AMERICAN IMMIGRATION LAWYERS ASSOCIATION

May 31, 2016

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via: www.regulations.gov
Docket ID No. USCIS- 2009–0020

Re: OMB Control Number 1615-0023

USCIS 60-Day Notice and Request for Comments: 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

To Whom It May Concern:

Founded in 1946, AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed changes to Form I-485, Supplement A, and the accompanying instructions, and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

General Comments

Length and Complexity of Form I-485 and Instructions

AILA appreciates that USCIS has significantly shortened and simplified Form I-485 and its instructions as compared to the proposed forms and instructions that were published on March 10, 2015, but ultimately not adopted.[1] While the current proposed forms and instructions are generally more concise than the prior proposed versions, there are still places where complex legal concepts are oversimplified. For example, Supplement A and its instructions assume that readers understand the meaning of a variety of legal terms. As such, we remain concerned that the instructions could ultimately prove harmful to pro se applicants, and suggest that USCIS add

[1] *See* 80 Fed. Reg. 12647 (Mar. 10, 2015).

a disclaimer that applicants should consider consulting a licensed attorney or an accredited representative if they have questions concerning their eligibility.

In addition, we appreciate the fact that the revised Form I-485 incorporates the information contained in the current Form G-325, and reduces the number of required forms by one. We suggest that USCIS consider taking this a few steps further and eliminate the need for Forms I-765 and I-131 from an I-485 application package. These forms are currently submitted without fee if filed with an I-485, and all required information is included in the proposed I-485 form. The forms could be replaced with simple "yes" or "no" check boxes at the beginning of the I-485 following the questions, "Do you wish to apply for an Employment Authorization Document?" and "Do you wish to apply for an Advance Parole Document to allow you to return to the U.S. after temporary foreign travel?"

Changes to Substantive Requirements Should Go Through the Formal Rulemaking Process

USCIS is proposing extensive changes to the Form I-485, Supplement A, and instructions, including changes that broaden the evidentiary requirements and information previously requested for adjustment of status. For example, many of the questions regarding the applicant's criminal history have been broadened to inquire about conduct that would fall outside the scope of the grounds of inadmissibility articulated at INA §212(a). In addition, the requirements spelled out in the additional instructions for applicants filing under special adjustment programs, additional categories, and Registry, seem to have been expanded. We note that under 8 CFR §103.2(a)(1), "[e]very benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission." Thus, all of the new language that is included in the proposed instructions will be incorporated by reference into the Title 8 of the Code of Federal Regulations without the opportunity for full notice and comment. The proposed changes exceed DHS's statutory authority, and should instead be promulgated by regulation in accordance with the Administrative Procedure Act (APA).

Website References

When referencing URLs in the form instructions, it would be helpful to use specific URLs in place of the very general www.uscis.gov. For example, the instructions on page 10 state, "If you are applying as an employment-based first preference, second preference, or third preference applicant or as a fourth preference special immigrant religious worker and you believe you are exempted from this bar by INA section 245(k), you should submit evidence to prove you qualify for this exemption. For more information, see www.uscis.gov." Given the complexity of the USCIS website, it is often difficult to find specific items via a reference to the site's homepage. We appreciate the fact that USCIS has provided more specific links in several other places in the instructions and ask that it do so throughout the form as needed. We also note that specific URLs are more likely to become outdated, and hope that USCIS will ensure that the URLs are current when cited to in the form instructions.

Comments on Proposed Form I-485

In addition to the aforementioned general concerns, we offer the following comments to the proposed I-485.

> *Page 9, Part 8, Question 17: "Have you EVER violated the terms or conditions of your nonimmigrant status?"*

This question, though seemingly straightforward, could cause confusion, especially for unrepresented applicants who may not understand what it means to violate the terms of conditions of their nonimmigrant status. USCIS should provide specific examples of what might constitute a status violation with a notation that the applicant should consult with a licensed attorney or accredited representative if they are unsure how to answer this question.

> *Page 10, Part 8, Question 25: "Have you EVER used any illegal drugs or abused any legal drugs?"*

This question is too broad. An admission of simply having used (but not abused) an illegal drug does not render the applicant inadmissible. The statutory health-related inadmissibility ground under INA §212(a)(1)(A)(iv) is limited to individuals who have been "determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict." This statutory provision has been interpreted by the government to implicate conduct that only goes far beyond simple "use" of a drug. For example, the Department of State (DOS) has concluded that "drug addiction" is limited to use resulting in physical or psychological dependence and "drug abuse" does not include experimentation with any particular substance.[2]

> *Page 10, Part 8, Question 26: "Have you EVER been arrested, cited, charged, or detained for any reason by any law enforcement official (including but not limited to any U.S. immigration official or any official of the U.S. Armed Forces or U.S. Coast Guard)?"*

Asking whether an applicant has been detained by any law enforcement official is beyond the scope of information that USCIS needs to assess an applicant's admissibility. The term "detained" should be deleted from this question, and in the corresponding explanatory paragraph preceding this question. USCIS should retain the language on the current form: "Have you EVER, in or outside of the United States … been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?"

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

This question is also overly broad. Admitting to committing any crime or any offense for which you were not arrested does not render the applicant inadmissible. Under INA §212(a)(2)(A)(i)(I) and §212(a)(2)(A)(i)(II), individuals may be inadmissible if they have committed acts that form

[2] *See* 42 CFR §34.2(h); Cable, DOS, 91-State-416180 (Dec. 24, 1991).

the essential elements of a crime involving moral turpitude (CIMT) or certain controlled substances offenses. However, the proposed question asks whether the applicants have ever committed any crime or offense for which they were not arrested. Because the question as currently phrased asks applicants to admit to conduct that goes far beyond the relevant inadmissibility grounds, we ask USCIS to retain the language on the current form: "Have you EVER, in or outside the United States ... knowingly committed any crime of moral turpitude or a drug-related offense for which you have not been arrested?"

> *Page 10, Part 8, Question 28: "Have you EVER pled guilty to or been convicted of a crime or offense (even if the violation was subsequently expunged or sealed by a court, or if you were granted a pardon, amnesty, a rehabilitation decree, or other act of clemency)?"*

USCIS should add "no contest" or "nolo contendere," so that this question reads "Have you EVER pled guilty or nolo contendere, or been convicted…."

> *Page 10, Part 8, Questions 36-38: "Have you EVER engaged in prostitution or are you coming to the United States to engage in prostitution?", "Have you EVER directly or indirectly procured (or attempted to procure) or imported prostitutes or persons for the purpose of prostitution?", "Have you EVER received any proceeds or money from prostitution?"*

USCIS has expanded the scope of these questions to require the applicant to disclose if he or she has EVER engaged in such conduct but the questions should be limited in scope to the 10-year time limitation set by Congress in INA §212(a)(2)(D). USCIS should continue to use the question on the current Form I-485: "Have you ever … [w]ithin the past 10 years, been a prostitute or procured anyone for prostitution, or intend to engage in such acts in the future?"

> *Page 13, Part 8, Question 61: "Have you EVER received public assistance in the United States from any source, including the U.S. Government or any state, country, city, or municipality (other than emergency medical treatment)?"*

According to USCIS guidance, noncash benefits and special-purpose cash benefits that are not intended for income maintenance, but rather to promote other important societal interests, should not be considered when evaluating whether a person is likely to become a public charge.[3] This question fails to distinguish between cash and noncash benefits. If a question pertaining to the use of public benefits is deemed necessary, it must be phrased to ask only those questions that are relevant to the public charge determination.

> *Page 13, Part 8, Question 70: "Have you EVER obtained a student nonimmigrant visa and violated the terms or conditions of your student nonimmigrant status?"*

This question is duplicative of Question 17 on Page 9 in Part 8, and should be removed.

[3] *See* https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge.

Page 13, Part 8, Question 73.a – 74.b: "Since April 1, 1997, have you been unlawfully present in the United States: 73.a. For more than 180 days but less than a year, and then departed the United States?...73.b. For one year or more and then departed the United States?"

These questions regarding unlawful presence should be removed because they require the applicant to have a thorough understanding of one of the most technical aspects of U.S. immigration law in order to provide a correct answer. It is likely that only represented individuals will be able to understand and accurately answer these questions.

Page 15, Part 10. Applicant's Certification

While AILA continues to question whether the Application Support Center (ASC) certification language is necessary, we commend USCIS for significantly reducing the length of the certification language that is included on many new USCIS forms and which was proposed for the I-485 in May 2015. If necessary at all, the applicant should only be required to sign an oath certifying that the information was complete, true, and correct at the time of filing, instead of at the time biometrics are taken.

Page 16, Preparer's Statement

The NOTE in 7.b. should read that attorneys and accredited representatives whose representation extends beyond preparation of the application *are obliged* to submit a Form G-28, instead of *may be obliged* to submit a Form G-28. The same change should be made to page 7 of the form instructions.

Page 16, Preparer's Certification

The preparer's certification (also referred to as "preparer's declaration") on USCIS forms has been a topic of much interest to AILA over the past couple of years. Beginning in 2014, a revised declaration containing problematic language began appearing on a number of forms.[4] We are pleased to see that the proposed Form I-485 includes a newly revised preparer's declaration that reads as follows:

By my signature, I certify, under penalty of perjury, that I prepared this application at the request of the applicant. The applicant then reviewed this completed application and informed me that he or she understands all of the information contained in, and submitted with, his or her application, including the Applicant's Certification, and that

[4] The language to which AILA objected is as follows:

By my signature, I certify, swear or affirm, under penalty of perjury, that I prepared this form on behalf of, at the request of, and with the express consent of, the petitioner. I completed the form based only on responses the petitioner provided to me. After completing the form, I reviewed it and all of the petitioner's responses with the petitioner, who agreed with every answer provided for every question on the form and, when required, supplied additional information to respond to a question on the form.

all of this information is complete, true, and correct. I completed this application based only on information that the applicant provided to me, or authorized me to obtain or use.

We thank USCIS for revising the preparer's certification and believe that the new language, if adopted without change, is a vast improvement over the prior objectionable language. Though the new proposed language could be more concise, we believe it addresses many of the issues we have raised previously. As noted in our recent comments, we believe that the language in the current Form I-129 offers more concise language while still accomplishing the necessary objectives.[5]

Comments on Main Instructions

Page 2, Who May File Form I-485, 1. Principal Applicant

USCIS should make it clear that the list of examples of who qualifies as a principal applicant is not exhaustive. For example, it could be revised to say: "The principal applicant is usually the individual named as the beneficiary of an immigrant petition or who is otherwise qualified to adjust status, including – but not limited to – an asylee or refugee…."

Page 5, Copies, NOTE

USCIS has added language which states that original documents not required or requested by USCIS may be "immediately destroyed upon receipt." Applicants, and in particular, pro se applicants, may not realize that original documents should not be submitted and include them in their application package. It seems drastic to immediately destroy documents that the applicant may need later for another purpose. We suggest that USCIS consider other alternatives, such as mailing the documents back to the applicant, sending the applicant an RFE for a Form G-884 Return of Original Documents, or sending the documents to the National Records Center to combine with the A file so that the applicant can later retrieve the documents by filing a Form G-884.

Page 5, Selective Service

In order to lessen the potential for confusion regarding the Selective Service requirements, the form instructions should include a sentence at the beginning of the first paragraph so that it reads:

Most males between ages 18 and 26 of age are required by the Military Service Act to register with the Selective Service System. Nonimmigrants are not required to register.

[5] The language in the current I-129 form is as follows:

By my signature, I certify, swear, or affirm, under penalty of perjury, that I prepared this petition on behalf of, at the request of, and with the express consent of the petitioner or authorized signatory. The petitioner has reviewed this completed petition as prepared by me and informed me that all of the information in the form and in the supporting documents, is complete, true, and correct.

Page 6, Alternate and/or Safe Address

AILA applauds USCIS for providing an alternate and/or safe mailing address option for applicants filing based on VAWA or T or U status.

Page 8, Box at the Top of the Page

This language should be revised to reflect the changes made to the ASC certification on the form. Specifically, the third sentence should read "At your appointment, USCIS will permit you to complete the application process only if you are able to confirm, under penalty of perjury, that all of the information in your application ***was*** complete, true, and correct ***at the time of filing***."

Page 9, Inspection and Admission or Inspection and Parole

Given that the arrival/departure records in CBP's electronic I-94 system are not always correct, evidence of lawful entry should be able to be satisfied by submitting either a Form I-94 or a passport page with an admission or parole stamp. This section should read as follows:

> This evidence must relate to your most recent U.S entry. Submit copies of the following documents, if available:
>
> - Passport page with nonimmigrant visa; and
> - Either the passport page with the admission or parole stamp issued by a U.S. immigration officer **OR** Form I-94 Arrival-Departure Record (See Form I-94 Arrival-Departure Record in the General Instructions section of these Instructions).
>
> If you do not have any of these documents, you should explain why they are not available.

Page 11, Certified Police and Court Records of Criminal Charges, Arrests or Convictions

USCIS has expanded the list of required evidence, adding greatly to the applicant's burden. Many of the optional documents under the current instructions would be required if the proposed instructions are adopted without change. For example, the current instructions allow submission of an original or certified copy of a court order vacating, setting aside, sealing, expunging, or otherwise removing the arrest or conviction, *OR* an original statement from the court confirming that there is no record of an arrest or conviction. However, the proposed instructions on page 12, section D eliminate the option of providing a letter and require the applicant to produce an original or certified copy of the court order *AND* an original or certified copy of the complete arrest report; the indictment, information, or other formal charging document, any plea agreement, and the final disposition for each incident. Similarly, under Section A, an arrest report, which is currently an option for an applicant who was arrested but not charged, would become a requirement.

These changes ignore the practicalities and procedures of the criminal justice system in the United States and around the world. There are countless jurisdictions, all with different rules regarding the retention of arrest and court records. Many jurisdictions destroy records after a

certain amount of time, making it impossible to retrieve the information USCIS would require under the proposed instructions. Some jurisdictions keep no records of convictions which have been expunged, thus the clerks cannot even see that there ever was a record, much less provide a copy of it. Moreover, information that is technically available to the applicant may be extremely difficult to obtain. For example, an applicant would be required to disclose an incident where he or she was detained by CBP at the airport. To document that incident, the applicant would have to file a FOIA request to obtain the records. CBP FOIA requests can often take a year or more to process, and when the request finally is processed, many times, the results are that no records were found. In addition, where court records are not available, court clerks often resist providing proof of their unavailability. Additionally, refugees and asylees who have been arrested or imprisoned as part of their persecution are often unable to obtain any documents. These burdens may be insurmountable for many applicants, but especially so for pro se applicants.

We ask USCIS to be more flexible in terms of the evidence that it deems acceptable to documents criminal charges, arrests, and convictions. It should accept an explanation of unavailability and allow alternative forms of evidence to prove the disposition of an arrest including letters and affidavits. This section should also provide a warning to potential applicants that, pursuant to INA §212(a)(2), an applicant may be deemed inadmissible and therefore ineligible for adjustment of status for certain types of criminal offenses or convictions, unless such inadmissibility can be overcome with a waiver. It should also warn applicants that they may be placed into removal proceedings if their application for adjustment of status is denied.

Additionally, the last paragraph in this section regarding juvenile delinquency is confusing. The last two sentences should be rewritten to read:

> *You must disclose **all** arrests and charges, even if the arrest occurred when you were a minor. While an adjudication of juvenile delinquency is not a "conviction" under U.S. immigration law, a charge in a criminal court proceeding (rather than a juvenile court proceeding) could be relevant to the adjudication of this application. If any arrest or charge was disposed of as a matter of juvenile delinquency, include the court or other public record that establishes this disposition.*

Page 13, What Is the Filing fee?

On May 4, 2016, USCIS released a proposed fee schedule that would change the filing fee for Form I-485.[6] If these proposed fees go into effect before this form is finalized, the fees will need to be updated. Alternatively, USCIS could refer the applicant to the USCIS website for current fee information.

Page 14, Filing Fee, "Filing Form I-485 with Forms I-765 and I-131"

USCIS should delete the words "and pay the required fees" from the first sentence, so that it reads: "If you file Form I-485, you may file Form I-765 and Form I-131 without paying

[6] *See* 81 Fed. Reg. 26904 (May 4, 2016).

additional fees." If an applicant's Form I-485 fees are waived, they are also able to File Form I-765 and I-131 concurrently without paying additional fees.

Page 15, Processing Information

USCIS should note that it will not reject applications that are accompanied by an approvable fee waiver.

Page 15, Processing Information, NOTE

As noted above, we suggest that USCIS consider alternatives to the immediate destruction of original documents, such as mailing the documents back to the applicant, sending the applicant an RFE for a Form G-884 Return of Original Documents, or sending the documents to the National Records Center to combine with the A file so that the applicant can later retrieve the documents by filing a Form G-884.

Comments on Proposed Additional Instructions

Page 20, Additional Instructions for Employment-Based Applicants, Alien Worker

USCIS should add "National Interest Waiver" to the list of EB-2 classifications.

Page 22, Additional Instructions for Special Immigrants, Special Immigrant Juvenile

USCIS should not ask for evidence of the juvenile court order, which is relevant to the Form I-360 adjudication, not the Form I-485 adjudication.

Page 30, Additional Instructions for Asylees and Refugees, Additional Evidence Requirements

It would be helpful to include examples of what evidence can be submitted, such as an I-94.

Page 32, Additional Instructions for Applicants Filing Under Special Adjustment Programs, CAA for Abused Spouses and Children

In list items number 4 and 5, "and" should be replaced with "or," so that those phrases read:

4. Reports or affidavits from medical personnel, school officials, and clergy

5. Reports or affidavits from social workers or other social service agency personnel.

Page 34, Additional Instructions for Applicants Filing Under Special Adjustment Programs, Evidence of Battery or Extreme Cruelty

In list items number 4 and 5, "and" should be replaced with "or," so that those phrases read:

4. Reports or affidavits from medical personnel, school officials, and clergy

5. Reports or affidavits from social workers or other social service agency personnel.

Page 35, Lautenberg Parolees, Denied Refugee Status

Lautenberg parolees should not be required to re-submit evidence of refugee status given that they had to have a denied I-590 to obtain parole.

Page 36, Section 13, Failing to Maintain Status

In order to qualify for adjustment of status former diplomats and high ranking officials must demonstrate, *inter alia*, that they failed to maintain lawful A or G nonimmigrant status. This section of the instructions states says that A and G nonimmigrants maintain their diplomatic status until DOS terminates it upon receipt of a Form DS-2008 from the foreign mission. However, following a change in the controlling government of a foreign country, if the new government neglects or refuses to submit Form DS-2008, DOS could still confirm that the former diplomat has failed to maintain status. The current wording of this section may discourage eligible individuals from filing and should be revised.

Additionally, we note that 8 CFR §245.3 states that "any alien who is prima facie eligible for adjustment of status ... under another provision of law shall be advised to apply ... pursuant to such other provision of law." The language in this section that says individuals "may wish" to consider applying under another immigrant category should be revised accordingly.

Page 38-39, Registry, Evidence of Continuous Residence and Page 40, Individuals Born under Diplomatic Status in the United States, Evidence of Continuous Residence

USCIS should more clearly note that the types of evidence listed are just examples, and not required. Additionally, affidavits are a form of evidence, and the instructions should make this clear. Instead, the instructions state that "[a]lthough you may submit affidavits, you should provide some type of additional evidence to support the application." This statement could discourage people from submitting affidavits and should either be deleted or revised to read: "Although you may submit affidavits, *it is recommended that you* provide some type of additional evidence to support the application."

Supplement A and Supplement A Instructions

While we appreciate the Service's desire to provide comprehensive guidance on INA §245(i), the Instructions to Supplement A could create confusion as they assume applicants will understand the meaning of a variety of legal terms used in the instructions. There are numerous references to statutory language that is copied from the INA without providing adequate context as to the meaning of that language, the exceptions that might apply, and the manner in which the statutory language itself is applied in practice.

Pages 2 and 3 of the instructions, related to Bars to Admission and Grounds of Inadmissibility, are particularly confusing. As a result, these instructions may unintentionally encourage ineligible individuals to apply and discourage eligible individuals from applying because they will not fully understand the interactions between the legal standards for admissibility, the bars to adjustment, and the available waivers. We suggest that in the instant case, a "less is more" approach would be more productive.

Supplement A Instructions, Page 1, Who May File, Item 1E

This sentence is confusing, and should be revised to read: "You are paying the required filing fee as described in the **What is The Filing Fee** section of these Instructions."

Supplement A Instructions, Page 2, Who May File

It appears that there is an error in the numbering. The numbers go from 2(A) through 2(E) and then switch to (A) through (C) without a corresponding number.

Supplement A Instructions, Page 3, What Evidence Must You Submit to Establish Eligibility…

While it is clear that the Supplement A may be rejected if required evidence is not submitted, there is no mention of the accompanying Form I-485. For the sake of clarity, USCIS should specify what will happen to the accompanying Form I-485.

Supplement A Instructions, Pages 6 and 9

We repeat our suggestion that USCIS consider alternatives to the immediate destruction of original documents, such as mailing the documents back to the applicant, sending the applicant an RFE for a Form G-884 Return of Original Documents, or sending the documents to the National Records Center to combine with the A file so that the applicant can later retrieve the documents by filing a Form G-884.

Supplement A Instructions, Page 10, Paperwork Reduction Act

We believe that the burden for reviewing the 10 pages of instructions and completing Supplement A will exceed 30 minutes, particularly for individuals who lack the background and experience to fully understand the parts of the instructions that require legal analysis.

Supplement A Instructions, Page 10, Checklist

We appreciate the checklist, and think it will especially help pro se applicants ensure that their applications are not needlessly rejected.

Conclusion

AILA appreciates the opportunity comment on the proposed changes and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

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