UPDATE ON PROVISIONAL WAIVERS FOR UNLAWFUL PRESENCE
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Our Agenda

• New USCIS Regulation on Provisional Unlawful Presence Waivers
  – Legal Requirements
  – Advocacy
  – Program Management Priorities
  – Planning for Implementation
Final Regulation

- Published in Fed. Reg. on January 3, 2013
- Few changes from proposed regulation
- Implementation begins on March 4, 2013
- No applications accepted before then
- Form I-601A not available yet
How Are the Final Regulations Different From the Proposed Regulations?

• Multiple filings of 601A
• Eligibility if interview scheduled after 1/3/13
• Broader eligibility for persons in removal proceedings
• Open to expansion of waiver eligibility after program assessed
What Do the Regulations Provide?

• Adjudication of unlawful presence waivers prior to consular interview
• Must still establish extreme hardship
• Applicant waits in U.S. for decision
• Provisional approval
  – Applicant has not triggered ground of inadmissibility for unlawful presence yet
  – Approval revoked if visa applicant found inadmissible on other ground
  – Consulate can still deny immigrant visa
Waivers for What Grounds?

• Only unlawful presence: 3- or 10-year bar
• Not if left U.S. after triggering 10-year bar and then EWI’ed (permanent bar)
• Not if ordered deported or removed
• Not for other grounds (e.g., fraud, health, criminal conduct)
Who is Covered?

• IRs who are consular processing
  – Spouses, children, parents of USCs
  – Rare for parents to qualify since would need USC parent or spouse
• QR need not be petitioner
• Must be at least 17
• Residing in U.S.
• Approved I-130 or I-360 and paid IV fee bill
• Immigration status irrelevant
Extreme Hardship to Whom?

- Extreme hardship to USC spouse or parent
- Not to LPR spouse or parent
- Extreme hardship to child only as it affects qualifying relative (USC parent/spouse)
- Current standard will not change
- USCIS reports I-601 approval rate of 65%
- Applications to be adjudicated by NBC
Who is Not Covered?

• “Reason to believe” may be inadmissible on other grounds
• Under age 17
• No case pending with DOS, IV fee not paid
• IV applicants scheduled before January 3, 2013 for consular interview
• Persons in removal proceedings unless proceedings admin closed at time of filing
• Persons subject to final order of removal
• Persons subject to reinstatement
• Adjustment applicants
Who is Not Covered but Could Be?

• IRs who have not started family-based process → file I-130
• Spouse or child of LPR → petitioner can naturalize
• Qualifying relative is LPR → naturalize
• Applicants scheduled for IV interview before 1/3/13 → new I-130 by different petitioner; new I-130 by same petitioner following DOS termination of first I-130
What if in Removal Proceedings?

• Get proceedings administratively closed
• Not re-calendared when I-601A filed
• File I-601A with USCIS, not EOIR
• If approved, get proceedings terminated
  OR
• Get proceedings terminated before filing I-601A
What’s the Filing Procedure?

- File I-130 or I-360, receive approval notice
- File sent to NVC
- Receive instructions from NVC, pay fee bill
- Notify NVC that wish to file I-601A
- File I-601A and supporting documents
- Fees: $585 for I-601A and $85 for biometrics (no fee waivers)
- Appear for biometrics
- Other grounds of inadmissibility?
How Do You Notify the NVC?

• Special e-mail: nvci601a@state.gov
• Subject line: NVC case number or USCIS receipt number
• Include petitioner’s name and DOB, representative’s name and address, statement that applicant seeking provisional waiver
• If properly notified, NVC will suspend consular processing
If You Don’t Notify the NVC?

• If scheduled for interview on or after 1/3/2013, notify U.S. consulate or embassy to suspend case

• Notify post after provisional waiver approved to reschedule interview
What Happens After Waiver Approval?

• If waiver approved, notice sent to applicant and NVC
• Complete DS-230 or 260 and proceed with consular processing
• 2-3 mos. after approval received, NVC will schedule interview
Provisional Waiver Approval Does Not Guarantee Visa Issuance

• Approval “provisional” because unlawful presence bar not yet triggered

• Applicants still undergo normal consular processing including medical exam and interview

• If applicant found to be inadmissible on any other ground, provisional waiver automatically revoked
How Do You Determine if Your Client Is Inadmissible on Other Grounds?

• Effective interviewing – including discussion of medical screening, detailed questions re immigration history, assessment of any contact with law enforcement
• Reference DS-230 questions
• Emphasize to client that nondisclosure impacts on effective counseling
How Will USCIS Adjudicate Provisional Waiver Applications?

• USCIS will issue RFEs if missing evidence:
  – Extreme hardship
  – Discretionary factors

• USCIS will not issue NOIDs

• USCIS can reopen, reconsider on own motion

• No appeal but can re-file I-601A

• Or can consular process and file I-601

• 3-month adjudication target
What Circumstances Trigger Denial?

- USCIS will deny waiver if other possible grounds of inadmissibility discovered
- USCIS will deny waiver if extreme hardship to QR not established
- USCIS may deny waiver as matter of discretion
- Other: failure to appear for biometrics
Will USCIS Pursue Enforcement Against a Waiver Applicant?

• If approved, no enforcement
• Denied waiver applicants may be subject to issuance of NTA
  – NTA issuance based on
    • USCIS November 7, 2011 policy memo and law enforcement priorities
    • http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20(Approved%20as%20final%202011-7-11).pdf
When Will USCIS Issue NTA?

- Finding of fraud in the application
- Under investigation for, arrested for, convicted of “egregious public safety crime” (Most are aggravated felonies)
- Crimes that trigger inadmissibility or deportability
- Human rights violator
- Re-entry after deportation and felony conviction
Remedy Assessment: Don’t Forget to Consider….

- Does the client have strong enough case for waiver approval?
- Does the client have a way to qualify for adjustment?
  - 245(i)
  - 245(a): entered with inspection
  - 245(a): granted advance parole
What Should Programs Do Now to Prepare?

• Analyze current cases that could benefit from the provisional waiver
• Meet and discuss soon
• Start with your existing caseload of waiver-eligible cases
• Communicate with clients who would benefit if the petitioner naturalized
Outreach for Hardship

• Who will you ask to help document extreme hardship?
  – Hospitals
  – Doctors
  – Clinics
  – Social Workers
  – School Counselors
  – Religious personnel
Training

- Staff should prepare now
- In-person training
- E-learning training
- Ask a local foundation for support
Training Up: What do You Need to Know To Represent Waiver Applicants?

• Law and Skills
  – Family-Based Immigration
  – Inadmissibility Assessment
  – Waiver Eligibility
  – Effective Interviewing
  – Preparing Effective Waivers
What Fees Should I Charge?

• Requires more work than many immigration benefit applications
• Client declaration: language capacity and ability to capture client’s voice
• Coordinating with community providers
• Of course waivers are always possible
Questions?

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