Form I-918 or Form I-918A) or qualifying relatives (Form I-929)

1. **Evidence of Continuous Physical Presence**

   a. **List of Documentation, page 27:** The list of documentation that may be used to establish continuous physical presence should reflect the "credible

evidence" standard and be more inclusive regarding the types of documents that may be submitted. For example, "College Transcripts" should be changed to "Education Documents" which may include but is not limited to evidence such as registration documentation, academic progress reports, program certificates, and/or high school or college transcripts.

b. **Reasons for Departure, page 27:** The instructions state that if you departed from the United States while in U-1 nonimmigrant status, you must provide the reason for each departure (if applicable). You can provide this information using the space provided in Part 13. Additional Information of Form I-485 or attach a separate sheet of paper.

Comment: This requirement that those in U-1 status must provide a reason for their departure is beyond the scope of the U visa adjustment statute and regulations. Neither INA 245(m) nor 8 CFR 245.24 require this justification for travel.

Recommendation: Delete "If you departed from the United States while in U-1 nonimmigrant status, you must provide the reason for each departure (if applicable). You can provide this information using the space provided in **Part 13. Additional Information** of Form I-485 or attach a separate sheet of paper."

c. **Passports:** In accordance with the regulations, these instructions should specify that if applicants do not have a passport or travel document they instead may include a valid explanation as to why such a document is not in their possession.

2. **Evidence of Compliance with Reasonable Requests for Assistance in the Investigation or Prosecution of the Qualifying Criminal Activity**

Instructions in this section are subtitled incorrectly, "Evidence of Compliance with Reasonable Requests for Assistance in the Investigation or Prosecution of the Qualifying Criminal Activity." This section begins, "You are required to provide **ongoing assistance**, as needed, to law enforcement agencies involved in the investigation or prosecution of the qualifying criminal activity. 8 CFR 245.24(a)(5) defines 'refusal to provide assistance in a criminal investigation or prosecution" as a refusal by the U nonimmigrant to provide assistance to law enforcement authorities after being granted U nonimmigrant status."' This introduction is problematic because it reiterates an incorrect interpretation of the law, and contradicts existing guidance and regulatory authority.

Stakeholders have previously stated the requirement that U adjustment applicants show they have not unreasonably refused to provide assistance in a criminal investigation or prosecution is ultra vires and an incorrect interpretation of the U adjustment statute.[1] The

[1] National Network to End Violence Against Immigrant Women. Comment to Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, RE: DHS Docket No. USCIS-2006-

certifying agency is already mandated to notify USCIS if, after certifying that a U visa applicant has been helpful, that applicant later unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim. To impose this additional evidentiary requirement is an imposition both on crime victims and on certifying agencies and is counter to Congressional intent.

The U adjustment statute states that "Secretary of Homeland Security may adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under INA § 101(a)(15)(U) to that of an alien lawfully admitted for permanent residence if the alien is not described in INA § 212(a)(3)(E), unless the Attorney General determines **based on affirmative evidence** that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution." Thus, the requirement requires adjustment applicants to prove a negative – that they have not unreasonably refused to provide assistance in a criminal investigation or prosecution – is ultra vires and an incorrect interpretation of the statute.

Apart from this, these instructions confuse "on-going" assistance with an unreasonable refusal to provide assistance. Under 8 CFR 245.24(b)(5), the standard for a U nonimmigrant holder to adjust status, applicants must show that they have not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status. Demonstrating that the applicant has not refused to provide assistance is distinctly different than demonstrating ongoing compliance with reasonable requests for assistance.

Recommendations:

- Change the subtitle to "Evidence that Applicant has not Unreasonably Refused to Provide Assistance in the Investigation or Prosecution of the Qualifying Criminal Activity."
- Remove the requirement of needing to show "ongoing assistance." For example, the statement in the instructions, " You are required to provide ongoing assistance until USCIS adjudicates your Form I-485" is an incorrect reading of the law and should be deleted.

The instructions for submission of an affidavit attesting to evidence of ongoing compliance with reasonable requests for assistance in lieu of a newly executed Form I-918 Supplement B does not align with the requirements in 8 CFR 245.24(e). For example, the instructions on page 28 state the evidence regarding non-refusal to assist may include:

> 1. A newly executed Form I-918, Supplement B, U Nonimmigrant Status Certification;

0067, ID: USCIS-2006-0067-0010 (February 10, 2009). Available at: https://www.regulations.gov/#!documentDetail;D=USCIS-2006-0067-0010

2. A photocopy of the original Form I-918, Supplement B, with a new date and signature from the certifying agency;

3. Documentation on official letterhead from the certifying agency stating that you have not unreasonably refused to cooperate in the investigation or prosecution of the qualifying criminal activity; **and**

4. An affidavit describing any efforts you made to obtain a newly executed Form I-918, Supplement B, or other evidence describing whether you received any requests to provide assistance in the criminal investigation or prosecution of the qualifying criminal activity, and your response to these requests. [Emphasis added].

Recommendation: The **"and"** between items 3 and 4 should be an **"or"** as it may not be possible for U visa adjustment applicants to obtain official documentation from the certifying agency at the time of adjustment and so the regulations at 8 CFR 245.24(e)(2) permit the submission of an affidavit. To require documentation in items 3 **and** 4 is beyond the statutory and regulatory authority.

On page 28, the I-485 instructions continue to state the following:

If you submit an affidavit, it **must** include:

1. A description of all instances when you were requested to provide assistance in the criminal investigation or prosecution of persons in connection with the qualifying criminal activity after you were granted U nonimmigrant status and how you responded to such requests;

2. Any identifying information you have about the law enforcement personnel involved in the case;

3. Any information you have about the status of the criminal investigation or prosecution, including any charges filed and the outcome of any criminal proceedings, or whether the investigation or prosecution was dropped and the reasons why;

4. Court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits of other witnesses or officials; and

5. If you have refused a request for assistance in the investigation or prosecution, you must provide a detailed explanation of why you refused to comply with requests for assistance and why you believed that the requests for assistance were unreasonable. [Emphasis added].

Again, these instructions go beyond the regulatory instruction on affidavits found at 8 CFR 245.24(e)(2). Item 4 on this list refers to documentation that is not listed in the regulations nor is it an appropriate addition to information that may be included in an affidavit.

Furthermore, these item is incorrectly concluded by an "and" instead of an "or." The language in 8 CFR 245.24(e)(2) also indicate that the information listed in points 1, 2, 3, and 5 "should" be included "when possible" and "if applicable," and not a requirement (thus the word "must" is too stringent of a standard).

Recommendations:

- Change the language in the instructions on page 28 to say "If you submit an affidavit, it **may** include…"
- Delete Item 4 in its entirety
- Review this section to ensure its compliance with the statutory and regulatory authority.

B. Cuban Adjustment Act (CAA) for Abused Spouses and Children, page 31.

1. Evidence of Physical Presence and of Inspection and Admission or Inspection and Parole

The instructions, as written, state: "The law does not require the one-year period of physical presence to occur after your parole. Abused spouses and children of CAA-eligible applicants must have been inspected and admitted or inspected and paroled into the United States. If you are present in the United States without inspection, you are not eligible for CAA adjustment unless you first present yourself to DHS and DHS paroles you under INA section 212(d)(5)(A), pending a final determination of your admissibility."

Comment: We are concerned that the instructions imply that abused spouses and children of qualified Cuban principals must themselves be "inspected and admitted" or "inspected and paroled" to apply for the VAWA protections of the CAA. We firmly believe, based upon existing law and USCIS guidance, that abused spouses and children who are eligible derivatives may apply for these protections regardless of their manner of entry.

According to INA 212(a)(6)(A)(ii) "the admission or parole" requirement does not apply to those who are applying for adjustment of status as VAWA self-petitioners. In 2006, Congress expanded the definition of "VAWA self-petitioner,"[2] to include an individual or child of an individual who qualifies for relief under "**the first section of Public Law 89-732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty.** See INA § 101(a)(51)(D).

In 2008, USCIS issued a memoranda entitled, "Adjustment of status for VAWA self-petitioner who is present without inspection." This guidance instructs:

"Effective immediately, USCIS interprets the introductory text in Section 245(a) of the Act as effectively waiving inadmissibility under section 212(a)(6)(A)(i) of the Act for any alien who is the beneficiary of an approved VAWA self-petition. All USCIS adjudicators will follow this interpretation in adjudicating a **VAWA self-petitioner's** adjustment of status

[2] See INA § 101(a)(51); See § 811 of Public Law 109-162, dated January 5, 2006, amended section 101(a) of the Immigration and Nationality Act by adding paragraph (51). [Emphasis added]

application."[3] [emphasis added]

The memo further makes changes to the Adjudicator's Field Manual, including:

"Under section 245(a) of the Act, the alien beneficiary of a VAWA self-petition may apply for adjustment of status even if the alien is present without inspection and admission or parole. USCIS has determined that this special provision in section 245(a) of the Act, in effect, waives the VAWA self-petitioner's inadmissibility under section 212(a)(6)(A)(i) for purposes of adjustment eligibility. Thus, a USCIS adjudicator will not find, based solely on the VAWA self-petitioner's inadmissibility under section 212(a)(6)(A)(i), that the VAWA self-petitioner cannot satisfy the admissibility requirement in section 245(a)(2) of the Act. The VAWA self-petitioner is not required to show a "substantial connection" between the qualifying battery or extreme cruelty and the VAWA self-petitioner's unlawful entry."[4]

Given that the Cuban Adjustment Act is reproduced as a historical note to INA §245, [5] it follows that the provisions for VAWA self-petitioners apply thusly to VAWA-based provisions of the CAA, and that eligible derivatives for VAWA-based protections of the CAA, regardless of their manner of entry, should be eligible for protection.

Assuming *arguendo*, that abused spouses and children of qualified Cuban principals may "cure" their entry without inspection by presenting themselves for parole with DHS under 212(d)(5)(A), then USCIS should amend its current guidance on the VAWA provisions of the CAA and existing Cuban parole guidance[6] to reflect this option, so that it is applied uniformly and consistently.

Conclusion

We appreciate the opportunity to comment on the proposed changes to Form I-485 and look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

ASISTA Immigration Assistance

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3 Michael Aytes. HQDOMO 70/23.1 "Adjustment of status for VAWA self-petitioner who is present without inspection" (April 11, 2008)

4 *Id.*

5 Cuban Adjustment Act of 1966 ("CAA"), Pub. L. No. 89-732, 80 Stat. 1161 (reproduced as a historical note to Immigration and Nationality Act ("INA") 245, 8 U.S.C.§ 1255)

6 Tracy Renaud. HQ 70/10.10 "Processing of Initial Parole or Renewal Parole Requests Presented by Natives or Citizens of Cuba to USCIS Field Offices" (March 4, 2008).