AILA, CLINIC, NILC Update on Public Charge

In January 2018, the Department of State revised the public charge provisions of the Foreign Affairs Manual (FAM). Most significantly, 9 FAM 302.8-2(B), which previously stated that "[a] properly filed, non-fraudulent Form I-864 [Affidavit of Support] … should normally be considered to meet the INA 212(a)(4) requirements and satisfy the totality of the circumstances analysis," was changed such that an affidavit of support is now only a "positive factor" in the totality of the circumstances analysis. Following this, the American Immigration Lawyers Association (AILA), Catholic Legal Immigration Network, Inc. (CLINIC), and the National Immigration Law Center (NILC) received reports of individuals who, notwithstanding presentation of a properly-completed Form I-864, were found inadmissible on public charge grounds. Many of these reports also involved applicants who, because of the public charge inadmissibility finding, were informed that their approved I-601A provisional unlawful presence waiver was revoked.

On August 28, 2018, AILA, CLINIC, and NILC sent a letter to the Department of State articulating our concerns regarding public charge assessments. On September 12, 2018, our organizations participated in a teleconference with representatives of the Department of State to discuss the issues presented. The following is a summary of the issues discussed on the call, based on a compilation of notes taken by AILA, CLINIC, and NILC representatives.

This is not an official record of the teleconference.
The information contained in this summary been not been endorsed or approved by the Department of State.

Issue: Notice to the public regarding the FAM changes and shift in weight of the Affidavit of Support in the "totality of the circumstances" public charge analysis.

State is following up with consular posts to encourage them to include information on public charge on their websites and to ensure that messaging and information to the public on the public charge requirements is consistent and clear.

Issue: Rejection of Affidavits of Support completed by joint sponsors for lack of a familial relationship to the applicant.

As confirmed in 9 FAM 302.8-2(C)(7), a "joint sponsor can be a friend or third party who is not necessarily financially connected with the sponsor's household." However, notwithstanding a 1998 Department of State cable affirming that the binding nature of the I-864 renders the intent of a joint sponsor to comply with the support obligations irrelevant, consular officers are now assessing whether a joint sponsor intends to comply with the contract as part of the public charge "totality of the circumstances" analysis. Toward this end, an affidavit from the joint sponsor describing his or her relationship to the applicant and intent/means to support the applicant may be advisable. The Department reviewed cases brought to its attention where the adjudicator indicated refusal under public charge was based on lack of a familial connection between the visa applicant and a joint sponsor. The Department advised that those refusals were either overturned or there were other reasons justifying a refusal under public charge. Cases that are refused on public charge grounds due to a lack of familial relationship between the applicant and a joint sponsor should be reviewed and raised with the consular post and/or LegalNet@state.gov if appropriate.

Issue: Revocation of an approved I-601A provisional unlawful presence waiver in conjunction with a public charge finding.

- An I-601A provisional waiver is automatically revoked upon a consular finding of "ineligibility" for a visa. 8 CFR § 212.7(e)(14).
- Whether a provisional waiver is revoked upon refusal of an immigrant visa depends on the basis for visa refusal. A visa refusal under INA § 221(g) does not necessarily require a determination of visa "ineligibility." A 221(g) refusal may be issued if there is a documentary deficiency which is not, per se, a determination of visa ineligibility. Therefore:
    - A provisional waiver should not be revoked if a visa is refused under INA § 221(g) due to a documentary deficiency.
    - A provisional waiver will be revoked if a visa is properly refused under INA § 212(a)(4).

- 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)."
    - Therefore, as explained in 9 FAM 302.8-2(B)(5)(2), if the applicant does not present an Affidavit of Support (where it is required) or the affidavit "does not reflect sufficient financial resources even after any possible joint sponsors have

submitted an Affidavit of Support," a 212(a)(4) determination would be appropriate, and the provisional waiver would be revoked.

  - However, if the Affidavit of Support is technically and substantively complete, but the consular officer simply needs additional documentation (such as updated tax returns, further proof of the sponsor's income, etc.), the visa should be refused under 221(g) (assuming there are no other issues) and the provisional waiver will remain valid, unless and until the consular officer makes a formal finding of inadmissibility under 212(a)(4).

- Attorneys with cases where an I-601A was revoked following a 221(g) refusal or an erroneous 212(a)(4) refusal (where there was only a documentary deficiency and no other issues) may consider requesting reconsideration of the 212(a)(4) finding and associated I-601A revocation by contacting the consular post and/or LegalNet@state.gov.
  In addition, a list of cases that fit this pattern received in response to our "Call for Examples" was submitted to State for review and possible action.