USCIS Responses to Public Comments Received on the 60-day Federal Register Notice, "Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions," 83 FR 49120 (Sept. 28, 2018).

1. Comment: Commenters provided their individual circumstances as examples of who needs a fee waiver.

Response: USCIS understands that this change will require people to obtain different documentation than they previously would have to establish eligibility for a fee waiver. However, applicants may still request fee waivers. USCIS does not believe the changes are an excessive burden on respondents.

2. Comment: This notice of a form change is a regulation.

Response: The current regulations at 8 CFR 103.7(c) provide that USCIS may, *in its discretion*, waive fees for a person who demonstrates an "inability to pay" the fee of an eligible form. However, USCIS has identified what it would consider as criteria for demonstrating "inability to pay" in the form and a USCIS policy memorandum. The form and its instructions are being revised to change the fee waiver policy through the USCIS Policy Manual. To simplify fee waiver requests, and improve quality and consistency of fee waiver adjudications, USCIS is updating the criteria it uses to establish inability to pay. DHS is not changing the applicable regulations.

3. Comment: USCIS did not properly follow the Administrative Procedure Act requirements. Specifically, the form edits did not provide the opportunity to meaningfully participate because it lacks sufficient evidence, and lacks the rationale and data precludes meaningful public participation.

Response: DHS is aware that if an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required under the Administrative Procedure Act (APA). 5 U.S.C.A. § 553(b)(3)(A). However, the form and instructions for USCIS Form I-912 only provide the USCIS interpretation of the inability to pay as provided in 8 CFR 103.7(c) and the procedures for requesting a fee waiver. Therefore, Form I-912 and its instructions are an interpretive rule and procedural rule.

An agency may issue a new interpretation of a regulation that deviates significantly from the agency's previous interpretation without following the APA's rulemaking provisions. *See Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015). In addition, the APA procedural-rules exception provides that agency may change the procedures for applying standards without engaging in notice and comment rulemaking. *See James v. Hurson Associates, Inc. v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000). That a rule adds burden to the affected regulated public does not mean it is not a procedural rule. *Id*. Thus USCIS is not required to use the APA's notice-

and-comment procedures to amend or repeal an interpretive or procedural rule, such as its fee waiver policy and Form I-912.

In *Perez* the Supreme Court also held that, although an agency can change its interpretation of a regulation at different times in its history, the interpretative changes can create no unfair surprise. *See Perez*, 135 S.Ct. at 1208, fn. 2; *see also Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (holding that *Seminole Rock* and *Auer* deference is inapplicable when there is a strong potential for unfair surprise); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). Accordingly, USCIS acknowledges that individuals who may have planned to file a request or a waiver may argue that changing a multi-year practice of accepting a means tested benefit as proof of inability to pay is a binding regulation. However, fee waivers are an exercise by DHS of the discretionary authority provided in INA section 286(m), 8 U.S.C.1356(m) to provide certain services for free, and the regulations codified under that authority at 8 CFR 103.7(c) provide that fee waivers are at the discretion of USCIS. Commenters on this form change also have not identified any action that they may have taken to their detriment in reliance on USCIS continuing its current policy. To the contrary, if an individual chooses to apply for and is granted a means tested benefit, it will be because they need the benefit and not because they wanted to use proof of such a benefit to obtain a USCIS fee waiver request. Stated more directly, an applicant for a USCIS immigration benefit would not seek to temporarily obtain means tested benefits simply so they could use the award letter to attach to their Form I-912 requesting that their USCIS fee be waived. Thus removing that requirement should not be detrimental because fee waivers remain available with proof of household income. In addition, while USCIS is abrogating the means tested benefit prong for fee waiver eligibility, we have maintained the ability to request a fee waiver using income tax returns or other proof of income that an individual should have available. Therefore, USCIS can identify no significant reliance interest that would have inured to anyone who would be requesting a fee waiver before this change that will be harmed by the change as a result of such a reliance interest. Plus, as discussed further below, USCIS is providing significant advance notice of the change to permit any person who may be affected by the change with sufficient time to conform to the new policy and practice.

Furthermore, USCIS is providing the opportunity for meaningful comment because DHS/USCIS has published the proposed form changes to change its fee waiver policy as required by the Paperwork Reduction Act (PRA). As was stated in the Federal Register Notice requesting public comments, our rational basis for the change is that the use of means tested benefits to demonstrate inability to pay resulted in inconsistent application of the policy. When USCIS revises a form, PRA regulations require two Federal Register Notices and two rounds of public comment. 5 CFR 1320.8(d)(1) requires an agency to provide a 60-day notice in the Federal Register before it submits a collection of information to OMB for approval. Following that notice and addressing the subject comments, on or before the date of submission to OMB, 5 CFR 1320.10(a) requires the agency to provide notice in the

Federal Register stating that OMB approval is being sought and that comments can be submitted to OMB within 30 days of the notice's publication.

Likewise, the USCIS form revision process involves experts from all directorates and it incorporates functional, policy, fiscal, legal, and operational considerations from counsel, intake, management, and operations. The revised forms are routed for concurrence throughout DHS, and other stakeholders for final approval before being posted for public comment. While PRA notices do not rise to the level of notice and comment rulemaking, they do provide public notice, and demonstrate that commenters' concerns have been considered. The information collection request as a whole provides USCIS rational basis and is based on our expertise in fees and fee waiver issues, and our experience in implementing the regulations. In the case of a policy interpretation of its own regulations, the use of form instructions is an appropriate method for USCIS to use. *See U.S. v. Mead Corp.,* 533 U.S. 218 (2001).

4. Comment: General opposition to the removal of the means-tested benefit criteria.

Response: As stated in the Federal Register Notice, USCIS has found that the various income levels used in states to grant a means-tested benefit result in inconsistent income levels being used to determine eligibility for a fee waiver. 83 FR 49120 (Sept. 28, 2018). USCIS is primarily funded by application and petition fees and authorized to establish fees at a level that will recover the full cost of USCIS adjudication and naturalization services including from those applications and petitions where a fee is not collected. See INA section 286(m), 8 U.S.C. 1356(m). Currently, the cost associated with applications and petitions that have been fee waived is shifted to other applications and petitions. Therefore, other applicants must cover the cost of fee- waived applications and petitions. In FY 2017, USCIS approved 588,732 or 86% of these fee waiver requests. To increase the consistency in the shifting of the cost of fee waivers to those who pay fees, USCIS has decided to apply more consistent standards of income and financial hardship for the purposes of determining inability to pay a fee.

5. Comment: USCIS would have to re-adjudicate income that a public-benefit granting agency had already determined.

Response: To make the eligibility requirement consistent, USCIS is removing the means-tested benefit receipt as a criteria for filing a fee waiver request. USCIS' determination of the inability to pay the fee for a request is distinct from that of other public benefit granting agencies, which may include a person's income. In addition, many applicants have requested a fee waiver based on the receipt of public benefits that are not means tested. This requires USCIS to reviews the public benefit requirements to determine whether it is a means-tested benefit and would be acceptable under the USCIS criteria. Means-tested benefits have a wide variety of eligibility requirements and income thresholds between states which includes incomes above the 150% of the Federal Poverty Guidelines which USCIS uses for

other fee waiver eligibility. Removing means-tested benefits as making an applicant eligible for a fee waiver will reduce the burden on USCIS and permit us to devote some resources to benefit adjudication now being used for fee waivers. Applicants may still request a fee waiver using the income or financial hardship criteria.

6. Comment: This change is a "waste of taxpayer to dollars" by requiring that USCIS reassess the income of the applicants.

Response: USCIS is funded through fees and taxpayer dollars are not used in the adjudication of fee waivers. Currently, the cost associated with applications and petitions that have been fee waived is shifted to other applications and petitions. Therefore, other applicants must cover the cost of fee-waived applications and petitions. Furthermore, and contrary to the commenters' suggestion, USCIS believes that the proposed change will reduce its administrative burden for fee waiver processing.

7. Comment: The proposed form changes would increase the burden on alien, nonprofit community organizations assisting the aliens and other agencies.

Response: USCIS acknowledges that providing copies of income tax returns or other acceptable proof of income may place more burden on the alien than providing a copy of a current award letter from a means tested benefit agency. However, an applicant who receives a means-tested benefit must generally provide evidence of income to the relevant agency. Therefore, applicants who receive a means tested benefit should have income documentation readily available to provide to USCIS. Thus, the additional burden should be minimal. In any event, DHS has considered the burden on applicants and determined that the benefits of the policy change exceed the potential small burden increase.

8. Comment: Removal of the means-tested benefit criteria would affect those who do not need to file tax returns and therefore do not have information on income. The change will affect elderly, refugees and asylees especially.

Response: Although the means-tested benefit criteria is being removed, the applicants would still be eligible for file under the criteria of having income at or below 150 percent of the Federal Poverty Guidelines, or having suffered a financial hardship. In addition, to apply for means-tested benefits, an applicant must provide proof of income to the public benefit granting agency. For purposes of a USCIS fee waiver, the requester would be merely providing that same documentation to USCIS. For other applicants who do not need to file a federal income tax return, a W-2 may be available through the U.S. Internal Revenue Service (IRS) or a statement from the IRS that indicates neither a tax return nor a W-2 is available. This statement in addition to the applicant's most recent paystubs, if available, should be sufficient evidence for income.

9. Comment: The policy changes will cause some aliens to not apply for naturalization or other benefits.

Response: The changes to Form I-912 do not prevent applicants from filing applications or petitions. Applicants who cannot afford, or claim they cannot afford, the fee could still apply for a fee waiver and may still qualify. In addition, there is no time limit for applying for naturalization. An alien may extend their permanent resident card and save funds to pay the fee for an application for naturalization at a later date without affecting their eligibility for the benefit.

10. Comment: The changes would restrict access to fee waivers.

Response: USCIS will continue to grant fee waivers, and shift the costs of fee-waived applications, petitions, and requests to other benefit-seeking applicants and petitioners. USCIS agrees that applicants with a household income greater than 150 percent of the federal Poverty guidelines who may have nonetheless been approved for a means tested benefit in their home state will no longer be eligible for a fee waiver under this changed policy, unless they suffer a financial hardship. Regardless of this impact, USCIS has decided to standardize eligibility for fee waivers and that applicants who pay fees should not pay higher fees so that families with incomes considerably above the poverty level can receive free immigration benefits. Applicants who cannot afford, or claim they cannot afford, a fee could still apply for a fee waiver and may still qualify.

11. Comment: The changes punish poor families or discriminate against low income families.

Response: USCIS disagrees. USCIS is updating fee waiver criteria to provide a more standardized and consistent review of fee waivers. All applicants may still request a fee waiver. In addition, USCIS notes that prior to the current policy, USCIS did not have a standard for fee waivers and applicants still filed requests for immigration benefits and paid fees without the benefit of fee waivers based on receiving a means tested benefit. In addition, Congress has provided that USCIS operations will be funded by fees paid by those filing requests for adjudication and naturalization services. Providing the criteria in policy guidance for how an applicant may provide evidence of eligibility to have such fees waived is neither punishing nor discriminatory.

12. Comment: Immigrants provide benefits to the U.S. and should be given an opportunity to obtain immigration benefits.

Response: USCIS did not propose to change any requirement for obtaining immigration benefits. Applicants are still eligible to apply for any benefit, including for a fee waiver.

13. Comment: The use of the IRS affidavit of non-filing form would not be useful to determine whether an alien had income.

Response: USCIS agrees and has updated the form instructions to provide that the fee waiver request should include a request for IRS transcripts and IRS Forms W-2. If the IRS statement is returned with no available tax returns or W-2 and the applicant affirms that he or she does not have income, USCIS will accept the documentation to establish that the alien has no income and therefore eligible for the fee waiver.

14. Comment: Tax transcripts should not be used.

Response: USCIS currently requests copies of income tax returns from applicants requesting fee waivers. Tax transcripts are easily requested through the Internal Revenue Service (IRS) website or though paper filing and are free to taxpayers. USCIS cannot accept incomplete copies of tax returns or copies that are not signed or submitted to the IRS to support fee waiver requests. Therefore, USCIS believes that requiring transcripts will reduce the number of fee waiver request rejections. In terms of the Non-filing letter from the IRS, USCIS is concerned about not receiving documentation of no-income. Therefore, obtaining information from the IRS in transcripts, a W-2, or proof of non-filing, if applicable, is sufficient documentation to establish the necessary income or no income.

15. Comment:
(a) The changes would impact the USCIS adjudication and create potential backlogs.
(b) Requiring each person to submit a form individually would be burdensome and unnecessary.

Response: USCIS believes that the changes will not increase the burden on it to review fee waiver requests. As for requiring a separate form for each family member, the burden may increase for households with several members. However, USCIS data indicate that over 90 percent of Form I-912 filings were filed for one person and less than 10 percent were for multiple members of the same household on one form. Thus, the impact is estimated to be minimal. USCIS believes the change will reduce the number of fee waiver requests that are rejected because of improper documentation, inadequate information and no signatures for household members. We think these benefits exceed the small increase in burden that this change may add.

16. Comment: The change would be an "infringement on state rights."

Response: The commenter did not indicate the factual or legal basis of their comment. USCIS fee waiver eligibility only impacts the waiver of USCIS fees and does affect a state's determination for eligibility of public benefits or income determinations for the public benefits.

17. Comment: USCIS should use a sliding scale for its fees instead of the change in criteria.

Response: Changing the USCIS fee schedule, including indexing the fees based on income level, requires notice and comment rulemaking. Thus, the commenters' suggestion exceeds what USCIS can do in form instructions or other policy guidance.

18. Comment: The changes would increase the burden on, have a disproportionate impact, and impose additional barriers to victims such as VAWA, T, U, and SIJ applicants and petitioners, and the impact is contrary to the congressional intent that the victims have access to these immigration benefits.

Response: USCIS believes that the impacts on the identified groups will actually be less pronounced than they will be on any other group and not more. The policy for VAWA, SIJ, T, and U applicants and petitioners will be retained with this form change, aside from the Form I-912 now being required. As stated below in response to another comment, USCIS has revised the form that was posted for public comment to clarify the evidence requirements for this population of respondents. Specifically, SIJ applicants will not be required to provide documentation of income and do not need to provide the income of a foster home or household members. VAWA self-petitioners, and applicants and petitioners for T and U nonimmigrant status, will not need to provide documentation of income from family members who are or where their abuser or human trafficker and may still use the "safe address" listed on the underlying form. Finally, if no evidence of income is available due to victimization, VAWA, T and U applicants and petitioners may provide affidavits or statements from religious organizations or advocacy groups with their Form I-912 to document income or lack thereof. Adjudicators of these benefits and their fee waivers may consider whatever evidence is provided, and their Form I-912 filings will not be summarily rejected at intake when income information is not provided.

19. Comment: The suggested form revisions would disproportionately impact self-petitioners for relief under the Violence Against Women Act (VAWA), petitioners for U nonimmigrant status, and applicants for T nonimmigrant status. Specifically,
    (a) The elimination of the means-tested benefit as a basis for fee waiver eligibility as well as the requirement to provide IRS documentation if the individual does not have other proof of income could prohibit victims from being considered for these benefits.
    (b) The stricter evidentiary requirements are contrary to Congress' intent in creating the "any credible evidence standard" for these programs and suggested that the agency, instead, retain its policy laid out in PM-602-0011.1, which allows greater flexibility to submit various types of evidence. The VAWA, T, and U population may find it difficult to obtain and submit the required documentation due to their victimization.

Response: While the "any credible evidence standard" does not apply to Form I-912, USCIS understands that the VAWA, T, and U population may have difficulty

in obtaining the required documentation due to their alleged victimization and that those filers may need USCIS to apply more flexible standards in the types of documentation that they may submit with their fee waiver request. Therefore, USCIS has revised the form and instructions to provide that fee waiver requests from a person with a pending or approved petition or application for VAWA benefits or T or U nonimmigrant status will not be required to include any household member, including the requester's spouse, who is or was their abuser or human trafficker in the "Your Household Size" and "Your annual Household Income" sections under Part 3. Likewise, any VAWA, T, or U applicants or petitioners who are listed as dependents on their tax return will not be required to include a spouse, parent, or adult child's income under Part 3 if that relative is or was their abuser or trafficker. Second, when applying for a fee waiver based on either household income or financial hardship, VAWA, T, and U applicants and petitioners generally must provide the required documentation of their income. Individuals who do not have any income and are unable to provide proof of income due to their alleged victimization may provide a detailed description of their situation in the form or in attachments to substantiate their inability to pay as well as their inability to obtain the required documentation. Additionally, they must submit any available documentation of their income, such as pay stubs or affidavits from religious institutions, non-profits, or other community-based organizations verifying that they are currently receiving some benefit or support from that entity and attesting to their financial situation.

20. Comment: The form should include a reference to the confidentiality protections under 8 U.S.C. 1367 to provide reassurance to applicants or petitioners for U nonimmigrant status, T nonimmigrant status, or relief under the Violence Against Women Act (VAWA) that any information submitted through the fee waiver request is protected from unauthorized disclosure pursuant to the statute.

    Response: USCIS is committed to protecting the safety of victims of domestic violence, trafficking, and other crimes by adhering to our obligations under 8 U.S.C. 1367. These protections apply to all information pertaining to individuals with a pending or approved VAWA, T, or U petition or application, which includes information provided on any USCIS form. USCIS employees receive training and guidance regarding these protections, and the agency's obligations will be made clear in the USCIS Policy Manual. It is unnecessary to reference the requirements and statute specifically on the form or instructions. Therefore, USCIS will not include specific reference to the confidentiality protections in every form.