IV WAIVERS- Stateside and Provisional

*** update by Kelli Stump to the 2013 article written by Jason Mills, Jacqueline Watson, and Cheryl David**

PRACTICAL GUIDE TOWARDS THE I-601A FILING PROCESS

Acceptance of provisional waivers began on March 4, 2013, so far USCIS has limited its use for immediate relatives. The new sections in the federal regulations apply to applicants who are seventeen years of age or older and who are children or spouses of U.S. citizens or who are a parent of a USC who is 21 years old or older.[1] Stepchildren, CSPA protected applicants, and (when appropriate) widows are also covered under the provisions if they fall in the immediate relative category.

Applicants must be present in the U.S. when filing the petition and appear for biometrics to be taken. The individual must be inadmissible solely under INA 212(a)(9)(B)(i)(I)or (II) up to the point of the consular interview. An approved I-130 (or similar petition) must be approved, pending with DOS, and immigration fees paid precedent to the waiver filing.

Until recently, USCIS appeared to be denying many cases based on a very liberal interpretation of the "reason to believe standard." Basically, if there was a reasonable suspicion that an applicant could potentially face a ground of inadmissibility other than unlawful presence, then USCIS in many instances would deny the application based on its interpretation of the reason to believe standard. Some of these denials were based on minor criminal arrests, regardless of a conviction, providing a false name while attempting to cross EWI, repeat border crossing violations occurring before the effective date of IIRIRA.[2]

On March 18, 2014, USCIS issued notice to the "stakeholder" that USCIS would no longer be making "reason to believe" denials based on criminal offenses that were not crimes of moral turpitude or otherwise fall under the petty offense exception. [3] Moreover, USCIS stated that it would be reopening, on its own motion, all I-601A waiver applications that were denied prior to January 24, 2014, solely because of a prior criminal offense, in order to determine whether there is reason to believe the prior criminal offense might render the applicant inadmissible.[4]

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[1] See id. p. 25. (discussion that limiting the provisional waiver to immediate relatives encourages LPRs to naturalize); see id. pp. 54-56.

[2] See INA 212(a)(9)(C)(i)(I).See AFM Ch 40.9.2(a)(4)(E)(i)(unlawful presence prior to April 1, 1997 does not count towards the bar found in 212(a)(9)(C).

[3] See USCIS to reopen I-601A Denials Based on "Reason to Believe" available at AILA InfoNet, Doc. No. 14031846 (Posted 03/18/2014).

[4] See id.

While this is wonderful news for practitioners, there are still concerns with the I-601A process and denial rates. Further worries exist as well such as denials in instances where USCIS has cited lack of extreme hardship without the issuance of an RFE. Because of this very limited approach taken so far by USCIS there are several steps that a representative should consider before filing an I-601A waiver.

Conduct your own background checks

Even if your client's offense falls within the petty offense exception, it is often prudent to conduct a background check to avoid other pitfalls. For both stateside processing and provisional waivers, filing FOIA requests whenever the suspicion or knowledge arises that your client has ever encountered DHS or DOS at any time is best practice. Depending upon the agency that may have encountered an applicant will depend on the location and procedure for requesting the FOIA.[5] This chart lists most of the agencies, filing addresses and information for FOIAs' dealing with immigration matters: http://www.cbp.gov/xp/cgov/admin/fl/foia/records.xml. Also, although not as often used an applicant may request access to US visit records. These can be requested at US Visit FOIA Security Offices, 245 Murray Lane, Spt 0635, Washington, DC 20528-0675. Oftentimes when filing a FOIA (especially in the case with CBP FOIAS) the initial response reveals no information on file or the response states that no records have been located. An appeal of the negative response will oftentimes result in the records that "did not exist" magically materialize especially when dealing with prior border apprehensions.

FOIA requests take time so file the FOIA requests either before or at least concurrently with the I-130 relative petition.

Be familiar with the standards for issuing NTAs

It is imperative to review all criminal and immigration records carefully. Where an I-601A is denied, USCIS has indicated that it will follow the guidance set forth in the November 7, 2011 Policy Memorandum PM-602-0050 on NTA issuance.[6] When encountering criminal history or other similar negative facts in the applicant's background then consulting with the policy memorandums in regards to the issuance of NTAs will assist in properly informing the applicant of the likelihood of risk in continuing the process.

Provide all pertinent documents when there is a criminal history

Although USCIS is no longer denying cases on the "reason to believe" standard for minor arrests or convictions, it is important to document that the crime indeed does not trigger an inadmissibility finding. After all, the burden is on the applicant to prove that he or she is eligible

[5] See AILA Doc. No. 13080645

[6] *See* "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens." AILA InfoNet Doc. No. 11110830 (*posted* 11/8/11).

for the benefit sought. The criminal information should contain results from an FBI print request, a judgment and conviction document as well as any sentence imposed or received.[7]

Include in your packet a short memo on the proper standard of review and why your client in not inadmissible

USCIS has stated that it will conduct a "limited review" of the waiver application to determine if the individual has self-reported a ground of inadmissibility, or the results of the background checks reveal conduct or actions that potentially would make the applicant ineligible for provisional unlawful presence waiver, an immigrant visa, or could impact the exercise of discretion.[8] This "limited review" should include an assessment of all evidence submitted relating to eligibility for the provisional waiver and must be based on more than mere conjecture and speculation. It is therefore prudent to remind them of this fact when submitting your application if there is any ground whatsoever that could lead to a simple "suspicion" of inadmissibility. Further, reminding USCIS of its own duties in the issuance of RFE's is a good idea as well.[9]

Use citations within your memo when addressing the reason to believe standard

It seems there are many new adjudicators within the waiver review process. Since this is likely the case it does not hurt to include within a short memo the proper approach to determine whether a reason to believe a ground of inadmissibility exists. In *Matter of U-H-*, the BIA equated the "reasonable grounds to believe" standard with the "probable cause" standard.[10] This interpretation is in line with the Department of State's interpretation of "reason to believe."[11] According to the Foreign Affairs Manual (FAM), "the essence of the [reason to believe] standard is that the consular officer must have more than a mere suspicion—there must exist a probability, supported by evidence that the alien is or has been engaged in trafficking" in the context of INA §212(a)(2)(C).[12] Moreover, "[the officer] must assess all evidence relating to a finding of inadmissibility."[13] 'Reason to Believe' must be more than mere conjecture or speculation—there must exist the probability, supported by evidence, that the alien is not entitled to status."[14] In

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[7] *See* INA§101(a)(48)(A) (defining conviction); *Heider v Keisler* 506 F.3d388 (5th Cir. 2007); See *Descamps v U.S.*
[8] 78 Fed. Reg. at 546-47.
[9] DHS states that it is " committed to issuing RFEs when critical information is missing related to extreme hardship or when critical information is missing related to discretion."
[10] 23 I&N Dec. 355, 356 (BIA 2002). In addition, in the removal context, courts have held that the determination of whether there is "reason to believe" must be based on reasonable, substantial, and probative evidence. *Garces v. Att'y General of the U.S.,* 611 F.3d 1337, 1346 (11th Cir. 2010); *Alarcon-Serrano v. INS,* 220 F.3d 1116, 1119 (9th Cir. 2000).
[11] *See* 9 FAM 40.31 PN 1.2.
[12] 9 FAM 40.23 N2.
[13] *Id.*
[14] 9 FAM 42.43 N2.1.

addition, an individual has a right to present evidence rebutting a "reason to believe" charge.[15] In sum, in assessing whether a person is inadmissible for trafficking, the officer must review all of the evidence relating to the incident in question and provide the individual with the opportunity to rebut the charge. Only if it is then determined that there is a probability that the person is inadmissible is the "reason to believe" standard met. A mere suspicion is not enough.

Present proper proof of extreme hardship

The requirement of proving extreme hardship to the qualifying relative is the same in the I-601A provisional waiver adjudication process as that found in the adjudications of other unlawful presence waivers. See 78 Fed Reg. 551. Reports have been received that some cases have been denied based upon lack of extreme hardship without even the benefit of a RFE to supplement or clarify evidence. Taking this trend into account a representative should be very familiar with the extreme hardship standard as set forth through experience and case precedent. See *Matter of Cervantes-Gonzalez*, 22 I&N, Dec. 560, 566 (BIA 1999).

When in Removal proceedings

Cases in removal proceedings where the respondent is eligible for consular processing with a stateside waiver may be considered for administrative closure. Representatives who come across this situation should try and provide an approved I-130 to the office of the chief counsel and request administrative closure based on prosecutorial discretion as well as alternative relief available outside of immigration court proceedings. Most local offices will have their own joint motion to administratively close proceedings so communication with the trial counsel is important. Once a case is administratively closed the waiver can then be filed. Assuming the waiver is eventually approved a motion to reopen for the purpose of termination should be filed with the court so that the applicant does not run into any problems at the consular interview.[16]

Denials and Revocations

According to the regulations, there is no process to appeal a denied I-601A nor do the regulations allow an applicant to file a motion to reopen.[17] Encountering a denial leaves the applicant with a few different options. The applicant can re-file the I-601A application for a new adjudication and must again pay the filing fee. The case must remain active with DOS and notification that the applicant will apply for another provisional waiver must also be sent to DOS again. There is no numerical limitation on the number of filings allowed.[18] The other option involves proceeding with regular consular processing and filing an I-601 waiver application after

[15] *See e.g., Pronsivakulchai v. Gonzales*, 461 F.3d 903 (7th Cir. 2006).
[16] 78 Fed Reg 556.
[17] See 78 Fed Reg 554.
[18] See 78 Fed Reg. 553.

the initial consular interview.[19] The applicant and his or her family at this point should be well informed of their options and the time frame and risks involving both.

After approval of the I-601A

Once the I-601A provisional waiver has been approved, the NVC will be notified. The NVC will then send the IV packet to the appropriate consular post to schedule an interview. The intended goal is to schedule the IV appointment within about 30-45 days from the approval of the waiver. Unless other grounds of inadmissibility are discovered by the consular officer at the interview then the visa should issue without delay. However it is best to give the client warning that visa issuance can sometimes take days and in some cases weeks. Also, it is important to keep in mind that the DOS has the ultimate say on admissibility and the issuance of the visa. Therefore, it is important to warn your client of this fact especially if there is anything in the applicant's background that might warrant the dreaded "administrative processing" delay on the issuance of a visa.

[19] See id.