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U.S. Citizenship and Immigration Services
Department of Homeland Security
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Via E-Mail: uscisfrcomment@dhs.gov

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

Dear Chief Aigbe:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the U.S. Citizenship and Immigration Services (USCIS) proposed rule, "Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives."

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our 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. permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this proposed rule and believe that our members' collective expertise provides experience that makes us qualified to offer views that will benefit the public and the government.

USCIS proposes to amend the current process for filing and adjudicating unlawful presence waivers of inadmissibility to allow certain immediate relatives of U.S. citizens to request and receive a provisional waiver prior to departing the United States for consular processing of their immigrant visa application.[1] Noting that the action

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

required to obtain lawful permanent resident (LPR) status—departure to attend the visa interview—is the very action that triggers the need for an unlawful presence waiver, USCIS states that the procedural change would "facilitate immigrant visa issuance shortly after the first consular interview," and "reduce the overall visa processing time, the period of separation of the U.S. citizen from his or her immediate relative, and the financial and emotional impact on the U.S. citizen and his or her family due to the immediate relative's absence from the United States."[2] The proposed change would also create a more predictable process and would therefore "encourage individuals to take affirmative steps to obtain an immigrant visa."[3] Finally, USCIS states that the proposed rule would minimize case transfers between USCIS and the Department of State (DOS), thereby saving both agencies time and resources.[4]

AILA applauds USCIS for taking steps to create a more efficient adjudication process for unlawful presence waivers while simultaneously offering protection to U.S. families who would otherwise suffer unnecessary hardships as a result of a lengthy separation from their relative. Although we have long supported and encouraged the concept of a provisional waiver process,[5] we are concerned that the rule as currently written is unnecessarily restrictive and therefore threatens to undermine the rationale and spirit of the proposed change.

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

As currently formulated, the proposed rule permits only a very limited group of individuals to apply for a provisional waiver: immediate relatives of U.S. citizens who can show extreme hardship to a U.S. citizen spouse or parent.[6] However, the hardships suffered by preference category families, who face the same lengthy separation from loved ones when they seek LPR status, are as equally compelling as those suffered by immediate relatives. Therefore, we recommend that the provisional waiver process be expanded to include preference relatives, including unmarried and married adult children of U.S. citizens, and spouses and children of LPRs. Opening up the provisional waiver process to these individuals would offer more measurable benefits to USCIS and DOS, would better facilitate legal immigration by encouraging a more sizable group to come out of the shadows, and comports with USCIS's goal of alleviating unnecessary familial hardships.

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[2] 77 Fed. Reg. at 19907.
[3] *Id*.
[4] *Id*.
[5] *See* "AILA Letter to DHS Secretary Napolitano Recommending Stateside Processing of I-601 Waivers," *published on* AILA InfoNet at Doc. No. 12010575. In addition, while the proposed rule limits the provisional waiver process to unlawful presence waivers, we strongly encourage USCIS to consider expanding the process to include other waivers, such as waivers under INA §212(h)(1)(B) (certain crimes) and INA §212(i) (fraud or misrepresentation).
[6] Proposed 8 CFR §212.7(e)(2)(iii), (vii); 77 Fed. Reg. at 19921.

In explaining why the rule is limited to immediate relatives, USCIS notes that Congress placed no limitation on the number of immediate relatives that can be admitted to the U.S. each year.[7] However, if USCIS were to permit preference relatives to apply for a provisional waiver only when they have a current priority date, there would be no discernable difference between immediate and preference relatives and no reason not to include preference relatives in this process.

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

The proposed rule limits the provisional waiver process to immediate relatives who can show extreme hardship to a U.S. citizen spouse or parent.[8] We urge USCIS to open the provisional waiver process to applicants who can establish extreme hardship to an LPR spouse or parent.

USCIS states that limiting the process to those who can show hardship to a U.S. citizen is consistent with Congressional prioritization of reunification of U.S. citizen families, and with legal precedent that favors U.S. citizens over LPRs. Yet, as mentioned, in enacting the statutory unlawful presence waiver provision, Congress made no such distinction between U.S. citizens and LPRs, nor does it distinguish between the two groups in many other areas of immigration law.[9] While the creation of the provisional waiver process can be viewed as an administrative change to improve efficiency, the exclusion of LPRs as qualifying relatives effectively changes the substance of the statute.

USCIS admits that a major problem with the current waiver process is that an immediate relative's extended absence from the United States to apply for a waiver can give rise to the sort of extreme hardship that the waiver is intended to address and ultimately avoid.[10] We note that this problem applies with equal force to an immediate relative whose LPR spouse or parent is the one who would suffer extreme hardship. In addition, many immediate relatives, whose U.S. citizen spouse or parent would suffer relatively minor hardships due to a lengthy separation, also have an LPR spouse or parent who would suffer immensely if separated from the applicant. By excluding LPR hardship from consideration, many applicants will choose to file a provisional waiver application with marginal evidence of hardship to their U.S. citizen relative in the hope that the waiver will be approved so that the significant LPR hardships can be avoided. These applications, which have a greater chance of being denied, will unnecessarily slow the processing of provisional waivers in general. Instead, USCIS should revise the rule to permit consideration of hardship to an LPR relative as envisioned in the statute.

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[7] 77 Fed. Reg. at 19907.
[8] Proposed 8 CFR §212.7(e)(2)(vii); 77 Fed. Reg. at 19921.
[9] *See* INA §212(a)(9)(B)(v) (waiver of unlawful presence); INA §212(h)(1)(B) (waiver of certain crimes); INA §212(i) (waiver of fraud or misrepresentation); INA §240A(b)(D) (cancellation of removal for non-permanent residents).
[10] *See* 77 Fed. Reg. at 19906.

Individuals in Removal Proceedings Should be Eligible for Provisional Waivers

Under the proposed rule, an alien in removal proceedings would not qualify for a provisional waiver. The proposed rule specifically excludes from the process:

1. Aliens in removal proceedings that have not been terminated or dismissed;[11]

2. Aliens who have not had their charging document (Notice to Appear or NTA) cancelled;[12] and

3. Aliens in removal proceedings that have been administratively closed but not subsequently reopened for the issuance of a final voluntary departure order.[13]

For the following reasons, we strongly encourage USCIS to permit individuals who are currently in removal proceedings or who have been issued an NTA to apply for and receive provisional waivers.

As a preliminary matter approximately 57-60 percent of non-detained respondents in removal proceedings and 84 percent of detained respondents are unrepresented.[14] Placing additional, confusing barriers to the waiver process for individuals in removal proceedings only creates further disadvantages for those who are unrepresented and could easily result in a wave of provisional waiver applications being filed by ineligible individuals.

Requiring Applicants to Have an NTA Cancelled, or Proceedings Terminated or Dismissed, Is Not Viable

It is extremely unlikely that DHS components will agree to dismiss or terminate proceedings, or cancel an NTA, on the mere assurance that an individual intends to apply for a provisional waiver. To do so would require EOIR, ICE, and/or CBP to expend resources before the applicant's eligibility for the waiver has even been established. In addition, since the refusal to terminate or dismiss proceedings, or cancel an NTA would render prospective provisional waiver applicants ineligible, the process as currently outlined means that ICE or CBP, and not USCIS, will have the first say as to who can and cannot benefit from the new rule.

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[11] Proposed 8 CFR §212.7(e)(3)(v); 77 Fed. Reg. at 19922.
[12] Proposed 8 CFR §212.7(e)(3)(vi); 77 Fed. Reg. at 19922.
[13] Proposed 8 CFR §212.7(e)(3)(vii); 77 Fed. Reg. at 19922.
[14] ABA Commmission on Immigration, "Reforming the Immigration System," §5-8, III, A, available at: http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

USCIS already adjudicates benefits for individuals who are in removal proceedings. For instance, an immigration judge will generally continue removal proceedings to allow USCIS time to adjudicate an I-130 petition filed on behalf of the respondent. Adjudication of provisional waiver applications prior to completion of proceedings could follow a similar procedure, and may influence whether the respondent elects to proceed with other applications for relief from removal, or accept voluntary departure to complete immigrant visa processing abroad. Requiring applicants to forgo other meritorious applications for relief in order to apply for a provisional waiver raises questions of due process, particularly with respect to unrepresented individuals who may waive the right to other relief without full knowledge or understanding of the consequences.

The Proposed Rule Does Not Comport with DHS's Prosecutorial Discretion Initiative

In November 2011, DHS announced the initiation of a nationwide prosecutorial discretion case review process which is designed to identify and remove low priority cases from the immigration court docket.[15] The primary discretionary action that ICE is offering to individuals it deems eligible is administrative closure. As written, the proposed rule would require those who have been granted administrative closure to have their cases recalendared and receive voluntary departure before they could apply for a provisional waiver. As such, the proposed rule essentially requires ICE to expend additional resources on cases it has already determined are low priority.

As previously stated, the majority of individuals in removal proceedings are unrepresented. Requiring unrepresented individuals to recalendar proceedings, apply for voluntary departure, and then apply for and obtain a provisional waiver during the voluntary departure period, will result in confusion, with perhaps only a minority of such individuals successfully navigating the process. Moreover, the proposed rule does not provide for the rejection of applications and refund of filing fees for individuals who mistakenly file an application prior to receiving voluntary departure.[16]

Where the alien is successful in having his or her case recalendared and is granted voluntary departure, if the provisional waiver is ultimately denied, the alien would be required to either leave the U.S. and pursue an immigrant visa and waiver through the regular process, ask ICE to exercise its prosecutorial discretion a second time, or remain in the U.S. and allow the voluntary departure order to convert into a removal order. Rather than being faced with such a difficult choice, many eligible aliens will simply choose to remain in administrative closure limbo, thereby undermining USCIS's rationale for developing this new rule.

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[15] *See* ICE Memorandum, P. Vincent, "Case-by-Case Review of Incoming and Certain Pending Cases," (Nov. 17, 2011), *published on* AILA InfoNet at Doc. No. 11111761 (*posted* Nov. 17, 2011).
[16] Proposed 8 CFR §212.7(e)(4)(ii); 77 Fed. Reg. at 19911, 19922.

Restrictions on Voluntary Departure Present Additional Difficulties for Provisional Waiver Applicants

DHS may grant voluntary departure, including all extensions, for a maximum of 120 days.[17] Likewise, an immigration judge may grant voluntary departure for up to 120 days at an initial master calendar hearing and prior to the conclusion of removal proceedings.[18] At the conclusion of removal proceedings, the immigration judge may grant only 60 days of voluntary departure.[19] Extensions beyond these maximum periods are not permitted.

The proposed rule not only requires that the applicant be present in the United States at the time of filing the provisional waiver application, he or she must also be in the United States for biometrics collection.[20] USCIS's reported processing times for other applications and petitions, even those that do not require an interview and generally require minimal supporting evidence, fall well outside 120 days.[21] Notably, USCIS anticipates that each provisional waiver application will require the same amount of agency processing time as the current waiver process and therefore, has proposed the same filing fee.[22] A number of consular posts are currently reporting case completion of I-601s beyond four months.[23] It is unrealistic for USCIS to receive and review applications, complete biometrics, schedule and complete interviews, if necessary, and decide waiver applications during a 60- or 120-day voluntary departure period. Any attempt to decide applications within the confines of a 120-day deadline would require USCIS to prioritize the processing of provisional waivers at the expense of other applications and petitions. If the provisional waiver is not approved within the voluntary departure period, the alien would be required to depart the U.S. to continue with the application. This is contrary to the spirit of the DHS proposed rule, which is to preserve family unity and reduce unnecessary hardships for U.S. citizens.

The Final Rule Should Permit Individuals in Removal Proceedings or with Outstanding NTAs to Apply for and Receive a Provisional Waiver

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[17] INA §240B(a); 8 CFR §240.25.
[18] INA §240B(a); 8 CFR §1240.26(b).
[19] INA §240B(b); 8 CFR §1240.26(c).
[20] Proposed 8 CFR §212.7(e)(2)(i); 77 Fed. Reg. at 19921.
[21] *See* https://egov.uscis.gov/cris/Dashboard/ProcTimes.do. USCIS reports a five-month processing time for I-130 petitions for immediate relatives, many of which do not include interviews, such as a petition by a U.S. citizen parent for a minor child. USCIS also reports a 4.8 month national average processing time for I-539 extension of status applications for H or L dependents, which require relatively little evidence in comparison with a waiver application and do not require any interview.
[22] 77 Fed. Reg. at 11910.
[23] "I-601 Forms Pending with Overseas Offices as of March 31, 2012," available at: http://www.uscis.gov/USCIS/About%20Us/Find%20A%20USCIS%20Office/International%20Offices/Processing%20Times/I-601%20Public%20Report%2003-2012.pdf.

Rather than excluding such a broad group of people from the provisional waiver process, a better system 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, or seek cancellation of the NTA, so that they could depart the U.S. for the immigrant visa interview. This would also ensure that a provisional waiver applicant who is issued an NTA while the 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 these cases can be dismissed, terminated, or cancelled once the provisional waiver is approved.

Alternatively, Provisions Must be Put in Place to Protect Applicants Who Have Been Granted Voluntary Departure

If the final rule is implemented without changes to the provisions regarding removal proceedings, we propose that USCIS include a guarantee that provisional waiver applications filed by aliens who have been granted voluntary departure are adjudicated within 90 days of receipt of the application. A 90-day adjudication period would minimize the risk that the applicant would be forced to depart the U.S. to await a final decision on the provisional waiver, and would encourage the applicant to file the application as soon as possible following the grant of voluntary departure.[24]

Similar to the provisions permitting the BIA to reinstate voluntary departure that expired during the course of an appeal, as an alternative we ask DHS to consider including a tolling provision that would "stay" the voluntary departure period pending adjudication of the provisional unlawful presence waiver, until such time that the alien departs the United States to attend their immigrant visa interview. If the alien fails to depart within 30 days of the provisional waiver grant or denial (whether or not the immigrant visa interview has been scheduled) the voluntary departure order would convert to a final removal order.

Loosen the Restrictions on Motions to Reopen/Reconsider and Refiling

Under the proposed rule, the denial of a provisional unlawful presence waiver cannot be appealed, and the alien may not file a motion to reopen or reconsider a denied provisional waiver.[25] In addition, an alien is ineligible for a provisional waiver if he or she "has previously filed a provisional unlawful presence waiver application" [26] and is even

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[24] Fixed processing times are not a new concept. Under 8 CFR §274a.13(d), USCIS must adjudicate an application for employment authorization document within 90 days of receipt, or the applicant is automatically eligible for interim employment authorization for 240 days. In addition, under 8 CFR §216.6(c)(1), the decision on a petition by an entrepreneur to remove conditions on LPR status "shall be made within 90 days of the date of filing or within 90 days of the interview, whichever is later." *See also* INA §336(b) (applicant may request district court action if USCIS fails to make a determination on naturalization within 120 days after the examination).

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

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

precluded from filing a new application if the first application is withdrawn.[27] The only opportunity for having a denied application reconsidered is if USCIS elects to reopen and approve a denied case on its own motion. This "one bite at the apple" approach is extremely narrow and will result in eligible applicants being unreasonably excluded from the process.

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

- ***Changed Circumstances.*** The proposed elimination of all appellate review makes it all the more imperative to have some mechanism in place to address situations where changed circumstances materially affect an applicant's eligibility for a waiver. A waiver applicant, for example, may have an LPR spouse or parent who naturalizes shortly after adjudication, giving her another qualifying relative for the hardship analysis.[28] Or, an existing qualifying relative may become ill shortly after the first review, dramatically altering the hardship calculus. Other comparable provisions in the Act and regulations recognize the need for a limited opportunity, with reasonable time and numerical limitations, to come back to the agency with new, material facts. AILA proposes, therefore, that the stateside waiver provisions have similar, limited opportunities for refiling, or reopening or reconsideration on an applicant's motion.

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

- ***Deficient Applications Filed by Pro Se Individuals***. Successful waiver applications require significant preparation and documentation with a high level of detail. Pro se applicants with colorable hardship claims should not be banished from the process for unknowingly submitting a deficient application the first time around.

- ***Deficient or Otherwise Improper Applications Filed by Notarios***. Applicants who fall victim to notarios and other unauthorized practitioners should not be penalized for actions taken on their behalf. This is particularly troubling given the provision that would preclude a second provisional waiver application if the alien withdraws the original application.

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[27] Proposed 8 CFR §212.7(e)(9); 77 Fed. Reg. at 19222.
[28] Proposed 8 CFR §212.7(e)(2)(vii); 77 Fed. Reg. at 19921.

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

USCIS states that permitting multiple applications "would significantly interfere with the interagency operations between USCIS and DOS and substantially delay immigrant visa processing."[29] However, USCIS and DOS must already coordinate to handle the logistical challenges that arise when a provisional waiver is denied, and the applicant must decide whether to proceed abroad or withdraw the immigrant visa application. The two agencies must also coordinate when USCIS elects to reopen a denied provisional waiver on its own motion. USCIS and DOS should take this one step further and develop mechanisms to handle cases that are reopened on the applicant's motion or where the applicant elects to refile.

Permit Concurrent Filing of I-212 Permission to Reapply for Admission after Deportation or Removal

Under the proposed rule, a person who requires an I-212 waiver, which grants permission to reapply for admission after a prior deportation or removal, would be ineligible for a provisional waiver.[30] However, as noted in the proposed rule, a similar stateside adjudication process currently exists for certain I-212 applicants.[31] Moreover, USCIS adjudication policy provides that in general, if an I-601 waiver is approved, an I-212 waiver will also be approved since both applications require the adjudicator to find that the applicant warrants a favorable exercise of discretion.[32] Therefore, we recommend that the proposed rule be amended to permit individuals who require both waivers to apply for them concurrently. To demand separate or consecutive processing, when a domestic process exists for both waivers, is unnecessary and would result in a waste of USCIS time and resources.

Provide for Appropriate Use of Requests for Evidence

USCIS states in the supplemental information that it intends to limit requests for evidence (RFEs) "solely to the issues of whether the alien has established extreme hardship and/or merits a favorable exercise of discretion."[33] USCIS should expand the use of RFEs to

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[29] 77 Fed. Reg. at 19907.
[30] Proposed 8 CFR §212.7(e)(2) and (e)(3)(i); 77 Fed. Reg. at 19921.
[31] 77 Fed. Reg. at 19907.
[32] *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.
[33] 77 Fed. Reg. at 19910.

include issues that may 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 necessary documents to establish this. Or information in the applicant's A-file may raise but not necessarily establish other issues relating to admissibility. Rather than deny these applications outright, and unnecessarily exclude many individuals from the provisional waiver process, USCIS should issue an RFE to obtain more information.

Provide for an Opportunity to Rebut or Explain When an Additional Ground of Inadmissibility Is Suspected

In addition to severely curtailing the use of RFEs, USCIS states that it "will not issue Notices of Intent to Deny (NOIDs) to provisional unlawful presence waiver applicants."[34] Instead, the proposed rule and the draft I-601A form and instructions provide that an alien is ineligible for a provisional unlawful presence waiver if "USCIS has reason to believe that the alien may be subject to grounds of inadmissibility other than unlawful presence ...."[35] In many cases, it may be impossible for the Service to determine whether a particular ground of inadmissibility applies without first obtaining additional information from the applicant. If an additional ground of inadmissibility is suspected, we propose that USCIS issue a NOID or RFE to obtain additional information, rather deny the application outright. This would provide individuals with the opportunity to demonstrate, if applicable, that they are not inadmissible as alleged, and that they are eligible for a provisional waiver. Issuing an RFE or NOID would ensure that all persons who are eligible for a provisional waiver are able to benefit from the process.

Provide for a Presumption of Extreme Hardship if Additional Waivers Are Required

The proposed rule provides for the automatic revocation of a provisional waiver if the consular officer determines that the applicant is subject to another ground of inadmissibility.[36] In this situation, "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."[37] Instead of requiring an entirely new adjudication, an approved provisional waiver should give rise to a presumption of extreme hardship, which would apply not only to the new unlawful presence waiver, but would also apply to other waivers with an extreme hardship standard.

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

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[34] *Id*.
[35] Proposed 8 CFR §212.7(e)(3)(i); 77 Fed. Reg. at 19921.
[36] Proposed 8 CFR §212.7(e)(13)(i); 77 Fed. Reg. at 19922.
[37] 77 Fed. Reg. at 19911.

Under the proposed rule, individuals who have already been scheduled for immigrant visa interviews are ineligible to apply for a provisional waiver.[38] USCIS states that "resource constraints and timing issues" warrant exclusion of these cases from the provisional waiver process.[39] However, in the absence of further justification or explanation, we submit that individuals who have been scheduled for an immigrant visa interview, but have not left the U.S. and attended an interview at the time the final rule becomes effective, should be permitted to apply for a provisional waiver. These individuals face the same lengthy separation and resulting hardships that the provisional waiver process seeks to alleviate. Concerns that there would be disruptions in scheduling appointments at U.S. consulates abroad, and particularly at Ciudad Juarez, should be outweighed by the humanitarian considerations that form the foundation for the proposed process change. USCIS has extensive experience handling waves of applications, for example when a country is designated or renewed for Temporary Protected Status, or a regulatory change or new law results in a large number of new applications.[40] The proposed rule should be amended to accommodate applicants who have been scheduled for immigrant visa interviews but who have not left the U.S.

The Minimum Age for Filing—17 Years—Is Misleading and Should be Eliminated

The proposed rule states that an alien is ineligible to apply for or receive a provisional waiver if he or she is under the age of 17.[41] Noting that unlawful presence does not begin to accrue until an alien reaches the age of 18, USCIS states that "[a]ccepting waiver applications from an alien who is 17 years of age or older would prevent an alien's prolonged separation from his or her U.S. citizen relative in the event that the alien's immigrant visa interview is scheduled after his or her 18th birthday."[42] However, the bar to admissibility cannot even be triggered until 180 days after the alien's 18th birthday. By accepting applications from individuals as young as 17 years of age, USCIS is inviting unnecessary filings and in turn will potentially collect a windfall in filing fees from individuals who may not even require a waiver. Instead of placing this arbitrary age minimum on applicants, USCIS should instead provide clear instructions to the public that unlawful presence does not accrue prior to an individual's 18th birthday, and allow the applicant to determine the appropriate time to file.

Remove the Provision Relating to Termination of the Validity of an Approved Waiver Where Conditional Resident Status Is Terminated

The proposed rule provides for automatic termination of the validity of an approved unlawful presence waiver where the conditional resident status of an alien admitted under INA §216 is terminated.[43] This provision is contrary to the INA and must be removed

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[38] Proposed 8 CFR §212.7(e)(3)(iv); 77 Fed. Reg. at 19921.
[39] 77 Fed. Reg. at 19909.
[40] Such as applications under the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).
[41] Proposed 8 CFR §212.7(e)(3)(ii); 77 Fed. Reg. at 19921.
[42] 77 Fed. Reg. at 19909.
[43] Proposed 8 CFR §212.7(a)(4)(iv); 77 Fed. Reg. at 19921.

from the final rule. Under INA §216(f), waivers under INA §212(h) (for certain criminal grounds of inadmissibility) and INA §212(i) (for fraud or misrepresentation) are automatically terminated upon termination of conditional resident status. Nowhere in this provision, nor in any other provision of the INA, is there mention of termination of an unlawful presence waiver under INA §212(a)(9)(B)(v) where conditional resident status is terminated. DHS lacks the authority to implement this change when Congress has already clearly spoken on the matter.

Train Adjudicators 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.[44] Nevertheless, we strongly suggest that implementation of the provisional waiver process include extensive training of adjudicators on the extreme hardship standard, as well as specific country conditions and hardships that are unique to various countries and parts of the world. Currently, most waiver applications are processed by USCIS personnel who are in-country or otherwise knowledgeable about conditions in the applicant's home country or region. While centralizing the waiver process will increase administrative efficiencies, it is extremely important that country-specific knowledge is not lost in the process.

Training is also important to ensure consistent and fair decision-making. Relevant case law and guidance set forth a long list of factors that must be assessed cumulatively when evaluating an extreme hardship claim.[45] AILA members have reported that some domestic adjudicators at local USCIS field offices appear to be unfamiliar with the correct standard and will only approve a hardship waiver where the qualifying U.S. relative has a life-threatening medical condition. However, a restrictive adjudication standard, such as this, is clearly at odds with the INA, case law, and the spirit of the proposed provisional waiver process.

While we fully recognize the proposed rule is not changing the extreme hardship standard, it is worth noting that the majority of unlawful presence waivers have been approved by USCIS. As a result, the current process has resulted in a strong body of administrative experience where extreme hardship has been found in both the initial waiver decisions rendered by USCIS and by the AAO. Training should take into account not only the relatively small percentage of AAO cases, but the majority of cases that have been approved in the field, and should include fact patterns common to those cases. We emphasize, however, that given the hardships associated with departing the U.S. for a lengthy but unknown period of time under the current process, the body of cases already decided likely represent the strongest in the spectrum of hardship fact patterns – cases where the evidence submitted far surpassed the preponderance of the evidence standard. Therefore, these cases should be seen as the upper boundary, not the lower boundary, of

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[44] 77 Fed. Reg. at 19907.
[45] *See e.g.*, *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), *aff'd Cervantes-Gonzalez v. INS*, 244 F.3d 1001 (9th Cir. 2001).

what can be considered extreme hardship under the "totality of circumstances" standard.[46]

It is hoped that the provisional waiver process will improve efficiency within USCIS through centralization and efficient resource allocation, while maintaining fundamental fairness to the applicant and his or her U.S. citizen spouse or parent. We urge USCIS to implement an in-depth training program for the new provisional waiver adjudicators to ensure fair and consistent decisions.

Suggested Changes to Proposed Form I-601A and Instructions

The proposed Form I-601A and accompanying instructions are largely sufficient with the exception of the section under Part 1, "Immigration or Criminal History Records." The questions in this section are confusing and contain inaccuracies that should be corrected. We suggest revised language below, but summarize the inaccuracies here:

1. **Form Item 25**: Only individuals who indicated in Item 25.a that they are currently in removal proceedings are supposed to answer Question 25.b (regarding administrative closure and voluntary departure). However, a person who was granted voluntary departure would likely have answered "No" to item 25.a and would have therefore skipped item 25.b.

2. **Form Item 26**: The "Note" preceding question 25.a states that if an individual answers "No" to item 26.b (regarding cancellation of an NTA), the individual is ineligible for a provisional waiver. Yet a person who was issued an NTA and placed into removal proceedings that were eventually terminated would respond "No" to item 26.b and would be eligible for a provisional waiver.

3. **Form Questions 28, 29, 30, 33**: According to the proposed rule a person is ineligible for the provisional waiver if USCIS has reason to believe he or she may be subject to grounds of inadmissibility other than unlawful presence.[47] The "Note" preceding item 25.a states that the provisional waiver application will be denied if the applicant answers "Yes" to items 28 (relating to false or misleading information), 29 (relating to assisting entry of a person without a valid travel document), 30 (relating to the commission of crimes) and 33 (relating to criminal convictions). However, Questions 28, 29, 30, and 33 are broader than the corresponding ground of inadmissibility and will potentially exclude eligible individuals from the process. For example, if a person answers "Yes" to Question 33 (whether the applicant has ever been convicted of a crime), the form and instructions indicate that the person is ineligible for the provisional waiver. However, not every conviction results in inadmissibility. Therefore, the notes in reference to these questions should be revised to indicate that by answering

[46] *Id.*
[47] Proposed 8 CFR §212.7(e)(3)(i); 77 Fed. Reg. at 19921.

"Yes" to these questions, the applicant "*may*" not be eligible for a provisional waiver, and his or her application "*may*" be denied.

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

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

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

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

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

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

In order to make this section of the form less confusing and more reflective of the intent of the proposed rule, however, we suggest that the Form be revised altogether to read:

Immigration or Criminal History Records

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

❑ Yes ❑ No

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

26. If you answered "Yes" to Question 25, please check the box that most accurately describes your current situation:

❑ I was issued an NTA but it was cancelled by DHS.

❑ I was in removal proceedings but my proceedings were terminated or dismissed.

❑ I was in removal proceedings and I am now subject to a final order of removal, deportation, or exclusion, or to the reinstatement of a prior removal order.

Note: You are not eligible for a provisional unlawful presence waiver and your application will be denied.

❑ I am currently in removal proceedings and I have a future court date scheduled.

Note: You are not eligible for a provisional unlawful presence waiver and your application will be denied.

❑ My removal proceedings are currently administratively closed and I do not have a future court date at this time.

Note: You are not eligible for a provisional unlawful presence waiver, unless your proceedings are reopened and you are granted voluntary departure (see below).

❑ My removal proceedings were administratively closed, but they were reopened and I was granted voluntary departure.

Note: You will need to provide a copy of the administrative closure notice and voluntary departure order.

27. Have you ever given false or misleading information to a U.S. Government official while applying for an immigration benefit or to gain entry or admission into the United States?

❑ Yes ❑ No

Note: If you answer "Yes" to Item 27, you may be ineligible for a provisional unlawful presence waiver, and your application may be denied.

28. Have you ever assisted the entry of someone, even a family member, into the United States without the benefit of a valid travel document?

❑ Yes ❑ No

Note: If you answer "Yes" to Item 28, you may be ineligible for a provisional unlawful presence waiver, and your application may be denied.

29. Have you ever committed a crime for which you were not arrested?

❑ Yes ❑ No

Note: If you answer "Yes" to Item 29, you may be ineligible for a provisional unlawful presence waiver, and your application may be denied.

30. Have you ever been arrested, cited, or detained by a law enforcement officer (including immigration and military officers) for any reason other than traffic violations in the United States, your home country, and/or any other country?

❑ Yes ❑ No

31. Have you ever been charged, indicted, imprisoned or jailed for any crime or offense?

❑ Yes ❑ No

32. If you answered "yes" to Item Numbers 30 or 31, were you ever convicted of a crime?

❑ Yes ❑ No

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

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

We appreciate the opportunity to comment on this proposed rule and look forward to a continuing dialogue with USCIS on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION