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CATHOLIC LEGAL  
IMMIGRATION  
NETWORK, INC.

August 28, 2018

Mr. David Newman  
Director, Office of Legal Affairs  
Bureau of Consular Affairs  
U.S. Department of State  
600 19<sup>th</sup> Street NW  
Room 12.100  
Washington, DC 20006

**RE: Public Charge Determinations**

Dear Director Newman:

The American Immigration Lawyers Association (AILA), Catholic Legal Immigration Network, Inc., and the National Immigration Law Center write to express our concern over current policy relating to the assessment and determination as to whether a visa applicant is “likely at any time to become a public charge” under INA §212(a)(4). In January 2018, the Department of State made significant changes to the public charge provisions of the Foreign Affairs Manual (FAM). Those changes appear to be the catalyst for the issues described herein.

Although the Department has long-employed a “totality of the circumstances” analysis when assessing the public charge issue, until January, a properly completed Form I-864, Affidavit of Support, was typically enough to satisfy INA §212(a)(4). Previously, 9 FAM 302.8-2(B) stated:

*A properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the totality of the circumstances analysis.*

In January 2018, however, this language was removed from the FAM. Revised 9 FAM 302.8-2(B) now directs officers to view the affidavit of support only as a “positive factor” in the totality of the circumstances analysis. As a result, many individuals have since appeared for consular interviews presenting Forms I-864 demonstrating access to income at or above the legal requirements only to be told that this is no longer sufficient. The experiences of visa applicants indicates a departure from past, long-established practice. Implemented without adequate notice to the public, this new approach to the public charge determination has had a substantial and unexpected impact on visa applicants.

Perhaps most significantly, individuals with an approved I-601A provisional unlawful presence waiver are informed that their waiver has been revoked upon refusal of an immigrant visa and are forced to proceed through the regular I-601 waiver process, even if they are later able to overcome the public charge issue with the submission of additional documentation. The I-601 waiver process takes well over a year. As a result, American families are unexpectedly being forced to endure the financial, emotional, and other hardships associated with a lengthy separation. These effects are heightened even further in dangerous locations which are subject to State Department travel advisories, thus undermining the very purpose of the provisional waiver process.

We thank you in advance for considering our view points on these matters, which are articulated in more detail below, and respectfully request a meeting with you and your colleagues at your earliest convenience to discuss these issues in more depth.

### **The Department of State Changed its Approach to Public Charge Determinations without Providing Adequate Notice to the Public**

Although 9 FAM 302.8-2(B)(2) directs consular officers to make “every effort to inform applicants in advance of the visa interview of the required support documents,” it does not appear that any notice, beyond the FAM changes, was provided to the public of the change in weight accorded to an affidavit of support within the totality of the circumstances test. Moreover, in the past several months, numerous reports indicate that State has rejected affidavits of support filed by joint sponsors where the sponsor lacks a familial relationship to the applicant, and visa applications have been refused pending the submission of a written statement explaining the relationship between the applicant and joint sponsor, or a declaration from the joint sponsor explaining the decision to support the applicant. As described in detail below, any requirement that a joint sponsor bear a family relationship to the applicant is contrary to the INA, the regulations, and the FAM. However, assuming without conceding that such a request is proper, there is no indication on Department websites, including the Bureau of Consular Affairs’ “Required Documents” page and the “What To Bring To Your Immigrant Visa Interview” checklist, that State has taken steps to inform applicants as to how they can be better prepared to satisfy INA §212(a)(4).<sup>1</sup> Without prominent notice of the actual documentary expectations, applicants who appear for interviews believing that they are documentarily qualified to receive a visa are being refused leading to often severe hardships.

### **The Practice of Requiring Joint Sponsors to be Related to the Applicant is not Required by the INA, the Regulations, or the FAM**

Our organizations have received numerous reports of immigrant visa applicants who are found inadmissible on public charge grounds when an affidavit of support completed and signed by a joint sponsor is deemed deficient because the joint sponsor is not related to the visa applicant. Multiple reports indicate that visas are refused under INA §212(a)(4) or §221(g) and the applicant is informed either orally or in writing that an affidavit of support from a familial joint sponsor is necessary to establish admissibility, or that some type of documentation, such as a letter explaining the relationship between the joint sponsor and the applicant is required.

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<sup>1</sup> DOS, “Required Documents” <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/interview/interview-prepare/required-documents.html>; “What To Bring To Your Immigrant Visa Interview” [https://travel.state.gov/content/dam/visas/Supplemental/appt%20letter\\_checklist%20for%20interview.pdf](https://travel.state.gov/content/dam/visas/Supplemental/appt%20letter_checklist%20for%20interview.pdf).

INA §213A(f) defines “sponsor” for purposes of the affidavit of support and makes no mention of a requirement that a joint sponsor be related to the applicant except in the limited circumstances of certain employment-based immigrant visas, humanitarian reinstatement, and INA §204(l) relief. Joint sponsors are only required to accept “joint and several liability with a petitioning sponsor” and must demonstrate “the means to maintain an annual income equal to at least 125 percent of the Federal poverty line....”<sup>2</sup> Likewise, 8 CFR §213a.2 does not include a relationship requirement for a joint sponsor. And perhaps most significantly, 9 FAM 302.8-2(C)(7) explicitly permits a non-relative to serve as a joint sponsor, stating “[t]he joint sponsor can be a friend or third party who is not necessarily financially connected with the sponsor’s household.”

To the extent that the Department’s practice of refusing affidavits of support that are executed by a non-relative is tied to fraud prevention and protection of visa applicants from unscrupulous actors, we certainly support those efforts. However, such efforts should not translate into a blanket rejection of any affidavit of support that is completed by a person who bears no family relationship to the applicant. Any such requirement plainly contradicts the FAM and is at odds with the statute and regulations.

### **Where Additional Documentation Could Overcome Public Charge Concerns, Visas Should Not be Refused under INA §212(a)(4)**

Reports submitted to our organizations also indicate that consular officers often refuse a visa under INA §212(a)(4), while indicating that additional documentation, such as an affidavit of support from a joint sponsor or other evidence, could overcome the finding—circumstances that should result in a 221(g) refusal instead. According to 9 FAM 302.8-2(B)(5), “[t]he determination of whether INA 221(g) or INA 212(a)(4) is the appropriate ground of refusal is determined by whether or not [the officer has] enough information to make a finding of whether the applicant is likely to become a public charge under INA 212(a)(4).” Under 9 FAM 302.8-2(B)(2), “[a]pplicants who are not likely to overcome the public charge provision even after the presentation of additional evidence should be refused under INA 212(a)(4) instead of INA 221(g).” By way of illustration, the manual references an affidavit of support that is “technically complete but does not reflect sufficient financial resources *even after any possible joint sponsors have submitted an Affidavit of Support* (emphasis added).”<sup>3</sup> Thus, if a consular officer determines that additional evidence—such as submissions by an additional joint sponsor—*could* establish sufficient financial resources to demonstrate that an applicant is unlikely to become a public charge, the officer should base a refusal on 221(g)—not 212(a)(4).

### **A 221(g) Refusal Does Not Necessarily Equate to a Finding of Visa “Ineligibility”**

An unfortunate consequence of visa refusals on public charge grounds is the revocation of approved I-601A provisional unlawful presence waivers. However, an I-601A waiver need not and should not be revoked if the visa is preliminarily refused under INA §221(g), the consular officer determines that additional evidence could overcome any public charge issues, and additional evidence does in fact satisfy the public charge requirements.

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<sup>2</sup> INA §213A(f)(5)(A).

<sup>3</sup> 9 FAM 302.8-2(B)(5).

Under 8 CFR §212.7(e)(14), an approved I-601A is revoked automatically if the Department of State “denies the immigrant visa application after completion of the immigrant visa interview based on a finding that the alien is ineligible to receive an immigrant visa” for any reason other than inadmissibility due to unlawful presence. This instruction is repeated at 9 FAM 302.11-3(D)(1). However, a refusal under INA §221(g) does not necessarily equate to a finding of visa ineligibility. That section provides for three bases for visa refusal:

- (1) it appears to the consular officer ... that such alien is *ineligible* to receive a visa...
- (2) the application fails to comply with the provisions of this Act, or the regulations issued thereunder, or
- (3) the consular officer knows or has reason to believe that such an alien is *ineligible* to receive a visa or such other documentation under section 212, or any other provision of law....<sup>4</sup>

The express reference to ineligibility in subsections (1) and (3), contrasted with the omission of that term in subsection (2), indicates that subsection (2) does not assume a finding of ineligibility. By its own terms, this subsection covers applications that, owing to a defect frustrating statutory and regulatory compliance—such as missing documentation—are *premature* for an eligibility assessment. 9 FAM 302.1-8(B) supports this reading by instructing consular officers that they may refuse a visa application under INA §221(g)(2) if the “applicant fails to furnish information as required by law or regulations” or “the application is not supported by the documents required by law or regulations.” The Department echoed this understanding when it stated that “[t]he character of an INA 221(g) refusal differs from a 212(a)(4) or other 212(a) refusal in that the refusal may be procedural (e.g., based on failure to complete the application properly), **and need not involve a formal finding of ineligibility under INA 212(a) or other grounds.**”<sup>5</sup> In practice, the need for additional documentation accounts for many, if not most, 221(g) refusals, and applicants are often able to quickly overcome such a refusal by providing the documentation requested by a consular officer.

The FAM also distinguishes between “refusal” and “ineligibility” in the context of 221(g) findings where the consular officer determines a security advisory opinion is required: 9 FAM 504.11-3(B)(2) states:

If, after interviewing the applicant, you decide that an advisory opinion is necessary, you must first refuse the alien under INA 221(g).... ***Under no circumstances should a final resolution of the question of eligibility be made before the Department's advisory opinion is received.*** (Emphasis added)

Thus, a 221(g) refusal does not inherently constitute a determination of ineligibility. This interpretation was also invoked during the implementation of the Child Status Protection Act

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<sup>4</sup> Emphasis added.

<sup>5</sup> Department of State: “221(g) Versus 212(a)(4)” (May 14, 1999); <https://www.aila.org/infonet/dos-on-221g-vs-212a4-findings> (Emphasis added).

(CSPA) of 2002. In guidance to consulates regarding visa refusals issued prior to CSPA’s effective date, DOS noted:

A 221(g) refusal will not be considered a “final determination,” regardless of whether it occurred within a year of August 6, 2002 or earlier. The only exception to this would be if the alien’s case was ultimately terminated under INA 203(g) for failure to make reasonable efforts to overcome 221(g) refusal. A 203(g) termination will be considered a “final determination.”<sup>6</sup>

As made clear by State’s approach to CSPA implementation, a 221(g) refusal can and often is interpreted as non-dispositive. To interpret it otherwise would have needlessly defeated Congress’s objectives to protect certain minors from aging out.

Similarly, where a visa applicant could satisfy the public charge requirements with the submission of additional documentation, State could deem a 221(g) refusal as a temporary or interim refusal not amounting to a formal finding of “ineligibility,” thus preserving the approved I-601A waiver unless and until the officer formally deems the applicant inadmissible under INA §212(a)(4). To do otherwise results in needless I-601A revocations that carry severe consequences for American families and defeat the objectives of the provisional waiver process.

DHS introduced and then expanded the provisional waiver process to advance three policy aims.<sup>7</sup> First, by allowing certain individuals unlawfully present in the United States to obtain a provisional waiver stateside, the government dramatically reduced the time those individuals must spend abroad consular processing—thereby minimizing family separation. Second, the process creates significant administrative efficiencies for both State and USCIS, by streamlining the waiver adjudication and visa issuance processes. Finally, the process was intended to incentivize individuals who might otherwise fear a lengthy process apart from their loved ones, to come out of the shadows and regularize their status through consular processing.

The Department’s current practice of deeming an I-601A waiver revoked in these circumstances and requiring the individual to go through the regular waiver process promotes family separation instead of family unity. Typically, a visa applicant with an approved I-601A waiver can complete the visa application process in about two weeks. If a 601A waiver is revoked, the applicant will be required to proceed through the regular I-601 waiver process, which is currently taking an average of 14 to 18.5 months.<sup>8</sup> This is true even if the applicant overcomes the 221(g) grounds through the submission of additional documentation in as little as 48 hours after the interview. This prolonged separation imposes severe hardships on U.S. citizen/LPR spouses and children who are dependent on the income, parenting, and other support provided by the overseas family member, and

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<sup>6</sup> DOS, “Child Status Protection Act: ALDAC #4 – What Constitutes a ‘Final Determination’ on an Application Adjudicated Prior to the Effective Date of CSPA?” (May 17, 2003); <https://www.aila.org/infonet/dos-cable-applications-adjudications-prior-cspa>.

<sup>7</sup> DHS, “Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,” 78 Fed. Reg. 535 (Jan. 3, 2013); <https://www.federalregister.gov/documents/2013/01/03/2012-31268/provisional-unlawful-presence-waivers-of-inadmissibility-for-certain-immediate-relatives>; “Expansion of Provisional Unlawful Presence Waivers of Inadmissibility,” 81 Fed. Reg. 50243 (July 29, 2016); <https://www.federalregister.gov/documents/2016/07/29/2016-17934/expansion-of-provisional-unlawful-presence-waivers-of-inadmissibility>.

<sup>8</sup> USCIS, “Check Case Processing Times;” <https://egov.uscis.gov/processing-times/>.

disincentivizes individuals from pursuing lawful permanent residence. The revocations therefore encourage immigrants to remain in the United States without status, the opposite of the effect intended by the provisional waiver process.

These I-601A revocations also frustrate the agency's goal of creating administrative efficiencies. The inefficiencies of the I-601 process were well-documented in the 2015 proposed rule to expand the provisional waiver process to more individuals:

*Inefficiencies in the Form I-601 waiver process also create costs for the Federal Government. If a DOS officer at a U.S. Embassy or consulate determines that the applicant is inadmissible based on a ground that can be waived, the DOS officer informs the applicant about the option to file a waiver application with USCIS. After the interview, DOS puts the immigrant visa process on hold while waiting for the applicant to submit the Form I-601 waiver application and for USCIS's decision on the waiver. If a waiver is approved, DOS must reschedule the applicant for additional visa processing at a U.S. Embassy or consulate, which uses valuable DOS consular officer resources that could be used for processing other visa applications.<sup>9</sup>*

Individuals whose I-601A waivers are revoked must proceed through the I-601 process at a time when USCIS already suffers from widespread capacity shortfalls and case processing delays. As described above, State must then bring the individual back in for a second interview and re-adjudicate the application. Rather than an efficiency enhancement, the revocation of I-601As in this scenario effectively becomes an administrative burden.

## **Conclusion**

In view of these considerations, including the substantial harms associated with the January 2018 changes to the FAM's public charge guidance, we respectfully request that the Department of State withdraw those changes and restore the prior FAM language. Alternatively, we ask State to take the following actions:

- (1) Immediately and prominently post additional information, including required and suggested documentation, and lines of questions that will be asked visa applicants at consular interviews to assess the public charge issue. Correspondence and documentary checklists issued by the National Visa Center should also be updated with this information;
- (2) Issue instructions to consular officers reminding them that I-864 affidavits of support completed by a joint sponsor should not be rejected as insufficient solely because of a lack of a family relationship between the sponsor and the applicant;
- (3) With respect to public charge determinations, issue instructions to consular officers to issue a 221(g)(2) "non-dispositive" refusal if the officer determines that the submission of additional evidence could demonstrate that the applicant is unlikely to become a public charge;
- (4) With respect to public charge determinations, issue instructions to consular officers that an approved I-601A provisional unlawful presence waiver is not automatically revoked unless and

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<sup>9</sup> DHS "Expansion of Provisional Unlawful Presence Waivers of Inadmissibility," 80 Fed. Reg. 43338 (July 22, 2015); <https://www.gpo.gov/fdsys/granule/FR-2015-07-22/2015-17794>.

until the officer deems a person “ineligible” for a visa under INA §212(a)(4), after consideration of all evidence;

- (5) Coordinate with USCIS to establish a full and fair process for reopening I-601A cases that were revoked on or after January 3, 2018, where the public charge issue was overcome following the submission of additional evidence, and no other eligibility issues are present.

We thank you for considering our views on these issues and look forward to engaging in a deeper discussion on the finer points presented in the near future. In the meantime, should you have any questions, please do not hesitate to contact Betsy Lawrence, AILA Director of Government Relations at [blawrence@aila.org](mailto:blawrence@aila.org) or (202) 507-7621.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION  
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